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ARTICLES

REGULATING HATE SPEECH AND THE FIRST AMENDMENT: THE ATTRACTIONS OF, AND OBJECTIONS TO, AN EXPLICIT HARMS-BASED ANALYSIS

RONALD TURNER*

INTRODUCTION

When, and under what circumstances, is the regulation of "hate speech"[1]

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* Assistant Professor of Law, The University of Alabama School of Law. B.A., *magna cum laude*, 1980, Wilberforce University; J.D., 1984, The University of Pennsylvania Law School. The author thanks Dean Kenneth C. Randall and the University of Alabama Law School Foundation for the generous research support which made this Article possible.

1. As noted by Professor Henry Louis Gates, the term "hate speech" is "ideology in spansule form" and is the

> term-of-art of a movement, most active on college campuses and in liberal municipalities, that has caused many civil rights activists to rethink their allegiance to the First Amendment, the very amendment that licensed the protests, the rallies, the organization and the agitation that galvanized the nation in a recent, bygone era.

Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC 37 (Sept. 20 & 27, 1993). As any definition of hate speech may tend to prejudice the discussion, shape or predetermine the outcome, or utilize terms laden with subjectivity, the reader should consider the following definitions and concepts. *See* Calvin R. Massey, *Hate Speech, Cultural Diversity, And The Foundational Paradigms Of Free Expression*, 40 UCLA L. REV. 103, 105 n.2 (1992). Professor Massey assumes that hate speech

> is any form of speech that produces any of the harms which advocates of suppression ascribe to hate speech: loss of self-esteem, economic and social subordination, physical and mental stress, silencing of the victim, and effective exclusion from the political arena.

Id. In Massey's view, this approach "admits the validity of the harms asserted and takes those harms seriously by making no attempt to distinguish between types of speech that might produce the same harm." *Id.*

Professor Frederick Schauer has defined hate speech as

> utterances intended to and likely to have the effect of inducing others to commit acts and violence or acts of unlawful discrimination based on the race, religion, gender, or sexual orientation of the victim; and . . . utterances addressed to and intended to harm the listener (or viewer) because of her race, religion, gender, or sexual orientation.

Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1349 (1992). For Professor Mari Matsuda, the three characteristics of racist speech are: "1. [t]he message is of racial

constitutional under, or violative of, the First Amendment to the United States Constitution?[2] Those questions, addressed by legal scholars in a slew of recent law review articles,[3] have been the subject of an ongoing "political correctness"[4]

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inferiority; 2. [t]he message is directed against a historically oppressed group; and 3. [t]he message is persecutorial, hateful, and degrading." Mari J. Matsuda, *Public Response To Racist Speech: Considering The Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

Professor Gerald Gunther has described hate speech as "speech expressing hatred or bias toward members of racial, religious, or other groups." GERALD GUNTHER, CONSTITUTIONAL LAW 1134 (12th ed. 1991). According to Professor Rodney Smolla, to use hate speech is to

> attack another because of his or her racial, ethnic, religious, or sexual identity . . . [and] is not to engage in mere dissent against the whole. Such an attack is rather to separate out certain members of the whole and make them targets, degrade them, strip them of their humanity, and set out others against them.

RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 151 (1992) [hereinafter SMOLLA, FREE SPEECH]. *See also* RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 6.01[1], at p. 6-3 (1994) (hate speech is "the generic term that has come to stand for verbal attacks based on race, ethnicity, religion, and sexual orientation or preference"); Nelson v. Streeter, 16 F.3d 145, 149 (7th Cir. 1994) (hate speech codes are "designed to shield groups perceived as vulnerable from offensive, hurtful, and wounding speech").

2. U. S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

3. *See, e.g.*, J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. J. 375; Cynthia G. Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993); J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L. J. 399 (1991); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Campus Antiracism Rules*]; Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words That Wound*]; Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L. J. 431 [hereinafter *Racist Speech on Campus*]; Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993) [hereinafter *Hate Speech Paradox*]; Massey, *supra* note 1; Martha Minow, *Speaking and Writing Against Hate*, 11 CARDOZO L. REV. 1393 (1990); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist And Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Nadine Strossen, *Regulating Racist Speech On Campus: A Modest Proposal?*, 1990 DUKE L. J. 484; Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's* R.A.V. *Decision*, 61 TENN. L. REV. 197 (1993); James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991).

4. *See generally* ARE YOU POLITICALLY CORRECT?: DEBATING AMERICA'S CULTURAL STANDARDS (Francis J. Beckwith & Michael E. Bauman eds., 1993). Some have argued that leftists have attempted "to impose an ideological orthodoxy on students and faculty, under the rubric of 'political correctness.'" *See generally* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE

debate between those who believe that hate speech must be protected under the First Amendment, and those who contend that hate speech can be regulated under the First and Fourteenth Amendments.[5]

Among the questions raised in the hate speech debate are the following: Is there an appropriate balance between one person's constitutionally protected speech and another person's constitutionally protected right to "equality"?[6] Does

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SPEECH 197 (1993). Professor Stanley Fish has written that perhaps the most stunning success of neoconservatives "has been the production (in fact a reproduction), packaging, and distribution of the term 'political correctness.'" STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH 8 (1994).

> The phrase [political correctness] is a wonderfully concise indictment that says that a group of unscrupulous persons is trying to impose its views on our campus populations rather than upholding views that reflect the biases of no group because they are common to everyone. It is these commonly shared views, we are told, that are really correct, while the views of feminists, multiculturalists, Afrocentrists, and the like are merely politically correct, correct only from the perspective of those who espouse them.

Id. Professor Fish argues that political correctness "is not the name of a deviant behavior but of the behavior that everyone necessarily practices." *Id.* at 9. Thus, debates between opposing parties are not "debates between political correctness and something else, but are between competing versions of political correctness." *Id.* *See also* RICHARD A. POSNER, OVERCOMING LAW 7 (1995) (describing political correctness as a "game of faith" in which "the empirical investigation of racial and sexual differences is rejected"); Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379, 406 (1994) (discussing the detractors of political correctness, Professor Delgado states that "[p]olitical correctness is little more than a modern, sanitized, prettified version of an old term. It means one who sympathizes with the Blacks, who takes their point of view").

5. U.S. CONST. amend. XIV, § 1 (no state shall "deny to any person within its jurisdiction the equal protection of the laws").

6. *See* Delgado, *Campus Antiracism Rules*, *supra* note 3, at 344-46; Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1978). The hate speech debate features two camps which see the world differently. The first camp approaches the issue of hate speech regulation as a free speech question.

> If one places speech at the center, a number of things immediately follow. The hate speech rule advocates are placed on the offensive, seen as aggressors attempting to curtail a precious liberty. The burden shifts to them to show that the speech restriction is not content-based, is supported by a compelling interest, is the least restrictive means of promoting that interest, and so on.

Richard Delgado & Jean Stefancic, *Essay I: Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851, 851-52 (1994) [hereinafter Delgado & Stefanic, *Essay I*]. Free speech advocates will be concerned about slippery slopes and the dangerous and censorious administrator who may impose "his or her notion of political orthodoxy on a campus climate that ought to be as free as possible . . . ." *Id.* at 852.

The second group approaches the hate speech issue by placing equality at the center of the controversy and maintains that "free speech advocates [must] show that the hate-speaker's interest in hurling racial invective rises to the requisite level of compellingness. They will insist that this

the First Amendment and the Enlightenment value of freedom of expression[7] protect hate speech from governmental regulation? Do the Fourteenth Amendment and the liberty and equality principles expressed therein provide a constitutional basis for the regulation of hate speech?[8] How should we weigh and

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interest be advanced in the way least damaging to equality, and they, too, will raise line-drawing and slippery slope concerns, but from the opposite direction." *Id.* at 852-53. Placement of either free speech or equality at the center of the hate speech debate is critical to the regulation issue. For instance, if an individual

> places at the center of [her] belief system the notion that all language should be free and that equality must accommodate itself to that regime, then all equality arguments but the most moderate will appear extreme and unjust, constrained as they are by our canonical language. The canon defines the starting point, the baseline from which we decide what other messages, ideas, concepts, and proposals are acceptable. Only moderate messages that effect minor incremental refinements within the current regime pass that test. . . . Reason and argument are apt to prove unavailing; the point of the canon is to define what is a reasoned, just, principled demand. Because hate speech rules fall outside this boundary, if one begins (as we do) with a free speech paradigm, reason fails and the status quo prevails.

Id. at 864 (footnote omitted). *See also* Richard Delgado & Jean Stefancic, *The Social Construction of* Brown v. Board of Education*: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 553 (1995) [hereinafter Delgado & Stefancic, *The Social Construction of* Brown] (the right to say whatever is on one's mind emanates from the First Amendment, and the right to protection from racial insult emanates from the Fourteenth Amendment).

7. *See* JOHN MILTON, THE AREOPAGITICA (Everyman's Library ed. 1927). Of course, Milton's "well-advertised tolerance did not extend to the thought that he hated." LEONARD LEVY, EMERGENCE OF A FREE PRESS 94 (1985). For Milton, Catholics were excluded from the free expression principle:

> I mean not tolerated popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely against faith or manners no law can possibly permit, that intends not to unlaw itself.

MILTON, *supra*, at 37. *See also* FISH, *supra* note 4, at 103 (after celebrating the virtues of toleration and unregulated publication, Milton "catches himself up short and says, of course I didn't mean Catholics, them we exterminate").

8. *See* Akhil R. Amar, *The Supreme Court, 1991 Term—Comment: The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124 (1992) (discussing the Supreme Court's decision in *R.A.V.* from the doctrinal perspective of the Reconstruction Amendments). A Fourteenth Amendment, equal protection approach to hate speech would provide a cause of action where a state school refused to protect students of color from harassment having analogues to other forms of harassment or torment from which white students were protected. *See* Stephen L. Carter, *Racial Harassment as Discrimination: A Cautious Endorsement of the Anti-Oppression Principle*, 1991 U. CHI. LEGAL F. 13, 14. Instead of focusing on the question of whether certain hate speech is protected by the First Amendment, the Equal Protection question would be whether a public school's failure to prevent or address incidents of hate speech would amount to a violation of the Fourteenth Amendment. *Id.* at 19. Professor Carter, calling for the

integrate the Free Speech and Equal Protection Clauses and the ideal and imperative of equal rights of and for all persons?[9] Why does the United States stand "virtually alone in extending freedom of expression to what has come to be called hate speech"?[10]

Others have addressed the foregoing questions, and I do not rehearse their arguments or analyses here. Rather, I inquire into two significant matters pertaining to the question of the constitutionality of any hate speech regulation: (1) the degree to which some speech, expression, and communicative acts are deemed harmful and are actually regulated in this society; and (2) the harms caused by certain hate speech.[11] I then ask why some harmful speech is regulated, without debate or controversy or cries for First Amendment protection, while hate speech regulation evokes cries of censorship and political correctness and abridgement of

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application of an anti-oppression principle (under which equal protection is interpreted as "directed not against particular racial classifications as such, but against systematic structures of racial oppression, of which racial classifications are essential building blocks"), argues that that principle "would in most instances consider a state's failure to protect its black students as exactly the literal denial of 'equal protection' with which the literature teaches us that those who wrote and ratified the Fourteenth Amendment were most centrally concerned." *Id.* at 22, 41.

9. The tension between the constitutional values of free speech and equality has "divided old allies and revealed unrecognized or unacknowledged differences in the experience, perceptions, and values of members of longstanding alliances. It has also caused considerable soul-searching by individuals with long-time commitments to both the cause of political expression and the cause of racial equality." *Racist Speech on Campus*, *supra* note 3, at 434. Professor Catharine MacKinnon, arguing that the "law of equality and the law of freedom of speech are on a collision course in this country," has written that

> [u]nderstanding that there is a relationship between these two issues--the less speech you have, the more speech of those who have it keeps you unequal; the more the speech of the dominant is protected, the more dominant they become and the less the subordinated are heard from--is virtually nonexistent.

CATHARINE A. MACKINNON, ONLY WORDS 71, 72-73 (1993).

10. Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 739 (1993) (discussing Kevin Boyle, *Overview of a Dilemma*, *in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 1 (Sandra Coliver ed. 1992)).

11. While I principally focus on these two matters, it should be noted that the literature on the hate speech regulation question contains at least three separate approaches. "The civil libertarian approach concludes that suppression of hate speech is generally an impermissible restriction upon the content of speech, except where the speech is directed toward an individual . . . where an immediate breach of the peace is likely." Egalitarians argue that the suppression of hate speech will address and remedy the harm resulting from such speech, and that the harm is usually "sufficiently grave to outweigh the harm resulting from its suppression." Accommodationists generally endorse measures that prohibit "'only targeted vilification of a person on the basis of race, gender, religion, ethnic origin, sexual orientation, or other protected characteristics.'" *See* Massey, *supra* note 1, at 106-07 (quoting Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 213 (1991)).

a "sacred" constitutional right to be a hate-speaker.

The first matter (the degree of the actual regulation of some harmful speech) merits discussion because it is often said that speech is "free"[12] and that government may not regulate speech on the basis of the speaker's viewpoint. Self-described free speech absolutists take the view that, no matter how offensive, speech can never be, and should not be, controlled or regulated. As discussed below, the absolutist position has not been accepted by the courts, and the government does in fact regulate certain speech and even permits viewpoint discrimination in certain circumstances.[13]

As to the second matter (the harms caused by certain hate speech), it is often said that society must tolerate hate speech because the benefits of "free" (non-regulated) hate speech outweigh the harms of hate speech (what I call the "frown or grin but in any event bear it" view). If it is true that hate speech does harm the targets of the communication,[14] then an instance of hate speech may result in some level of harm. When the task of assessing the harms caused by hate speech falls to governmental entities and the courts, judicial rulings on hate speech questions will necessarily be influenced by the judge's or factfinder's assumptions, beliefs, and opinions with respect to the arguments presented concerning the harms of the challenged speech. The actual and potential effects of hate speech assume critical importance and should be the subject of explicit discussion by those who write the laws and rules regulating hate speech as well as the courts engaged in the review of the constitutionality of hate speech regulations.

This Article joins "those who are reluctant to cede the framing of the hate-speech debate to those who have fashioned the so-called pertinent questions since its inception,"[15] and does so from an understanding "that the central meaning of the First Amendment lies not in what we see, but in what we ignore."[16] The

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12. I agree with Professor Larry Alexander that no speech is "free," for "[s]peech and listening are costly activities." Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L. J. 921, 933-34 (1993). In the context of hate speech, speech is surely not "free" for those persons subjected to racist or sexist slurs and epithets. As the targets of hate speech bear the costs of hearing, experiencing, and dealing with such speech, those who argue against regulation effectively require the targets to suffer harms in the name of others' freedoms.

13. *See infra* Part II.

14. "The capacity of speech to cause injury in diverse ways contends with the goal of strong free speech (and free press) protection, and it is a commonplace that robust free speech systems protect speech not because it is harmless, but despite the harm that it may cause." Schauer, *supra* note 1, at 1321. *See also* Balkin, *supra* note 3, at 414 (noting that the right of free speech "includes the government's grant of power to private citizens to harm others through the exercise of their right to speak").

15. Robin D. Barnes, *Standing Guard for the P.C. Militia, or, Fighting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct and Political Correctness*, 1992 U. ILL. L. REV. 979, 980-81.

16. Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 398 (1989) (book review).

"mechanical jurisprudence and case law laid down in an earlier era will not hold the line much longer,"[17] and many who previously subscribed to First Amendment formalism have now turned to First Amendment realism and urge that "even if First Amendment doctrine permits regulating hate speech, wisdom and good policy counsel against it."[18] Thus, instead of blindly accepting the general view that all speech is "free" in the sense that society must not prohibit or limit it, I start from the observation that certain speech is regularly restricted because society, speaking through the courts, legislatures, and other institutions, has determined that particular harms caused by particular speech can and indeed should be regulated, and can even be prohibited without running afoul of the free speech guarantee.[19] If that observation is correct, we should not quickly rush to the conclusion that hate speech cannot be proscribed on the sole ground that the First Amendment protects and guarantees the freedom of speech. The question we must ask is whether the harms of certain hate speech are such that that speech can be regulated in the same way that other forms and categories of speech have been subjected to constitutional restrictions.[20]

The question examined here is whether hate speech *can be* lawfully and constitutionally regulated because of the harm caused by such speech; whether it *should be* regulated is another matter altogether.[21] The constitutionality of hate speech regulation may be questioned, even if it is concluded that hate speech is harmful. Identification of possible or actual harms requires an assessment of other factors, such as the degree of harm, the specific expression or mode of expression to be regulated, the degree and diminution of dialogue and critique, and the degree of comfort regarding the assurance that the regulators will act appropriately. Thus, a finding of harm does not definitively resolve the constitutional question, but would lead to other critical questions which may better inform constitutional analysis and adjudication.

This Article is divided into the following parts: Part I provides a brief overview of approaches to the First Amendment and looks at the established limitations on government regulation of speech, especially the viewpoint discrimination restriction.[22] Part II discusses selected decisions by the United

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17. Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1809 (1994).

18. *Id.*

19. *See infra* Part II.

20. *See infra* Part III.

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> [F]orces, both on the left and the right who oppose hate-speech regulation are beginning to hedge their bets. While they earlier argued that hate-speech rules were flatly unconstitutional, now they are beginning to argue in the alternative: Even if the rules are constitutional, they are a bad idea, and campuses and other institutions should not enact them even if they legally can do so.

Delgado & Yun, *supra* note 17, at 1811-12.

22. *See infra* notes 29-97 and accompanying text.

States Supreme Court that refer to some notion of harm as part of the Court's First Amendment analysis.[23] Part III discusses hate speech and the harms thereof, and asks whether certain harms are sufficient to warrant regulation similar to the regulations deemed permissible and constitutional in other contexts.[24] Part IV discusses the application of a harms-based analysis to hate speech questions, reviews a recent decision by the Supreme Court of Canada in which that court applied a harms-based analysis in upholding certain laws restricting hate speech,[25] considers objections to and obstacles facing the adoption of the harms-based rationale by the courts, and concludes that, with the exception of assaultive speech directed to specific targets in a face-to-face and confrontational manner, a harms-based approach to and analysis of hate speech presents many problems that may render that approach unworkable.[26] Part V then turns to the issue of the regulation of hate speech in the specific context of colleges and universities.[27] This Article concludes with observations on the role of injury and harm in the hate speech debate, with proponents arguing that hate speech causes real injury to the targets of the speech, and opponents dismissing the claimed injuries as "merely dignitary, and not a real harm."[28]

I. FREE(?) SPEECH

A. Approaches To The First Amendment

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[29] A "safeguard against governmental suppression of points of view with respect to public affairs,"[30] the First Amendment generally prevents the government from proscribing speech or expressive conduct because of the government's disapproval of the ideas expressed.[31] Thus, governmental regulation or prohibition of speech, "on the sole ground that some or many in the audience find what is said or written offensive, abridge[s] essential free speech interests."[32]

"[F]ree speech values are plural and diverse rather than unitary."[33] Scholars

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23. *See infra* notes 98-238 and accompanying text.

24. *See infra* notes 239-299 and accompanying text.

25. *See* Regina v. Keegstra, 3 S.C.R. 697 (Can. 1990), discussed *infra* at notes 320-59 and accompanying text.

26. *See infra* notes 378-430 and accompanying text.

27. *See infra* notes 431-505 and accompanying text.

28. Delgado & Stefancic, *The Social Construction of* Brown, *supra* note 6, at 553.

29. U.S. CONST. amend. I.

30. Cass R. Sunstein, *Neutrality In Constitutional Law (With Special Reference To Pornography, Abortion, And Surrogacy)*, 92 COLUM. L. REV. 1, 22 (1992) (footnote omitted).

31. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Texas v. Johnson, 491 U.S. 397, 401 (1989).

32. DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 171 (1986).

33. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 831

have spilled much ink trying to "identify a single value animating the protection of free speech like democracy, self-realization, [and] autonomy."[34] "But it would be most surprising if free speech were connected with any single value. This is true for most constitutional rights, which serve a range of purposes."[35] Given the plural speech values, it can be anticipated that "free speech doctrine is not particularly principled in any natural sense. The Court has created an array of doctrinal boxes for speech issues, and determines the result by picking the box. Some boxes protect speech strongly, others do not."[36]

One recurring debate in First Amendment jurisprudence involves three questions: (1) whether the First Amendment is an absolute; (2) whether the competing interests of the speaker and the government should be balanced; and (3) whether a categorization approach to the free speech question is preferable.[37] Absolutists take the view that the First Amendment's declaration that "Congress shall make no law . . . abridging the freedom of speech" means just that: "Congress shall make NO LAW abridging speech."[38] Justice Hugo Black counseled that the language of the First Amendment meant literally that Congress could not make any law abridging speech "without any 'ifs' 'buts' or 'whereases.'"[39] Justice Black believed that "the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing'

(1994).

34. *Id. See also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877 (1963); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Turner, *supra* note 3.

35. Sunstein, *supra* note 33, at 831 (footnote omitted). *See also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

36. Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1019 (1993).

37. GUNTHER, *supra* note 1, at 1004-07.

38. STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 13 (1990). *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 42-43 (1991). There are at least two types of absolutism. The first, absolute absolutism, maintains that there are no permissible restraints or penalties on speech. *See* SMOLLA, FREE SPEECH, *supra* note 1, at 23. Under the second category of absolutism, qualified absolutism, the "freedom of speech" is absolutely protected but is defined more narrowly such that government has some room to maneuver in regulating certain forms of communications. *Id.* at 23-24.

Absolutists claim, *inter alia*, with few or no exceptions: that any effort to regulate speech threatens the principle of free expression; that the First Amendment embodies a conception of neutrality among different points of view, forbidding governmental line-drawing between speech that it likes and speech that it does not like; that the free speech principle is not limited to political speech; that any restrictions on speech may expand and result in other restrictions and acts of censorship; and that balancing should play no role in First Amendment law. SUNSTEIN, *supra* note 4, at 5-7.

39. Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

that was to be done . . . ."[40] Another jurist, Justice William Douglas, was of the view that the "ban of 'no' law" that abridges First Amendment rights is "total and complete."[41] It should be noted, however, that the absolutist view has been rejected by the Supreme Court,[42] and it is now "an entrenched feature of first amendment doctrine that the coverage of the first amendment does not extend to all linguistically communicative acts."[43] "First Amendment absolutism has never entailed absolute devotion to free expression; the question has always been where to draw the line."[44]

The balancing theory posits that in the event of a "conflict between speech and other social values, the weight of the speech interest is balanced against the weight of the competing interest" in the particular case before the court.[45] "Where First Amendment rights are asserted . . . resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."[46] In one Supreme Court decision, Justice Felix Frankfurter stated:

> The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.[47]

Critics of the balancing approach argue that balancing is too deferential to governmental views and judgments and provides inadequate guidance to decisionmakers,[48] leads to uncertainty, and fails to insulate the judiciary from the

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40. Konigsberg v. State Bar of California, 366 U.S. 36, 61 (1961) (Black, J., dissenting). For a discussion of Justice Black's First Amendment views, see ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994).

41. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 156 (1973) (Douglas, J., concurring).

42. *Konigsberg*, 366 U.S. at 49.

43. Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 562 (1989).

44. Henry Louis Gates, Jr., *Truth or Consequences: Putting Limits on Limits*, ACADEME, Jan.-Feb. 1994, at 14.

45. SMOLLA, FREE SPEECH, *supra* note 1, at 39. There are at least two types of balancing—ad hoc balancing and definitional balancing. Under ad hoc balancing, speech cases are to be decided by considering the particular circumstances in specific cases. Under definitional balancing, courts are not to define free speech by resort to absolutism or by focusing on the circumstances of an individual case; rather, courts must assess the competing interests in the general run of cases and formulate rules covering those cases. *See* SMOLLA & NIMMER, *supra* note 1, § 2.07, at p. 2-61; SHIFFRIN, *supra* note 38, at 14. The balancing referred to in the text is ad hoc balancing.

46. Barenblatt v. United States, 360 U.S. 109, 126 (1959).

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

48. GUNTHER, *supra* note 1, at 1006.

passions of the public.[49]

The third approach, known as categorization, sets out bright line rules that distinguish speech within the protection of the First Amendment from speech outside the protection of the Amendment.[50] Thus, the category of political speech is protected[51] and other categories of speech, such as fighting words[52] and obscenity,[53] are not protected. Categorization may be acceptable, or at least more acceptable, when it rests upon adequate explanations of why a particular category is protected or unprotected, but categorization is also subject to the criticism that it consists largely of conclusory statements, covert balancing, and overgeneralizations.[54]

Although application of the differing categories of absolutism, balancing, and categorization in hate speech cases is beyond the scope of this Article, it is worth noting that under the pure absolutist view, the government could not lawfully regulate hate speech or any other speech. Under a balancing test, courts would weigh the free speech interest (in that instance, the asserted "right" of the hate speaker) against the weight of the competing interest (such as preservation of the peace) or equality value. Under a categorization approach, the question would be whether hate speech fell within the protection of the First Amendment or whether some defined hate speech category was an unprotected class of speech like fighting words or obscenity.

Once the pure absolutist approach is rejected, the axiom that speech is "free," meaning that the speech cannot be lawfully regulated by law, is not a sufficiently accurate statement of the law. Indeed, there are many exceptions to the protection of the First Amendment.[55] One cannot legally infringe another individual's

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49. SMOLLA & NIMMER, *supra* note 1, § 2.07, at p. 2-61. Professor Kent Greenawalt has argued that when ad hoc balancing includes substantial deference to the legislature, "it is subject to the fatal objection that its practical bite is almost as slight as that of the rational-basis test. If the ultimate criterion is whether the legislature might reasonably have balanced the factors as it did, only rarely will a court give a negative answer." KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 222 (1989).

50. GUNTHER, *supra* note 1, at 1007; Frederick Schauer, *Codifying The First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285, 302.

51. Political speech, considered by many to be high value speech, has received special First Amendment protection. One critique of this valuation of political speech posits that in light of the "power that judges and politicians have to affect the content of legal norms, it is plausible to interpret the special protection political speech has received in the past as the result of judicial bias toward the importance of public life." Alon Harel, *Free Speech Revisionism: Doctrinal and Philosophical Challenges*, 74 B.U. L. REV. 687, 692 (1994) (book review). *See also* R. H. Coase, *The Economics of the First Amendment: The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974) (those who are protected by the protection of political speech play a key role in fashioning that protection).

52. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

53. Miller v. California, 413 U.S. 15 (1973).

54. GUNTHER, *supra* note 1, at 1007.

55. *See generally* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871 (1991); Schauer,

copyright or trademark.[56] One cannot use the First Amendment as a shield to allow the formation of an unlawful conspiracy,[57] lie while under oath,[58] disclose official state secrets,[59] engage in expression that breaches the peace,[60] make certain comments as a lawyer on pending cases,[61] state that a judge is a "buffoon" or "probably one of the worst judges in the United States,"[62] or make harassing telephone calls.[63] Thus, to argue that the First Amendment is a "seamless web" ignores the large number of exceptions that come into play, especially where the interests of powerful individuals or groups are at issue.[64]

If exceptions to First Amendment protection are so prevalent, why is the suggestion that certain hate speech regulations do not violate the First Amendment met with consternation?[65] In light of the foregoing, it is more accurate to say that

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supra note 43 (discussing the many acts of "speech" that remain untouched by the coverage of the First Amendment); *infra* notes 84-96 and accompanying text.

56. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

57. Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

58. *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1286 (1992).

59. Snepp v. United States, 444 U.S. 507 (1980).

60. Schenck v. United States, 249 U.S. 47 (1919).

61. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

62. *See* Richard Reuben, *Lawyer's License at Risk*, A.B.A. J., March 1994, at 31. A Los Angeles lawyer made these statements about a federal judge in the United States District Court for the Central District of California. The judge in question referred the matter to the chief judge of the Central District of California, who referred the matter to the district's Standing Committee on Discipline. *Id.*

63. *See, e.g.*, State v. Gattis, 730 P.2d 497 (N.M. Ct. App. 1986). *But see* People v. Klick, 362 N.E.2d 329 (Ill. 1977) (state telephone harassment law was unconstitutionally overbroad). For a discussion of the First Amendment and telephone harassment, see Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL OF RTS. J. 179, 192-206 (1994).

64. Delgado, *supra* note 4, at 392.

> The wealthy and powerful are considered to have a kind of property interest in their reputation, so speech that damages them is compensable even though words are the sole means of causing the harm. And the same is true for words that violate a copyright, communicate a threat, form a monopoly, or constitute misleading advertising. Disrespectful words uttered to a judge, teacher, police officer, or other authority figure are also punishable, as are untruthful words uttered under oath or words that disseminate an official secret. Each of these exceptions or special doctrines exists to promote the interests of a powerful group such as the military or consumers.

Id. at 392-93 (footnotes omitted).

65. Delgado & Stefancic, *supra* note 58, at 1286. On that point, Delgado and Stefancic state:

> Yet the suggestion that we create new exception [sic] to protect lowly and vulnerable members of our society, such as isolated, young black undergraduates attending

speech can be regulated in certain circumstances, such as when the weight of a competing interest or value is deemed to outweigh the asserted speech interest, or where the speech at issue falls within a recognized unprotected category. Thus, it is not enough to say that hate speech is protected expression simply because it is speech, or that any efforts to regulate hate speech are per se unconstitutional, for the analysis cannot begin and end with mere labeling or categorization. Important questions must be posed and significant arguments must be made and considered before it can be concluded that a particular hate speech regulation is or is not constitutional.

B. Restrictions

When can speech be regulated consistent with the First Amendment? As noted by Justice John Paul Stevens, the term "the freedom of speech" could not be "co-extensive with the category of oral communications that are commonly described as 'speech' in ordinary usage."[66] Thus, the "Framers did not intend to provide constitutional protection for false testimony . . . or conspiracies among competitors to fix prices. The Amendment has never been understood to protect all oral communication, no matter how unlawful, threatening, or vulgar it may be."[67] Tested in the "crucible of litigation,"

> it is now settled that constitutionally protected forms of communication include parades, dances, artistic expression, picketing, wearing arm bands, burning flags and crosses, commercial advertising, charitable solicitation, rock music, some libelous false statements, and perhaps even sleeping in a public park.[68]

Thus, some speech and expression can be constitutionally regulated, and some speech and expression is constitutionally protected. How do we distinguish the former from the latter? What methodologies are used by the courts in determining whether certain speech falls within or outside the protection of the First Amendment?

There are at least three specific and recognized restrictions on speech: content-neutral restrictions, content-based restrictions, and viewpoint-based restrictions.[69] Where restrictions are content-neutral, communications are

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> dominantly white campuses, is often met with consternation: the First Amendment must be a seamless web; minorities, if they knew their own self-interest, should appreciate this even more than others. This one-sidedness of free-speech doctrine makes the First Amendment much more valuable to the majority than to the minority.

Id. (footnote omitted).

66. John Paul Stevens, *The Freedom of Speech*, 102 YALE L. J. 1293, 1296 (1993).

67. *Id.*

68. *Id.* at 1298 (footnotes omitted).

69. *See* SUNSTEIN, *supra* note 4, at 11-14; Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 796 (1993) [hereinafter *Words, Conduct, Caste*]. One scholar has criticized this tripartite system:

restricted without regard to the message conveyed.[70] For example, a government ban on billboards or a law forbidding all advertising on subways would be content-neutral because all communications or messages (whether Republican or Democrat, liberal or conservative, etc.) are treated the same; the ban does not turn on and is not affected by the content of the speech, and the restriction applies across the board to all speakers affected by the restriction.[71] "Content-neutral restrictions are evaluated through a balancing test, one that looks at the extent of the harm, the existence of alternative outlets, the availability of less restrictive means of regulation," and other factors.[72]

Content-based (and viewpoint neutral) restrictions limit communications because of the message conveyed, and are presumed unconstitutional and are permitted in limited circumstances.[73] For instance, the content of the speech is critical when government bans political speech in a certain place or implements a rule stating that persons may not discuss baseball or politics or matters involving race, for "we . . . have to know what the speech is in order to know whether it is regulated."[74] Restriction of speech on the basis of content carries with it the very real risk that government may prefer some communications and messages over others. Given that risk, the government's "action will be subjected to a more stringent standard than when it treats all messages equally, say by banning all billboards."[75]

However, the Supreme Court routinely departs from the general rule against

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> Sometimes the tripartite system is more than just redundant; it can in fact be damaging. It allows mechanical resolution of cases and consequent lack of attention to important conflicts between societal values and interests. Instead of engaging in a substantive debate about the proper degree of shielding from potentially disruptive materials, such as those with erotic content or a racist message, Sunstein (and others) have suggested that such restrictions are invalid simply because they are content-based or viewpoint-based. Sunstein concedes that there are cases in which viewpoint-based or content-based restrictions are proper, but he believes that they must carry a presumption of invalidity because he fears that such restrictions generally flow from hidden and illegitimate government motives.

Harel, *supra* note 51, at 702-03 (footnotes omitted).

70. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

71. SUNSTEIN, *supra* note 4, at 11.

72. *Words, Conduct, Caste*, *supra* note 69, at 796.

73. *Id.*

74. SUNSTEIN, *supra* note 4, at 12.

75. GREENAWALT, *supra* note 49, at 225. For an interesting discussion of the Supreme Court's strict scrutiny analysis and content-based speech restrictions, see Eugene Volokh, *Freedom of Speech Beyond Strict Scrutiny*, U. PA. L. REV. (forthcoming).

content regulation.[76] For example, the Court has held that an election-day, content-based ban on political speech within one hundred feet of a polling place did not violate the First Amendment.[77] The Court upheld a federal regulation prohibiting employees of federally funded family planning clinics from discussing abortion with pregnant women.[78] In addition, public colleges and universities routinely make, indeed must make, content-based distinctions in formulating and carrying out their educational missions.[79]

As to viewpoint-based restrictions,[80] the government "makes the point of view of the speaker central to its decision to impose, or not to impose, some penalty."[81] As noted by Professor Cass Sunstein:

> The government might, for example, ban anyone from criticizing a war, or from favoring homosexuality, or from speaking against the incumbent President, or from arguing on behalf of affirmative action programs. Here the government is trying to protect a preferred side in a debate and to ban the side that it dislikes. A viewpoint-based restriction is distinctive in the sense that it comes into effect only when a particular viewpoint is expressed. We know that we are dealing with a viewpoint-based restriction if and only if the government has silenced one side in a debate.[82]

Government discrimination on the basis of viewpoint can skew the public debate on a particular issue by restricting the ability of one party to communicate its message, with such discrimination often arising from governmental hostility to certain ideas or other illegitimate governmental justifications.[83]

If asked the general question whether government may regulate speech on the basis of the viewpoint of the speaker, most respondents would answer in the negative. Although that answer would be correct in certain instances, it would be incorrect in many others. Some acts characterized as "speech" in ordinary

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76. Stevens, *supra* note 66, at 1304.

77. Burson v. Freeman, 504 U.S. 191 (1992).

78. Rust v. Sullivan, 500 U.S. 173 (1991); Stevens, *supra* note 66, at 1304.

79. *See infra* Part III.

80. Viewpoint-based restrictions are a subset of content-based restrictions.

> All viewpoint-based restrictions are, by definition, content-based; government cannot silence one side in a debate without making content crucial. But not all content-based restrictions are viewpoint-based. The key difference between a content-based and a viewpoint-based restriction is that the former need not make the restriction depend on the speaker's point of view.

SUNSTEIN, *supra* note 4, at 12. *See also* Stevens, *supra* note 66, at 1309 ("[C]ontent discrimination is not the same as viewpoint discrimination.").

81. SUNSTEIN, *supra* note 4, at 12.

82. *Id.*

83. *See* Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 881 (1993).

language are not protected by the First Amendment,[84] and the Supreme Court has validated laws incorporating viewpoint preferences by ignoring obvious forms of such preferences.[85] Thus, viewpoint discrimination in the area of commercial speech has been deemed lawful in certain contexts. For example, the government lawfully bans the promotion of casino gambling[86] even though it allows advertising opposing casino gambling. The government prohibits television advertising promoting cigarette smoking but does not forbid television advertising opposing smoking.[87] "[T]he opinion that cigarette smoking is harmful is a viewpoint, just as is the opinion that people ought to smoke" is a viewpoint.[88] The government may choose to regulate airline advertising[89] but not bus advertising. And it may lawfully monitor solicitation by lawyers[90] even though it does not monitor solicitation by doctors.

The National Labor Relations Board restricts certain statements by employers and unions where the statements violate the National Labor Relations Act[91] and prohibits coercion and threats against employees during the "critical period" preceding NLRB-conducted representation elections.[92] The Securities and Exchange Commission restricts the statements that may be made by the sellers of securities and "imposes old-fashioned prior restraints, requiring government preclearance before speech may reach the public."[93] The Federal Communications

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84. As noted by Professor Frederick Schauer:

> [A] criminal defendant charged with participation in a bank robbery by virtue of having communicated the combination of the bank's safe to the person who in fact opened the safe benefits from no special presumptions or tests because the participation was linguistically communicative. The defendant in a Sherman Act price-fixing case whose sole activity consists of transmitting to a competitor the prices her company is about to charge is treated the same way as any other antitrust defendant despite the fact that her activities were restricted to speech used for the purpose of communicating information. The securities laws engage in wholesale regulation of what can be said, how it can be said, and when it can be said, and do so (except when a newspaper or magazine is involved) totally outside of the purview of the first amendment. The same can be said for laws regulating labor relations, in particular laws controlling both picketing and the conduct of elections. To lie under oath violates the law even if the lie told turns out to cause no harm whatsoever in the particular case, a result unexplainable if courtroom testimony under oath were an activity covered by the first amendment.

Schauer, *supra* note 43, at 563 (footnotes omitted).

85. Kagan, *supra* note 83, at 875-76.

86. Posados de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).

87. *See* 15 U.S.C. § 1335 (1994).

88. Schauer, *supra* note 43, at 566.

89. Morales v. Trans World Airlines, 504 U.S. 374 (1992).

90. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

91. 29 U.S.C. §§ 151-69 (1994).

92. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

93. SUNSTEIN, *supra* note 4, at 33. *See generally* NICHOLAS WOLFSON, CORPORATE FIRST

Commission regulates broadcasting under a "public interest" standard.[94] Government employment contracts with former employees who held security clearances may constitutionally prohibit the former employees from publishing certain subjects without a prepublication review because of a perceived danger to national interests.[95] Thus, viewpoint discrimination is often permitted and is an established and common part of the legal landscape.[96]

In the face of the widely held perception that viewpoint discrimination is generally unconstitutional, why have some forms of viewpoint discrimination been accepted and gone unchallenged? One answer may be that the "presence of real-world harms obscures the existence of selectivity."[97] Because the desired ends—including the prevention of the harms of smoking, gambling, fraudulent or misleading commercial speech, threats to employees attempting to exercise their statutory right to unionize, untrue or misleading proxy statements, etc.—may be uncontroversial and accepted as mainstream propositions, the means of accomplishing those ends are not considered to be problematic from a First Amendment perspective.

II. Harmful Speech and the First Amendment

Salient exceptions to the First Amendment "all involve the concrete prospect of significant—and involuntary—exposure to harm."[98] There are abundant examples of Supreme Court discussions of harm in First Amendment cases. In *Chaplinsky v. New Hampshire*,[99] the Court affirmed the conviction of Walter Chaplinsky who said to a police officer, "[y]ou are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[100] The Court held that the statute under which Chaplinsky was charged did not violate the First Amendment.[101] The Court opined that "it is well understood that the right of free speech is not absolute at all times and under all

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Amendment Rights and the SEC (1990).

94. Sunstein, *supra* note 4, at 33.

95. Snepp v. United States, 444 U.S. 507, 511-12 (1980).

96. *But see* Danny J. Boggs, *A Differing View on Viewpoint Discrimination*, 1993 U. Chi. Legal F. 45.

97. Sunstein, *supra* note 30, at 30.

98. Gates, *supra* note 44, at 14.

99. 315 U.S. 568 (1942).

100. *Id.* at 569.

101. *Id.*

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id. (citing Chapter 378, Section 2 of the Public Laws of New Hampshire).

circumstances."[102]

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[103]

In the Court's view, the New Hampshire statute was "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace."[104] "Argument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[105]

The *Chaplinsky* Court identified several harms in its discussion of the New Hampshire statute and the First Amendment. Certain speech may be constitutionally regulated in order to prevent harm to "the social interest in order and morality."[106] The state may act to prevent the harms of a breach of the peace, fighting, violence, retaliation, and the infliction of injury to the addressee of fighting words. Regulation of such words to prevent those harms was not unconstitutional, the Court said, and Walter Chaplinsky was lawfully prosecuted by the state for making the above-quoted statements.

In 1949, the Court decided *Terminiello v. City of Chicago*.[107] Arthur

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102. *Id.* at 571.

103. *Id.* at 571-72 (footnotes omitted) (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)). The Court quoted the New Hampshire Supreme Court's opinion in *Chaplinsky*:

> The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight . . . . Such words, as ordinary men know, are likely to cause a fight. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including "classical fighting words", words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.

Id. at 573.

104. *Id.*

105. *Id.* at 574.

106. *Id.* at 572.

107. 337 U.S. 1 (1949).

Terminiello, a suspended priest, was found guilty of disorderly conduct in violation of a Chicago, Illinois ordinance and was fined.[108] Terminiello gave an address in a Chicago auditorium. Outside the auditorium were one thousand persons protesting the meeting. During his address, Terminiello condemned the protesters and, in the Court's words, he "vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare."[109] The city charged Terminiello with violating the aforementioned ordinance. At trial, the judge

> charged that "breach of the peace" consists of any "misbehavior which violates the public peace and decorum"; and that the "misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[110]

The Court observed that:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.* There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[111]

The Court concluded that the city ordinance, "as construed by the trial court seriously invaded this province."[112] Terminiello was convicted because his "speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not

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108. *Id.* at 2. The ordinance provided:

> All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city . . . shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally fined not less than one dollar nor more than two hundred dollars for each offense.

Id. (alteration in original).

109. *Id.* at 3.

110. *Id.*

111. *Id.* at 4-5 (emphasis added) (citations omitted).

112. *Id.* at 5.

stand."[113] Thus, in the absence of harm, in that case, a "clear and present danger of a serious substantive evil,"[114] the city had abridged Terminiello's First Amendment rights.

In *Feiner v. New York*,[115] a soap box speaker was arrested and convicted for refusing to obey a police order to stop making a speech in which he called the mayor of Syracuse, New York a "champagne-sipping bum" and the American Legion a "Nazi Gestapo," and said, in the face of a hostile crowd, that "negroes . . . should rise up in arms and fight for their rights . . . ."[116] Upholding the conviction, the Court reasoned that the arrest was the "means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order."[117] The Court stated that the speaker was not arrested nor convicted for the making or content of the speech. Rather, the sole motivation of the police in making the arrest was a "proper concern for the preservation of order and protection of the general welfare . . . ."[118]

Beauharnais v. Illinois[119] involved a Chicago, Illinois ordinance that made it a crime to publicly display any publication that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" and "exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[120] Beauharnais, the president of the White Circle League, passed out bundles of lithographs on the streets of downtown Chicago "calling on the Mayor and the City Council of Chicago 'to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro . . . .'"[121] The lithograph also stated that, "'[i]f persuasion and the need to prevent the white race from being mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[122] Beauharnais was convicted of violating the ordinance and was fined two hundred dollars.[123]

The precise question before the Court was "whether the protection of 'liberty' in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing . . . libels . . . directed at designated collectivities and flagrantly disseminated."[124] The Court, in an opinion by Justice Frankfurter, stated:

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113. *Id.*
114. *Id.* at 4.
115. 340 U.S. 315 (1951).
116. *Id.* at 330.
117. *Id.* at 321.
118. *Id.* at 319.
119. 343 U.S. 250 (1952).
120. *Id.* at 251 (citing Section 224a, Illinois Criminal Code, ILL. REV. STAT., 1949, c. 38, Div. 1, Section 471).
121. *Id.* at 252.
122. *Id.*
123. *Id.* at 251.
124. *Id.* at 258.

> Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.[125]

Illinois had been the scene of "exacerbated tension between races, often flaring into violence and destruction."[126] Utterances of the type before the Court in *Beauharnis* had played a significant part in many of the outbreaks, as Illinois attempted to "assimilate vast numbers of new inhabitants, as yet concentrated in discrete racial or national or religious groups--foreign-born brought to it by the crest of the great wave of immigration, and Negroes attracted by jobs in war plants and the allurements of northern claims."[127] In addition, the first northern race riot, which occurred in Springfield, Illinois, had resulted in the loss of life; rioting had taken place in East St. Louis, Illinois, and there had been a race riot in Chicago in the summer of 1919.[128]

> In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.[129]

Justice Frankfurter noted that it could be argued that the ordinance would not help matters, and "that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings."[130] He answered that argument as follows:

> Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social

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125. *Id.* at 258-59 (footnote omitted).
126. *Id.* at 259.
127. *Id.* at 259-60.
128. *Id.* at 260-61 (footnote omitted).
129. *Id.* at 261.
130. *Id.* at 261-62.

issues.[131]

In addition, Frankfurter concluded that it would be "arrant dogmatism" for the Court to deny that Illinois "may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[132] Thus, "we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved."[133] Conceding that the choice of the Illinois legislature could be abused,[134] the Court reasoned that "[e]very power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law."[135] Finding no warrant in the Constitution for denying Illinois the power to pass the law under attack, Frankfurter noted:

> [I]t bears repeating--although it should not--that our findings that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others. It is not for us, however, to make the legislative judgment. We are not at liberty to erect those doubts into fundamental law.[136]

Again, the notion of harms, both real and conceivable, played a role in the Court's analysis. In holding that the ordinance was constitutional, the *Beauharnais* Court noted that the purveyance of falsehood concerning racial and religious groups promoted strife; that utterances like those at issue before the Court had resulted in exacerbated tensions between races; and that violence, destruction, and race riots had occurred in Illinois. Faced with those harms and disruptions, the state could constitutionally prohibit the lithograph distributed by Beauharnais in order to promote the peace and well-being of the state and its inhabitants. While it is generally understood that *Beauharnais* is no longer good law in light of *New York Times v. Sullivan*,[137] the Court's recognition of the harms

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131. *Id.* at 262.

132. *Id.* at 263.

133. *Id.*

134. The arguments were made that the law could be discriminatorily enforced, and that prohibiting libel of a racial group or creed was "but a step from prohibiting libel of a political party." *Id.*

135. *Id.*

136. *Id.* at 267.

137. 376 U.S. 254 (1964). The *New York Times* Court held that a public official could not maintain a libel action unless the public official could show that the alleged libeller had "actual malice," more specifically, could show that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The Court "has not had occasion to answer the precise question whether prohibitions on group libel might be

identified by the state illustrate the point that a harms-based analysis is not foreign to First Amendment analysis.

The Court in *Miller v. California*[138] stated that, "obscene material is unprotected by the First Amendment."[139] Recognizing that the states have a legitimate interest in prohibiting the dissemination or exhibition of obscene materials,[140] and acknowledging the inherent dangers of undertaking to regulate any form of expression, the Court set out the following guidelines for the trier of fact in cases involving obscenity and the First Amendment: (1) "whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;"[141] (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;"[142] and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[143]

In another case decided the same day as *Miller*, the Court's articulated rationale for proscribing obscenity referred to the need of "protect[ing] 'the social interest in . . . morality'" and the need to "maintain a decent society."[144] The "current standard for identifying obscenity was justified in part by reference to real-world harms,"[145] and the Court openly looked to and made findings with respect to the average person's and the community's views of expression, the offensive nature of the expression, and the "value" of the expression.[146] Thus, in the case of obscenity, society has determined that such material has little or no value, and is harm-causing because it can or does cause antisocial conduct, corruption of character, erosion of moral standards, and degradation of preferred

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acceptable in the wake of *New York Times v. Sullivan*. But most people think that bans on group libel or hate speech, broadly defined, are no longer permissible." SUNSTEIN, *supra* note 4, at 186.

138. 413 U.S. 15, 23 (1973).

139. *Id.*

140. The Court turned to the dictionary to define obscenity. Obscene material is "disgusting to the senses," is "grossly repugnant to the generally accepted notions of what is appropriate," is "offensive or revolting as countering or violating some ideal or principle," and is "disgusting, repulsive, filthy, foul, abominable, loathsome." *Id.* at 18 n.2.

141. *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

142. *Id.*

143. *Id.*

144. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59-61 (1973). *Slaton* also spoke of the correlation between obscene materials and sex crimes. *Id.* at 58-59. As noted by Professor Elena Kagan, "[t]his concern too may reflect a notion of morality, but if so, it is a morality rooted in material harms." Kagan, *supra* note 83, at 894.

145. Kagan, *supra* note 83, at 893.

146. Apply this analysis to hate speech. Can the average person and the community determine that certain hate speech does not meet the standards of that community and therefore is not protected by the First Amendment? Can certain hate speech be regulated where it is deemed to be patently offensive? Can certain hate speech be regulated where it is determined that the speech has no political, scientific, literary, or artistic value? If it is constitutionally permissible to regulate obscene materials, is it also constitutional to regulate certain hate speech? If not, why not?

values.[147]

In *City of Renton v. Playtime Theatres, Inc.*,[148] the Court held that a city ordinance, which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school, was constitutional. Writing for the Court, Justice Rehnquist opined that the city ordinance was aimed not "at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community."[149] The ordinance was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life'. . . ."[150] Thus, Rehnquist stated, the ordinance was completely consistent with the Court's definition of content-neutral speech regulations and did not contravene the principle underlying the Court's concern about "'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'"[151] As to the method chosen by the city to further its substantial interests, the Court determined that "'[i]t is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'"[152] Moreover, the ordinance was valid because it was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects . . . ."[153]

Can the *Renton* Court's holding that the government can regulate speech if it does so because of the untoward secondary effects of the speech rather than because of the Court's disapproval of the content of the speech be applied to hate speech? If the primary-secondary dichotomy is in the eye of the judiciary only,[154] and if it is true that it is the content of speech that determines the effects, "a strong argument can be made that the prohibition is in actuality content-based."[155] Can

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147. Sheldon H. Nahmod, *Adam, Eve and the First Amendment: Some Thoughts on the Obscene as Sacred*, 68 CHI.-KENT L. REV. 377, 377-78 (1992).

148. 475 U.S. 41 (1986).

149. *Id.* at 47.

150. *Id.* at 48 (alterations in original).

151. *Id.* at 48-49 (quoting Police Dept. v. Mosley, 408 U.S. 92, 96 (1972)).

152. *Id.* at 52 (alterations in original) (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion)).

153. *Id.*

154. Stephen Reinhardt, *The First Amendment: The Supreme Court and the Left—With Friends Like These*, 44 HASTINGS L. J. 809, 819 (1993). Judge Reinhardt notes that one major problem with the *Renton* doctrine is the risk of misapplication. "Even assuming that one could justify, intellectually, a regulation of speech based on secondary as opposed to primary effects, the state legislatures and city councils that implement the doctrine are often neither sophisticated in its use nor particularly concerned abut [sic] First Amendment niceties." *Id.*

155. *Id.*

it not be argued, then, that certain hate speech is regulable because of the adverse effects and consequences of such speech, and that such regulation is not unconstitutional solely on the ground that the regulation looks at the content of the speech? Like constitutional and content-based regulation of the secondary effects of other speech, cannot the secondary effects of certain hate speech be lawfully and constitutionally regulated? If one answers this question in the negative, what distinguishes some secondary effects from others for First Amendment purposes? Is the distinction based on the valuations of the different expressions and the harms thereof? Is it fair to say that the distinction is really a reflection of "substantive disagreements over matters of policy?"[156]

In *Texas v. Johnson*,[157] the flag burning case, the Court considered two interests offered by the State of Texas attempting to justify the conviction of Gregory Johnson for burning an American flag. The state claimed that its interest in preventing breaches of the peace justified Johnson's conviction for flag desecration. "However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag."[158] The Court reasoned that acceptance of the state's argument that Johnson's conduct created the potential for a breach of the peace as a justification for the conviction would eviscerate the Court's holding in *Brandenburg v. Ohio*.[159] "This we decline to do."[160] Johnson's expressive conduct did not fall within the proscribed class of fighting words. Justice Brennan wrote: "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."[161]

The State of Texas also urged that its interest in preserving the flag as a symbol of nationhood and national unity justified Johnson's conviction. Justice Brennan stated that Johnson was prosecuted because he knew that his expressive conduct would cause serious offense. "The Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others."[162] The Court disagreed with the state's argument that the message conveyed by flag desecration was a harmful one and therefore could be prohibited.[163] Noting the "bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself

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156. *Id.* at 820.

157. 491 U.S. 397 (1989).

158. *Id.* at 408.

159. 395 U.S. 444 (1969) (per curiam). In *Brandenburg*, the Court held that a state could not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

160. *Texas*, 491 U.S. at 409.

161. *Id.*

162. *Id.* at 411.

163. *Id.* at 413.

offensive or disagreeable,"[164] Justice Brennan concluded that nothing in the Court's precedents suggested that a state could "foster its own view of the flag by prohibiting expressive conduct relating to it."[165]

Chief Justice Rehnquist, dissenting, disagreed with both the Court's analysis and result. "No other American symbol has been as universally honored as the flag."[166] "The flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."[167] After noting and quoting from the *Chaplinsky* "fighting words" decision,[168] Rehnquist opined that the public burning of the flag by Johnson was not an essential part of any exposition of ideas, and had a tendency to incite a breach of the peace. The flag burning,

> like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace.[169]

For Rehnquist, "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others."[170] One of the "high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning."[171]

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164. *Id.* at 414.

165. *Id.* at 415.

166. *Id.* at 427 (Rehnquist, C. J., dissenting, joined by Justices White and O'Connor).

167. *Id.* at 429.

168. *See supra* notes 99-106 and accompanying text.

169. *Texas*, 491 U.S. at 431 (alteration in original).

170. *Id.* at 432.

171. *Id.* at 435. In a separate dissent, Justice Stevens argued that the "concept of 'desecration' does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense." *Id.* at 438 (Stevens, J., dissenting). Thus, "one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others . . . [would] . . . be seriously offended." *Id.* Even if the actor knew that all possible witnesses would understand that he intended to send a message of respect, Justice Stevens stated, the flag burner could still be guilty of desecration if he also knew that that understanding did not lessen the offense taken by some of the witnesses. *Id.* Accordingly, Stevens concluded that the case had nothing to do with disagreeable ideas, but rather involved disagreeable conduct that diminished the value of an important national asset. If Johnson had chosen to spray paint his message on the facade of the Lincoln Memorial, "there would be no question about the power of the Government to prohibit his means of expression." *Id.*

One year after the decision in *Johnson*, the Court in United States v. Eichman, 496 U.S.

Barnes v. Glen Theatre, Inc.[172] involved the claim that the First Amendment prohibited the State of Indiana from enforcing its public indecency law to prevent totally nude dancing.[173] In rejecting the claim and applying *United States v. O'Brien*,[174] a plurality of the Court concluded that the statute was justified despite its incidental limitations on some expressive activity, that the "statute's purpose of protecting societal order and morality is clear from its text and history,"[175] and that the law "furthers a substantial government interest in protecting order and morality."[176] The governmental interest was unrelated to the suppression of free expression, the Court explained, and Indiana sought to prevent the "evil" of public nudity "whether or not it is combined with expressive activity."[177] In a concurring opinion, Justice Scalia wrote:

> Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "contra bonos mores," *i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cock fighting, bestiality, suicide, drug use, prostitution,

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310 (1990), considered the prosecution of individuals for burning a flag in violation of the Flag Protection Act of 1989. 18 U.S.C. § 700 (1994). The Flag Protection Act, passed by Congress in 1989 following the Court's decision in *Johnson*, provided, in pertinent part: "Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." *Id.* The Court held that the conviction was inconsistent with the First Amendment. In his opinion for the Court, Justice Brennan noted that the Court was aware that flag desecration was offensive to many. "But the same might be said, for example, of virulent ethnic and religious epithets . . . vulgar repudiations of the draft . . . and scurrilous caricatures . . . ." *Eichman*, 496 U.S. at 318 (citations omitted). Punishing flag desecration "dilutes the very freedom that makes this emblem so revered, and worth revering." *Id.*

172. 501 U.S. 560 (1991).

173. *Id.* at 562-63. The Indiana statute provides, in pertinent part, that a "person who knowingly or intentionally, in a public place . . . appears in a state of nudity . . . commits public indecency, a Class A misdemeanor." IND. CODE § 35-45-4-1 (1993).

174. 391 U.S. 367 (1968). In *O'Brien*, the Court set out the following four-part test:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

175. *Barnes*, 501 U.S. at 568. The Court conceded that it was "impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted this statute, for Indiana does not record legislative history, and the State's highest court has not shed additional light on the statute's purpose." *Id.* at 567-68.

176. *Id.* at 569.

177. *Id.* at 571.

> and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist . . . there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."[178]

The purpose of the Indiana statute, as Scalia saw it, "is to enforce the traditional moral belief that people should not expose their private parts indiscriminately, regardless of whether those who see them are disedified."[179]

In a separate concurrence, Justice Souter argued that the interest asserted by the State in "preventing prostitution, sexual assault, and other criminal activity" was sufficient to justify the enforcement of the statute against the adult entertainment at issue in the case.[180] In his view, Indiana's interest in banning nude dancing resulted from a correlation of such dancing with other evils and, given that correlation, "the interest is unrelated to the suppression of free expression."[181]

Let us turn to two more recent decisions by the Supreme Court, the first dealing with hate speech, the second with hate crimes. *R.A.V. v. City of St. Paul*[182]

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178. *Id.* at 575 (Scalia, J., concurring in the judgment).

179. *Id.* Scalia would have upheld the Indiana statute on the ground that moral opposition to nudity supplied a rational basis for the prohibition of nudity, "and since the First Amendment has no application to this case no more than that is needed." *Id.* at 580.

180. *Id.* at 582 (Souter, J., concurring in the judgment).

181. *Id.* at 586. In his dissenting opinion, Justice White (joined by Justices Marshall, Blackmun, and Stevens) explained that the Court's references to the state's general interest in promoting societal order and morality was not sufficient justification for a statute which reached a "significant amount of protected expressive activity." *Id.* at 590. The purpose of preventing nude dancing in theaters and barrooms "is to protect the viewers from what the State believes is the harmful message that nude dancing communicates." *Id.* at 591. The perceived damage to the public interest caused by nudity on the streets and in public parks was not what the state sought to prevent in prohibiting nude dancing in theaters and taverns, Justice White stated. "There the perceived harm is the communicative aspect of the erotic dance." *Id.* The attainment of the state's goal of deterring certain social and moral harms depended on "preventing an expressive activity." *Id.*

To the extent that the Court was concerned with prostitution and other evils, White continued, the Indiana statute was not narrowly drawn. The state could have required nude dancers to remain a certain distance from spectators, limited nude entertainment to certain hours, required that such establishments be dispersed throughout the city, and criminalized prostitution and obscene behavior. "Banning an entire category of expressive activity, however, generally does not satisfy the narrow tailoring requirement of strict First Amendment scrutiny." *Id.* at 594.

182. 505 U.S. 377 (1992). For discussions of *R.A.V.*, see EDWARD J. CLEARY, BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK *R.A.V.* CASE (1994); Jonathan D. Selbin, *Bashers Beware: The Continuing Constitutionality of Hate Crimes Statutes After* R.A.V., 72 OR. L. REV. 157 (1993); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Turner, *supra* note 3.

held that a city's bias-motivated crime ordinance, which prohibited the display of a symbol which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,[183] was facially invalid under the First Amendment in that it prohibited "otherwise

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183. *R.A.V.*, 505 U.S. at 380. The St. Paul, Minnesota, Bias-Motivated Crime Ordinance provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. (citing St. Paul, Minn. Leg. Code § 292.02 (1990)).

A teenager, Robert A. Viktora, was charged with violating this ordinance after he and several other teenagers assembled and burned a cross inside the fenced yard of an African-American family. *Id.* at 379-80; Turner, *supra* note 3, at 197. Immediately before constructing and burning the cross, Viktora and his cohorts engaged in a discussion of racial tensions, and one of the teenagers told of being accosted by three African-Americans. Viktora recounted that an African-American male had pulled a knife on him, and members of the group were disgusted about the fact that an African-American family was living across the street from one of the teenagers and decided to do something about it. *See* United States v. Juvenile Male J.H.H., 22 F.3d 821, 826-27 (8th Cir. 1994). One teenager suggested puncturing the tires of the black family's car, and another youth responded "that that had already been done and 'it didn't do no good. . . . They're still there.'" *Id.* at 827. Viktora then brought up the movie "Mississippi Burning," and another teenager said, "Let's go burn some niggers." *Id.* A cross was built out of the wooden legs of a bar stool, tape, and cloth. Three of the young men entered the black family's fenced backyard with the cross and a can of flammable liquid and doused the cross with the liquid and set it afire. *Id.* In addition, the teenagers built two other crosses and burned them at a nearby apartment complex and at the street corner directly across from the black family's home. Thus, within a two-hour time span the teenagers burned three crosses in or in close proximity to the black family's home. *Id.*

Viktora was charged with cross-burning in violation of the Minnesota ordinance. *Id.* at 824. The Minnesota Supreme Court held that the reach of the ordinance was limited to fighting words within the meaning of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and therefore reached only expression that the First Amendment did not protect. *See In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991), *rev'd*, 505 U.S. 377 (1992).

Viktora and two other juveniles were convicted for acts of juvenile delinquency, specifically, for having interfered with federal housing rights by force or threat, and having aided and abetted those crimes. *See Juvenile Male J.H.H.*, 22 F.3d at 823. The government argued that the convictions did not violate the First Amendment because two of the juveniles were convicted for cross-burning as a means to threaten and intimidate an African-American family. Agreeing, the United States Court of Appeals for the Eighth Circuit concluded that, unlike the ordinance held invalid by the Supreme Court in *R.A.V.*, the federal statutes violated by the juveniles (18 U.S.C. § 241 (1994) and 42 U.S.C. § 3631 (1988)), prohibited only a mode of expression, i.e., threats of violence and intimidation. Consequently, even if those sections "make content distinctions, they are of a kind that poses 'no significant danger of idea or viewpoint discrimination.'" *Juvenile Male J.H.H.*, 22 F.3d at 826 (citation omitted) (quoting *R.A.V.*, 505 U.S. at 388).

permitted speech solely on the basis of the subjects the speech addresses."[184]

The Court's opinion, authored by Justice Scalia, accepted "the Minnesota Supreme Court's authoritative statement that the ordinance reached only those expressions that constituted 'fighting words' within the meaning of *Chaplinsky*."[185] Noting that fighting words are excluded from the scope of the First Amendment, the Court stated that the exclusion "simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'non speech' element of communication."[186] However, the Court continued, government may not regulate fighting words on the basis of hostility or favoritism towards the message conveyed.[187] The St. Paul ordinance, "limited by the Minnesota Supreme Court's construction to reach only symbols or displays that amount to 'fighting words,' . . . applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"[188]

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas--to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality--are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.[189]

Moreover, stated the Court, the ordinance involved viewpoint discrimination because displays of some words,

> [such as] odious racial epithets, for example--would be prohibited to proponents of all views. . . . [while] . . . "fighting words" that do not themselves invoke race, color, creed, religion, or gender . . . would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc. tolerance and equality, but could not be used by that speaker's opponents.[190]

In the final paragraphs of its opinion, the Court took up the city's and amicis' arguments that the ordinance was justified because it was narrowly tailored to serve compelling state interests. "Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been

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184. *R.A.V.*, 505 U.S. at 381.

185. *Id.*

186. *Id.* at 386.

187. *Id.*

188. *Id.* at 391.

189. *Id.*

190. *Id.* (emphasis in original). The Court opined that one could hold up a sign saying that all "anti-Catholic bigots" were misbegotten, but not a sign stating that all "papists" were, "for that would insult and provoke violence on the basis of religion." *Id.* at 391-92.

subjected to discrimination, including the right of such group members to live in peace where they wish."[191] Not doubting that those interests were compelling or that the ordinance could be said to promote them, the Court, concerned with the danger of censorship, asked whether the content discrimination of the ordinance

> was reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility--but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.[192]

Justice White's concurring opinion agreed with the Court that the judgment of the Minnesota Supreme Court should be reversed.[193] In his view, however, the case could have been "decided within the contours of established First Amendment law by holding . . . that the . . . ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment."[194] White argued the majority's holding protected narrow categories of expression long held to be undeserving of First Amendment protection. "Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words."[195] For Justice White, it was inconsistent to hold that government may proscribe an entire category of speech but "may not treat a subset of that category differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection."[196]

In a separate concurrence, Justice Blackmun argued that by deciding that a state "cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws."[197] Blackmun stated that it was possible that *R.A.V.* would "not significantly alter First Amendment jurisprudence, but, instead, will be regarded as an aberration--a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words."[198] Seeing no First

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191. *Id.* at 395.

192. *Id.* at 395-96 (footnote omitted).

193. *Id.* at 397.

194. *Id.* (White, J., concurring in the judgment, joined by Justices Blackmun, O'Connor, and Stevens).

195. *Id.* at 401.

196. *Id.*

197. *Id.* at 415 (Blackmun, J., concurring in the judgment).

198. *Id.*

Amendment values that were compromised by a law prohibiting "hoodlums from driving minorities out of their homes by burning crosses on their lawns," Justice Blackmun saw "great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community."[199]

Justice Stevens, concurring in the judgment, began his opinion with the statement: "Conduct that creates special risks or causes special harms may be prohibited by special rules."[200] Threatening an individual "because of her race or religious beliefs may cause particularly severe trauma or touch off a riot . . . ."[201] Such threats "may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules."[202] The Court's "entire First Amendment jurisprudence creates a regime based on the content of speech," Stevens stated, and the "scope of the First Amendment is determined by the content of expressive activity."[203] The line between permissible advocacy and impermissible incitement to crime or violence depends on what the speaker says, and whether the speech falls within the protected or unprotected categories is determined in part by its content.[204]

In his majority opinion, Justice Scalia stated that the federal government can criminalize only those threats that are directed against the President because "the reason why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the . . . President."[205] Stevens took issue with the Court's analysis. As he understood that "opaque passage," Congress could "choose from the set of unprotected speech (all threats) to proscribe only a subset (threats against the President) because those threats are particularly likely to cause 'fear of violence,' 'disruption,' and actual 'violence.'"[206]

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199. *Id.* at 416.

200. *Id.* (Stevens, J., concurring in the judgment).

201. *Id.*

202. *Id.*

203. The First Amendment broadly protects "speech," Stevens opined, but does not protect the right to fix prices, breach contracts, place bets with bookies, or violate the Sherman Act. *Id.* at 420.

204. *Id.* at 421.

> Whether a magazine is obscene, a gesture a fighting word, or a photograph child pornography is determined, in part, by its content. Even within categories of protected expression, the First Amendment status of speech is fixed by its content. . . . It can, therefore, scarcely be said that the regulation of expressive activity cannot be predicated on its content: much of our First Amendment jurisprudence is premised on the assumption that content makes a difference.

Id. (citations omitted).

205. *Id.* at 388.

206. *Id.* at 424 (Stevens, J., concurring in the judgment).

> Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul's City Council may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment--that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words--seems to me eminently reasonable and realistic.[207]

The *R.A.V.* Court also recognized that a state could regulate advertising in one industry but not another because the risk of fraud in the regulated industry was greater than in other industries.[208] Justice Stevens stated that this same reasoning demonstrated the constitutionality of the St. Paul ordinance. "Certainly a legislature that may determine that the risk of fraud is greater in the legal trade than in the medical trade may determine that the risk of injury or breach of peace created by race-based threats is greater than that created by other threats."[209]

Stevens also argued that a selective proscription of unprotected expression "would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression. . . . Such selective protection is no different from a law prohibiting minors (and only minors) from obtaining obscene publications."[210] St. Paul had determined that fighting-word injuries based on race, color, creed, religion or gender were

> qualitatively different and more severe than fighting-word injuries based on other characteristics. Whether the selective proscription of proscribable speech is defined by the protected target . . . or the basis of the harm . . . makes no constitutional difference: what matters is whether the legislature's selection is based on a legitimate, neutral, and reasonable distinction.[211]

Justice Stevens also reasoned that the ordinance regulated speech not on the basis of its subject matter or viewpoint, but rather on the basis of the harm caused by the speech. The ordinance regulated expression that caused injury and did not regulate expression involving discussions that concerned the characteristics of race, color, creed, religion or gender.[212] Even if the ordinance regulated fighting words on the basis of subject matter, such regulation would be constitutional, for subject matter regulations do not raise the same concerns of government censorship presented by viewpoint regulations.[213] The St. Paul ordinance was evenhanded, did not regulate on the basis of viewpoint, and did not "prevent either

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207. *Id.*
208. *Id.* at 388.
209. *Id.* at 424-25 (Stevens, J., concurring in the judgment).
210. *Id.* at 425.
211. *Id.*
212. *Id.* at 433-34.
213. *Id.* at 434.

side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target's 'race, color, creed, religion or gender.'"[214] Thus, in Stevens' view, the ordinance simply banned punches below the belt by both parties. "It does not, therefore, favor one side of any debate."[215] Stevens concluded that the St. Paul ordinance regulated expressive activity that was wholly proscribable and did so "not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity."[216]

It appears that what St. Paul lost in *R.A.V.* "--what government at all levels lost--was a form of expression: the use of the criminal law as a means to communicate the public's repudiation of hate speech focused on the race, religion, or gender of its intended victims."[217] Interestingly, the Court did not extend that general principle to hate crimes. In *Wisconsin v. Mitchell*,[218] an individual's "sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race."[219] Under the applicable Wisconsin law, the offense of aggravated battery carried a maximum sentence of two years' imprisonment. Because the jury found that the perpetrator had chosen his victim due to the victim's race, the maximum sentence was increased to seven years.[220] The convicted party challenged the constitutionality of the enhancement statute on First Amendment grounds.

The Wisconsin Supreme Court ruled that the "statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection."[221] The state argued that the statute did not punish bigoted thought, but instead punished only conduct. The United States Supreme Court, concluding that the state's argument was literally correct, stated that the argument did not dispose of the First Amendment challenge. Although the statute punished criminal conduct, it enhanced the maximum penalty for "conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all."[222] Because the only reason for the penalty enhancement was the defendant's discriminatory motive for selecting the victim, the defendant argued that the statute punished bigoted beliefs in violation of the First Amendment. The Court noted that judges traditionally have considered a wide variety of factors in determining which

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214. *Id.* at 435 (emphasis in original).

215. *Id.*

216. *Id.* at 436.

217. KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 97 (1993).

218. 113 S. Ct. 2194 (1993). For a discussion of *Mitchell*, see Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

219. *Mitchell*, 113 S. Ct. at 2196.

220. *Id.* at 2197; *see also* WIS. STAT. ANN. § 939.645 (West 1995).

221. State v. Mitchell, 485 N.W.2d 807, 812 (1992) (emphasis in original).

222. *Mitchell*, 113 S. Ct. at 2199.

sentence to impose, with the defendant's motive being an important factor.[223] It is also "equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge."[224]

As to the defendant's argument that the Wisconsin penalty-enhancement statute was invalid because it punished the defendant's discriminatory motive or reason for acting, the Court reasoned that the statute singled out "for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. . . . [B]ias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[225] "The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[226]

Thus some concept of harm has been an element of the Court's analysis of the First Amendment in various contexts. Fighting words can be regulated in order to prevent and deal with the injuries and immediate breaches of the peace resulting from the use of such words.[227] Speech can be regulated if it can be shown that it is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[228] At one time, speech could be regulated in order to address and deter the possible strife and tensions between so-called racial groups that could be caused by the purveyance of falsehoods concerning such groups.[229] A city may constitutionally regulate the areas in which adult motion picture theaters may operate in order to prevent crime, protect retail trade, maintain property values, and generally protect and preserve the quality of neighborhoods, commercial districts, and the "quality of . . . life."[230] Also a state may lawfully enforce a ban on public indecency without violating the First Amendment where it seeks to prevent the evil of public nudity and promote

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223. *Id.*

224. *Id.* at 2200. In Dawson v. Delaware, 503 U.S. 159 (1992), the Court held that the admission of evidence at a capital-sentencing hearing that the defendant was a member of a white supremacist prison gang violated the First Amendment because the evidence proved nothing more than the defendant's abstract beliefs. In another decision, Barclay v. Florida, 463 U.S. 939 (1983), the Court permitted the sentencing judge to take into account the defendant's racial animus (the defendant was a member of the Black Liberation Army) towards his victim. The *Mitchell* defendant argued that *Dawson* and *Barclay* were inapposite because those cases did not involve the application of a penalty-enhancement provision. Rejecting that argument, the *Mitchell* Court stated that in *Barclay* the Court "held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether a defendant should be sentenced to death, surely the most severe 'enhancement' of all." *Mitchell*, 113 S. Ct. at 2200.

225. *Mitchell*, 113 S. Ct. at 2201.

226. *Id.*

227. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

228. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

229. Beauharnais v. Illinois, 343 U.S. 250 (1952). *See supra* notes 119-36 and accompanying text.

230. Renton v. Playtime Theatres, 475 U.S. 41, 48 (1986).

public morality.[231] Additionally a state may constitutionally enact a penalty-enhancement statute for bias-motivated crimes where the state concludes that such conduct inflicts greater individual and societal harm, and is more likely to provoke retaliatory crimes, inflict emotional harms on victims, and incite community unrest.[232]

Cases in which the Court held that a state or locality abridged First Amendment rights have turned, in part, on the Justices' assessments of whether the conduct at issue presented the possibility of potential or actual harm. In *Texas v. Johnson*, the Court pointed out that no disturbance of the peace actually occurred or was threatened to occur due to the burning of the flag,[233] and that no reasonable onlooker would have regarded the flag burning as a direct personal insult or an invitation to fight.[234] The dissenting Justices based their arguments, in part, on the notion that the flag burning had a tendency to incite a breach of the peace, and that a state could regard the conduct as evil or offensive.[235] In *R.A.V.*, Justice Blackmun argued that the Court had manipulated doctrine in order to strike down an ordinance whose premise the Court opposed, "namely, that racial threats and verbal assaults are of greater harm than other fighting words."[236] Justice Stevens, arguing in *R.A.V.* that conduct which creates special risks or causes special harms may be prohibited by special rules, concluded that threatening an individual because of her race or religion may be punished more severely than other threats.[237] In his view, a city council could lawfully, reasonably, and realistically "determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society."[238] As can be seen, issues of harm are considered and relied upon by both liberal and conservative Justices who are clearly influenced by the particular expression exposed to regulation.

III. The Harms of Hate Speech

Speech can cause and inflict injury, and will often be protected "not because it is harmless, but despite the harm it may cause."[239] As noted by Professor Schauer:

> To put it more precisely, existing understandings of the First Amendment presuppose that legal toleration of speech-related harm is the currency with which we as a society pay for First Amendment protection. Paying a higher price by legally tolerating more harm is thus

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231. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991).
232. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201 (1993).
233. 491 U.S. 397, 408 (1989).
234. *Id.* at 409.
235. *See supra* notes 166-71 and accompanying text.
236. *See supra* notes 197-99 and accompanying text.
237. *See supra* notes 200-04, 206-07 and accompanying text.
238. *See* R.A.V. v. City of St. Paul, 505 U.S. 327 (1992).
239. Schauer, *supra* note 1, at 1321.

> taken to be necessary in order to get more First Amendment protection. Conversely, it appears equally well accepted that being more concerned about speech-related harm by tolerating less of it requires accepting a commensurately weaker First Amendment.[240]

Hate speech is not without cost; those who are the targets of such speech can and do pay the price of the hate-speaker's asserted First Amendment freedom.

A. Hate Speech

It has been recognized, and it seems indisputable, that "[h]ate speech based on race or ethnicity or gender is typically more hurtful and painful to the listener than are other types of generic insults. The literature describing the experience of being victimized by this kind of speech is extensive and convincing."[241] The hurtful experience of "being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face."[242] Individuals are injured by such speech,[243] and the

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240. *Id.* at 1322 (footnote omitted). Professor Schauer has also argued that

> existing understandings of the First Amendment are based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay for it. This assumption, however, seems curious. It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries. And when in some situations those who bear the cost are those who are least able to afford it, there is even greater cause for concern. If free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech.

Id.

241. Brownstein, *supra* note 63, at 204.

242. *Racist Speech on Campus*, *supra* note 3, at 452. What about words like "honky," "redneck," and "cracker?" While those words can be harmful epithets in certain contexts, some have argued that such words are not comparably damaging to whites as are epithets hurled against people of color and other so-called minorities. In the view of two commentators:

> The word "honky" is more a badge of respect than a put down. "Cracker," although disrespectful, still implies power, as does "redneck." The fact is that terms like "nigger," "spick," "faggot," and "kike" evoke and reinforce entire cultural histories of oppression and subordination. They remind the target that his or her group has always been and remains unequal in status to the majority group. Even the most highly educated, professional class African-American or Latino knows that he or she is vulnerable to the slur, the muttered expression, the fishy glance on boarding the bus, knows that his degree, his accomplishments, his well-tailored suit are no armor against mistreatment at the hands of the least educated white.
>
> But not only is there no correlate, no hate speech aimed at whites, there is no means by which persons of color and others can respond effectively to this form of speech within the current paradigm. Our culture has developed a host of narratives, mottoes, and presuppositions that render it difficult for the minority victim to talk back in individual cases, and to mobilize effectively against hate speech in general. These include: feelings are minor; words only hurt if you let them; rise above it; don't be so

personal attack of hate speech can produce an instinctive, defensive psychological reaction, as well as fear, rage, shock, and flight.[244]

In a recent article, Professor Calvin Massey discusses five types of harms caused by hate speech and the arguments for the suppression thereof.[245] First, hate speech can produce violence directed toward either the targets of the speech or those who use the speech. "Suppression of speech which incites violence can be justified on the grounds that it serves to protect specific individual interests from invasion and also to preserve a more general societal interest in preventing violent rupture of social norms."[246] Second, hate speech can be harmful to the specific individuals towards whom it is directed. Suppression can be justified on the grounds that the injuries suffered by individual targets of hate speech "are every bit the equal of the loss of reputation, humiliation, or emotional torment suffered by victims of the dignitary torts."[247] Third, suppression of hate speech can be grounded in the justification that it harms those groups which are the target of vilification.[248] Fourth, hate speech may be harmful and require suppression because doing so "will preserve public discourse as a truly autonomous mode of governance."[249] Finally, it has been argued that hate speech should be suppressed because such speech is contrary to the societal consensus with respect to the elemental wrongness of the use of racial epithets. On that view, the suppression of hate speech is "symbolically necessary as an 'unequivocal expression[] of solidarity with vulnerable minority groups.'"[250]

Professor Robert Post has grouped the harms of what he calls "racist speech" into five categories.[251]

> sensitive; don't be so humorless; talk back--show some backbone. Stated or unstated narratives like these form part of the linguistic and narrative field on which minority victims have to play in responding to taunts and epithets, and of course limit the efficacy of any such response.

Delgado & Yun, *supra* note 17, at 1823 (footnotes omitted).

243. *See Racist Speech on Campus*, *supra* note 3, at 457.

244. *Id.* at 452.

245. *See* Massey, *supra* note 1.

246. *Id.* at 155.

247. *Id.* at 158. Massey refers to the torts of defamation, invasion of privacy, and the intentional infliction of emotional distress. *Id.*

248. *Id.* at 164.

249. *Id.* at 167. There are two branches to this argument. The first argues that hate speech silences members of the targeted groups and effectively excludes them from participation in public discourse. The second argues that hate speech is so irrational and inherently abusive that it serves as an obstacle to a calm and fully deliberative process that is seen by many as the ideal of public discourse. *Id.*

250. *Id.* at 170 (alteration in original).

251. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 271-77 (1991) [hereinafter Post, *Racist Speech, Democracy*]. *See also* ROBERT C. POST, CONSTITUTIONAL DOMAINS 293-303 (1995) (discussing the harms of hate speech) [hereinafter POST, CONSTITUTIONAL DOMAINS].

(1) *"Deontic" Harm.* "The basic point is that there is an 'elemental wrongness' to racist expression, regardless of the presence or absence of particular empirical consequences such as 'grievous, severe psychological injury.'"[252] A society committed to the ideals of social and political equality cannot remain passive, and must "issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals."[253]

(2) *Harms to Identifiable Groups.* Racist expression harms those groups that are the target of the expression. "On this view speech likely to cast contempt or ridicule on identifiable groups ought to be regulated to prevent injury to the status and prospects of the members of those groups."[254] "Racist expression is viewed as especially unacceptable . . . [and] the oppression of already marginalized groups . . ." is locked in.[255]

(3) *Harm to Individuals.* Racist expression, like defamation, invasion of privacy, and intentional infliction of emotional distress, harms individuals. "These injuries include 'feelings of humiliation, isolation, and self-hatred,' as well as 'dignitary affront . . . .'[256] [R]acial insults conjure up the entire history of racial discrimination in this country."[257] Regulation of racist expressions directed toward individuals may have to be "narrowed to those that are addressed to specific individuals or that in some other way can be demonstrated to have adversely affected specific individuals."[258] In the case of preventing dignitary harms, "the injury might be understood to inhere in the utterance of certain racist communications; if the focus is on emotional damage, independent proof of distress might be required to sustain recovery."[259]

(4) *Harm to the Marketplace of Ideas.* Racist expression harms the operation of the marketplace of ideas.[260] Depending on the way in

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252. Post, *Racist Speech, Democracy, supra* note 251, at 272.

253. *Id.* (quoting David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 456 (1987)).

254. *Id.* at 273.

255. *Id.*

256. *Id.* at 274 (quoting Delgado, *Words That Wound*, *supra* note 3, at 143).

257. *Id.* (quoting Delgado, *Words That Wound*, *supra* note 3, at 157).

258. *Id.*

259. *Id.*

260. *Id.* at 275. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-

which such expression is understood to damage the marketplace of ideas, the class of communications subject to legal sanction "might be confined to communication experienced as coercive and shocking, or it might be expanded to include communication perceived as unconsciously and irrationally racist, or it might be expanded still further to encompass speech explicitly devaluing and stigmatizing victim groups."[261]

(5) *Harm to Educational Environments.* Racist expression can harm the "educational mission of colleges and universities."[262] "Some campus regulation [of racist communications] . . . focuse[s] on the damage that racist expression is understood to cause to particular individuals or groups . . . and proscribe[s] racist expression that 'will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities.'"[263] Other college and university regulations seek to inculcate the value of diversity. "[R]acist expression interferes with education . . . because of the . . . harms . . . inflict[ed] on groups or individuals or the marketplace of ideas, [and] also . . . because such expression exemplifies conduct contrary to the educational goals that colleges . . . and universities seek to instill."[264]

Professor Mari Matsuda has written about the specific negative effects of racist hate messages.[265] Victims of hate propaganda experience "physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and

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GOVERNMENT (1948); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Stanley Ingber, *The Marketplace of Ideas: A Legitimating Myth*, 1984 DUKE L.J. 1; David A. Strauss, *Persuasion, Autonomy, And Freedom Of Expression*, 91 COLUM. L. REV. 334 (1991). The marketplace theory posits that the truth is most likely to emerge if no limitations are placed on utterances that can plausibly be regarded as efforts to present reasons for accepting or rejecting propositions whose truth the speaker asserts or denies. *See* IBEW, Local 501 v. NLRB, 181 F.2d 34 (2d Cir. 1950) (Judge Learned Hand writing for the court), *aff'd*, 341 U.S. 694 (1951). For many, the marketplace theory is problematic. "The notion of ideas competing with each other, with truth and goodness emerging victorious from the competition, has proven seriously deficient when applied to evils, like racism, that are deeply inscribed in the culture." Delgado & Stefancic, *supra* note 58, at 1281. We must also be cognizant of efforts by those who do not doubt their premises or power to employ that power to suppress articulations of opposing positions. Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 865 (1992).

261. Post, *Racist Speech, Democracy*, *supra* note 251, at 275.

262. *Id.* at 276.

263. *Id.* (quoting UNIVERSITY OF CALIFORNIA, UNIVERSITY WIDE STUDENT CONDUCT: HARASSMENT POLICY (1989)).

264. *Id.* at 277; *see infra* Part V.

265. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335-40 (1989).

difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide. Professor Patricia Williams has called the blow of racist messages 'spirit murder' in recognition of the psychic destruction victims experience."[266] The personal freedom of targets is restricted, as they "quit [their] jobs, forego education, leave their homes, avoid certain public places . . . and . . . modify their behavior."[267] Some targets reject their "own identity as a victim-group member. As writers portraying the African-American experience have noted, the price of disassociating from one's own race is often sanity itself."[268] "[O]ne's self-esteem and sense of personal security is [also] devastate[d]. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain."[269] Thus, "racist hate messages cause real damage."[270]

Professor Richard Delgado, in a pathbreaking article,[271] identified the harms of racial insults. "[M]ental or emotional distress is the most obvious direct harm caused by a racial insult . . ." writes Delgado, and "mere words, whether racial or otherwise, can cause mental, emotional, or even physical harm to their target, especially if delivered in front of others or by a person in a position of authority."[272] "[A] racial insult is always a dignitary affront . . . [and] is a serious transgression . . . because it derogates by race, a characteristic central to one's self-image."[273] "Verbal tags" provide a means by which individuals may be treated as class members and are "assumed to share all of the negative attitudes imputed to the class."[274] Racial insults keep the targets compliant and inflict psychological harm upon them.[275] Insults and negative stereotypes "can operate as 'self-fulfilling prophecies,'"[276] and minority children begin to question "their competence,

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266. *Id.* at 2336 (quoting Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987)).

267. Matsuda, *supra* note 265, at 2337.

268. *Id.*

269. *Id.* at 2338. Professor Matsuda also notes the effects of racist speech on non-target-group members. The associational and other liberties of whites are curtailed by the use of racist speech, and "dominant-group" members who object to hate propaganda share a "guilty secret: their relief that they are not themselves the target of the racist attack." *Id.* In addition, "at some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth." *Id.* at 2339.

270. *Id.* at 2340. *Accord* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 221 (1991).

271. Delgado, *Words That Wound, supra* note 3.

272. *Id.* at 143.

273. *Id.* at 143-44.

274. *Id* at 144.

275. *Id.* at 144-46.

276. *Id.* at 146 (quoting MARTIN DEUTSCH ET AL., SOCIAL CLASS, RACE AND PSYCHOLOGICAL DEVELOPMENT 175 (1968)).

intelligence, and worth."[277] Children who are subjected to racial insults may react aggressively or passively.[278] Aggressive reactions can lead to children being labeled as troublemakers, while a passive reaction may result in children turning "the aggressive response on themselves."[279]

B. A Specific Example: The "N" Word

Racial insults and hate speech do not just happen; rather, such expression is an intentional act. "Most people today know that certain words are offensive and only calculated to wound. No other use remains for such words as 'nigger,' 'wop,' 'spick,' or 'kike.'"[280] To provide context and content to this discussion of the harms of hate speech, let us focus on that paradigm of the concept of racial slurs—the word "nigger."[281]

The "n" word, like other slurs and epithets, may be used by the speaker to harm the sensibilities and attack the dignity of those subjected to that verbal attack. "'Nigger' hark[s] back to slavery days"[282] and is more than mere intolerance or incivility. "Nigger," used in certain contexts, is direct and open hostility and a manifestation of racism.[283] One can humiliate an African-American

> by calling him or her a "nig-r." Indeed, the image of someone being called a "nig-r" is perhaps the paradigm of our concept of a racial slur. In our historical context, the notion of blacks as "nig-rs" rationalized their segregation on trains, in schools, in housing, in medical care, and in jobs. It conjures up a stereotype of someone lazy, ignorant, unintelligent and, of course, black. The violence of calling someone a "nig-r" is not merely the refusal to accept someone's humanity, it is the prophecy that, as a black, one will never be accepted. It designates one's color as an unbridgeable divide, an irreducible wall. The epithet becomes a disempowering evocation of a diffuse racial mindset which will everywhere bar access to one's dreams. The evocation depends entirely on social and historical context for its meaning.[284]

Professor Andrew Hacker has described the harmful force of the word

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277. *Id.* at 146.

278. *Id.* at 147.

279. *Id.* at 147.

280. *Id.* at 145 (footnote omitted).

281. *See infra* note 284 and accompanying text.

282. Delgado, *Words That Wound, supra* note 3, at 158.

283. SMOLLA, FREE SPEECH, *supra* note 1, at 153. Mark Fuhrman's use of the word illustrates this point. *See* CHRISTOPHER A. DARDEN, IN CONTEMPT (1996) (discussing Fuhrman's use of the word "nigger" and its impact on the O.J. Simpson criminal trial).

284. D. Marvin Jones, *The Death of the Employer: Image, Text, And Title VII*, 45 VAND. L. REV. 349, 355-56 (1992) (footnotes omitted). Professor Jones does not spell out racial slurs in a "personal effort to avoid harm to others, and to prevent desensitization to harmful words." *Id.* at 365 n.81; *accord* Matsuda, *supra* note 265, at 2329.

"nigger."

> When a white person voices [the word "nigger"], it becomes a knife with a whetted edge. No black person can hear it with equanimity or ignore it as "simply a word." This word has the force to pierce, to wound, to penetrate, as no other has. There have, of course, been terms like "kike" and "spic" and "chink." But these are less frequently heard today, and they lack the same emotional impact. Some nonethnic terms come closer, such as "slut" and "fag" and "cripple." Yet, "nigger" stands alone with its power to tear at one's insides. It is revealing that whites have never created so wrenching an epithet for even the most benighted members of their own race.[285]

Of course, no one is ever a "nigger" or "kike" or "faggot" or "honky" or any other slur or epithet.[286] That "logical" view of such expression is of small comfort, however, to those persons who are subjected to epithets and are harmed by intentional verbal abuse.

That the word "nigger" can be a fighting word is illustrated by the following example. In February 1993, a group of young African-American males in Hampton, Virginia were bowling at a local bowling alley. As two of the young men headed to the snack bar, someone in a group of white bowlers called one of the black youths, Allen Iverson, a "nigger." Iverson responded, "You ain't gonna do nothing to me." One of the whites swung a chair at Iverson and set off a melee between Iverson's friends and the group of whites. Iverson (one of the top basketball and football players in the country) was arrested (no whites were charged),[287] was convicted of "maiming by mob," and was sentenced to fifteen years in prison with ten years suspended. He was denied bail pending the appeal even though felons convicted of more heinous crimes were routinely granted bail. Iverson was subsequently released from prison pursuant to Virginia Governor Douglas Wilder's grant of partial clemency, and is attending Georgetown University and is a member of that school's basketball team.[288]

The epithet "nigger" separates and isolates African-Americans from the rest of society. While in the fourth grade, I eagerly headed out to recess to play kickball with my group of "friends" (who happened to be white). I was told by my "friends" that I could not play with them as I had routinely done before that day. Why not? Because, one of my white classmates said, they could not play with "niggers." I remember to this day being confused and angry. When I asked my teacher why my "friends" were being so mean to me, she responded that I should

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285. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 42 (1992).

286. *See* Thomas C. Grey, *Discriminatory Harassment and Free Speech*, 14 HARV. J.L. & PUB. POL'Y. 157, 164 (1991).

287. *See* David Faulkner, *The Agony and the Ecstacy*, SPORTING NEWS, Jan. 30, 1995, at 26; Ned Zeman, *Southern Discomfort*, SPORTS ILLUSTRATED, Oct. 25, 1993, at 46-47.

288. J. A. Adande, *It's Air Time for Hoyas' Allen Iverson*, WASH. POST, Nov. 27, 1994, at D1; Faulkner, *supra* note 287.

not make trouble.

"Nigger" is used by some whites who claim that they do not understand the reactions of African-Americans to the use of that slur. For instance, an African-American sixth grader threw a white classmate against a locker after the classmate called a black girl a "nigger." The white student did not understand his black classmate's reaction. "Why are you so angry? . . . I didn't call you nigger . . . ."[289]

During one of my eighth grade geography classes, a white student referred to the African nation of "Niger" as "Nigger." My white classmates looked toward me and laughed as I, the only black student in the class, did a slow burn and glared at the person who had pronounced the name incorrectly. The teacher assured me that he meant nothing by it, and we moved on to other continents. I was still angry after class, and I remember the teacher asking me why I was so upset over a "mistake." Shortly thereafter, a white student in my art class said that his parents did not like President John F. Kennedy because Kennedy "liked niggers." I picked up a lump of clay and smashed it into the student's face. (I was sent to the principal's office and, as we said then, "tasted the paddle.")

"Nigger" is used to intimidate, to offend, and to terrorize African-Americans on college and university campuses. A university counselor found the words "Death Nigger" carved into his door.[290] In another incident, a message was slipped under the door of an African student. The message read: "African Nigger do you want some bananas? Go back to the Jungle."[291] A college student walked into a classroom and found the following written on a blackboard: "A mind is a terrible thing to waste--especially on a nigger."[292]

Can or should society regulate and prohibit the use of the word "nigger" whenever that word is used as a racial epithet and slur?[293] I do not think that there

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289. *See* Deborah W. Post, *Race, Riots and the Rule of Law*, 70 DENV. U. L. REV. 237, 239 (1993) (describing an incident involving her son).

290. Barnes, *supra* note 15, at 989.

291. *Racist Speech on Campus*, *supra* note 3, at 433.

292. *Id.*

293. I anticipate the argument that a governmental body's regulation of the "epithet/slur" use of the word "nigger" could also regulate the use of that word when it is directed by some African-Americans at other African-Americans. Some have distinguished between "nigger" and "nigga" or "niggah," a "pronunciation which carries with it a much different, and noninsulting, connotation especially when used by blacks themselves." Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 479 (E.D. Mich. 1993), *aff'd*, 55 F.3d 1177 (6th Cir. 1995). "Nigger" is also used by some African-American rap artists in their music. Such use of the word by African-Americans is the subject of debate within some segments of the African-American communities. *See generally* MICHAEL E. DYSON, REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM chs. 1, 2 (1993); Paul Delaney, *Amos 'n Andy in Nikes*, N. Y. TIMES, Oct. 11, 1993, at A17; Mark Tran, *Taking The Rap*, THE GUARDIAN, Dec. 13, 1993, at 4.

By focusing on the harm factor, we can see the clear distinction between the epithet/slur use of the word and the non-epithet/slur use. The epithet/slur use carries with it the potential and actual harms of a direct infliction of injury on the target of the expression and a breach of the peace. These harms are not likely (or are not as likely) to occur where the word is used as an expression

is any doubt that, in certain contexts, the word "nigger" can be a fighting word, can cause harm to the targets of those who would use that repugnant term, and can result in a breach of the peace. Imagine that a white person walks up to a black person and screams into the black person's face, "You nigger! You're a nigger!" Are we not concerned that the statement will provoke a verbal and perhaps physical confrontation between the speaker and the hearer? Does not history, reality, and common sense tell us that the use of this slur, epithet, and dagger of hate speech can harm the individuals involved and society in general? Can we not see that the potential and actual harms of the use of epithets and slurs are real and costly, and that there may be significant and legitimate reasons for some carefully crafted rule restricting the purported "free speech" right to call someone a "nigger" or a "faggot" or a "kike" or a "spic" or a "wetback"?[294]

If we accept the notion that the First Amendment does not grant the absolute right to say whatever you want, whenever you want, to whomever you want, and if we accept the view that words like "nigger," particularly when used as an epithet in an assaultive and face-to-face confrontational manner, can be injurious and harmful,[295] why is it so often assumed that the regulation of hate speech does or will violate the First Amendment? Why do some argue, with little hesitation and with much assurance, that hate speech should receive constitutional protection even though other constitutional values, interests, and rights may be adversely affected or even lost?[296] Is it because they disagree with the view that hate speech causes any harm or injury to the targets of the speech? Or is it because they agree and acknowledge that hate speech does harm and injure the targets of such speech, but disagree on the extent of the harm?[297] Is it because they believe that the world

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of "affection" or is used by an African-American rapper as part of his or her artistic expression.

294. In the context of the military, the United States Air Force Court of Military Review affirmed the conviction and sentencing of a white service member to 25 days of confinement and the forfeiture of two months' pay for using the words "nigger" and "spear chucker" when referring to his white former girlfriend's new African-American boyfriend. United States v. Way, 1992 CMR LEXIS 357 (A.F.C.M.R. 1992).

295. Professor Nadine Strossen, a critic of hate speech codes, concedes that certain racially harassing speech communicated in a certain context, such as "I've never tried a nigger," should be subject to regulation consistent with First Amendment principles. Strossen, *supra* note 3, at 490. *See also* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481, 527 (1991) (a supervisor who refers to a subordinate as "a fucking whore" or "a fucking nigger" may have uttered fighting words); *Racist Speech on Campus*, *supra* note 3, at 452 (face-to-face racial insults are undeserving of First Amendment protection).

296. *See* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 582 (1993).

297. Stefancic & Delgado, *supra* note 10, at 746. Stefancic and Delgado argue that "[t]hough some disagree on the extent of the harm, few disagree that hate speech injures its victims." *Id.* Other nations have recognized the harms of hate speech. *See generally* Elizabeth F. DeFeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57 (1992); Eric Neisser, *Hate Speech in the New South Africa: Constitutional Considerations for a*

is full of purportedly similar and harmful words and epithets, and that all members of society must put up with and tolerate such expression?

* * * * *

Certain hate speech is low value speech and serves no purpose other than to cause injury to the targets of such speech.[298] Hate speech

> directed at individual members of a suspect class is uniquely valueless, irrational, and undeserving of constitutional protection because it is focused on irrelevant personal characteristics that the victim cannot change. Hate speech and other kinds of expression that can be identified as actionable harassment do not warrant this status because they communicate a noxious idea. Hate speech is harassment because it is targeted expression that serves no purpose other than the infliction of serious harm on its victims.[299]

If hate speech is low value, harassing speech that serves no purpose other than to inflict harm on individuals, can that speech be regulated consistent with the First Amendment using a harms-based approach?

IV. A Harms-Based Analysis

As discussed above,[300] certain speech and expression is often regulated on the basis of some assessment of the value and harm of the speech or expression.[301]

> Our system has carved out or tolerated dozens of "exceptions" to the free speech principle: conspiracy; libel; copyright; plagiarism; official secrets; misleading advertising; words of threat; disrespectful words uttered to a judge, teacher, or other authority figure; and many more. These exceptions (each responding to some interest of a powerful group) seem familiar and acceptable, as indeed perhaps they are.[302]

Land Recovering from Decades of Racial Repression and Violence, 5 Seton Hall Const. L. J. 103 (1994). The Canadian Supreme Court, in a recent decision, used a harm-based rationale. *See infra* notes 320-55 and accompanying text. The French have concluded that hate speech inflicts "psychological and moral harm . . . [and] damages the individual and collective reputations of its victims." For Germans, "a racial or ethnic attack is an affront to a person's core identity." Stefancic & Delgado, *supra* note 10, at 746. Uruguayan law "expressly acknowledges the pain caused by racist words or acts [and][t]he Netherlands recognizes that racist statements are insulting and distressing." *Id.* "[I]n the United Kingdom, racial vilification is a form of defamation," and in South Africa it is believed that racial insults harm "souls." *Id.*

298. Brownstein, *supra* note 63, at 205.

299. *Id.* at 206.

300. *See supra* Parts I and II.

301. *See* Sunstein, *supra* note 4, at 125.

302. Richard Delgado & David H. Yun, *Essay II: Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 Cal. L. Rev. 871, 883

Is hate speech, regulated on some basis of harm,[303] one of the exceptions to the First Amendment? If a harms-based analysis is used in the regulation of hate speech, what magnitude of harm must be shown? Even if it is generally agreed that hate speech harms the targets of such speech in that the target "suffers emotional humiliation and personal loss of dignity" and feels "threatened, humiliated, and diminished,"[304] can the harms be regulated without violating the Constitution?

As discussed in Part III above, hate speech can result in deontic harm, can harm identifiable groups and individuals, can hinder the operation of the marketplace of ideas, and can deter the educational environment and mission of colleges and universities.[305] Personal attacks and epithets have been likened to slaps in the face[306] and it has been urged that hate speech causes real physiological symptoms and emotional distress, and results in restrictions of personal freedom, humiliation, loss of self-esteem, and violence.[307]

It is not enough to merely say generally that hate speech is harmful and therefore can or should be regulated. A more refined and nuanced analysis requires that two additional and specific inquiries be made: (1) whether the context, content, and mode of delivery of the speech in question warrants regulation,[308] and (2) whether the specific harms of the at-issue hate speech are of a type and degree that can be regulated without violating the First Amendment. These inquiries must be considered in assessing the constitutionality of hate speech regulation.

A regulator asking the first question must determine whether the particular

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(1994).

303.

> When government intervenes to tell one class of speakers to avoid saying hurtful things to another, governmental aggrandizement is at best a remote concern. This is the reason why regulation of private speech--libel, copyright, plagiarism, deceptive advertising, and so on--rarely presents serious constitutional problems. The same should be true of hate speech regulation.

Id. at 889.

304. Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1, 2 (1991).

305. *See supra* notes 252-64 and accompanying text. On the regulation of hate speech in the college and university setting, see *infra* Part V.

306. *See supra* note 242 and accompanying text.

307. *See supra* notes 245-59, 266, 272 and accompanying text.

308. This is another way of saying that the regulator must determine whether the particular speech and the circumstances of its communication constitutes and falls within some definition of "hate speech" that can be regulated. Of course, the broader the definition of hate speech, the more expansive will be the reach of the regulation. Conversely, a narrower definition of hate speech will limit the reach of the regulation and confine the areas and types of speech subject to regulation. On the need for a contextual inquiry in hate speech matters, see John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653 (1994).

hate speech can or should be restricted on the basis of its specific content, the context in which it was uttered, and the way in which the speaker communicated the particular speech. Consider again the example of the paradigmatic racial slur—the word "nigger."[309] Does that word constitute hate speech which can be regulated under the Constitution? The answer to that question depends on an assessment of context, content, and delivery. If, for example, the word "nigger" is used as an epithet by a white person and is directed in a face-to-face and confrontational manner to and against an African-American, that epithet is potentially subject to regulation. Then, the second inquiry—whether the specific harms of the at-issue expression can be regulated—must be answered as part of the evaluation of the context-content-mode of delivery formulation. Recall the example noted above in which a brawl in a bowling alley was precipitated by the use of the word "nigger" by a white patron.[310] In that context, the word had a particular, assaultive content and was delivered in such a fighting-words way that actually caused the harms of a breach of the peace and violence.

But the same word can be and is used in other contexts and in other ways. Suppose, for example, that a rapper uses the word "nigger" in a song,[311] or that some African-Americans use, in a noninsulting manner, the word "nigger" or "niggah" when referring to other African-Americans.[312] In those contexts, and notwithstanding the fact that the word is the same as the word used in the bowling alley, the word "nigger" may not fall within a hate-speech prohibition because of the different contexts in which the word is used, because the word is not directed in an assaultive, fighting words, face-to-face manner to a "target," and because the use of the word is not likely to cause harm (i.e., is not likely to cause violence or emotional distress).

Is a harms-based approach to the question of whether certain hate speech can be constitutionally regulated workable? Is such an approach fundamentally consistent or inconsistent with First Amendment jurisprudence and the common understandings of what falls within and outside of First Amendment protection? What distinguishes the concededly harmful consequences of speech and expressions that are considered to be outside the protection of the First Amendment[313] from other harmful, yet constitutional, expressions that society has decided must be tolerated by the targets of the harmful speech? Can a harms-based approach provide a useful mechanism for the evaluation of particular expressions mask the political and ideological choices society makes on a daily basis when it regulates or does not regulate certain types of speech? Where is the line drawn, and what stated and unstated values, principles, and beliefs will guide those determinations?

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309. *See supra* notes 282-94 and accompanying text.

310. *See supra* notes 287-88 and accompanying text.

311. *See supra* note 293.

312. *Id.*

313. *See supra* Part II.

A. Attractions Of A Harms-Based Approach

Recall the previous discussion concerning the harms caused by hate speech.[314] Certain hate speech is "assaultive speech" in which words are used as weapons to "ambush, terrorize, wound, humiliate, and degrade,"[315] and the targets of the speech are excluded from full participation in social, political, and educational endeavors. Racial epithets and insults harm the targets of such expression directly, by injuring their psyches and by encouraging third parties to engage in immediate hostile action, or indirectly, by constructing images and stigma-pictures which depict the targets as less than human.[316] As we have seen, harassment and direct personal assaults harm their targets, and can arguably be regulated and are not tolerated (as in other contexts) because of the harm and disruption that such communications and actions cause. Persons who are called "kike," "nigger," "fag," or some other epithet feel threatened and diminished and suffer emotional harm and humiliation as well as personal loss of dignity.[317]

The question whether certain hate speech can be constitutionally regulated must look at the adverse effects on the equality rights of those targeted by such speech. Viewed generally, a harms-based analysis of hate speech—based on an evaluation of the specific harms caused by specific hate speech communicated to specific individuals in specific contexts and circumstances—is not inconsistent with the harms-based First Amendment analysis applied in other areas.[318] A harms-based approach is likely to identify and rectify some of the serious harms caused by hate speech and could therefore provide a constitutional basis for regulation.

Why should the First Amendment not protect certain kinds of hate speech from regulation directed at preventing and remediating the harms of the speech? One obvious answer is that those who are the targets of such speech will either be freed from exposure to such speech or, if such speech is directed at them, will have some means of seeking redress for any injury they may have suffered (thereby discouraging hate-speakers from using such speech). Another answer is that society's expression of its disapproval of hate speech can serve as a significant and universal statement of the norms and expected behavior of its citizenry with respect to issues of race, gender, religion, and the like (just as society expresses its disapproval of libel, perjury, misleading advertising, etc.). If, as in other areas of constitutionally regulated speech, the government can show that the regulation is necessary because the at-issue speech will produce sufficiently bad

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314. *See supra* Part III.

315. MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1 (1993).

316. Delgado & Stefancic, *Essay I*, *supra* note 6, at 855; Delgado & Stefancic, *supra* note 58, at 1276; Ronald Turner, *"Little Black Sambo," Images and Perceptions: Professor Cohen on Professor Lawrence*, 12 HARV. BLACKLETTER J. 131 (1995).

317. Wolfson, *supra* note 304. Such pejoratives are "arguably a mere profane grunt rather than an idea or opinion." *Id.* at 16.

318. *See supra* Part II.

consequences,[319] proponents of a harms-based analysis can plausibly argue and conclude that the regulation of certain hate speech is also constitutional.

An example of an explicit harms-based approach to hate speech regulation is found in a recent ruling by the Supreme Court of Canada, *Regina v. Keegstra*,[320] wherein the court employed a methodology analogous to the American compelling interest/narrowly tailored means test.[321] In that case, a high school teacher was charged and convicted under section 319(2) of the Criminal Code of Canada ("Code")[322] with unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students. The teacher attributed several evil qualities to Jews and described them as "treacherous," "subversive," "sadistic," "money-loving," "power hungry," and "child killers."[323] In class, he taught that Jewish people sought to destroy Christianity and were responsible for depressions, anarchy, chaos, wars, and revolution. According to the teacher, Jews "created the Holocaust to gain sympathy" and were deceptive, secretive, and inherently evil.[324] Students were expected to reproduce his teachings in class and on examinations, and their grades would suffer if they did not do so.[325]

Addressing the teacher's appeal of his conviction, the Supreme Court of Canada addressed the questions: (1) whether section 319(2) infringed the guarantee of freedom of expression set forth in Section 2(b) of the Canadian Charter of Rights and Freedoms ("Charter"),[326] and (2) whether the presumption

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319. *See supra* Part II.

320. 3 S.C.R. 697 (1990). As discussed below, the Canadian "constitutional" free speech provision at issue in *Keegstra* is "patterned after the United States' conception of free speech, and the doctrinal system of each country uses some type of balancing test to determine the legitimacy of restraints placed on constitutional liberties . . . ." Richard Delgado, *Foreword: Essays on Hate Speech*, 82 CAL. L. REV. 847, 847 n.2 (1994).

321. *See* Massey, *supra* note 1, at 187.

322. That section provides:

> Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (b) an offence punishable on summary conviction.

Criminal Code of Canada, R.S.C., ch. C-46, § 319(2) (1985).

323. *Keegstra*, 3 S.C.R. at 714.

324. *Id.*

325. *Id.*

326. CAN. CONST. (Sched. B to Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms). Section 2(b) of the Charter provides:

> 2. Everyone has the following fundamental freedoms:
>
> . . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication . . .

The *Keegstra* Court explained that the reach of Section 2(b) is potentially very wide, "expression being deserving of constitutional protection if 'it serves individual and societal values in a free and

of innocence protected by Section 11(d) of the Charter[327] was unjustifiably breached by reason of section 319(3)(a) of the Code,[328] which affords a defense of truth to the wilful promotion of hatred speech in certain circumstances.[329]

In analyzing the first issue of whether section 319(2) violated Section 2(b) of the Charter, the Court used a two-step approach in which it asked: (1) "whether the activity of the litigant who alleges an infringement of the freedom of expression falls within the protected Section 2(b) sphere";[330] and (2) "whether the purpose of the impugned government action is to restrict freedom of expression."[331] In answering the first question, the Court found that the first step

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democratic society.'" 3 S.C.R. at 727. Some of the convictions fueling the freedom of expression are that seeking and attaining truth is an inherently good activity, participation in social and political decision-making is to be fostered and encouraged, and diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed. *Id.* at 728; Irwin Toy Ltd. v. Quebec (Attorney General), 1 S.C.R. 927 (1989).

327. Section 11(d) of the Charter provides:

> 11. Any person charged with an offence has the right
>
> . . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . . .

328. Section 319(3)(a) provides:

> (3) No person shall be convicted of an offence under subsection (2)
>
> (a) if he establishes that the statements communicated were true.

329. *Keegstra*, 3 S.C.R. at 715.

330. *Id.*

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, and beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

Id. at 729 (quoting *Irwin Toy*, 1 S.C.R. at 968). In other words, the *Keegstra* Court stated, "the term 'expression' as used in s. 2(b) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed . . . ." *Id.* (references omitted).

331. *Id.* Government action having the purpose of infringing freedom of expression necessarily infringes the right guaranteed by Section 2(b) of the Charter, the Court wrote:

> If, however, it is the effect of the action, rather than the purpose, that restricts an activity, s. 2(b) is not brought into play unless it can be demonstrated by the party alleging an infringement that the activity supports rather than undermines the principles and values upon which freedom of expression is based.

Id. at 729-30.

was satisfied, reasoning that communications which wilfully promote hatred against an identifiable group convey a meaning and are intended to do so by those who make them.[332] The type of meaning conveyed is irrelevant to the question of whether Section 2(b) was infringed. The Court stated the fact that the expression covered by [section] 319(2) is invidious and obnoxious is beside the point. "It is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning, and it must therefore be concluded that the first step of the . . . test is satisfied."[333] Responding to the second question, the Court concluded that the purpose of section 319(2)[334] was to restrict the content of expression by singling out particular meanings that are not to be conveyed.[335] "Section 319(2) therefore overtly seeks to prevent the communication of expression, and hence meets the second requirement . . . of the test."[336] Accordingly, the Court concluded that section 319(2) constituted an infringement of the freedom of expression guaranteed by Section 2(b) of the Charter.[337]

The Court's conclusion that section 319(2) constituted an infringement of the freedom of expression guaranteed by Section 2(b) did not conclude the inquiry. The Court then asked whether such an infringement was justifiable under Section 1 of the Charter[338] as a reasonable limit in a free and democratic society.[339] To

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332. *Id.* at 730.

333. *Id.*

334. *See supra* note 322.

335. *Keegstra*, 3 S.C.R. at 730.

336. *Id.*

337. *Id.*

338. Section 1 of the Charter provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1. The Court noted that the words "free and democratic society" "embraces [sic] the very values and principles which Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution . . . ." *Keegstra*, 3 S.C.R. at 736; *see also* Regina v. Oakes, 1 S.C.R. 103 (1986).

339. As the Court noted, there is no equivalent to Section 1 of the Charter in the United States Constitution.

> Of course, American experience should never be rejected simply because the *Charter* contains a balancing provision, for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be an absolute guarantee of constitutional rights. Where § 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken in the United States. Far from requiring a less solicitous protection of Charter rights and freedoms, such independence of vision protects these rights and freedoms in a different way. . . . [T]he international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view,

answer this question, the Court had to decide whether the infringement of Section 2(b), occasioned by section 319(2), was justifiable in a free and democratic society. In formulating its answer, the Court looked to section 319(2) and asked "whether the amount of hate propaganda in Canada causes sufficient harm to justify legislative intervention of some type."[340] In assessing harm, the Court looked to: (1) the 1965 Cohen Committee report which found that the incidence of hate propaganda in Canada was not insignificant;[341] (2) the 1984 report of the House of Commons Special Committee which observed that increased immigration and periods of economic difficulty had produced an atmosphere ripe for racially motivated incidents;[342] (3) international human rights principles;[343] and

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> reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.

Keegstra, 3 S.C.R. at 743. *See also id.* at 738-44 (discussing American constitutional jurisprudence).

340. *Id.* at 745.

341. REPORT OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA (1965) (also known as the Cohen Committee Report). The 1965 Cohen Committee Report stated that there were a small number of persons and a larger number of organizations "dedicated to the preaching and spreading of hatred and contempt against certain identifiable minority groups in Canada." *Keegstra*, 3 S.C.R. at 745 (quoting the Cohen Committee Report). The Committee noted the results of the use of hate propaganda in other countries,

> particularly in the 1930's when such material and ideas played a significant role in the creation of a climate of malice, destructive to the central values of Judaic-Christian society, the values of our civilization. The Committee believes, therefore, that the actual and potential danger caused by present hate activities in Canada cannot be measured by statistics alone.

Id.

342. In that report, the House of Commons Special Committee on the Participation of Visible Minorities in Canadian Society noted an increase in hate propaganda in virtually every part of Canada.

> Not only is it anti-semitic and anti-black, as in the 1960s, but it is also now anti-Roman Catholic, anti-East Indian, anti-aboriginal people and anti-French. Some of this material is imported from the United States but much of it is produced in Canada. Most worrisome of all is that in recent years Canada has become a major source of supply of hate propaganda that finds its way to Europe, and especially to West Germany.

Keegstra, 3 S.C.R. at 745-46 (quoting the Special Committee report).

343. The Court referred to the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the United Nations in 1966. The convention contains a resolution that the state parties agree to

> adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination.

Id. at 750-51 (quoting the 1966 Convention). *See also id.* at 751-55 (discussing other international covenants and conventions dealing with racism and hatred).

(4) other provisions of the Charter.[344]

In the Court's view, the presence of hate propaganda in Canada was sufficiently substantial to warrant concern. The Court recognized two types of injuries caused by hate propaganda. "First, there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. . . . Words and writings that wilfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group . . . ."[345] Those individuals targeted by hate propaganda therefore are humiliated and degraded, and the "derision, hostility and abuse encouraged by hate propaganda [has] a severely negative impact on the individual's sense of self-worth and acceptance."[346] The impact of such propaganda may "cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority."[347]

A second harmful effect of hate propaganda, the Court continued, is its influence on society at large.[348] Individuals can be persuaded to believe almost anything if information or ideas are communicated by the right technique and in the proper circumstances. "It is thus not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society."[349] "Even if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient's mind as an idea that holds some truth, an incipient effect not to be entirely discounted . . . ."[350] "The threat to the self-dignity of target group members is thus matched by the possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society."[351]

The Court thus concluded that in enacting section 319(2) "Parliament's purpose was to prevent the harm identified by the [Cohen] Committee as being caused by hate-promoting expression."[352] That objective was of the utmost

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344. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15 (every individual is equal before the law and has the right to equal protection and equal benefit of the law without discrimination based on race, national and ethnic origin, colour, religion, sex, age, or mental or physical disability); CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 27 (the Charter "is to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians").

345. *Keegstra*, 3 S.C.R. at 746.

346. *Id.*

347. *Id.*

348. *Id.* at 747.

349. *Id.*

350. *Id.* at 747-48 (citation omitted).

351. *Id.* at 748.

352. *Id.* at 749.

importance, the Court stated, because "Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups."[353] Accordingly, the Court found that a "powerfully convincing legislative objective exists such as to justify some limit on freedom of expression."[354] Consequently, the infringement of the teacher's freedom of expression, as guaranteed by Section 2(b) of the Charter, was upheld as a reasonable limit prescribed by law in a free and democratic society.[355]

Keegstra is a real example of the way in which a harms-approach to hate speech works. Canada recognizes that hate propaganda can attack the targeted person and has expressly recognized the ways in which such propaganda harms the targets psychologically and emotionally, causing them to withdraw from society and to forego other endeavors which are available to and enjoyed by persons not targeted. Further, Canada looks beyond the harms suffered by targeted individuals and to the impact of hate propaganda on society. It recognizes that hate propaganda and hate speech are not just spoken and forgotten; rather, such expressions can become part of the social fabric and context and reflect and lead to discrimination and even violence against those who are defiled by such speech. The Canadian Parliament felt that the degree and nature of the actual and potential harm created by hate propaganda were sufficiently serious to require the regulation of such speech. The Canadian Supreme Court, convinced of those harms, upheld that country's efforts to proscribe and punish hate propaganda.

Note the contrast between the American and Canadian approaches to hate speech regulation as illustrated by *R.A.V.* and *Keegstra*, a contrast noted by one scholar in the following passage:

> American courts convey the state's unwieldy ambitions partly through dramatic and even feverish rhetoric in which the judges imagine an apparently endless array of potentially silenced speakers and threats to democracy. . . . The deliberative and careful terms in which the *Keegstra* majority recreates legislative motivation and traces out the sources and justifications for the regulation of hate speech help to create a very different image of the state. The language is not sensational or dramatic, but calm and reasoned. It is less overtly metaphorical and less figurative than the language in the American cases. The state is depicted as careful and responsible, and the measured rhetoric of the Court subtly reinforces this image.[356]

Canada's high court speaks of community and multiculturalism, democracy and mutual respect; the American high court discusses protecting the right of free

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353. *Id.* at 758.

354. *Id.*

355. *Id.* at 787, 795.

356. Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1492.

speech about disfavored topics and ideas and the constitutional prohibition against the imposition of restrictions on hate speakers. The American Court's analysis of hate speech is detached and formalistic.[357] Canada's Supreme Court looked to several kinds of extraconstitutional sources, including international human rights documents to which Canada is a party; the United States Supreme Court does not look to such sources.[358] The Canadian and American high courts also differ on the private versus public aspects of hate speech.

> The American approach to hate speech classifies the target's interest in protection as purely private. The predominant technique of critics, which relies on story-telling and the creation of empathy, implicitly accepts that classification and hopes to generate enough sympathy to make the private plight a matter of public concern. But the failure to challenge the implicit classification of that interest as purely private allows the official discourse to characterize regulation as illegitimate favoritism and to ignore the alternative perspectives. In contrast, the Canadian hate speech cases find that the regulation of hate speech protects not just the targets, but also important public interests, including equal participation in public life, democracy and respect for human dignity and equality. These arguments may further a richer discussion of the potential public--as opposed to merely private--issues in the regulation of hate speech.[359]

Is the Canadian harms-based approach far removed from American jurisprudence on hate crime issues? Consider the United States Supreme Court's decision in *Wisconsin v. Mitchell*.[360] Although that case dealt with penalty enhancements for hate crimes and not hate speech, the Court did recognize that a state may punish a defendant's discriminatory motive or reason for acting, just as governments do under state and federal antidiscrimination laws that have been upheld against constitutional challenge.[361] The Wisconsin statute "singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict

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357. *Id.* at 1449, 1461.

358. *Id.* at 1499 n.257. Also, unlike Canada, the United States is not a party to any of the international instruments mentioned in *Keegstra*. *Id.*

359. *Id.* at 1500.

360. 113 S. Ct. 2194 (1993) (discussed *supra* notes 218-26 and accompanying text).

361. The *Mitchell* Court noted that Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against an employee because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (1988). In Hishon v. King & Spalding, 467 U.S. 69, 78 (1984), the Court rejected the argument that Title VII was an unconstitutional infringement of employers' First Amendment rights. In R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (discussed *supra* notes 182-216 and accompanying text), the Court referred to Title VII as an example of constitutionally permissible content-neutral regulation of conduct.

distinct emotional harms on their victims, and incite community unrest."[362] The desire of the state to "redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases."[363] Thus, a state's assessment of harm and its enactment of laws to redress the perceived harms is permissible, at least in the hate crimes context.[364]

The use of a harms-based analysis in *Mitchell* shows that a harms-based analysis of hate speech is not a novel concept.[365] Professor Richard Delgado has argued that the courts should utilize a harms-based analysis—specifically, the tort of intentional infliction of emotional distress— to redress racial insults personally directed at individuals in the workplace and other settings.[366] Defining a racial insult as "language intended to demean by reference to race, which is understood as demeaning by reference to race, and which a reasonable person would recognize as an insult,"[367] he argued for judicial application of tort analysis to incidents involving racial insults because the "racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted."[368] This argument—that we should look "to tort law and . . . that racially, ethnically, and sexually offensive public speech should be prohibited because it intentionally inflicts emotional harm on offended listeners"[369]—warrants consideration.

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362. *Mitchell*, 113 S. Ct. at 2201 (citation omitted).

363. *Id.*

364. Professor Mayo Moran offers another explanation for the Court's decision in *Mitchell*. If the question whether certain speech is constitutionally protected is decided by those in positions of power, and if those individuals will find speech sufficiently dangerous to suppress only where they feel personally threatened, speech will only be suppressed when it appears to those in power that the speech at issue is more than merely offensive and that the speech attacks or threatens them. Moran, *supra* note 356, at 1457 n.124. Conversely, when speech attacks those individuals who do not have social or institutional power, the speech will be constitutionally protected because, in the eyes of the decisionmakers, the speech does not appear to be dangerous. *Id.*

The *Mitchell* Court "finds itself able to sufficiently imagine the perspective of the victim to find that bias-motivated crimes 'inflict distinct emotional harms on their victims.'" *Id.* (citation omitted). Thus, judges who do not "enjoy the same comfort of distance" in hate crime cases as they do in hate speech cases may be more inclined to allow regulation of the former and to invalidate regulation of the latter. "[I]t does not seem accidental that the Court is somewhat incredulous about the claim of harm when it is the kind of harm that could never happen to them, and sympathetic when it is the kind of harm that could befall them and those they care about." *Id.*

365. Harm is an explicit or unstated factor in the constitutional analysis of other areas of speech and communication. *See supra* Part II.

366. Delgado, *Words That Wound, supra* note 3; *see also* Nockleby, *supra* note 308, at 689-711 (arguing for a new, contextually-based tort to redress harms from racial intimidation).

367. Delgado, *Words That Wound, supra* note 3, at 167.

368. *Id.* at 135.

369. David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 BROOK. L. REV. 1165, 1166 (1991).

> The harm, which has been variously characterized as an assault or as an infliction of psychic trauma, is argued to be the same as the harm redressed by the private tort of intentional infliction of emotional harms recognized by the Second Restatement of Torts and most jurisdictions. Thus, given such harm, the public interest in redressing it overrides any competing first amendment interests.[370]

Examples of harmful and actionable conduct and speech include a restaurant manager's shouting at a black person that he could not be served because he was black,[371] and a white supervisor shouting at a black employee, "You goddam [sic] 'niggers' are not going to tell me about the [work] rules. I don't want any 'niggers' working for me. I am getting rid of all the 'niggers' . . . ."[372] In another case, a flight attendant yelled at a black passenger, "Get out of the plane you black bastard."[373] The district court wrote that the "galvanic effect of such speech which is intended to turn racial animus into racially-based hostile conduct at least warrants the spotlight of full exposition at trial."[374] These cases illustrate the way in which the intentional infliction of emotional distress tort can be utilized to address the hurt and harms of epithets and racist speech. If such harm can be redressed via tort without First Amendment problems, then why can it not be similarly concluded that certain hate speech regulations are consistent with the First Amendment? Such an argument is certainly plausible. But, as discussed below, the judiciary has not been persuaded by plaintiffs' claims that the emotional harm inflicted by certain language (including hate speech) is intolerable and constitutionally regulable.[375]

One can also anticipate the objection that regulation of hate speech will require line-drawing by regulators and courts. While that general objection may have some force,[376] it is also true that judges "inevitably decide open issues--and many constitutional cases raise such issues--in light of their experiences, interests, perceptions, needs, and biases."[377] That judges may be called on to decide hate speech cases and to sequester unconstitutional from constitutional speech is not

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370. *Id.* (footnotes omitted). "As persuasive as the argument seems, the judiciary has shown little more sympathy for it than for other arguments favoring suppression of offensive speech." *Id.*

371. Fisher v. Carrousel Motel Hotel, Inc., 424 S.W.2d 627, 630 (Tex. 1967) (the "defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting").

372. Alcorn v. Anbro Engineering, Inc., 468 P.2d 216, 217 (1970).

373. Doricent v. American Airlines, Inc., 1993 U.S. Dist. LEXIS 15143 (D. Mass. 1993).

374. *Id.* at *31 (footnote omitted). *See also id.* at *31 n.7 ("such racially motivated galvanic hate speech is today so far beyond the mores of our people as to warrant an action for intentional infliction of emotional distress").

375. Goldberger, *supra* note 369, at 1190.

376. *See infra* note 379 and accompanying text.

377. Becker, *supra* note 36, at 976. *Accord* Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661 (1985); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985).

a unique proposition.

B. Objections To A Harms-Based Approach

What about the other side of the ledger? What arguments can be made in support of the position that a harms-based analysis is not a useful or proper way to approach the issue of hate speech regulation? The fact that some speech causes harm is indisputable.[378] How can we distinguish harmful and constitutionally regulable speech from lawful (i.e., non-regulable) speech? What guides the decisionmaker or the factfinder in the search for the answer to these questions?

That some speech causes harm does not mean that all harmful speech can be constitutionally regulated, for we know that not all speech causes "harm" that rises to a level justifying governmental regulation. Distinguishing regulable harm from non-regulable harm falls to the decisionmaker or factfinder who must draw lines without violating the First Amendment and with due concern for the censorship and self-censorship which can result whenever the government does not permit certain speech. The problem for the decisionmaker is how to approach the notion that "harm must have occurred because the particular utterance in question is itself harm producing."[379]

> For example, a speaker utters an epithet that allegedly causes emotional harm to members of a particular minority group. Whether the epithet in fact caused emotional harm is a judgment that the decisionmaker can hardly make independently from her own judgment that this particular epithet caused harm. Professor Tribe writes that, "[t]he Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard."[380]

Professor Anthony D'Amato, discussing the problem of assessing harm in a constitutional manner and basing his argument on what he calls "pragmatic indeterminacy,"[381] has argued that the Constitution "should not, and more importantly cannot, allow punishment for speaking words that themselves allegedly 'cause hurt.'"[382] Professor D'Amato is aware of the reality that judges

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378. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 837 (2d ed. 1988):

> One may not be privileged to mislead a blind man into thinking that a window is a door or to extort a sum for telling him the truth. Justice Holmes was surely right that the first amendment does not protect "a man in falsely shouting fire in a theater and causing a panic." (citations omitted).

379. Anthony D'Amato, *Free Speech and Religious, Racial, and Sexual Harassment: Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 330 (1991).

380. *Id.* (footnotes omitted).

381. *Id.* at 330. "Pragmatic indeterminacy is the current version of American legal realism, stating that law-words, whether statutory or precedential, cannot constrain judges to decide a particular case in a particular way." *Id.* (footnotes omitted). *See also* Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990).

382. D'Amato, *supra* note 379, at 330.

have to rule on controversies involving speech.

> To the extent that the speech causes harm that is provable independently of a judgment that the particular words uttered caused harm in themselves, judges must resolve those cases under the . . . fundamental proposition that courts exist to address harms. However, cases that consider whether the actual words uttered must have produced the alleged harm, come close to begging the question whether a harm occurred.[383]

That passage should be read and understood in connection with Professor D'Amato's view that no utterances are harmful per se even though many utterances can have harmful consequences to an audience.

> Independent proof of harmful consequences is possible. For example, if I write falsely that someone is a perjurer and my writing leads to his dismissal from his job, then assuming he proves this causal chain, my statement will have defamed that person, and he will have an action in libel against me.[384]

It is not clear that Professor D'Amato's analysis does anything more than punt the tough question of whether society can regulate certain harmful expressions, like hate speech, consistent with the First Amendment, on the basis that society has made a determination that certain hate speech harms others in intolerable and demonstrable ways. Consider D'Amato's following example.

> Suppose someone calls me a "wop." Are my feelings hurt because the epithet is true or because it is false? If someone calls me a "mickey," presumably I should not feel hurt because the epithet does not apply. But then, why should I feel hurt if I am called a "wop"? Have I impliedly chosen to say that it applies by virtue of my very declaration that the statement has harmed me?[385]

We should not confuse harm viewed from the exceptional or atomistic perspective with harm viewed from the more common and broader perspective that looks at and accounts for variant harms caused by such speech. It may be true that some individuals, like Professor D'Amato, would not be upset or have their feelings hurt in the event someone calls them a "wop." It may also be true that a particular individual who is black would not be upset or harmed by someone who calls her a "nigger." The absence of an adverse reaction by certain persons does not tell us anything about what is happening to other persons of color throughout the country, however, and does not tell us if or why D'Amato's or another individual's experiences are the baselines from which we can and should view the propriety of a harms-based approach. We should hesitate before extrapolating from individual assertions, anecdotes, and arguments as we argue for or against,

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383. *Id.* at 335 (footnote omitted).

384. *Id.* at 344.

385. *Id.* at 345.

and formulate and implement, public policy in the hate-speech area.

Is it possible to add some facts to Professor D'Amato's example which would at least call into question the notion that the epithet "wop" is really no big deal? Recall the mode of First Amendment analysis discussed above—content, context, and mode of delivery. What if one of Professor D'Amato's best friends called him a "wop"? What if the person calling him a "wop" was one of his students in the middle of a class? What if the person using the epithet has cornered D'Amato and is yelling the epithet at him in a face-to-face manner? Plug in any other epithet and any other person and context into the foregoing questions and ask yourself whether we can so easily dismiss the harms of epithets and slurs and come to overall conclusions about what is harmful and what is not.

It is noteworthy that some courts have not been receptive to intentional infliction of emotional distress claims based on asserted harms caused by expression. In *Collin v. Smith*,[386] the court held that the plaintiffs could not rely on the tort in their effort to bar public speech by Nazis. The "problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that 'invites dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[387] And in *Hustler Magazine v. Falwell*,[388] the Supreme Court rejected the argument that liability for certain outrageous public statements should be measured pursuant to the *Restatement of Torts*:

> Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently "outrageous." But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.[389]

The Court determined that the vagaries of Virginia's intentional infliction of emotional harm tort "made line-drawing impossible and rendered it vulnerable to subjective application."[390] Outrageousness in political and social discourse is inherently subjective, the Court reasoned, and "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."[391] Similar concerns about inherent subjectivity could arise in hate speech cases.

The tort approach to hate speech regulation could be difficult to reign in and could assign the risk of harmful expression to the speaker rather than the

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386. 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).
387. *Id.* at 1206 (quoting Terminiello v. City of Chicago, 337 U.S. 14 (1949)).
388. 485 U.S. 46 (1988).
389. *Id.* at 53.
390. Goldberger, *supra* note 369, at 1189.
391. *Falwell*, 485 U.S. at 55.

listener.[392] Some will

> find unattractive the degree of paternalism involved in restricting speech on the basis of a few unreasonable although foreseeable reactions, when these do not constitute a significant threat to social order. Moreover, while these approaches would compel actors to internalize costs of 'risky' speech, we do not allow it to reap the equally fortuitous benefits. The net result of this asymmetry would be to discourage speech.[393]

Judicial reluctance to treat harm as a basis for regulation may also be explained by the general view that the customary rationales articulated by courts in offensive speech cases are dispositive and, thus, any related harm question can be safely ignored.[394] On that view, the courts cannot engage in principled line-drawing that will reflect free speech values.

> Because of the plausibility and analytical consistency of the line-drawing rationale, it has substantial persuasive power. It reflects the insight that courts cannot draw clear and objective lines to provide an absolutely reliable means of distinguishing communication that genuinely causes emotional harm from that which offends and provokes but does not cause palpable harm. Any attempt to draw a line will ultimately involve a linguistic formula articulated in a statute or judicial opinion that will be subject to the obvious difficulty of drawing a bright line to delineate permissible speech activities. The difficulty is particularly acute because the formula must also provide a description of the amount of psychological pain that must be suffered by alleged victims before the speech can be punished or suppressed. The measurement of such pain in litigation is an uncertain process, if only because the most important evidence of the pain will be the victim's subjective description of it.[395]

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392. Gates, *supra* note 44, at 16.

393. *Id.* at 16-17.

394. Goldberger, *supra* note 369, at 1199. That view confuses offensive speech with speech that causes identifiable and legally cognizable harms. Offensive speech is "language, public displays, or discomforts associated with communication that triggers an unpleasant emotional response in at least some listeners and that steps over the bounds of perceived good taste." Nockleby, *supra* note 308, at 667. Harmful speech does "more than trigger an adverse emotional reaction in a listener." *Id.* at 668 (footnote omitted). For example, libel has no constitutional value "because libel harms the reputations of individuals in a way that makes it difficult for them to function in society. Libel not only 'offends,' but also harms, the person about whom the libel is disseminated." *Id.* at 668-69 (footnote omitted).

395. Goldberger, *supra* note 369, at 1200. Professor Goldberger notes that in spite of the persuasiveness of the problem of line-drawing rationale, that rationale alone is not sufficient to explain the judiciary's failure to consider emotional harms more carefully. Courts engage in line drawing all the time in First Amendment and other areas of the law, including obscenity, application of the clear and present danger test, libel laws, and the fighting words doctrine. *Id.* at 1202. "[T]he

Moreover, courts may fear the confusion and possible failure to distinguish anger from pain. "[A]nger is easily confused with pain. As a result, an offended listener may be tempted to assert that he has been harmed even though he is instead experiencing anger. This is encouraged by the law's tendency to be more sympathetic to redressing harm than to redressing anger."[396] Applying this to the hate speech arena, courts may be reluctant to allow regulation of such speech where anger and harm[397] are intermingled or inseparable.

A strong objection to an approach in which the only relevant issue is one of harm[398] has been voiced by Professor Cass Sunstein:

> Speech may be regulated if government can make a demonstration that the speech at issue will produce sufficiently bad consequences. This is the only question for the Court. Would it not be possible, and desirable, to have a "single-tier" First Amendment, in the sense that all speech is presumed protected, but we allow government to regulate speech in those rare cases where the harm is very great?
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> On reflection, this position does indeed seem unacceptable. If it were the law, the same standards of harm would be applied to all speech. This would mean that regulation of (for example) campaign speeches must be tested under the same standards applied to regulation of false commercial speech, child pornography, conspiracies, libel of private persons, and threats. If the same standards were applied, one of two results would follow; and both seem to face decisive objections.[399]

Sunstein discusses two problems with a test based solely on harm. First, the burden of justification imposed on government in showing the requisite level of harm would have to be lowered "so as to allow for regulation of false commercial speech, private libel, unlicensed medical and legal advice, and so forth."[400] Value would not matter, Sunstein argues, as the only question would concern the government's justification "which would have to meet the same standard in all

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many examples of line drawing in speech contexts and in other democracies suggest that the American judiciary's heavy reliance on the difficulty in drawing lines to explain rulings in offensive speech cases leaves a great deal to be desired." *Id.* at 1203.

396. *Id.* at 1200-01; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

397. I do not foreclose the possibility that one could construct an analysis in which anger resulting from being subjected to racial epithets, particularly those delivered in a face-to-face and confrontational manner, would be equivalent to "harm" as that notion is discussed herein.

398. In considering the following discussion of the problem with a sole focus on harm, keep in mind Professor Sunstein's view that the "existence of a two-tier First Amendment is hard to deny; and the tiers are defined by reference to value, not simply by reference to harm." SUNSTEIN, *supra* note 4, at 125.

399. *Id.* at 127.

400. *Id.*

cases."[401] But if the harms-based approach would lower the government's burden for the purpose of permitting regulation of false commercial speech, private libel and the like, "there would seem to be an unacceptably high threat of censorship of many other forms of speech, including political expression. A system in which political speech receives the same relatively low level of protection now given to commercial speech would produce serious risks to democratic self-governance."[402]

Second, Sunstein continues, an exclusive focus on harm could raise the government's burden of justification. Stringent standards applied to governmental efforts to regulate political speech would also be applied to governmental attempts to regulate false commercial speech, child pornography, and unlicensed medical practice. "The same very high burden would be placed on all government efforts to regulate speech. This approach would have the large advantage of removing possible risks to political speech. But it would also ensure that government controls could not be applied to speech that in all probability should be regulable."[403] In other words, an across-the-board application of the most stringent standards to governmental speech controls would ensure that government

> could not regulate (among other things) criminal solicitation, child pornography, private libel, and false or misleading commercial speech. The harms that justify such regulation are of course real. But if we are honest, we will have to conclude that those harms are insufficient to permit government controls under the extremely high standards applied to regulation of political speech.[404]

In addition, regulation of attempted bribes, criminal solicitations, and conspiracy would only be permissible

> when these forms of speech threaten clear and immediate harm. Many attempted bribes, solicitations, and conspiracies are doomed to failure from the start; they do not cause harm in the world. If they are to be treated as core speech for constitutional purposes, they cannot be

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401. *Id.*

402. *Id.* According to Sunstein:

> Such a system might well, for example, allow government to regulate political speech when it is misleading or false. This approach would provide far too little breathing space for important speech. Misleading and even false political speech is part and parcel of vigorous political debate. So too, severe risks would be produced by a system in which libel of government officials received no more protection than libel of ordinary citizens. Such a system would deter criticism of government, and criticism of government is indispensable to democracy. But a framework looking only at harm would put libel of government officials on the same ground as libel of private citizens, and if the current, relatively lenient standards for private libel are to be applied generally, we would endanger democratic processes.

Id. at 127-28 (footnotes omitted).

403. *Id.* at 128.

404. *Id.*

regulated when the harm is not likely to occur.[405]

Thus, under Professor Sunstein's view, sole reliance on harm would either lower or raise the standards of regulatory justifications imposed on government. Sunstein correctly concludes that an "inquiry into harm alone would do violence to many of our considered judgments about particular free speech cases. . . . [A] system that does violence to those judgements is not likely to deserve support."[406]

Other concerns relative to a harms-based approach arise when the focus turns to who will decide regulatory issues and how those issues will be decided. A particular administrator's or judge's understanding of the meaning and seriousness or lack of seriousness of harms caused by insult, affront to dignity, harassment, intentional infliction of emotional distress, and similar harms arising from and related to hate speech will certainly affect and predetermine the outcome of cases.[407] "The judge's experience with insult and invective, with black people, with historical episodes such as the Hollywood blacklist, and so on, will all play a role in that understanding."[408] If a judge or decisionmaker does not see or assess the harm of certain hate speech as "serious," the need for regulation will not be apparent and the asserted constitutional right of a hate speaker to engage in the speech will be protected.

C. Should A Harms-Based Approach Be Adopted?

Answering the normative question whether a harms-based approach to the regulation of hate speech should be adopted must take into account the objections to such an approach, the current state of First Amendment law (what Professor Elena Kagan calls the "'ought' in the 'is' of First Amendment doctrine"),[409] and the fact that the judiciary has not been persuaded by claims that the emotional harm inflicted by offensive language is intolerable and compensable.[410] Regulation on the basis of harm is attractive if seen as viewpoint neutral in the sense that speech is regulated on the basis of the harm caused by the speech rather than the viewpoint espoused by the speech.[411] The hard question of whether a harms-based regulation is truly viewpoint neutral must be addressed. If all or some viewpoint-based regulations can be viewed as harm-based regulations then the distinction between the two types of regulations cannot be observed.[412] "For

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405. *Id.*

406. *Id.* at 129.

407. Delgado & Stefancic, *Essay I, supra* note 6, at 858 n.36.

408. *Id.*

409. Kagan, *supra* note 83, at 877.

410. Goldberger, *supra* note 369, at 1190. "There is no official recognition of either the immediate harm done by [hate] speech or the direct connection between such speech and violence against Blacks, Jews, women or homosexuals, to name others who are the object of hate speech and bias crimes." Post, *supra* note 289, at 242.

411. Kagan, *supra* note 83, at 878; Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 612.

412. *See* Kagan, *supra* note 83, at 880. "The substitution of labels--'harm-based' for

it is difficult to see why anyone would opt to regulate a viewpoint that did not cause what seemed (to the regulators at least) to be a harm--or at a bare minimum, that could not reasonably be described as harmful."[413]

Consider other issues relative to a claim that a particular expression made in a particular context has harmed a listener. If, as a matter of law, the expression constitutes fighting words, the target of the fighting words will be able to argue for proscription of the speech on the basis that fighting words are a recognized exception to First Amendment protection.[414] But let us complicate matters. Suppose that a speaker makes the following statement (and consider the content, context, and mode of delivery of the expression).[415] A speaker, in a face-to-face confrontation, directs the pejorative and epithets, "get lost nigger, kike, queer, etc.," at a listener; the expression, arguably a mere profane grunt rather than an idea or opinion, is designed to intimidate rather than rationally communicate an idea. If the grunt is based on factually false premises about a minority group or minority group member and seeks to create fear and to intimidate the listener and target of the expression, can it not be plausibly argued that such expression can be regulated without violating the free speech guarantee? Does not the harm or potential of harm resulting from the content, context, and mode of delivery of the pejoratives and epithets provide a basis for constitutional regulation?[416]

Now change the scenario and suppose that, instead of saying "kike," the speaker says to the listener, "you are a Jew." Also suppose that from the speaker's reading of the Bible Jews are responsible for the death of Christ; that Jews are greedy; that Jews are inherently purveyors of the worst excesses of the capitalist system; that Zionism is racism; that Jews are depraved elements in the body politic; and that Jews should leave all schools and should leave the United States.[417] The statement is

> calm, deliberative, and nasty. It is intellectual (in the sense of reference to the learned sources) and false in its assertions. It threatens Jews and expresse[s] anger and fear. Do we permit this kind of anti-semitic statement because it is expressed and clothed in the garments of rational thought, but ban the "Jew is kike" epithet? If we do, it appears that we are expressing a kind of elitist theory of permissible racist speech. Street vernacular won't cut it, but racism of the academy will.[418]

'viewpoint-based'--thus either allows most viewpoint regulation to go forward or leaves yet unanswered the central issue of precisely when such regulation is appropriate." *Id.*

413. *Id.*

414. *See supra* notes 99-105 and accompanying text.

415. *See supra* notes 308-12 and accompanying text.

416. *See* Wolfson, *supra* note 304, at 16. "Like an obscene telephone call, a racial epithet is not plausibly taken as part of social deliberation on racial issues, and the harms that it produces go well beyond offense." SUNSTEIN, *supra* note 4, at 187.

417. *See* Wolfson, *supra* note 304, at 16-17.

418. *Id.* at 17. Professor Henry Louis Gates, Jr. has offered a similar example involving the following two statements made to a black freshman at Stanford University.

It could be argued that the tone and content of the statement has political content and should not be regulated,[419] and that a line can and should be drawn which would distinguish speech discussing cultural differences, prejudices, biases, and ignorance from speech that is intended to and does threaten individuals because of their membership in a disfavored group.[420] The point being made is that if First Amendment protection or non-protection will turn on a court's assessment of the harm, insult, and injury to the listener, courts must be aware of the possibility that bland, mediocre, and non-confrontational means are used to communicate the same harmful, threatening, and derogatory thoughts and views communicated by epithets.[421] Thus, a harms-based approach will thrust judges into issues of content and style and will require the courts to "weigh the proportion of emotion and derision to the percentage of pure reason."[422]

Add to the pertinent backdrop the Supreme Court's *R.A.V.* decision,[423] wherein the Court held that governments could not selectively target for regulation and prohibition those fighting words that contained bias-motivated hatred or expressions. *R.A.V.* "indicates that, in general, it's also none of the government's business whether the individual's action conveys a message of racial hatred, or instead conveys a different message or no message at all."[424] Given *R.A.V.* and the real concern that harms-based regulations and viewpoint-based regulations could collapse into and be indistinguishable from each other for the purposes of

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> Levon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well-intentioned, but given the fact that aptitude tests place African-Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you don't belong here, and your college experience will be a long downhill slide.
>
> . . . .
>
> Out of my face, jungle bunny.

Gates, *supra* note 1, at 45. For Gates, there is no doubt which statement is likely to be more "wounding" and alienating to African-Americans. "Under the Stanford speech regulations, however, the first is protected speech, and the second may well not be: a result that makes a mockery of the words-that-wound rationale." As noted by Delgado and Yun, the "jungle bunny" statement is a more serious example of hate speech because it is not open to argument or a more-speech response, and the statement has "overtones of a direct physical threat." Delgado & Yun, *supra* note 17, at 1820. "The other version, while deplorable, is unlikely to be coupled with a physical threat, and is answerable by more speech." *Id.* *See also infra* note 468.

419. SUNSTEIN , *supra* note 4, at 163.

420. *See* Barnes, *supra* note 15, at 988.

421. Wolfson, *supra* note 304, at 21.

422. *Id.*

423. *See supra* notes 182-216 and accompanying text.

424. Tribe, *supra* note 218, at 13.

discerning the true nature of the regulation of speech, one could conclude, as I do, that a broad harms-based approach to hate speech regulation would be unconstitutional because it would suck large amounts of protected expression from the coverage of the First Amendment.[425]

A narrower and weaker version of the harms-based approach, one which is limited to the regulation of face-to-face, confrontational, and/or harassing expressions and epithets of all kinds (and not just those limited to a selective group of epithets) could pass constitutional muster.[426] Under the narrower version, government could enact laws prohibiting specifically defined types of harassment, threats, intimidation, and epithets which include, but would not be limited to, race, sex, or other status. Thus, if the ordinance at issue in *R.A.V.* had proscribed all fighting words and not just fighting words based on selective categories, the ordinance would have been constitutional.[427] Accordingly,

> a carefully drafted statute might well surmount these hurdles, and such a law surely would not be subject to the selectivity analysis of *R.A.V.* Viewpoint-neutral laws of this kind--whether framed in terms of fighting words or in some other manner--might be especially appropriate in communities (such as, perhaps, educational institutions) whose very purposes require the maintenance of a modicum of decency.[428]

In sum, a harms-based regulatory approach limited to instances in which a speaker violates a narrowly defined ordinance or regulation prohibiting fighting words or harassment[429] could be constitutional. Courts should uphold such narrow and content-based restrictions on hate speech if the particular speech at issue is not reasonably taken to be part of an exchange of ideas[430] and constitutes unlawful fighting words or harassment by vilification within defined and limited contexts. I will return to this subject in the following Part.

V. Campus Regulation of Hate Speech

"[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[431] As stated in *Tinker v. Des Moines Independent School*

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425. "If restrictions on hate speech cover not merely epithets but also speech that is part of social deliberation, they appear overbroad and unconstitutional for that very reason." *Words, Conduct, Caste, supra* note 69, at 813.

426. *See infra* notes 496-99 and accompanying text.

427. Kagan, *supra* note 83, at 889.

428. *Id.* at 889-90.

429. Sunstein, *supra* note 4, at 203.

430. *Words, Conduct, Caste*, *supra* note 69, at 797.

431. Healy v. James, 408 U.S. 169, 180 (1972) (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 506 (1969)).

District,[432] the First Amendment must always be applied "in light of the special characteristics of the . . . environment" in a particular case.[433] In the context of colleges and universities, the Supreme Court has noted that the "college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[434] That the First Amendment applies to state colleges and universities does not mean that those colleges and universities cannot constitutionally regulate speech and expression. State college and university action is state action for the purposes of the First Amendment, and free and protected speech concerns can be implicated whenever those institutions make speech-related decisions.[435]

Universities necessarily regulate some speech; as Professor Stanley Fish has written, if universities "were only places to encourage free expression . . . it would be hard to say why there would be any need for classes, or examinations, or departments, or disciplines or libraries, since freedom of expression requires nothing but a soapbox or an open telephone line."[436] In some circumstances, Fish states, the obvious good of free expression may pose a threat to the university's purpose of investigating and studying matters of fact and interpretation and, at that point, it may be necessary for the university to discipline or regulate speech.[437] Furthermore, universities value speech on the basis of quality, content, and viewpoint, and define what constitutes and counts

> as knowledge, as important, relevant to the world and to the human condition. Inevitably, such assessments regulate speech in terms of content, viewpoint, and even ideology. Indeed, that is the whole point: to promote quality speech as quality is understood within the relevant academic community or by the relevant administrator (or both).[438]

Universities can also go too far in regulating or responding to the speech of

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432. 393 U.S. 503 (1969).

433. *Id.* at 506.

434. *Healy*, 408 U.S. at 180-81. *See also id.* at 201-02 (Rehnquist, J., concurring in the result) (stating that the "constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws," and that a college may expect that its students adhere to generally accepted standards of conduct).

For analysis of the First Amendment and "academic freedom," see University of Pennsylvania v. EEOC, 493 U.S. 182 (1990); J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment*, 99 YALE L.J. 251 (1989).

435. Becker, *supra* note 36, at 1030.

436. STANLEY FISH, *There's No Such Thing As Free Speech and It's a Good Thing, Too, in* DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES 237 (Paul Berman ed. 1992).

437. *Id.* at 238.

438. Becker, *supra* note 36, at 1033.

its faculty members,[439] as illustrated by *Jeffries v. Harleston*.[440] In *Jeffries*, the chairman of the Black Studies Department at the City College of New York sued university officials alleging that they had violated the First Amendment by removing him from the chair because of the content of a speech he had given.[441] The college was concerned that Jeffries' speech threatened recruitment, fund raising, and the college's relationship with the community.[442] At trial, the jury concluded, *inter alia*, that Jeffries had proven that his speech was a substantial or motivating factor in removing him from the chair of the department.[443] The district court ordered Jeffries reinstated as department chairman.[444]

On appeal, the United States Court of Appeals for the Second Circuit noted that protection against government retaliation for speech extends to the government's own employees although the government's need for efficient functioning is a factor; accordingly, when a government employee expresses an opinion on a matter of social or political concern, even where the statement is critical of the government that employs the worker, the government cannot sanction the speech unless the speech impairs the efficiency of government operations.[445] Jeffries' speech unquestionably involved public issues, the court stated, in that the speech criticized the public school curriculum for reflecting racial bias against minorities and discussed the history of black oppression.[446]

> These issues are suffused with social and political hues. True, the tenor of Jeffries' speech was less than ingratiating, and, as evidenced by the ensuing uproar, its content affronted many who heard it or, at least, heard about it. But First Amendment protection does not hinge on the palatability of the presentation; it extends to all speech on public matters, no matter how vulgar or misguided.[447]

The Second Circuit further concluded that the evidence supported the jury's finding that the college was motivated by the content of Jeffries' speech when it removed Jeffries from the chair of the Black Studies Department, and agreed with the district court that the jury could reasonably have concluded that the college

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439. *See, e.g.*, Silva v. University of New Hampshire, 888 F. Supp. 293 (D.N.H. 1994).

440. 21 F.3d 1238 (2d Cir. 1994), *vacated and remanded*, 115 S. Ct. 502 (1994).

441. In a speech discussing the public school curriculum, Jeffries stated, *inter alia*, that a specific official was "an ultimate, supreme, sophisticated, debonair racist" and a "sophisticated, Texas Jew." *Id.* at 1242. Jeffries also stated that "rich Jews" financed the slave trade, and that Jews and Mafia figures in Hollywood had conspired to "put together a system of destruction of black people" by portraying blacks negatively in films. *Id.*

442. *Id.*

443. *Id.* at 1243.

444. *See* Jeffries v. Harleston, 828 F. Supp. 1066 (S.D.N.Y. 1993).

445. *See* Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

446. *Jeffries*, 21 F.3d at 1245.

447. *Id.* at 1245-46 (citation omitted).

would not have removed Jeffries but for the speech.[448] The college also failed to show that Jeffries' speech interfered with the college's operations. The college had argued that it need only demonstrate a reasonable expectation that Jeffries' speech would eventually cause disruption because Jeffries held a highly visible policymaking position. Although agreeing that government generally has more discretion to sanction employees who serve in confidential, policymaking, or public contact roles, the court concluded that the college had not shown that Jeffries, by virtue of his position as department chair, could undermine the institution's mission with his speech.[449] The applicable institutional by-laws charged the department chairman with carrying out the policies of the department, faculty, and the board of trustees, but did not vest him with the power to make policy. As department chairman, Jeffries performed an essentially ministerial role.[450] Accordingly, the Second Circuit affirmed the finding that the college had violated Jeffries' First Amendment rights, and also affirmed the district court's reinstatement order.[451] Thus, the college's move against Jeffries, predicated on stated but unproven concerns of harm to the institution,[452] was initially held to be an unconstitutional infringement of Jeffries' right to free speech before subsequent developments led to a different result.[453]

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448. *Id.* at 1246.

449. *Id.* at 1247.

450. *Id.*

451. *Id.* at 1248-49. The Second Circuit vacated the punitive damages awards against six individual defendants and remanded for a new trial on the question whether Jeffries should recover punitive damages from those defendants. *Id.* at 1249-50.

452. *See supra* note 449 and accompanying text.

453. Thereafter, and in the wake of Waters v. Churchill, 114 S. Ct. 1878 (1994), the Second Circuit held that university officials did not violate Jeffries' First Amendment rights because they were motivated by reasonable predictions of disruption in university operations. *See* Jeffries v. Harleston, 53 F.3d 9 (2d Cir.), *cert. denied*, 116 S. Ct. 173 (1995). For commentary on the *Jeffries* litigation, see Nathan Glazer, *Levin, Jeffries, and the Fate of Academic Autonomy*, 36 WM. & MARY L. REV. 703 (1995).

In the cited article, Professor Glazer also discusses the case of Professor Michael Levin against the City College of New York. Levin v. Harleston, 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992). In a letter to the *New York Times*, a book review, and another letter published in the *Proceedings and Addresses of the American Philosophical Association*, Professor Levin set out his views on affirmative action and the relative intelligence of blacks and whites. Among other things, Levin criticized the *Times* for supporting affirmative action; stated that the only adjustments in educational measures that will allow blacks their due number of successes amount to making course work and tests easier and easier, and that the American polity will have to reconcile itself to an embarrassing failure rate for blacks; and that the reason for the low representation of blacks in the field of philosophy was their lower level of intelligence on average. *See* Glazer, *supra*, at 711.

The university scheduled another section of Professor Levin's required course for undergraduates in philosophy, and explained in a letter to students that the extra section was added because Professor Levin had "expressed controversial views." *Levin*, 770 F. Supp. at 907. An ad

University decisions on faculty hiring and promotion also regulate speech.

> This is the most important and effective way in which an academic institution regulates speech. Much academic speech, particularly in classrooms, student papers, and exams, depends on who is hired. Speech at a law school without any critical race theorists will be different from speech at a law school with several. And hiring and tenure decisions are based on assessments of the quality and content of the applicant's speech, the quality of the applicant's arguments, research, methodology, and, inevitably (especially at the margins of academic discourse within any discipline), viewpoints.[454]

Universities do not offer all possible courses and do not permit a school curriculum devoted to flat earth science.[455] Universities select course offerings on the basis of the content to which students will be exposed, and may not offer courses of particular interest to some students, particularly some people of color and women.[456] Further, there are rules, both written and unwritten, that govern the permissible and expected types of discussion in classrooms. "Such understandings are not made blindly; viewpoint and ideology are inevitably relevant."[457] Student papers and examinations are graded on the basis of the contents thereof and on the professor's evaluation of the student's knowledge and the quality of her reasoning. If the paper or examination "has been based on a viewpoint or ideology the professor considered stupid, irrelevant, irrational, superstitious, or evil, the importance of viewpoint and ideology to evaluating content would be obvious."[458]

Commencing in 1979, many college campuses noticed a significant increase in the number of hate speech incidents directed at blacks, people of color, gays, lesbians, and others. Since the 1986-1987 academic year, the *Chronicle of Higher Education* reports that approximately 175 colleges and universities experienced

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hoc committee reviewed the matter and concluded that Levin's statements regarding the intellectual inferiority of blacks "does, in our view, clearly have the potential to harm the process of education in his classes. . . . Thus we find that it is appropriate for the College to continue to carefully implement ways to protect the students from such harm." *Id.* at 914.

The trial court found that there had been a chilling effect on Professor Levin's exercise of his right to free speech, and permanently enjoined the university from commencing or threatening to commence any disciplinary proceedings against, or other investigations of Levin, predicated solely upon his expression of ideas, and from creating or maintaining shadow or parallel sections of his classes. In addition, the college was ordered to take reasonable steps to prevent disruptions of Professor Levin's classes. *Id.* at 927.

454. Becker, *supra* note 36, at 1034.

455. Wolfson, *supra* note 304, at 5.

456. Becker, *supra* note 36, at 1034.

457. *Id.* at 1035.

458. *Id.* "Imagine, for example, that you are grading an essay question on gradations of punishment for various forms of rape. And imagine that the exam you are reading argues that rape should be legal, indeed rewarded, because women enjoy rape; rape is therefore a good thing. You should be affected by the exam's viewpoint, content, and ideology in assigning a grade to it." *Id.*

serious racial unrest.[459] The National Institute Against Prejudice and Violence has estimated that twenty to twenty-five percent of minority students are victimized at least one time during their college years.[460] For example, in a 1987 incident at the University of Michigan, students shoved a leaflet under the door of a room in which black women were holding a meeting; the leaflet said that blacks "don't belong in classrooms, they belong hanging from trees."[461] Moreover, a racial brawl occurred at the University of Massachusetts following the television viewing of a World Series game;[462] white students at Stanford University scrawled stereotypically black facial features on a poster of Ludwig von Beethoven and placed it outside the dorms of black students;[463] a fraternity member at the University of California at Berkeley shouted obscenities and racial slurs at black students as they passed a fraternity house;[464] and a Berkeley campus disc jockey told black students to "go back to Oakland" when they requested that the station play rap music.[465]

There have been numerous press reports of white students engaging in the verbal or symbolic insulting of black students and other people of color. Those insults include shouted and spray-painted racial denigrations, caricatures of racial facial features displayed on posters, the mimicry of blacks in white sorority parties through make-up, and racial stereotypes exhibited in student newspapers and on campus radio broadcasts.[466]

Experienced observers of the nation's campuses believe this spate of

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459. Delgado & Yun, *supra* note 302, at 872.

460. *Id.*

461. *See* Isabel Wilkerson, *Campus Blacks Feel Racism's Nuances*, N.Y. TIMES, Apr. 17, 1988, at A1; *Racism, Cynicism, Musical Chairs*, THE ECONOMIST, June 25, 1988, at 30. Other incidents occurred at that university, including the distribution of a flier naming the month of April "White Pride Time" and featuring a counseling session on "how to deal with uppity niggers." *See* Deborah R. Schwartz, Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733, 734 (1990). In response to these and other incidents, the University of Michigan promulgated an antidiscrimination policy in 1988. *See* THE UNIVERSITY OF MICHIGAN POLICY ON DISCRIMINATION AND DISCRIMINATORY HARASSMENT OF STUDENTS IN THE UNIVERSITY ENVIRONMENT (1988); *infra* notes 469-79 and accompanying text (discussing court challenge to the policy).

462. *State Starting an investigation of Clash at Massachusetts U.*, N.Y. TIMES, Nov. 18, 1986, at B24.

463. Felicity Barringer, *Campus Battle Pits Freedom of Speech Against Racial Slurs*, N.Y. TIMES, Apr. 25, 1989, at A1.

464. Diane Curtis, *College Campuses Reinforce Rules Barring Racism*, SAN FRANCISCO CHRON., Sept. 18, 1989, at A1, A8.

465. *Id.*

466. *See* HOWARD J. EHRLICH, CAMPUS ETHNOVIOLENCE AND THE POLICY OPTIONS 41-72 (1990); Byrne, *supra* note 3, at 401-02; *Asians at University of Minnesota Receive Racist Letter*, CHRONICLE OF HIGHER EDUC., May 2, 1990, at A3; *Racism Flares on Campus*, TIME, Dec. 8, 1980, at 28.

> abuse to be unprecedented in frequency and intensity. In the lifetime of current educators, universities have been more welcoming to racial diversity than has society as a whole; this racist backlash mocks our hope that education will temper racial animosity.[467]

In response to these serious incidents, many colleges and universities have enacted hate speech codes and regulations of one sort or another.[468] Generally,

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467. Byrne, *supra* note 3, at 401-02. For an account of other incidents, see Schwartz, *supra* note 461, at 734-37.

468. One example of a hate speech code is the Stanford University code created by Stanford law Professor Thomas Grey. The core of that policy stated:

> Speech or other expression constitutes harassment by personal vilification if it:
>
> a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin; and
>
> b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
>
> c) makes use of insulting or "fighting" words or non-verbal symbols.
>
> In the context of discriminatory harassment, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

The Stanford Discriminatory Harassment Provision, *quoted in* Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POLICY 81, 106-07 (1991); *Racist Speech on Campus*, *supra* note 3, at 450-51 (quoting policy).

Stanford, a private university, at one time indicated that it would attempt to comply with the First Amendment in regulating hate speech. SUNSTEIN, *supra* note 4, at 203; Grey, *supra* note 286; Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339 (1992). It is noteworthy that the policy was asymmetrical in that whites could not direct "verbal assault weapons" against blacks, other people of color, or women, while those protected by the speech code could use all the words at their disposal against whites. Grey, *supra* note 286, at 162. Professor Charles Fried has argued that such "asymmetry would seem to be a defect--an injury not only to traditional free speech principles of content- and viewpoint-neutrality, but also to the value of civility." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 247 (Geoffrey R. Stone et al. eds., 1992).

On February 28, 1995, a Santa Clara, California Superior Court judge held that Stanford's hate speech policy was unconstitutional under a California law extending to students at private institutions of higher learning the same civil rights enjoyed by students at public universities. Stanford decided not to appeal the Superior Court's ruling. *See* Bill Workman, *Stanford Won't*

hate speech codes prohibit hateful or harassing speech intended to insult or to stigmatize individuals on the basis of their racial, sexual, ethnic, or other status.[469] One study, conducted under the auspices of the Freedom Forum's First Amendment Center, inventoried speech proscriptions in 384 campus handbooks and student guides.[470] Twenty-eight percent of the surveyed institutions had advocacy rules, such as rules prohibiting "any behavior that implicitly or explicitly carries messages of racism, sexism, stereotyping, or discrimination of any kind."[471] Other institutions had general harassment codes which included verbal harassment and made harassment on the basis of particular group status punishable. For example, the University of Southern Maine proscribes "harassment or intimidation of another person."[472] It also prohibits "harassment or discrimination based on race, color, religion, sex, sexual orientation, national origin, or citizenship status, age, disability, or veteran's status."[473] Only eight percent of surveyed institutions prohibited fighting words as defined in the Supreme Court's *Chaplinsky* decision.[474] And fourteen percent of institutions prohibited the intentional infliction of emotional distress.[475]

University hate speech regulations have not fared well when reviewed by the courts. In *Doe v. Michigan*,[476] the court held that the University of Michigan's 1988 policy[477] was unconstitutionally vague and overbroad. Those who drafted the policy had in mind court decisions holding that verbal harassment by coworkers of minorities or women could violate Title VII of the Civil Rights Act of 1964 ("Title VII").[478] In the court's view, the university apparently had no

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Appeal Ruling on Anti-Hate Speech Rule, S.F. CHRON., Mar. 10, 1995, at A11; Lynn Ludlow, *Conservatives and free speech*, S.F. EXAMINER, Mar. 5, 1995, at A-12.

469. *See* Turner, *supra* note 3, at 225.

470. *See generally* Arati R. Korwar, *Speech Regulations at Public Colleges and Universities*, ACADEME, Jan.-Feb. 1994. The study omitted separate statements of equal opportunity, affirmative action, and nondiscrimination, as well as sexual harassment policies.

471. *Id.*

472. *Id.*

473. *Id.* at 9-10 (footnote omitted).

474. *Id.* at 10.

475. *Id.* at 11.

476. 721 F. Supp. 852 (E.D. Mich. 1989).

477. The policy prohibited "behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, martial status, handicap or Vietnam-era veteran status" and poses a threat or interferes with an individual's university endeavors. *Id.* at 856. An example of a statement violative of the policy was set forth in an interpretive guide provided by the university's office of affirmative action: "A male student makes remarks in class like 'Women just aren't as good in this field as men.'" *Id.* at 858.

478. 42 U.S.C. §§ 2000e-2000e17 (1988). *See generally* Harris v. Forklift Systems, Inc, 114 S. Ct. 367 (1993); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990); Ronald Turner, *Employer Liability Under Title VII for Hostile Environment Sexual Harassment By Supervisory Personnel: The Impact*

coherent view of the nature or limits of the policy or the university's authority to regulate racist speech, and the policy failed to distinguish unprotected from protected speech. Thus, the court stated, "the University had no idea what the limits of the Policy were and it was essentially making up the rules as it went along."[479]

In 1989, the University of Wisconsin adopted a policy under which students would be disciplined if they intentionally demeaned a specific individual on the basis of his or her race or other specified grounds and thereby damaged the educational environment.[480] In requiring that insults be directed at a specific individual, the drafters of the policy thought that it was necessary to limit the regulation and disciplinary action to fighting words[481] so as to protect the constitutionality of the policy.[482] The policy was challenged in a court action,[483] and the court held that the policy was overbroad and did not meet the requirements of the fighting-words doctrine.

As to the fighting-words doctrine, the court determined that the policy went beyond the present scope of that doctrine in that the policy did not require that the regulated expression, by its very utterance, would tend to incite a violent reaction.[484] Further, the court held that the policy's prohibition of speech which created an intimidating, hostile, or demeaning environment was too broad because the term "hostile" covered nonviolent as well as violent situations, and an intimidating or demeaning environment was not likely to incite a violent reaction.[485] "Since the UW Rule covers a substantial number of situations where no breach of the peace is likely to result, the rule fails to meet the requirements of

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and Aftermath of Meritor Savings Bank, 33 How. L. J. 1 (1990).

479. *Doe*, 721 F. Supp. at 868.

480. The Wisconsin rule prohibited:

> [R]acist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, or other expressive behavior or physically conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
>
> 2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.

WISC. ADMIN. CODE UWS § 17.06(2) (Aug. 1988).

481. *See supra* notes 99-105 and accompanying text.

482. *See* Byrne, *supra* note 3, at 413-14; *see also* Patricia B. Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First-Amendment and University Interests*, 16 J.C. & U. L. 573, 587 (1990) (staff lawyer at the University of Wisconsin discusses the concerns considered in the drafting of the policy).

483. UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991).

484. *Id.* at 1172.

485. *Id.* at 1172-73.

the fighting words doctrine."[486] As to the policy's anti-harassment provision, the court distinguished Title VII from the university's policy. Title VII addresses employment, and not educational settings; Title VII's hostile environment analysis would not apply because the agency analysis applicable to Title VII cases would not hold a school liable for its students' actions (the students are not agents of the school); and Title VII cannot supersede the First Amendment.[487]

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University[488] involved a fraternity's action for declaratory judgment and an injunction seeking to nullify sanctions imposed upon it by the university because the fraternity conducted an "ugly woman contest" with racist and sexist overtones. During the contest, one member of the fraternity, who happened to be white, dressed as an offensive caricature of a black woman and spoke in slang to parody African-Americans. The fraternity later apologized to the university for the presentation and conceded that the contest was sophomoric and offensive. The dean of students suspended the fraternity from all activities for the rest of the semester, imposed a two-year prohibition on all social activities (with certain exceptions), and required the fraternity to plan and implement an educational program addressing cultural differences, diversity, and the concerns of women.[489] The fraternity brought suit challenging the university's actions.

The United States Court of Appeals for the Fourth Circuit concluded that it was obvious that the contest was "an exercise of teenage campus excess" and reflected a "sophomoric nature."[490] But the fraternity's low-grade entertainment did not necessarily weigh in the First Amendment's inquiry, the court stated, and it would seem that the contest was inherently expressive and thus entitled to First Amendment protection.[491] The university argued that the message conveyed by the fraternity's conduct—that racial and sexual themes should be treated lightly—was antithetical to the university's mission of promoting diversity and providing an educational environment free from racism and sexism.

According to the court, the evidence established "that the punishment was meted out to the Fraternity because its boorish *message* had interfered with the described University mission. It is manifest from these circumstances that the University officials thought the Fraternity intended to convey a message."[492] Further, the court determined that the university's action was unconstitutional under *R.A.V. v. City of St. Paul*.[493] The university punished "those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the

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486. *Id.* at 1173.
487. *Id.* at 1177.
488. 993 F.2d 386 (4th Cir. 1993).
489. *Id.* at 388.
490. *Id.* at 389.
491. *Id.* at 391.
492. *Id.* at 392 (emphasis in original).
493. 505 U.S. 377 (1992).

University's goals and probably embraced by a majority of society as well."[494] The First Amendment, however, generally prevents government from proscribing expressive conduct because of disapproval of the ideas expressed.[495] Concluding that the university had selectively limited speech and could have accomplished its goals in a fashion other than silencing speech on the basis of viewpoint, the court affirmed the district court's summary judgment in favor of the fraternity.

As can be seen, questions of overbreadth, vagueness, and unconstitutional selectivity must be addressed by those institutions with or considering hate speech codes. Although *R.A.V.* did not specifically address hate speech codes and did not provide a complete picture of the regulatory options that might pass constitutional muster,[496] the Court's rationale and analysis suggest that a hate speech code that does not apply in a "neutral" and across-the-board fashion could be unconstitutional.[497] Thus, codes could prohibit defined harassment, threats, or intimidation including but not limited to race, sex, sexual orientation, and so forth,[498] but codes that singled out particular types of hate speech while leaving other forms untouched would not be "neutral" under *R.A.V.* and would therefore be unconstitutional.[499]

Furthermore, a code would apparently pass First Amendment muster if it was restricted to prohibitions of harsh and confrontational face-to-face epithets and invective calculated to disrupt the targeted person's ability to function on campus and enjoy the same opportunities and benefits that are available to all students.[500] Recall that in *R.A.V.* the Court noted that the city could have achieved "precisely the same beneficial effect" through an "ordinance not limited to the favored topics . . . ."[501] Hence, an ordinance prohibiting all fighting words would have been constitutional; an ordinance prohibiting fighting words based on race, sex, or some other specific category was unconstitutional. Broader hate speech codes (not limited to specific categories or topics) do carry a practical risk, however. The broader the code, the more extensive its regulatory reach and the more vulnerable the code is to charges of unconstitutional vagueness and overbreadth. Regulating broad categories of fighting words, harassment, intimidation and the like have indefinite parameters that are vulnerable to unconstitutional manipulation.[502]

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494. *Iota Xi*, 993 F.2d at 393.
495. *Id.* (citing *R.A.V.*, 505 U.S. at 382).
496. *See* Brownstein, *supra* note 63, at 209.
497. Delgado & Yun, *supra* note 302, at 886.
498. *See* Kagan, *supra* note 83, at 889.
499. Delgado & Yun, *supra* note 302, at 886.
500. *Id.*
501. R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).
502. Brownstein, *supra* note 63, at 208. *See also* Kagan, *supra* note 83, at 889-90:

> A law prohibiting, in viewpoint-neutral terms, not merely fighting words but other kinds of harassment and intimidation would (and should) face greater constitutional difficulties, relating most notably to overbreadth and vagueness; but a carefully drafted statute might well surmount these hurdles, and such a law surely would not be subject to the selectivity analysis of *R.A.V.* Viewpoint-neutral laws of this kind--whether

No student or member of a university community has the right to utter face-to-face epithets or invective to another student or member of the university community. The targeted student or member of the community has a right not to have the face-to-face epithets and invective uttered to her, and a college or university has the right and obligation to address and redress the harms to educational environments caused by hate speech.[503] Speech codes drafted to address and to prohibit such speech may be necessary to the specific context, operation, and mission of academic communities. As noted above, universities impose limits on the topics discussed in classrooms, impose subject matter restrictions as part of the educational process, ban or discourage irrelevant discussions, require students to treat other students and members of the academic community with a minimum of civility and respect, make judgments on the quality of communications that affect admissions and the evaluation of students and prospective and actual faculty, and engage in viewpoint discrimination when making academic judgments.[504] Universities and colleges may not censor as they please, but as a practical matter those institutions, seeking to promote and protect the educational mission, do and must control speech in ways that other non-educational institutions do not and cannot.

> Surely the educational mission ought to grant the university somewhat greater room to maneuver, especially in light of the complexity and delicacy of the relevant policy questions. Courts might also hesitate before finding viewpoint discrimination or impermissible selectivity. Perhaps there should be a presumption in favor of a university's judgment that narrowly defined hate speech directed at blacks or women produces harm that is especially threatening to the educational enterprise.[505]

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framed in terms of fighting words or in some other manner--might be especially appropriate in communities (such as, perhaps, educational institutions) whose very purposes require the maintenance of a modicum of decency.

503. POST, CONSTITUTIONAL DOMAINS, *supra* note 251, at 296-97; Delgado & Yun, *supra* note 302, at 891. Professor Post argues that the constitutionality of hate speech regulations on university and college campuses depends upon the logic of instrumental rationality, and specifically upon three factors: (1) the nature of the educational mission of the university; (2) the instrumental connection of the regulation to the attainment of the mission; and (3) the deference that courts should display toward the instrumental judgment of institutional authorities. "The current controversy regarding the constitutionality of regulating racist speech on university and college campuses may most helpfully be interpreted as a debate about the first of these factors, the constitutionally permissible educational objectives of public institutions of higher learning." POST, CONSTITUTIONAL DOMAINS, *supra* note 251, at 324 (footnote omitted).

504. *See supra* notes 436-58 and accompanying text; SUNSTEIN, *supra* note 4, at 199-200.

505. SUNSTEIN, *supra* note 4, at 202.

CONCLUSION

Some speech is constitutionally protected even though it harms other individuals. Some speech is not constitutionally protected because it harms other individuals. What explains the constitutional protection in the former but not the latter? It is my view that a harms-based analysis is in fact a part of the explanation of the protection and non-protection of certain speech, and that the valuation of the type and extent of the harm explains, at least in part, why the regulation of some speech (like child pornography) is deemed to be uncontroversial, while the regulation of other speech (like certain hate speech) is controversial. The actual and perceived harms of child pornography are such that society has rightly and understandably moved to prohibit such speech.

If harm is a criterion, can it not be plausibly argued that certain hate speech can and should be rightly and understandably condemned and prohibited without violating the First Amendment? If one answers that question in the negative, is it not because of a different valuation of both the speech itself and the actual and perceived harms of the speech? I submit that the valuation of the at-issue speech is a critical component of First Amendment analysis, even where such valuation is not expressed or spelled out. This often silent but always present judgment as to the level and degree of harm is found in the constitutional regulation of many forms and varieties of speech.[506] This is not to say that all speech that can or does cause harm can be constitutionally regulated; it is to say that those who contend that hate speech cannot be regulated without violating the First Amendment should be asked to explain why an assessment of the harm to the targets of such speech should not be part of the constitutional calculus. In other words, if as a general proposition, it is proper to assess harm in making determinations about the constitutionality of certain speech, it should be proper to assess harm relative to hate speech.

While it is true that courts may not be receptive to harms-based arguments,[507] a consistent and principled approach to First Amendment questions requires a discussion and evaluation of the harms of hate speech as well as recognition that what is really at play in the regulation of hate speech and all other speech is an exercise consisting of value judgments regarding the speech in question. One can certainly debate plausible and contending perspectives on the question of harm in a particular case involving the regulation of speech. My point is that truth-in-labeling and an accurate description of what is actually done in this country with regard to the regulation of speech should be recognized as we continue to debate issues relative to and arising from the regulation of hate speech.

Regulation of hate speech may or may not be a "good" idea. But the regulation of hate speech is not so far removed from other societal restrictions on certain expressions. I am not urging a broad ban on hate speech, for such a ban would violate the First Amendment in that it would prohibit a great amount of

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506. *See supra* Part V.

507. *See supra* notes 335-408 and accompanying text.

speech that contributes to public deliberation.[508] I do submit that those who argue against even narrow hate speech regulations should at least consider an analysis that accounts for the harm factor and any explicit or implied valuation of the at-issue speech, and should not rely on a knee-jerk, conclusory, and "of course that's unconstitutional" reaction to hate speech regulations and codes.

508. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 251 (1993).