

Texas Law Review

presents

**SPRING 2005 LAW JOURNAL WRITE-ON
COMPETITION**

IT IS VERY IMPORTANT THAT YOU READ THESE INSTRUCTIONS BEFORE YOU BEGIN.

A. SUBMITTING THE ESSAY

- ◆ **DEADLINE:** Your essay must be postmarked or submitted in person by **5:00 p.m., Tuesday, May 31, 2005**. You may hand-deliver or mail your essay to the offices of the *Texas Law Review* (Townes Hall, 4.138). Late papers will not be accepted. If you choose to mail in your essay, please mail to:

Texas Law Review
Write-on Competition
The University of Texas School of Law
727 East Dean Keeton Street
Austin, Texas 78705

- ◆ **COPIES:** Submit three copies of your essay to the *Texas Law Review*. Submit three additional copies for **each** of the other journals (you may select up to 4) in which you are interested. All essays submitted will be considered by the *Texas Law Review*. Thus, if you would like 4 journals to consider your essay in addition to *TLR*, you must submit 15 copies of your essay (3×5).
- ◆ **IDENTIFICATION:** Put (1) the last six digits of your Social Security number and (2) the year of law school that you just completed (first year or second year) **on a separate page stapled** to the front of **each** copy of the essay that you submit. **Do not** put the first three digits of your Social Security number or your essay title on the identification page. **Do not** put your name anywhere other than on the forms that follow these instructions.
- ◆ **PREFERENCE SHEET:** Turn in your preference sheet with your essay. Do not include the *Texas Law Review* on your preference sheet. The *Texas Law Review* will extend an offer of membership to any candidate whose essay is chosen through its selection process. Accordingly, a candidate might receive an offer from the *Texas Law Review* and from other journals.
- ◆ **GPA RELEASE & CONTACT FORMS:** Turn in your *TLR* GPA Release Form and Contact Form with your essay. This form is the only link between your essay and you. Therefore, it is important that your information is accurate and **legible**. If you turn in your essay by hand, we will have separate boxes for essays and GPA Release Forms. If you mail in your essay, your GPA Release Form will be separated from your essay as soon as we open the envelope. **Do not** include your name or any other personal information anywhere else inside the envelope or on your essay. Please note that if you apply to the *Texas International Law Journal* or *The Review of Litigation*, you need to fill out their GPA release forms as well.
- ◆ **EMERGENCIES:** In the event of extraordinary circumstances, write-on candidates may call Nick Bunch at the *Texas Law Review* office (512-232-1281) to negotiate *possible* extensions.

B. HONOR CODE

- ◆ The Write-On Competition is conducted pursuant to the Honor Code. A student may be disqualified by a journal or expelled from the Law School (yes, it's happened before) for violating a rule of the Write-On Competition. Each journal may determine independently whether a candidate has violated a rule of the Write-On Competition.
- ◆ **THE ESSAY THAT YOU HAND IN MUST BE THE PRODUCT OF YOUR EFFORTS ALONE.** It is a violation of the Honor Code to solicit or use advise on how to write your essay. This includes help with structure, style, argument, and proofreading. It also includes reading

essays from previous years, except for the two sample answers provided on the *Texas Law Review* write-on web page. **Under no circumstances** may you discuss the contents of this packet with other students participating in the write-on competition.

- ◆ **NO ONE MAY CONDUCT ANY OUTSIDE RESEARCH.** *Your essay should be based on the packet materials alone.* You may make passing reference to history, current events, or other information not included in the packet. You may rely on basic legal knowledge acquired during the first year of law school to support your argument. However, your essay should focus on the packet sources. Treat the packet as a self-contained “universe of discourse.”
- ◆ You may consult dictionaries (including legal dictionaries), thesauri, and style manuals, as well as their electronic equivalents, such as a word processor’s spell-checker.
- ◆ If the packet mentions a case or source that is not included as a primary source within the packet, you may discuss it in your essay, but you may not investigate the actual source. If you cite a source that appears within another source, make clear in which packet source it appears.

C. CITATION

- ◆ **FORM:** We do not require a particular citation form, such as BlueBook or ALWD. However, it is extremely important that you choose *some* citation form and use it consistently. When citing an authority, refer to its title, author, packet page number, and the column in which it appears. The following examples may be of assistance, but are not mandatory citation forms:
 - (a) Cases: *Case Name*, at 2, col. 1.
 - (b) Periodical Articles: Author, *Title*, at 3, col. 2.
 - (c) Constitution: U.S. CONST. amend. XIV § 1.
- ◆ **PLACEMENT:** You may cite authority within the body of your paper or you may use footnotes. However you choose to cite, be consistent.

D. AESTHETICS

- ◆ **LENGTH:** Your essay must be printed on a letter-quality printer and must not exceed eight (8) double-spaced pages. Shorter essays are perfectly acceptable.
- ◆ **FONT:** 12-point, Times New Roman font is required.
- ◆ **PAPER:** The copies of your essay must be submitted on white 8½” × 11” paper.
- ◆ **MARGINS:** Use one-inch margins on all sides. Page numbers should be centered at the bottom of each page and can fall within the bottom one-inch margin.

E. APPROACHING THE ESSAY

- ◆ **THERE IS NO “QUESTION PRESENTED.” THERE ARE NO “RIGHT” ANSWERS.**
- ◆ The packet consists of a diverse collection of materials. We **do not** expect or encourage you to use all, or even most, of the materials in the packet. Attempts by previous candidates to incorporate the entire packet into the essay have been, on the whole, unsuccessful. Many of the best essays in previous write-ons have been narrowly focused, concentrating on only a few sources. If you have a strong argument about a single source, feel free to use only that source.
- ◆ These materials are intended to provoke critical thought; therefore, you should not simply summarize the cases. Your essay should reflect command of the materials you use, as well as

very careful reasoning in the development of a thesis and supporting arguments. We repeat, there are no “right” answers! The packet is designed to encourage candidates to shape creative legal arguments.

- ◆ There is no significance to the order of the materials in the packet.
- ◆ Edit your essay. Organization and clarity of thought are crucial to a successful essay, as are good grammar and style.
- ◆ Do not feel hesitant about criticizing court decisions if you believe the court’s analysis is flawed. Remember that some of the court decisions and statutes in the packet may no longer be good law.
- ◆ The materials in the packet have been heavily edited. Most footnotes and case citations have been omitted without indication. Dissenting and concurring opinions have often been omitted without indication, as have portions of some majority opinions. You may not investigate or refer to omitted portions of these sources.
- ◆ **Do not be intimidated by the length of the packet (or these instructions)!** We include a variety of materials in the packet so that you can write on a wide variety of issues. Do not feel compelled to read everything in the packet.

F. NOTES ON THE TEXAS LAW REVIEW

The write-on competition is an mandatory part of the membership selection process for the *Texas Law Review*. The *Texas Law Review* will extend ten offers of membership based **solely** on the strength of essay submissions. For the remaining candidates, the quality of the essay is often the deciding factor.

Grading of the essays is completely anonymous; no grader will know your name or your grades. Further, all essays are graded by three independent graders, with the aim of reducing grading disparities. Essay scores and grades are tracked only by your abbreviated Social Security number until membership offerees are selected. Only then will identification numbers be matched up with names. *Texas Law Review* will only consider applicants that, as of the end of the Spring 2004 semester, have earned enough credit hours to be classified under the 2004-2006 UT Law School catalogue as “second-year” students or higher (29 semester hours of credit or more).

Approximately fifty applicants are offered membership on *Texas Law Review*. *TLR* will aim to notify new members early in the week of August 16th. Those candidates who accept an offer of membership on the *Texas Law Review* will be required to attend a two-day orientation/training session on **August 29–30** (the Monday and Tuesday before Fall classes start), to attend a cite-checking session on **September 3** (Saturday), and to fulfill all other obligations of membership.

G. FINAL REMARKS

The packet should contain XX numbered pages exclusive of these instructions, the forms that follow them, and the Table of Contents. If your packet is missing any pages, please contact the offices of the *Texas Law Review* immediately.

Good luck and have a wonderful summer!

Journal Preference Sheet

University of Texas School of Law: Spring 2005 Journal Write-On Competition

Please place an “X” next to the journals that you would like to consider your application. You may select up to four journals, not including the *Texas Law Review*. Please keep in mind the following:

- ◆ **ALL entries will be considered for membership by the *Texas Law Review***, regardless of the preferences below.
- ◆ Though each of the journals below specializes in a specific area of the law, you need not have specialized knowledge in the subject area, nor be planning a career in a given area, to participate.
- ◆ You must return this sheet with your essay if you wish to be considered for any journal other than *Texas Law Review*.
- ◆ **Three (3) copies** of your essay must be submitted for each journal that you preference on the table below. For example, if you select two journals below, you should include nine copies of your essay with your application—three copies for the *Texas Law Review* and three copies a piece for each of the other two journals.

The *Texas Law Review* will extend its offers first, around the third week of August. The *Texas Law Review* cannot begin extending offers for membership until all first-year grades have been returned. Other journals will have a three-day period following the extension of *Texas Law Review* offers during which they may extend but not accept offers. This lets you consider all of your options before accepting.

Last six digits of your social security number:

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Journal	Consider My Application
American Journal of Criminal Law	
Texas Environmental Law Journal	
Texas Hispanic Journal of Law and Policy	
Texas Intellectual Property Law Journal	
Texas International Law Journal (<i>rising 2Ls only</i>)	
Texas Journal of Law, Business, & Economics	
Texas Journal of Women and the Law	
Texas Journal on Civil Liberties and Civil Rights	
Texas Review of Entertainment and Sports Law	
Texas Review of Law and Politics	
The Review of Litigation	

Texas Law Review GPA Release Form

Last Name	First Name	MI	Full Social Security No.	1L Section
Address		City	State	Phone number

I authorize The University of Texas School of Law to release my overall GPA to the *Texas Law Review*.

I understand that unless I specify otherwise, this information may be kept as a permanent record on file with the *Texas Law Review*.

Signature	Date
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Please mark here if you do **NOT** want to be considered for *Texas Law Review* membership.

Texas Law Review Contact Sheet

So that *Texas Law Review* is able to timely contact students selected for membership, please provide us as much contact information as you can. If available, please provide: (1) a phone number where you can be reached from August 1–14, (2) a phone number where you can be reached from August 15–28, (3) your cell phone number, (4) your summer work phone number, (5) your permanent (e.g., parents' home) phone number, and (6) your e-mail address. It is **essential** that you provide *TLR* with as many alternative numbers as possible so that we can promptly extend offers of membership.

Last Name	First Name	MI
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1L Section (if you are rising 2L) semester	Total credit hours you will have earned upon completing the Spring 2004
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Phone Numbers

(1) _____ (Aug. 1–14) (2) _____ (Aug. 15–30)
(3) _____ (Cell) (4) _____ (Permanent)
(5) _____ (Work)

Email Address

(6) _____ (e-mail)

Mailing Addresses

Summer Address: _____

**Austin Address:
(for Fall 2005)** _____

Date of return to Austin: _____

The Review of Litigation GPA Release Form

I, _____, hereby authorize the University of Texas School of Law to release my cumulative law school grade point average to *The Review of Litigation* for consideration in the Summer Write-On Competition.

Signed,

(Signature)

(Date)

(Print Name)

(Full Social Security Number)

Texas International Law Journal GPA Release & Application Form

In evaluating prospective members, the *Texas International Law Journal* considers an applicant's writing ability, language proficiency, and GPA. Please print the following information:

GPA Release

Last Name	First Name	MI	Full Social Security No.	1L Section
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Address	City	State	Phone
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I authorize The University of Texas School of Law to release my overall GPA to the *Texas International Law Journal*.

I understand that unless I specify otherwise, this information may be kept as a permanent record on file with the *Texas International Law Journal*.

Signature

Date

Language Ability

As an international law journal, we are interested in your foreign language skills. Please list any foreign language(s) that you know, and circle the number that most closely corresponds to your level of proficiency. If you have experience in more than three languages, please list those languages and your skill level in each as well.

1 = Fluent (able to speak and read at a sophisticated, scholarly level)

2 = Conversational (able to speak and read at a moderate level with a general vocabulary)

3 = Basic (have rudimentary speaking and/or reading skills)

	1	2	3	
Language 1	Level of ability			

	1	2	3	
Language 2	Level of ability			

	1	2	3	
Language 3	Level of ability			

Contact Information

In order to ensure that *TILJ* is able contact students selected for membership, please provide (1) a phone number where you can be reached during early August (August 1–19), (2) a phone number where you can be reached during the last week of August (August 20–31), (3) your cell phone number if applicable, (4) your permanent (parents' home) phone number, and (5) your e-mail address. It is **essential** that you provide *TILJ* with as many alternative numbers as possible. If we cannot reach you, we will not be able to extend you an offer to join.

(1) _____ (Aug. 1–19) (2) _____ (Aug. 20–31)

(3) _____ (Cell phone) (4) _____ (Permanent)

(5) _____ (e-mail)

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HETRICK v. MARTIN
Sixth Circuit Court of Appeals (1973)

McCREE, Circuit Judge

This appeal requires us to decide whether the First Amendment prevents a state university from discharging a teacher whose pedagogical style and philosophy do not conform to the pattern prescribed by the school administration. The district court, sitting without a jury, held that the Constitution did not bar officials of Eastern Kentucky University from refusing to renew plaintiff's teaching contract on the ground of impermissible deviation from the teaching standards thought appropriate by her superiors. We affirm.

Plaintiff Phyllis Hetrick was employed as a nontenured assistant English professor at Eastern Kentucky for the 1969-70 school year . . . Her troubles with the school administration apparently began when unnamed students as well as the parents of one student complained about certain of her in-class activities. Specifically, at one point, in an attempt to illustrate the "irony" and "connotative qualities" of the English language, she told her freshman students "I am an unwed mother." At the time, she was a divorced mother of two, but she did not reveal that fact to her class. Also, she apparently on occasion discussed the war in Vietnam and the military draft with one of her freshman classes. The district court found that even though the school administration was concerned about the appropriateness of these occurrences, "it does not appear that any of the faculty members felt that Dr. Hetrick had on those particular occasions exceeded the bounds of her teaching prerogative."

After her termination by the University, plaintiff brought this action under 42 U.S.C. § 1983 for declaratory and injunctive relief against the president and regents of Eastern Kentucky University. She asserted that her First and Fourteenth Amendment rights had been violated by her termination . . . on an arbitrary basis, for making in-class statements about the war and the draft, and because of her beliefs and ideas. The intervening decisions of the Supreme Court . . . narrowed the issue in this case to whether

plaintiff had been terminated for conduct on her part protected by the First Amendment.

The district court concluded that the decision not to renew plaintiff's contract was the result of defendants' "concern for her teaching methods and ability," and was not prompted by her exercise of First Amendment rights. In discussing the scope of the protection afforded teachers by the First Amendment, the court stated:

The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has a right to require some conformity with whatever teaching methods are acceptable to it. In this case it simply appears that Dr. Hetrick's teaching techniques were not acceptable to the University. The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy—it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English Department—but the fact that the University decided that they were not and chose not to renew her contract, does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.

In a memorandum opinion filed with the court's findings of fact and conclusions of law, the court elaborated on its findings in this regard:

It is Dr. Hetrick's position that the non-renewal of her contract resulted from certain statements she made in her classes relating to the Vietnam War and the military draft. . . . It simply seems that Dr. Hetrick's teaching methods were too progressive, or perhaps less orthodox than the other faculty members

in her department felt were conducive to the achievement of the academic goals they espoused. The court must conclude that a State University has the authority to refuse to renew a non-tenured professor's contract for the reason that the teaching methods of that professor do not conform with those of the tenured faculty or with those approved of by the University.

Thus, we are squarely presented with the question whether the administration of a public school may, consistent with the First Amendment, fail to renew a nontenured teacher because of displeasure with her "pedagogical attitudes." We conclude, as did the district court, that it may.

We do not accept plaintiff's assertion that the school administration abridged her First Amendment rights when it refused to rehire her because it considered her teaching philosophy to be incompatible with the pedagogical aims of the University. Whatever may be the ultimate scope of the amorphous "academic freedom" guaranteed to our Nation's teachers and students, it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession.

**KEYISHIAN v. BOARD OF REGENTS OF
THE UNIVERSITY OF THE STATE OF
NEW YORK
Supreme Court of the United States (1967)**

Mr. Justice BRENNAN delivered the opinion of the Court.

Appellants were members of the faculty of the privately owned and operated University of Buffalo, and became state employees when the University was merged in 1962 into the State University of New York, an institution of higher education owned and operated by the State of New York. As faculty members of the State

University their continued employment was conditioned upon their compliance with a New York plan, formulated partly in statutes and partly in administrative regulations, which the State utilizes to prevent the appointment or retention of "subversive" persons in state employment.

Each of them refused to sign, as regulations then in effect required, a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York. Each was notified that his failure to sign the certificate would require his dismissal. Keyishian's one-year-term contract was not renewed because of his failure to sign the certificate. Hochfield and Garver, whose contracts still had time to run, continue to teach, but subject to proceedings for their dismissal if the constitutionality of the New York plan is sustained.

A three-judge federal court held that the program was constitutional. We reverse.

There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion. But "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." The principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks. In *De Jonge v. Oregon*, the Court said:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the

Republic, the very foundation of constitutional government.

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.” In *Sweezy v. New Hampshire*, we said:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

We emphasize once again that “[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,” “[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive,

government may regulate in the area only with narrow specificity.” New York’s complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will “steer far wider of the unlawful zone” For “[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.” The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.

...

**BURK v. AUGUSTA-RICHMOND
COUNTY**
Eleventh Circuit Court of Appeals (2004)

ANDERSON, Circuit Judge
Martha Burk, the National Council of Women’s Organizations, and the Rainbow/PUSH Coalition (referred to collectively as “Burk”) appeal from the district court’s denial of their motion for preliminary injunction in a challenge to the constitutionality of Augusta-Richmond County’s permitting requirement for public demonstrations in groups of five or more people. The appeal presents two questions: (1) the facial constitutionality of requiring groups of five or more persons to obtain a permit before publicly engaging in political expression in a public forum; and (2) whether requiring permit applicants to submit an indemnification agreement “in a form satisfactory” to the county attorney grants the attorney unconstitutional discretion over permitting decisions. We find the Ordinance unconstitutional in each respect and reverse.

A. The Augusta-Richmond County Ordinance

Section 3-4-11 of the Augusta-Richmond County Code (the “Ordinance”), enacted in anticipation of protests during the then-forthcoming Masters Golf Tournament held annually at the Augusta National Golf Club, states:

There shall be no public demonstration

or protest, (hereinafter collectively referred to as “event”) consisting of five (5) or more persons on any sidewalk, street, public right-of-way or other public property within Augusta unless a permit for same has been issued for such event by the Sheriff of Richmond County.

Augusta-Richmond County Code § 3-4-11. The Code defines “Protest/Demonstration” as “Any expression of support for, or protest of, any person, issue, political or other cause or action which is manifested by the physical presence of persons, or the display of signs, posters, banners, and the like.” § 3-4-1(e). Violating the Ordinance is a misdemeanor punishable by a \$ 1,000 fine and/or 60 days imprisonment.

The County Sheriff may deny an application for any of several reasons.

...
A. The Constitutionality of the Permitting Provision

...
Because it requires groups of five or more people to obtain permission from the County Sheriff in order to carry out a protest or demonstration, the Augusta-Richmond Ordinance is a prior restraint on speech. Prior restraints are presumptively unconstitutional and face strict scrutiny. Nonetheless, a prior restraint may be approved if it qualifies as a regulation of the time, place, and manner of expression rather than a regulation of content. A content-neutral time, place, and manner regulation must leave open alternative channels of communication and survive “intermediate scrutiny,” the requirement that it not restrict substantially more speech than necessary to further a legitimate government interest. By contrast, content-based speech regulations face “strict scrutiny,” the requirement that the government use the least restrictive means of advancing a compelling government interest.

Accordingly, we first inquire whether the Ordinance is content-neutral. It is not. The Ordinance applies only to “public demonstration or protest,” § 3-4-11, defined as “support for, or protest of, any person, issue, political or other cause or action,” § 3-4-1(e). Neither in its brief

nor at oral argument has the County disputed Burk’s assertion that this language targets “political” expression, however defined. Nor has the County disputed the fact that the Ordinance leaves other speech untouched. The Ordinance therefore classifies and regulates expression on the basis of content.

...
The Ordinance’s purported goals are maintaining public safety, avoiding traffic congestion, keeping the peace, and providing advance notice to law enforcement officials of public events. But the Ordinance regulates countless expressive activities that do not threaten public safety, traffic, or the peace, and it fails to regulate countless other expressive activities that do threaten the harms. For example, the ordinance does not apply to numerous activities involving more than five people—e.g., a street party, a tail-gating party, a sidewalk performance by a five-person musical group, or even a high school band—that will likely threaten the County’s feared harms. And the Ordinance restricts a five-person political discussion or silent sit-in on the sidewalk’s edge even though such events are unlikely to threaten the County’s feared harms. In other words, there are easily “a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute’s scope, while others fall inside.” Therefore, the Ordinance is not justified by its purported content-independent goals, and the County has regulated based on content.

...
The County errs by failing to appreciate the difference between picketing—which is a method of delivery of speech involving conduct without regard to any particular message or subject matter—and the County’s definition of “Protest/Demonstration,” which expressly targets all expression on a certain subject matter, political speech. Of course, people engaging in picketing nearly always intend to send a message of some kind along with their acts. However, the acts themselves—standing, marching, or holding a sign, for example—do not involve any particular expressive content, and the conduct may therefore be regulated without burdening any particular viewpoint or subject matter. A content-neutral conduct

regulation like those at issue in *Frisby* . . . “places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed,” and it may be said about such regulations that they have nothing to do with the content of speech but rather are imposed because of the nature of the regulated conduct. Thus, a content-neutral conduct regulation applies equally to all, and not just to those with a particular message or subject matter in mind. The same cannot be said of the Augusta-Richmond County Ordinance because it applies to a particular subject matter of expression, politics, rather than to particular conduct, such as picketing.

...

Because the Ordinance is a content-based prior restraint on speech, we must strictly scrutinize it to ascertain whether it employs the least restrictive means to meet a compelling government interest. Few laws survive such scrutiny, and this Ordinance is no exception. The County could promote its goals through numerous less restrictive means. It could, for example, target only offensive behavior or the manner of delivery of speech without regard to viewpoint or subject matter. Or it could tailor its regulation more closely to fit expressive instances or conduct likely to threaten the harms it fears. Or it could enact an ordinance . . . which applies generally, without reference to expressive content, and only to larger groups. Finally, it is clear that regulating as few as five peaceful protestors (e.g. silently sitting in on the edge of the sidewalk) is not the least restrictive means of accomplishing the County’s legitimate traffic flow and peace-keeping concerns.

...



ROBERTS v. HARAGAN
United States District Court for the Northern
District of Texas (2004)

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are not in dispute. At the time of the actions relevant to this case, Plaintiff was a student at Texas Tech University Law School. Plaintiff wanted to deliver a speech and

pass out literature on campus in order to express his religious and political views that “homosexuality is a sinful, immoral, and unhealthy lifestyle.”

...

III. ANALYSIS

The University currently operates under a policy that regulates student conduct, including speech-related activities, on campus. Plaintiff requested permission to engage in constitutionally protected speech pursuant to a former version of the policy (the “prior policy”), which has now been superseded by a revised, interim policy (the “interim policy”). . . . Plaintiff complains that the interim policy is facially unconstitutional.

A. What Kind of Forum is the University Campus?

In order to “ascertain what limits, if any, may be placed on protected speech [the United States Supreme Court has] often focused on the place of that speech, considering the nature of the forum the speaker seeks to employ.” Central to the analysis then in this case is the character of a public university campus. As the Supreme Court has noted, “The college classroom with its surrounding environs is peculiarly the marketplace of ideas.” According to the Supreme Court, it cannot be argued that “either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Although First Amendment rights must always be applied “in light of the special characteristics of the . . . environment in the particular case,” and schools are afforded a certain degree of latitude to control conduct on their campuses, the Supreme Court has noted that “state colleges and universities are not enclaves immune from the sweep of the First Amendment.” The precedents of the Supreme Court “leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is

nowhere more vital than in the community of American schools.”

As with any government-owned property, the standard by which the constitutionality of any regulation of free speech and expressive activity on a public university campus must be evaluated “differs depending on the character of the property at issue.” Where First Amendment activity is concerned, the Supreme Court has adopted “forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes.” Historically, the Court has characterized government-owned property as one of three categories of forums: (1) the “traditional public forum,” (2) the “public forum created by government designation,” i.e., the “designated public forum,” and (3) the “nonpublic forum.”

...
This Court begins its analysis of the facts of this case by recognizing one axiom: the entire University campus is not a public forum subject to strict scrutiny. That this is true is clear from the Supreme Court’s recognition that “the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” “Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes.” Likewise, the Supreme Court has made it clear that

publicly owned or operated property does not become a “public forum” simply because members of the public are permitted to come and go at will. . . . We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please . . . There is little doubt that in some circumstances the Government may ban the entry on to public property that is not a “public forum” of all persons except those who have legitimate business on the premises. The Government, no less than

a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.

However, this Court must also recognize an equally important axiom: the “campus of a public university, at least for its students, possesses many characteristics of a public forum.” “The campus’s function as the site of a community of full-time residents makes it a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment, and suggests an intended role more akin to a public street or park than a non-public forum.” As a community for its students, “a campus of a major state university is a microcosm of the [larger] community [outside its boundaries], and, as such, contains a variety of fora,” both public and non-public.

Taking these two axioms at face value, this Court makes this preliminary assumption about the Texas Tech University campus: to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University’s students, irrespective of whether the University has so designated them or not. These areas comprise the irreducible public forums on the campus. Of course, the University, by express designation, may open up more of the residual campus as public forums for its students, but it can not designate less. Consequently, any restriction of the content of student speech in these areas is subject to the strict scrutiny of the “compelling state interest” standard, and content-neutral restrictions are permissible only if they are reasonable time, place, and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication. This assumption necessarily implies its converse: not all places within the boundaries of the campus are public forums. Those areas not public forums, either by virtue of their correspondence to traditional public forums, or by express designation, are therefore either non-public forums or limited public forums.

...

The “all inclusive” nature of the government ownership of the entire University campus does not moot the reality that the campus comprises, at least as to its students, a variety of forums. Neither can the fact that use of the University campus, for most intents and purposes, is “limited” to that of the students and University personnel, lead to the conclusion that it is therefore a “limited public forum” subject only to a reasonableness standard. The University’s policy is unconstitutional to the extent it regulates the content of student speech in areas of the campus that are public forums, either by tradition or designation, in order to serve anything less than a compelling interest. In addition, it is unconstitutional to the extent that it imposes on expression in those public forums any content-neutral regulations that serve anything less than a significant interest and that do not provide for adequate alternate venues for that expression. With this understanding clearly in mind, the Court will proceed to its analysis . . .

...

C. *The University’s Interim Policy*

...

Texas Tech University is a state university governed by its board of regents. The Rules and Regulations of the Board of Regents of the Texas Tech University System, Rule 08.07, adopted on May 11, 2001, governs the use of the University’s campus and facilities. That Rule makes the campus and facilities available subject to the following priorities:

- a. regular institutional programs;
- b. programs sponsored and conducted by the TTU system and/or a component institution(s) academic and administrative departments or organizations which are affiliated with such departments: and
- c. activities that have as their purpose, service or benefit to the entire . . . TTU system community and that are sponsored by registered student organizations.

...

After designating several specific facilities and areas of the University that are subject to specific limitations or priorities congruent with their intended functions, such as the academic buildings, residence halls, and athletic and recreational facilities, the University’s interim policy designates several other areas, identified as “forum areas,” where unrestricted student expression is allowed on a “first-come, first-served” basis. No permission is required for student expression in the forum areas. Requests for permission to engage in “free expression activities” outside the forum areas must be made at least two business days prior to the date of the requested activity. Requests are to be submitted to the Center for Campus Life, the director or designee of which “will review the request only for noncontent-based criteria” and issue a response within two business days. Denials of requests “will be accompanied by a written explanation of any noncontent-based reasons” for the denial, and denials “may be appealed to the vice president for Student Affairs, or his designee, who will provide a written final decision for noncontent-based criteria no later than two business days after the appeal is filed.”

Students who engage in free expression on campus may be subject to discipline for

activities that include, but are not limited to, physical, verbal, written or electronically transmitted threats, insults, epithets, ridicule or personal attacks or the categories of sexually harassing speech set forth in the Code of Student Conduct that . . . are personally directed at one or more specific individuals based on the individual’s appearance, personal characteristics or group membership, including, but not limited to, race, color, religion, national origin, gender, age, disability, citizenship, veteran status, sexual orientation, ideology, political view or political affiliation; and . . . are sufficiently severe or pervasive to create an objectively hostile environment for that individual by interfering with or diminishing his or her ability to

participate in, or benefit from, services, activities or privileges provided by the university.

However, “to make an argument for or against the substance of any political, religious, philosophical, ideological or academic idea is not harassment, even if some listeners are offended by the argument or idea.”

Lastly, the interim policy permits distribution of printed materials as follows:

Students and registered student organizations do not need prior approval concerning the content or distribution of such materials as leaflets and handbill. However, students may be required to provide student identification upon request. The director of the Center for Campus Life may impose restriction on the time, place and manner for distribution of printed materials, except for those distributed in the forum areas. The materials, however, may not conflict with the provisions of the *Code of Student Conduct* and must comply with all applicable local, state, and federal laws.

...

3. *The Speech Code*

Plaintiff contends that the Speech Code ban on insults, epithets, ridicule, or personal attacks is also a content-based restriction, because it is based on the potential reaction to the speech by individuals in the audience. Plaintiff argues that the Speech Code amounts to a content-based restriction on student expression because any regulation that restricts expression “out of concern for its likely communicative impact . . . can not be justified without reference to the content of the regulated speech.” Plaintiff asserts that this attempt to predict the benefit of the speech’s content before it occurs carries with it a heavy presumption against constitutionality. Defendants argue, correctly, that the Speech Code does not prohibit speech prospectively but only applies after a student has violated the Speech Code.

In further objecting to the Speech Code, Plaintiff argues alternatively that, even if the Speech Code is a content-neutral regulation, the University only has the right to apply content-neutral restrictions to students’ expressive conduct that “materially and substantially interferes with the requirements of appropriate discipline in the operation of the school,” or that “impinges upon the rights of other students.” Plaintiff insists that the Speech Code goes further than is permitted on a university campus.

Plaintiff argues that the interim policy is overbroad and therefore facially invalid because it is not narrowly tailored and goes well beyond the University’s significant interest in maintaining order on its campus and trespasses on protected student expression. Plaintiff contends that the Speech Code controls speech that may only be potentially disruptive and that “unsubstantiated fear or apprehension” that a student or student group’s speech will cause disruption is insufficient to restrict student expression. He argues that there is no basis for concluding that all such student expression, however unobtrusive and quiet, will always disrupt the campus or cause someone to feel ridiculed or insulted, citing *Tinker* for the proposition that expression may not be restricted merely to avoid the risk that “any variation from the majority’s opinion may inspire fear[,] . . . start an argument, or cause a disturbance.” Plaintiff also considers the Speech Code to be impermissibly vague, not providing students with sufficient notice as to what expression might cause them to run afoul of the Code and causing them to censor themselves in order to avoid such infractions.

The University responds that the purposes served by the Speech Code fall within the scope of the University’s legitimate interests and that there is no danger of any substantial effect on expression that is not subject to those legitimate interests. The University contends that any instance of speech that is intended to harass or intimidate others that is constitutionally protected could only comprise a negligible portion of the harassment targeted by the policy. It also charges Plaintiff with failure to produce any example where the University has in fact implemented its policy against

students engaged in casual conversations on campus. In response to Plaintiff's claim that the Speech Code is vague, the University counters that it is not required to have standards that are absolutely incapable of any misunderstanding.

"Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Because the application of the overbreadth doctrine is "manifestly strong medicine," before a statute or regulation may be invalidated on its face, the overbreadth must be "substantial." "There must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." The issue for First Amendment purposes is whether the law in question reaches "a substantial amount of constitutionally protected conduct."

The doctrine of overbreadth, while extremely circumscribed in most applications, is generally afforded a broader application where First Amendment rights are involved. This is a consequence of the doctrine's concern that much protected speech might suffer a "chilling" effect from a statute's potential application in circumstances beyond those that involve clearly unconstitutional speech or conduct. In its application, however, how substantial the overbreadth needs to be is a function of the doctrine's "concern with chilling" protected speech," and the degree of substantiality required correspondingly "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from pure speech toward conduct." "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."

The Speech Code that makes up part of the University's interim policy is undeniably regulation that is "specifically addressed to

speech or to conduct necessarily associated with speech," i.e., "threats, insults, epithets, ridicule, or personal attacks, or the categories of sexually harassing speech." Under these circumstances, this Court's concern for the possible "chilling" effect of such a policy does not attenuate but rather strengthens considerably in favor of applying the overbreadth doctrine. Undeniably, much of the speech it regulates lies outside those categories of constitutionally unprotected speech, such as fighting words, libel, and obscenity, that have been recognized by long-standing jurisprudence. This Court is of the opinion that application of the Speech Code to the public forum areas on campus would suppress substantially more than threats, "fighting words," or libelous statements that may be considered constitutionally unprotected speech, to include much speech that, no matter how offensive, is not proscribed by the First Amendment.

Even if this Court were to determine that the Speech Code is not a content-based restriction, but merely a content-neutral time, place, and manner regulation, the University fails to convince this Court how its interests in controlling harassing or insulting student speech is significant enough to justify trespass on students' First Amendment freedom in areas outside of the University's nonpublic forum areas. Students, no less than their counterparts outside the campus, rightly expect to have open to them public forums where their freedom of expression is not unnecessarily discounted in relation to governmental concerns, just because the government places great value on its concerns. The legitimacy of the University's concerns is not an absolute value, but rather it must be weighed relative to the student's rights it would suppress and the need to avoid a chilling effect on freedom of expression. Only then may its significance become apparent. In this Court's opinion, the significance is apparent in venues such as classrooms and other facilities and areas of the campus in which the University's proprietary interests and academic mission are most pronounced. It is in these particular settings that intimidation and the hostile environment it may foster can create barriers to equal access to all the benefits, services, activities, and privileges provided by

the University. That significance is not so apparent in the public forum areas of the campus. At some point, the University's interests must attenuate and the students' interests in having a true public forum open to their free-expression interests must predominate. Therefore, even if the Court were of the opinion that the Speech Code is a content-neutral, time, place, and manner regulation, it would still be compelled to find that it is not justified by a significant interest and would still find it unconstitutional as to the public forum areas of the campus.

...

**CHAPLINSKY v. STATE OF NEW
HAMPSHIRE**
Supreme Court of the United States (1942)

Mr. Justice MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, Section 2, of the Public Laws of New Hampshire: "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."

The complaint charged that appellant "with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names."

Upon appeal there was a trial de novo of appellant before a jury in the Superior Court. He was found guilty and the judgment of

conviction was affirmed by the Supreme Court of the State.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way they encountered Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint with the exception of the name of the Deity.

Over appellant's objection the trial court excluded as immaterial testimony relating to appellant's mission "to preach the true facts of the Bible," his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by

Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.” Freedom of worship is similarly sheltered.

Appellant here pitches his argument on the due process clause of the Fourteenth Amendment.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. 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.”

The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press

means only freedom from restraint prior to publication.

On the authority of its earlier decisions, the state court declared that the statute’s purpose was to preserve the public peace, no words being “forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” It was further said: “The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are ‘fighting words’ when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . 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 constitute 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.”

We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute 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. This conclusion necessarily disposes of appellant’s contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law.

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the

privilege of free speech. 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.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge or may be shown in mitigation are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

COHEN v. CALIFORNIA
Supreme Court of the United States (1971)

Mr. Justice HARLAN delivered the opinion of the Court

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code § 415 which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct” He was given 30 days’ imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

“On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words ‘Fuck the Draft’ which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of

informing the public of the depth of his feelings against the Vietnam War and the draft.

“The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.”

. . .

I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* present.

The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only “conduct” which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon “speech,” not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen’s ability to express himself. Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Appellant’s conviction, then, rests squarely upon his exercise of the “freedom of speech” protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been

thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

...
[A]s it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer."

No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in

order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately

sweeps within its prohibitions all “offensive conduct” that disturbs “any neighborhood or person.”

II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as “offensive conduct,” one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an “undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.” We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above

but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why “wholly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons,” and why “so long as the means are peaceful, the communication need not meet standards of acceptability.”

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its

BLAIR v. CITY OF EVANSVILLE
United States District Court for the Southern
District of Indiana (2005)

genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, "one of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

Reversed.

II. Background

...
Vice President Dick Cheney ("the Vice President" or "Vice President Cheney") visited Evansville, Indiana, on Wednesday, February 6, 2002, to appear at an event at the Centre. The Vice President's appearance in Evansville was his first public appearance following the attacks on the World Trade Center and Pentagon on September 11, 2001.

...
At any event attended by the Vice President, the Secret Service creates a "secure area" in order to ensure the Vice President's physical safety. To evaluate the size and scope of the appropriate secure area at a given venue, the Secret Service considers a number of factors, including emergency vehicle access, the potential for emergency evacuation of the Vice President and other building occupants, and the set-off distances necessary to mitigate the effectiveness of a variety of weapons.

...
Blair is an Evansville resident On February 6, 2002, in order to make a statement about the Vice President, Blair traveled to the area near the Center with a sign that stated "Cheney, 19th Century Energy Man." The sign was a comment on the Vice President's relationship with energy companies. The sign was approximately thirty inches by forty inches.

Blair had intended to meet people near the Centre, however, when they did not show up by 4:15 p.m., he walked toward the venue. Blair did not see any area designated for protest and did not see any person in the designated protest area as he walked by. Therefore, he walked to an area where people attending the event could see his sign. He stood across Locust Street from the only open entrance to the Centre and slightly northwest of that entrance. At that point, Locust Street is approximately thirty-six to forty feet wide. Blair stood approximately 100 feet from the entrance.

Blair stood silently on the sidewalk with his sign, although people could walk around him.

Blair stood at this location for less than five minutes before Welcher approached him. Welcher noticed Blair holding the sign. Blair was not being loud or disruptive when Welcher first saw him. However, Welcher informed Blair that he could not stand on the sidewalk because protest was not allowed in that area. Welcher indicated that there was a designated area for protesters that Blair had to go to if he wished to engage in protest. Blair objected and noted that the Civic Center of the community should be an appropriate place to engage in protest. Nevertheless, Welcher indicated that Mr. Blair had to move on. Blair asked on whose authority this order was being made. Welcher indicated that he had created a Public Safety Order requiring him to move on. A Public Safety Order is a technique taught to Evansville police officers to deal with crowds, demonstrations, and large groups where a need arises to take action to preserve the peace and order, and to protect public safety.

Blair did not want to walk to the end of the street to the location pointed out by Welcher because this area was so far away that no one attending the event, including the Vice President, would be able to see his sign. Welcher told Blair on a number of occasions, apparently four or five times, that Blair had to move.

A. FIRST AMENDMENT CLAIM

First, the no-protest zone at issue in this case was not narrowly tailored to serve a significant government interest. “[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” The inquiry is whether or not the no-protest zone “burdened substantially more speech than . . . necessary to further [Defendants’] legitimate interests.” Moreover, the no-protest zone cannot be held invalid “simply because the [C]ourt concludes that the government’s interest could be

adequately serviced by some less- speech-restrictive alternative.”

The Court concurs with Defendants that security for this event must be looked at through the lens of the close-in-time events of 9/11. In that regard, the decision to limit the loitering, or standing, of individuals within a specific area around the Centre was a reasonable restriction of the ability of protestors to convey their messages. Defendants considered the ingress and egress of participants, including the Vice President and the public, in regular or emergency situations, and considered the distance necessary to minimize the risk of injury from weapons. These concerns, coupled with the history of protecting the Vice President during other events and the more recent awareness for the potential of terrorism at large events in general, justified Defendants’ decision to create a no-protest zone. The Court finds that without such a zone, Defendants could not have provided for the protection of Vice President Cheney or the public as effectively.

However, the restriction of protesters to an area 500 feet away from the only entrance used by attendees, and on the opposite end of the building from where Vice President Cheney would enter the facility and from where the majority of people attending the event would park, burdened speech substantially more than was necessary to further the Defendants’ goals of safety. Defendants contend that this was a necessary precaution because they needed to “maintain the possibility of emergency ingress and egress, and the presence of individuals or groups standing in the area [outside the security zone] could impede such access.” But this reason just repeats the justification for having a “security zone” or “no-protest zone” in the first place. It does not add an additional danger or articulate why demonstrators needed to be corralled 500 feet from the only entrance open during the Vice President’s visit. Defendants articulated no particularized threat to the Vice President or the event itself to justify the large distance between the protest zone and the intended audience. Furthermore, other cases that have looked at restrictions on access to public buildings similar to the Centre have found a

violation of the First Amendment on more narrow restrictions.

Defendants also argue that this was the place nearest to the facility that would allow protestors to be seen by the Vice President and also by attendees, plus achieve Defendants' safety goals. Yet, the parking lot used by most attendees, the one on Ninth Street, was more than 500 feet away from the protest zone. It is unlikely that persons entering the Centre for the event could see the protestors . . . who were almost the length of two football fields away, much less have the opportunity to hear any message they wished to convey. [T]he location of the protest zone here eliminated any meaningful avenue for the communication of ideas by the protestors to at least one intended audience, the attendees.

Defendants' contention that the large no-protest zone and that the specific location for the protest zone was necessary is also belied by the fact that the Vice President's motorcade was allowed to pass directly next to the protest zone. If the concern about mitigating the effect of a variety of weapons weighed heavily in the decision to place the protest zone 500 feet away from the only entrance to the event, and more than 500 feet away from the parking lot where most of the attendees would park, then it is inconsistent to allow the protected target, Vice President Cheney, to be a sidewalk away from that very zone at any time.

Defendants' assertion that other options were available to Blair is significantly undermined by the fact that when Blair asked to conduct his protest in the parking lot across from the Centre on Ninth Street, Welcher told him no. This fact belies Defendants' contention that Blair had realistic options to convey his message to his intended audience. Defendants also aver that there would have been no restriction on Blair's carrying his thirty inch by forty inch sign in to the Centre as an attendee and carrying out his protest within the Centre. There is no evidence to suggest that Defendants would have allowed this type of activity within the Centre when they decided to significantly curtail it on the outside. Defendants simply provided no adequate or realistic alternative for Blair's demonstration.

In summary, the Court finds that Defendants' creation of a large no-protest zone, and the creation of a designated protest zone 500 feet or more away from Blair's targeted audience violated Blair's First Amendment Rights.

...

BRANDENBURG v. OHIO
Supreme Court of the United States (1969)

PER CURIAM

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

...

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and,

in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech . . . was as follows:

“This is an organizers’ meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.

“We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.”

. . .

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California’s Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. The Court upheld the statute on the ground that, without more, “advocating” violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But [this decision] has been thoroughly discredited by later decisions. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group

for violent action and steeling it to such action.” A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio’s Criminal Syndicalism Act cannot be sustained. The Act punishes persons who “advocate or teach the duty, necessity, or propriety” of violence “as a means of accomplishing industrial or political reform”; or who publish or circulate or display any book or paper containing such advocacy; or who “justify” the commission of violent acts “with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism”; or who “voluntarily assemble” with a group formed “to teach or advocate the doctrines of criminal syndicalism.” Neither the indictment nor the trial judge’s instructions to the jury in any way refined the statute’s bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.

. . .

**MADSEN v. WOMEN’S HEALTH CENTER
Supreme Court of the United States (1994)**

Mr. Chief Justice REHNQUIST delivered the opinion of the Court
Petitioners challenge the constitutionality of an injunction entered by a Florida state court which prohibits antiabortion protesters from demonstrating in certain places and in various ways outside of a health clinic that performs abortions. We hold that the establishment of a 36-foot buffer zone on a public street from which demonstrators are excluded passes muster under the First Amendment

I

Respondents operate abortion clinics throughout central Florida. Petitioners and other groups and individuals are engaged in activities near the site of one such clinic in Melbourne, Florida. They picketed and demonstrated where the public street gives access to the clinic. . . . The trial court thereupon issued a broad[] injunction, which is challenged here.

The court found that, despite the initial injunction, protesters continued to impede access to the clinic by congregating on the paved portion of the street—Dixie Way—leading up to the clinic, and by marching in front of the clinic’s driveways. It found that as vehicles heading toward the clinic slowed to allow the protesters to move out of the way, “sidewalk counselors” would approach and attempt to give the vehicle’s occupants antiabortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns.

The protests . . . took their toll on the clinic’s patients. A clinic doctor testified that, as a result of having to run such a gauntlet to enter the clinic, the patients “manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures.” The noise produced by the protesters could be heard within the clinic, causing stress in the patients both during surgical procedures and while recuperating in the recovery rooms. And those patients who turned away because of the crowd to return at a later date, the doctor testified, increased their health risks by reason of the delay.

Doctors and clinic workers, in turn, were not immune even in their homes. Petitioners picketed in front of clinic employees’ residences; shouted at passersby; rang the doorbells of neighbors and provided literature identifying the particular clinic employee as a “baby killer.” Occasionally, the protesters would confront minor children of clinic employees who were home alone.

This and similar testimony led the state court to conclude that its original injunction had

proved insufficient “to protect the health, safety and rights of women in Brevard and Seminole County, Florida and surrounding counties seeking access to [medical and counseling] services.” The state court therefore amended its prior order, enjoining a broader array of activities.

. . .

II

We begin by addressing petitioners’ contention that the state court’s order, because it is an injunction that restricts only the speech of antiabortion protesters, is necessarily content or viewpoint based. Accordingly, they argue, we should examine the entire injunction under the strictest standard of scrutiny. We disagree. To accept petitioners’ claim would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group’s past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion, and of any consequent request that their demonstrations be regulated by injunction. There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner’s message.

Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech “without reference to the content of the regulated speech.” We thus look to the government’s purpose as the threshold consideration. Here, the state court imposed restrictions on petitioners incidental to

their antiabortion message because they repeatedly violated the court’s original order. That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court’s order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based. Accordingly, the injunction issued in this case does not demand [a] level of heightened scrutiny And we proceed to discuss the standard which does govern.

III

. . .

1

We begin with the 36-foot buffer zone. The state court prohibited petitioners from “congregating, picketing, patrolling, demonstrating or entering” any portion of the public right-of-way or private property within 36 feet of the property line of the clinic as a way of ensuring access to the clinic. This speech-free buffer zone requires that petitioners move to the other side of Dixie Way and away from the driveway of the clinic, where the state court found that they repeatedly had interfered with the free access of patients and staff. . . . The buffer zone also applies to private property to the north and west of the clinic property. We examine each portion of the buffer zone separately.

We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation. Here the picketing is directed primarily at patients and staff of the clinic.

The 36-foot buffer zone protecting the entrances to the clinic and the parking lot is a means of protecting unfettered ingress to and egress from the clinic, and ensuring that petitioners do not block traffic on Dixie Way. The state court seems to have had few other

options to protect access given the narrow confines around the clinic. As the Florida Supreme Court noted, Dixie Way is only 21 feet wide in the area of the clinic. The state court was convinced that allowing petitioners to remain on the clinic’s sidewalk and driveway was not a viable option in view of the failure of the first injunction to protect access. And allowing the petitioners to stand in the middle of Dixie Way would obviously block vehicular traffic.

The need for a complete buffer zone near the clinic entrances and driveway may be debatable, but some deference must be given to the state court’s familiarity with the facts and the background of the dispute between the parties even under our heightened review. Moreover, one of petitioners’ witnesses during the evidentiary hearing before the state court conceded that the buffer zone was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic. Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots. We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order. On balance, we hold that the 36-foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake.

. . .

2

. . .

B

In response to high noise levels outside the clinic, the state court restrained the petitioners from “singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the [c]linic” during the hours of

7:30 a.m. through noon on Mondays through Saturdays. We must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary. We have upheld similar noise restrictions in the past, and as we noted in upholding a local noise ordinance around public schools, “the nature of a place, ‘the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable.’” Noise control is particularly important around hospitals and medical facilities during surgery and recovery periods, and in evaluating another injunction involving a medical facility, we stated:

“Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day’s activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.”

We hold that the limited noise restrictions imposed by the state court order burden no more speech than necessary to ensure the health and well-being of the patients at the clinic. The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests. “If overamplified loudspeakers assault the citizenry, government may turn them down.” That is what the state court did here, and we hold that its action was proper.

C

The same, however, cannot be said for the “images observable” provision of the state court’s order. Clearly, threats to patients or proscribable under the First Amendment. But rather than prohibiting the display of signs that could be interpreted as threats or veiled threats, the state court issued a blanket ban on all “images observable.” This broad prohibition on all “images observable” burdens more speech

than necessary to achieve the purpose of limiting threats to clinic patients or their families. Similarly, if the blanket ban on “images observable” was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by “images observable” inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment.

D

The state court ordered that petitioners refrain from physically approaching any person seeking services of the clinic “unless such person indicates a desire to communicate” in an area within 300 feet of the clinic. The state court was attempting to prevent clinic patients and staff from being “stalked” or “shadowed” by the petitioners as they approached the clinic.

But it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters’ speech is independently proscribable (*i.e.*, “fighting words” or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand. “As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.” The “consent” requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

E

The final substantive regulation challenged by petitioners relates to a prohibition against picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff. The prohibition also covers impeding access to streets that provide the sole access to streets on which those residences are located. The same analysis applies to the use of sound amplification equipment here as that discussed above: the government may simply demand that petitioners turn down the volume if the protests overwhelm the neighborhood.

As for the picketing, our prior decision upholding a law banning targeted residential picketing remarked on the unique nature of the home, as “the last citadel of the tired, the weary, and the sick.” We stated that “[t]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”

But the 300-foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby*. The ordinance at issue there made it “unlawful for any person to engage in picketing before or about the residence or dwelling of any individual.” The prohibition was limited to “focused picketing taking place solely in front of a particular residence.” By contrast, the 300-foot zone would ban “[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.” The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.

...

**AMERICAN BOOKSELLERS
ASSOCIATION v. HUDNUT
Seventh Circuit Court of Appeals (1985)**

EASTERBROOK, Circuit Judge.

Indianapolis enacted an ordinance defining “pornography” as a practice that discriminates against women. “Pornography” is to be redressed through the administrative and judicial methods used for other discrimination. The City’s definition of “pornography” is considerably different from “obscenity,” which the Supreme Court has held is not protected by the First Amendment.

...

“Pornography” under the ordinance is “the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”

The statute provides that the “use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.” The ordinance as passed in April 1984 defined “sexually explicit” to mean actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus. An amendment in June 1984 deleted this provision, leaving the term undefined.

The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or

to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many amici point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. And as one of the principal drafters of the ordinance has asserted, “if a woman is subjected, why should it matter that the work has other value?”

Civil rights groups and feminists have entered this case as amici on both sides. Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce’s *Ulysses* to Homer’s *Iliad*; both depict women as submissive objects for conquest and domination.

We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way—in sexual encounters “premised on equality”—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

I

The ordinance contains four prohibitions. People may not “traffic” in pornography, “coerce” others into performing in pornographic works, or “force” pornography on anyone. Anyone injured by someone who has

seen or read pornography has a right of action against the maker or seller.

...

II

The plaintiffs are a congeries of distributors and readers of books, magazines, and films. The American Booksellers Association comprises about 5,200 bookstores and chains. The Association for American Publishers includes most of the country’s publishers. Video Shack, Inc., sells and rents video cassettes in Indianapolis. Kelly Bentley, a resident of Indianapolis, reads books and watches films. There are many more plaintiffs. Collectively the plaintiffs (or their members, whose interests they represent) make, sell, or read just about every kind of material that could be affected by the ordinance, from hard-core films to W.B. Yeats’s poem “Leda and the Swan” (from the myth of Zeus in the form of a swan impregnating an apparently subordinate Leda), to the collected works of James Joyce, D.H. Lawrence, and John Cleland.

...

III

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Under the First Amendment the government must leave to the people the evaluation of ideas. Bold or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

The ideas of the Klan may be propagated. Communists may speak freely and

run for office. The Nazi Party may march through a city with a large Jewish population. People may criticize the President by misrepresenting his positions, and they have a right to post their misrepresentations on public property. People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because “above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas”

Under the ordinance graphic sexually explicit speech is “pornography” or not depending on the perspective the author adopts. Speech that “subordinates” women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in “positions of servility or submission or display” is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an “approved” view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious

before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, “pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights [of all kinds].”

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler’s orations affected how some Germans saw Jews. Communism is a world view, not simply a Manifesto by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government. Religions affect socialization in the most pervasive way. . . . Many people believe that the existence of television, apart from the content of specific programs, leads to intellectual laziness, to a penchant for violence, to many other ills. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution—a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant. Seditious libel is protected speech unless the danger is not only grave but also imminent.

Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

It is possible to interpret the claim that the pornography is the harm in a different way. Indianapolis emphasizes the injury that models in pornographic films and pictures may suffer. The record contains materials depicting sexual torture, penetration of women by red-hot irons and the like. These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the "subordination" of women. As we discuss in Part IV, a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film.

The more immediate point, however, is that the image of pain is not necessarily pain. In *Body Double*, a suspense film directed by Brian DePalma, a woman who has disrobed and presented a sexually explicit display is murdered by an intruder with a drill. The drill runs through the woman's body. The film is sexually explicit and a murder occurs—yet no one believes that the actress suffered pain or died. In *Barbarella* a character played by Jane Fonda is at times displayed in sexually explicit ways and at times shown "bleeding, bruised, [and] hurt in a context

that makes these conditions sexual"—and again no one believes that Fonda was actually tortured to make the film. In *Carnal Knowledge* a woman grovels to please the sexual whims of a character played by Jack Nicholson; no one believes that there was a real sexual submission, and the Supreme Court held the film protected by the First Amendment. And this works both ways. The description of women's sexual domination of men in *Lysistrata* was not real dominance. Depictions may affect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder.

...

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity." If the government may declare the truth, why wait for the failure of speech?

Under the First Amendment, however, there is no such thing as a false idea, so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever "excluded" from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.

...

We come, finally, to the argument that pornography is "low value" speech, that it is enough like obscenity that Indianapolis may prohibit it. Some cases hold that speech far removed from politics and other subjects at the core of the Farmers' concerns may be subjected to special regulation. These cases do not sustain statutes that select among viewpoints, however.

At all events, "pornography" is not low value speech within the meaning of these cases. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature.

This precludes a characterization of the speech as low value. True, pornography and obscenity have sex in common. But Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value. The ordinance applies to graphic sexually explicit subordination in works great and small. The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works.

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.

...

UNITED STATES v. O'BRIEN
Supreme Court of the United States (1968)

Mr. Chief Justice WARREN delivered the opinion of the Court

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. .

. . . He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

...

II.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. . . . This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we 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. We find that the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act meets all of these requirements, and

consequently that O'Brien can be constitutionally convicted for violating it.

...

R.A.V. v. CITY OF ST. PAUL
Supreme Court of the United States (1992)

Justice SCALIA delivered the opinion of the Court

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished under any of a number of laws, one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990), which provides:

“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.”

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment. The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner's overbreadth claim because, as construed in prior Minnesota cases . . . the modifying phrase “arouses anger, alarm or resentment in others” limited the reach of the ordinance to conduct that amounts to “fighting words,” *i. e.*, “conduct that itself inflicts injury or tends to incite immediate violence . . .,” and therefore the

ordinance reached only expression “that the first amendment does not protect.” The court also concluded that the ordinance was not impermissibly content based because, in its view, “the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.” We granted certiorari.

I

[W]e accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute “fighting words” within the meaning of Chaplinsky. . . Assuming, *arguendo*, that all of the expression reached by the ordinance is proscribable under the “fighting words” doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations. Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation and for obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.

We have sometimes said that these categories of expression are “not within the area of constitutionally protected speech,” or that the “protection of the First Amendment does not extend” to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand

characterizing obscenity “as not being speech at all.” What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. We recently acknowledged this distinction in *Ferber*, where, in upholding New York’s child pornography law, we expressly recognized that there was no “question here of censoring a particular literary theme”

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government “may regulate [them] freely.” That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well. It is not true that “fighting words” have at most a “*de minimis*” expressive content, or that their content is *in all respects* “worthless and undeserving of constitutional protection”; sometimes they are quite expressive indeed. We have not said that they constitute “no part of the expression of ideas,” but only that they constitute “no *essential* part of any exposition of ideas.”

. . .

In other words, the exclusion of “fighting words” from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a “nonspeech” element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a “mode of speech”; both can be used to convey an idea; but

neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.

The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be “underinclusive,” a First Amendment “absolutism” whereby “within a particular ‘proscribable’ category of expression, . . . a government must either proscribe *all* speech or no speech at all.” That easy target is of the concurrences’ own invention. In our view, the First Amendment imposes not an “underinclusiveness” limitation but a “content discrimination” limitation upon a State’s prohibition of proscribable speech. There is no problem whatever, for example, with a State’s prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be “underinclusive,” it would not discriminate on the basis of content.

Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience* – *i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example,

only that obscenity which includes offensive *political* messages. And the Federal Government can criminalize only those threats of violence that are directed against the President, see *18 U. S. C. § 871*—since the reasons 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 person of the President. But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example, a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is “*justified* without reference to the content of the . . . speech.” A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

These bases for distinction refute the proposition that the selectivity of the restriction is “even arguably ‘conditioned upon the sovereign’s agreement with what a speaker may

intend to say.’” There may be other such bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular “neutral” basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State’s prohibiting only those obscene motion pictures with blue-eyed actresses.) Save for that limitation, the regulation of “fighting words,” like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

Applying these principles to the St. Paul ordinance, we conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” 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.

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person’s mother, for example—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 those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be *facially* valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of "bias motivated" hatred and in particular, as applied to this case, messages "based on virulent notions of racial supremacy." One must wholeheartedly agree with the Minnesota Supreme Court that "it is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear," but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, JUSTICE STEVENS suggests that this "fundamentally misreads" the ordinance. It is directed, he claims, not to speech of a particular content, but to particular "injuries" that are "qualitatively different" from other injuries. This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols

which will arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" are those symbols that communicate a message of hostility based on one of these characteristics. St. Paul concedes in its brief that the ordinance applies only to "racial, religious, or gender-specific symbols" such as "a burning cross, Nazi swastika or other instrumentality of like import." Indeed, St. Paul argued in the Juvenile Court that "the burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate."

The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. As explained earlier, the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty.

St. Paul argues that the ordinance comes within another of the specific exceptions we mentioned, the one that allows content discrimination aimed only at the "secondary effects" of the speech. According to St. Paul, the ordinance is intended, "not to impact on [*sic*] the

right of free expression of the accused,” but rather to “protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against.” Even assuming that an ordinance that completely proscribes, rather than merely regulates, a specified category of speech can ever be considered to be directed only to the secondary effects of such speech, it is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of *Renton*. As we said in *Boos v. Barry*, “Listeners’ reactions to speech are not the type of ‘secondary effects’ we referred to in *Renton*.” “The emotive impact of speech on its audience is not a ‘secondary effect.’”

It hardly needs discussion that the ordinance does not fall within some more general exception permitting *all* selectivity that for any reason is beyond the suspicion of official suppression of ideas. The statements of St. Paul in this very case afford ample basis for, if not full confirmation of, that suspicion.

Finally, St. Paul and its *amici* defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is 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 subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the “danger of censorship” presented by a facially content-based statute, requires that that weapon be employed only where it is “*necessary* to serve the asserted [compelling] interest.” The existence of adequate content-neutral alternatives thus “undercuts significantly” any defense of such a statute, casting considerable doubt on the government’s protestations that “the asserted justification is in fact an accurate description of the purpose and effect of the law.” The dispositive question in this case, therefore, is whether content discrimination is 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.

Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

The Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Press Briefing by Former White House Press Secretary Ari Fleischer (Sept. 26, 2001)

Q: As Commander-In-Chief, what was the President's reaction to television's Bill Maher, in his announcement that members of our Armed Forces who deal with missiles are cowards, while the armed terrorists who killed 6,000 unarmed are not cowards, for which Maher was briefly moved off a Washington television station?

MR. FLEISCHER: I have not discussed it with the President, one. I have—

Q: Surely, as a —

MR. FLEISCHER: I'm getting there.

Q: Surely as Commander, he was enraged at that, wasn't he?

MR. FLEISCHER: I'm getting there, Les.

Q: Okay.

MR. FLEISCHER: I'm aware of the press reports about what he said. I have not seen the actual transcript of the show itself. But assuming the press reports are right, it's a terrible thing to say, and it unfortunate. And that's why—there was an earlier question about has the President said anything to people in his own party—they're reminders to all Americans that they need to watch what they say, watch what they do. This is not a time for remarks like that; there never is.

Sedition Act (1798)

SEC. 2. And be it further enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or publishing, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.

18 U.S.C. 2385 (2005)
Advocating overthrow of Government

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

If two or more persons conspire to commit any offense named in this section, each shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

As used in this section, the terms “organizes” and “organize”, with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of

existing clubs, classes, and other units of such society, group, or assembly of persons.

**INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS**
**Adopted and opened for signature,
ratification, and accession by United Nations
General Assembly Resolution 2200A(XXI) of
16 Dec. 1966**

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Florida Senate Bill 2126
**An Act Relating to Student and Faculty
Academic Freedom in Postsecondary
Education (2005)**

WHEREAS, academic freedom consists of protecting the intellectual independence of professors, researchers, and students in the

pursuit of knowledge and the expression of ideas from interference by legislators or authorities within the institution itself, meaning that no political or ideological orthodoxy should be imposed on professors and researchers through the hiring, tenure, or termination process or through any other administrative means by the academic institution nor should legislators impose any such orthodoxy through the control of postsecondary institution budgets, and

WHEREAS, from the first statement on academic freedom, it has been recognized that intellectual independence means the protection of students as well as faculty from the imposition of any orthodoxy of a political or ideological nature, and

WHEREAS, the General Report of the Committee on Academic Freedom and Tenure of the American Association of University Professors admonished faculty to avoid “taking unfair advantage of the student's immaturity by indoctrinating him with the teacher's own opinions before the student has had an opportunity fairly to examine other opinions upon the matters in question, and before he has sufficient knowledge and ripeness of judgment to be entitled to form any definitive opinion of his own,” and

WHEREAS, in 1967, the American Association of University Professors' Joint Statement on Rights and Freedoms of Students reinforced and amplified this injunction by affirming the inseparability of “the freedom to teach and freedom to learn” and, in the words of the joint statement, “Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion”

...

(3) Students have a right to expect that their academic freedom and the quality of their education will not be infringed upon by instructors who persistently introduce controversial matter into the classroom or coursework that has no relation to the subject of study and serves no legitimate pedagogical purpose.

...

(6) Faculty and instructors have a right to academic freedom in the classroom in discussing their subjects, but they should make

their students aware of serious scholarly viewpoints other than their own and should encourage intellectual honesty, civil debate, and critical analysis of ideas in the pursuit of knowledge and truth.

Letter from Office for Civil Rights, U.S. Department of Education (2003)

...

OCR [Office for Civil Rights, U.S. Dept. of Education] has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.

...

Some colleges and universities have interpreted OCR's prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program. Thus, OCR's standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim's position, considering all the circumstances, including the alleged victim's age.

...

American Association of University Professors Statement on the Academic Bill of Rights (2003)

The past year has witnessed repeated efforts to establish what has been called an “Academic Bill of Rights.” Based upon data

purporting to show that Democrats greatly outnumber Republicans in faculty positions, and citing official statements and principles of the American Association of University Professors, advocates of the Academic Bill of Rights would require universities to maintain political pluralism and diversity. This requirement is said to enforce the principle that “no political, ideological or religious orthodoxy should be imposed on professors and researchers through the hiring or tenure or termination process.” Although Committee A endorses this principle, which we shall call the “principle of neutrality,” it believes that the Academic Bill of Rights is an improper and dangerous method for its implementation. There are already mechanisms in place that protect this principle, and they work well. Not only is the Academic Bill of Rights redundant, but, ironically, it also infringes academic freedom in the very act of purporting to protect it.

A fundamental premise of academic freedom is that decisions concerning the quality of scholarship and teaching are to be made by reference to the standards of the academic profession, as interpreted and applied by the community of scholars who are qualified by expertise and training to establish such standards. The proposed Academic Bill of Rights directs universities to enact guidelines implementing the principle of neutrality, in particular by requiring that colleges and universities appoint faculty “with a view toward fostering a plurality of methodologies and perspectives.” The danger of such guidelines is that they invite diversity to be measured by political standards that diverge from the academic criteria of the scholarly profession. Measured in this way, diversity can easily become contradictory to academic ends. So, for example, no department of political theory ought to be obligated to establish “a plurality of methodologies and perspectives” by appointing a professor of Nazi political philosophy, if that philosophy is not deemed a reasonable scholarly option within the discipline of political theory. No department of chemistry ought to be obligated to pursue “a plurality of methodologies and perspectives” by appointing a professor who teaches the phlogiston theory of

heat, if that theory is not deemed a reasonable perspective within the discipline of chemistry.

These examples illustrate that the appropriate diversity of a university faculty must ultimately be conceived as a question of academic judgment, to be determined by the quality and range of pluralism deemed reasonable by relevant disciplinary standards, as interpreted and applied by college and university faculty. Advocates for the Academic Bill of Rights, however, make clear that they seek to enforce a kind of diversity that is instead determined by essentially political categories, like the number of Republicans or Democrats on a faculty, or the number of conservatives or liberals. Because there is in fact little correlation between these political categories and disciplinary standing, the assessment of faculty by such explicitly political criteria, whether used by faculty, university administration, or the state, would profoundly corrupt the academic integrity of universities. Indeed, it would violate the neutrality principle itself. For this reason, recent efforts to enact the Academic Bill of Rights pose a grave threat to fundamental principles of academic freedom.

The Academic Bill of Rights also seeks to enforce the principle that “faculty members will not use their courses or their position for the purpose of political, ideological, religious, or antireligious indoctrination.” Although Committee A endorses this principle, which we shall call the nonindoctrination principle, the Academic Bill of Rights is an inappropriate and dangerous means for its implementation. This is because the bill seeks to distinguish indoctrination from appropriate pedagogy by applying principles other than relevant scholarly standards, as interpreted and applied by the academic profession.

If a professor of constitutional law reads the examination of a student who contends that terrorist violence should be protected by the First Amendment because of its symbolic message, the determination of whether the examination should receive a high or a low grade must be made by reference to the scholarly standards of the law. The application of these standards properly distinguishes indoctrination from competent pedagogy. Similarly, if a professor of American literature

reads the examination of a student that proposes a singular interpretation of Moby Dick, the determination of whether the examination should receive a high or a low grade must be made by reference to the scholarly standards of literary criticism. The student has no “right” to be rewarded for an opinion of Moby Dick that is independent of these scholarly standards. If students possessed such rights, all knowledge would be reduced to opinion, and education would be rendered superfluous.

The Academic Bill of Rights seeks to transfer responsibility for the evaluation of student competence to college and university administrators or to the courts, apparently on the premise that faculty ought to be stripped of the authority to make such evaluative judgments. The bill justifies this premise by reference to “the uncertainty and unsettled character of all human knowledge.” This premise, however, is antithetical to the basic scholarly enterprise of the university, which is to establish and transmit knowledge. Although academic freedom rests on the principle that knowledge is mutable and open to revision, an Academic Bill of Rights that reduces all knowledge to uncertain and unsettled opinion, and which proclaims that all opinions are equally valid, negates an essential function of university education.

...

A basic purpose of higher education is to endow students with the knowledge and capacity to exercise responsible and independent judgment. Faculty can fulfill this objective only if they possess the authority to guide and instruct students. AAUP policies have long justified this authority by reference to the scholarly expertise and professional training of faculty. College and university professors exercise this authority every time they grade or evaluate students. Although faculty would violate the indoctrination principle were they to evaluate their students in ways not justified by the scholarly and ethical standards of the profession, faculty could not teach at all if they were utterly denied the ability to exercise this authority.

Skepticism of professional knowledge, such as that which underlies the Academic Bill of Rights, is deep and corrosive. This is well illustrated by its requirement that “academic institutions . . . maintain a posture of

organizational neutrality with respect to the substantive disagreements that divide researchers on questions within . . . their fields of inquiry.” The implications of this requirement are truly breathtaking. Academic institutions, from faculty in departments to research institutes, perform their work precisely by making judgments of quality, which necessarily require them to intervene in academic controversies. Only by making such judgments of quality can academic institutions separate serious work from mere opinion, responsible scholarship from mere polemic. Because the advancement of knowledge depends upon the capacity to make judgments of quality, the Academic Bill of Rights would prevent colleges and universities from achieving their most fundamental mission.

When carefully analyzed, therefore, the Academic Bill of Rights undermines the very academic freedom it claims to support. It threatens to impose administrative and legislative oversight on the professional judgment of faculty, to deprive professors of the authority necessary for teaching, and to prohibit academic institutions from making the decisions that are necessary for the advancement of knowledge. For these reasons Committee A strongly condemns efforts to enact the Academic Bill of Rights.

The AAUP has consistently held that academic freedom can only be maintained so long as faculty remain autonomous and self-governing. We do not mean to imply, of course, that academic professionals never make mistakes or act in improper or unethical ways. But the AAUP has long stood for the proposition that violations of professional standards, like the principles of neutrality or nonindoctrination, are best remedied by the supervision of faculty peers. It is the responsibility of the professoriate, in cooperation with administrative officers, to ensure compliance with professional standards. By repudiating this basic concept, the Academic Bill of Rights alters the meaning of the principles of neutrality and nonindoctrination in ways that contradict academic freedom as it has been advanced in standards and practices which the AAUP has long endorsed.

**University of Michigan Policy on
Discrimination and Discriminatory
Harassment (1988)**

[P]ersons were subject to discipline for:

1. Any 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, marital status, handicap or Vietnam-era veteran status, and that

a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.

**The Ring of Confidence, The Herald
(Glasgow) (2005)**

RIOT theatre stages brothel play, screamed newspaper headlines last week. The stories told how Birmingham Rep, the theatre forced to cancel a production of Behzti, a play in which a rape takes place in a Sikh temple, was staging Bells. An allegedly controversial work, Bells is set in a mujra, a Pakistani courtesan club.

Behzti made its own headlines in December, when protesters demanded that Birmingham Rep cancel its performance. Death threats were made against Gurpreet Kaur Bhatti, the play's writer, who was forced to go into hiding. Following consultations between the police and the theatre's management, the protesters got their wish.

Not since Salman Rushdie's *The Satanic Verses* had issues of artistic freedom been argued so aggressively. The artistic community was outraged, and letters of protest at the play's cancellation and support for Bhatti duly appeared in the press. The issue was complicated, however, and some playwrights argued that issues of responsibility and of the context in which a play is presented had to be taken into account.

...
A closer reading of the stories revealed that, in fact, Muslim leaders who were approached to comment on *Bells* had no problem with the content of the play. These establishments exist, they said. They have done for centuries, and, given that they are on the rise in contemporary London, this was a legitimate subject for drama.

It is to be hoped that by the time *Bells*, written by Yasmin Whittaker Khan, reaches Glasgow in a couple of weeks as part of this year's Arches Theatre Festival, the attendant furore will have been forgotten. The artistic merit of the play and its sister piece, Azma Dar's *Chaos*, which is also being performed, will have a chance to speak for themselves.

Behzti never had that luxury. In the unlikely event that is ever staged, the baggage left behind from the protests and their aftermath will inevitably get in the way of a critique of the play's value as art.

...
You can't imagine Shan Khan would allow a play of his to be cancelled. The Glasgow-Asian writer's play, *Office*, set among a network of London drugs dealers, caused a stir when it premiered at Edinburgh International Festival four years ago. This year he's back with *Prayer Room*, a co-production, coincidentally, between EIF and Birmingham Rep.

In terms of an examination of the complications of multi-culturalism, Khan raises the stakes by bringing together Christians, Muslims and Jews, then putting them in the melting pot of a multi-faith prayer room in a British college. As in his previous play, drugs and a slang-ridden patois, of which swearing forms a large part, are much in evidence.

As colourfully motor-mouthed as any of his characters, Khan has forthright opinions

about the Behzti controversy.”It should never have been pulled, “ he says. “What gives anyone the right to say what should or shouldn’t be on at the theatre? I mean, hardly anyone Asian goes to the theatre anyway.” After some thought, however, he tempers his response. “I wasn’t there, and if someone’s chucking bricks at you and scaring little kids, then you have to do something. Maybe it was the right decision.”

Khan doesn’t define himself as an Asian writer, but “as a writer, who happens to be Asian”.

“I’m from Glasgow and I live in London. I don’t just want to write about Asians in an Asian community.

I want to write about what’s going on on my own doorstep, and that’s a whole mixed-up multi-cultural thing. Prayer Room’s not making any great statement about all that.

It’s an entertainment. It’s hilarious, having all these guys in the same room and seeing what happens.”

As entertaining as it may be, and however Khan defines himself, Prayer Room is another example of a community finding a mature voice that takes on board its westernised integration. As for provocation, following the headlines concerning Bells, Khan looks set to claim a few column inches with his next project—a libretto for English National Opera. If such a commission sounds as though he’s succumbed to establishment respectability, the fact that the music is to be provided by Asian Dub Foundation suggests otherwise.

And the working title? Gaddafi: The Opera. There may be trouble ahead.

**Charles M. Madigan, Red Flag Warning:
Teenagers Know Little About—and Put
Little Faith in—America’s Tattered Free
Speech Heritage (2005)**

Given the modern media atmosphere, it is hard to believe the 1st Amendment is in trouble. In this brave new world, all manners of language, assumption, scurrilous bilge and flapdoodle are afoot as expression takes a joyride on the expanding technology and ease of access of the Internet, the nation’s freshest communications carnival.

You can say pretty much whatever you want there, any way you want to say it.

It provides both a hall pass for the sophomoric and a pathway for efforts that nudge right up against being profound.

...
In America, that is.

In some parts of the world, daring behaviors on the Internet can lead to a prison sentence or worse. Even taking advantage of access to it is a big risk.

Freedom of expression is one of the hallmarks of the American experience, a right we have cherished from the earliest days of the republic. Everything that is published here rests on that foundation, along with everything that is broadcast or televised.

...
There’s nothing vague about the foundation provided by the 1st Amendment.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

It’s not just a Norman Rockwell painting.

It’s a guarantee that—short of becoming the cliched fool who shouts “fire” in a crowded theater that is not burning—what you feel you have to say, you can say.

The problem is there are cracks in the foundation. Amazingly, a lot of people are confused about the 1st Amendment, particularly a lot of high school students. In a recently released poll, about three in four say they don’t know how they feel about the 1st Amendment, or they take it for granted.

The Knight Foundation’s High School Initiative was aimed at collecting a base line of information on attitudes about the 1st Amendment. Its survey, conducted by the Department of Public Policy at the University of Connecticut, questioned more than 100,000 students, along with faculty and administrators at 544 high schools across the nation.

The results show that three in four students think that burning the flag, a time-tested gesture of protest, is illegal (it is not). Half of

those students believe the government can censor what is on the Internet (it cannot).

And most troubling of all, particularly for advocates of expression, more than a third of those high school students think the 1st Amendment goes too far in the rights it guarantees.

If they carry those attitudes into adulthood, they will undoubtedly join the mass of grown-up Americans who also have little knowledge or little respect for the 1st Amendment.

The danger is personal, even though it has implications for all media.

American democracy is constructed on an assumption that an informed citizenry will ultimately make decisions through its elected representatives.

What happens if you begin editing your complaints, thinking that it's not legal even to raise them?

What if "petitioning the government" never enters your mind because you didn't know that was an option?

How could it be that so many young people have become so confused?

It could be that, given the right attention and the revival of civics as a course and also as a way of life, the gradual erosion of support for the 1st Amendment could be turned around.

If it isn't, the teenagers who pay so little attention to this fundamental right might find out later in life that they have problems to address and injustices to protest, but no effective way to do either.

Loudoun's New Move: the Tussle (2004)

It turns out the students at Loudoun Valley High School in Purcellville will, in fact, be allowed to tango at tomorrow's Homecoming Dance.

They can salsa and swing dance, too, Principal Gerald Black has promised, although they have all signed a pledge that they will "face each other" on the dance floor. Also on the pledge's list: no drugs, alcohol or "freak dancing."

Loudoun Valley and Loudoun County's other seven high schools are just the latest to grapple with the bumping and grinding club moves that have seeped into school dances across the Washington region and the nation over the past couple of years.

Loudoun Valley's "face each other" order had seemed reasonable, Black said, a simple attempt to stop popular back-to-front dancing in which a girl gyrates her hips against the pelvis of a guy standing behind her.

"It's very suggestive, and it would certainly not be appropriate in a school setting," he said.

But the pledge has sparked a student-led protest about freedom and self-expression. More than 300 students signed a petition complaining that the rule is "arbitrary, irregular and in violation of . . . First Amendment freedoms of expression in all forms," said senior Anton Soukup, 17.

Another student printed a T-shirt with the message, "How are we supposed to do the hokeypokey if we can't turn ourselves around?"

On the subject of dancing, passions have run particularly high in Western Loudoun, a growing semi-rural area that boasts both the national headquarters of the Home School Legal Defense Association and the county's only elected Democratic supervisor.

"I've been giving a lot of thought to this, and I do believe it's a different clientele out here," said Priscilla B. Godfrey (Blue Ridge), who represents the Loudoun Valley area on the School Board. Only in the west have there been complaints about the issue, and they have come from both sides, she said.

The district has both people who are "very on to First Amendment rights" and "a very strong Christian community," she said.

County officials decided to require pledges after several parents and students complained at a School Board meeting in the spring that Loudoun Valley High's dances had become so explicit that they felt they could no longer attend.

"I had girls come and talk to me afterwards, and they felt really degraded about what they had done at the prom," said Christian

Amonson, 17, one of those who spoke at the meeting.

But parent Laura George immediately saw a First Amendment threat in the pledge Loudoun Valley put out, and she encouraged her daughter and her classmates to protest.

“Civil rights are falling by the wayside every second,” she said. “I’ve got to take a stand here for my kids. I’ve got to teach them that you question authority when authority’s gone mad.”

Nonsense, said Barbara Curtis, a parent of a Loudoun Valley student who complained about dancing in a column in a local newspaper last spring. She is writing a book about “dirty dancing at the prom” and said she’s done dozens of interviews with students nationwide, including girls whose dates had ditched them when they refused to take part.

“It’s not a very noble cause to be fighting for,” she said. “The kids with the petition, they know what’s been going on.”

...

Peter Baker, In Russian Media, Free Speech for a Select Few (2005)

If President Bush thought he would receive support from Russian reporters when he raised the cause of free speech, he did not know much about the Kremlin press pool.

“What is this lack of freedom all about?” one Russian reporter challenged Bush during his joint news conference with Russian President Vladimir Putin yesterday. “Our regional and national media often criticize government institutions.”

Bush seemed surprised. “Obviously, if you’re a member of the Russian press, you feel like the press is free,” he replied. “You feel that way? That’s good.” Bush added, “That is a pretty interesting observation for those of us who don’t live in Russia to listen to.”

The exchange illustrated more about the state of freedom in Russia than met the eye. While Putin travels around with a contingent of reporters just as Bush does, the Kremlin press pool is a handpicked group of reporters, most of whom work for the state and the rest selected for their fidelity to the Kremlin’s rules of the game. Helpful questions are often planted. Unwelcome

questions are not allowed. And anyone who gets out of line can get out of the pool.

The Kremlin press pool is like so many institutions in Russia that have the trappings of a Western-style pluralistic society but operate under a different set of understandings, part of what analyst Lilia Shevtsova of the Carnegie Moscow Center calls “the illusion of democracy.” Television channels air newscasts with fancy graphics but follow scripts approved by the Kremlin. Elections are held, but candidates out of favor with the Kremlin are often knocked off the ballot. Courts conduct trials, but the state almost never loses. Parliament meets but only to rubber-stamp Kremlin legislation.

...

Although some print media in Russia remain lively and critical of the government, coming to Putin’s defense at yesterday’s news conference in Slovakia were two reporters who belong to the Kremlin press pool. The first was Andrei Kolesnikov, a correspondent for Kommersant, a business newspaper owned by Putin critic Boris Berezovsky. But Kolesnikov just released two books about his time covering Putin that the Kremlin likes.

Kolesnikov challenged Bush, asserting that “it’s impossible to call Russia or the U.S. fully democratic” and questioned Bush about the “enormous powers of the security services” in the United States that had resulted in “the private lives of citizens falling under the control of the government.”

The second reporter, who questioned Bush’s assertion that Russian media are not free, works for Interfax, a news service that often closely hews the state line. He asked Bush “about violations of the rights of journalists in the United States, about the fact that some journalists have been fired.”

While he did not specify what he meant, Russian media several years ago highlighted the cases of a couple U.S. journalists at obscure news organs who lost jobs after criticizing Bush’s post-Sept. 11 legislation. Bush noted that whenever reporters are fired in the United States, it is not by the government.

In Russia, on the other hand, Putin’s Kremlin used a state-controlled company to take over the only independent television network,

NTV. When the ousted NTV journalists took over a different channel, TV-6, the state shut it down. When they tried again with a network called TVS, Putin's press minister yanked it off the air and replaced it with a sports channel.

The general manager installed at NTV after the Kremlin takeover was later fired when his coverage of the Moscow theater siege in 2002 angered Putin. Then NTV's most independent remaining hosts, Leonid Parfyonov and Savik Shuster, were taken off the air after the government bristled at their talk shows. Shuster's show was called "Freedom of Speech."

Kolesnikov's predecessor at Kommersant, Yelena Tregubova, was kicked out of the Kremlin press pool because, she said, she would not follow official instructions. She later wrote a tell-all book that peeved the Kremlin. When Parfyonov interviewed her for NTV, the segment was yanked after it had already aired in eastern time zones. When a small bomb exploded outside her apartment door last year, Tregubova fled the country.

If Bush does not trust the Russian press to get the story of yesterday's news conference right, he can at least go to the Kremlin's own Web site. On it was posted a transcript of the joint news conference. Only all of Bush's statements and answers were deleted.

Julie Hilden, The Constitutionality of Police-Imposed "Free Speech Zones" (2004)

Protesters at the DNC [Democratic National Convention] were confined to a fenced-in area—a wire enclosure topped by razor wire outside Boston's FleetCenter, where the Convention was held. They charged that their First Amendment rights were violated by this confinement.

Were they correct? Certainly, the involvement by police in enforcing the enclosure established the "state action" necessary to establish a First Amendment violation.

But on the other hand, one could argue that the protesters still did get to exercise their free speech rights to some extent—and that, even if their rights were infringed upon, that

infringement was necessitated by security concerns.

Jon Henley, France Outlaws Sexist and Anti-Gay Insults: Legislation is aimed at Curbing Rising Homophobia, but Civil Liberty Groups Say Threats of Imprisonment and Heavy Fines Go too Far (2004)

The French parliament yesterday definitively adopted legislation that could lead to year-long jail terms for anyone found guilty of insulting homosexuals or women.

The justice minister, Dominique Perben, believes the laws are necessary to combat an increase in homophobia, but they have been condemned by advocates of free speech who say they are too strict and unworkable.

The law puts anti-gay and sexist comments on an equal footing with racist or anti-semitic insults, allowing French courts to hand down fines of up to euros 45,000 (£ 30,000) and jail sentences of up to 12 months for "defamation or incitement to discrimination, hatred or violence on the grounds of a person's sex or sexual orientation".

Proferring an anti-gay insult, including any remark "of a more general nature tending to denigrate homosexuals as a whole", in public—meaning on air, in print or at a public meeting—is also an imprisonable offence, while private sexist or homophobic taunts between individuals could incur fines of up to euros 375.

Gay and feminist groups have welcomed the law, which is in part a response to a significant increase in verbal and physical attacks recorded against homosexuals in France.

The number of violent acts against gay men and women doubled to 86 in 2003.

"It's great and welcome news," said Ronan Rosec of the campaign group SOS Homophobie.

"Gays in France just do not want to be abused, physically or verbally, any more."

Another gay rights organisation, Inter-LGBT, said the law marked "the crossing of a decisive bridge" for France.

The feminist group Les Chiennes de Garde, or Guard Bitches, added that it hoped the

law would lead to a fall in the number of physical attacks on women “by first outlawing verbal violence”.

But the legislation, which also establishes an impartial body, the High Authority against Discrimination and for Equality, to help victims of bias, has drawn as much criticism as praise, particularly from advocates of free speech who say it will be difficult to enforce and will lead to self-censorship.

In theory, critics say, the law could mean that devout Christians who denounce homosexuality as “deviant” would be prosecuted; comedians can no longer make mother-in-law jokes; the producers and distributors of the camp comedy film *La Cage Aux Folles* could end up in the dock; and parts of the Old Testament might be banned.

The media campaign group Reporters Without Borders said a society “advances towards tolerance . . . via freedom of expression and debate, and not through repression”.

The Catholic church in France also expressed concern that the law might prevent clergymen from expressing their opposition to legalising gay marriage.

Even the national commission on human rights, a government advisory body, has criticised the law, arguing that courts “will face great difficulty defining what is an insult, and will thus have to condemn words . . . certain films, books and even the Bible could fall under its remit.”

The Book of Leviticus, for example, describes male homosexuality as “an abomination”.

In an attempt to allay such fears, Inter-LGBT says it will prosecute only “genuinely scandalous remarks . . . cases that we are certain to win, and guaranteeing an educational effect”.

But SOS Homophobie and Act-Up have both said they consider that describing homosexuality as “abnormal” is an insult under the terms of the new law.

French judges say they expect “an avalanche” of complaints under the legislation, particularly in its early days, and acknowledge that there are bound to be significant differences of interpretation and appreciation.

“We will have to try to preserve the freedom of expression while respecting the law,” said Francois Cordier, a Paris public prosecutor.

“Day-to-day insults against gays must be punished, as must incitement to violence, hatred, discrimination. But we cannot deny every monotheistic religion an opinion on homosexuality.”

Mr. Cordier said it would take some time before an accepted jurisprudence emerged.

“The courts will have somehow to draw a line between opinions that might be shocking but must be allowed to be expressed in a democracy, and speech that is undeniably homophobic,” he said. “It will not always be easy.”

Sara Rimensnyder, Sins of the Author— Michel Houellebecq sued by Muslims (2002)

“THE DUMBEST RELIGION, after all, is Islam.”

So spoke best-selling French author and provocateur Michel Houellebecq just days before September 11, 2001, in an interview with the magazine *Lire*. He also called the Koran “mediocre” and said he considers the scriptures of Christianity, Judaism, and Islam all to be “texts of hate.” His statements, not surprisingly, infuriated Muslim organizations. Here’s what is surprising: In September 2002, Houellebecq was brought before a criminal court for uttering those words. He faced up to a year in prison or a \$51,000 fine.

In the U.S., Houellebecq would be protected by the First Amendment. Not so in France. Four Muslim groups, along with an organization called the Human Rights League, pressed charges, arguing that the author’s statements incited racism. A 1972 law “bans hate speech, making racial defamation and provocation to racial hatred or violence punishable by criminal law,” according to a 2001 Brookings Institution paper cited on the weblog *Emmanuelle.net*. *Lire* was also charged for publishing the interview.

Houellebecq has said the interview was “crooked,” indicating that the magazine edited his words to imply that he—like the lead

character in his most recent novel, Platform—was “obsessed with Islam.” The author also has argued that his statements were against Islam, not against Muslims. “I do not see how criticizing a religion in an acerbic manner involves them as people,” he said.

But Dalil Boubakeur of the Paris Mosque told the court: “Freedom of expression stops where it can do harm. . . . I believe my community is humiliated, my religion is insulted, I ask for justice.”

At press time, the court had yet to make its ruling. Judging by the brigade of intellectuals who showed up to testify in Houellebecq’s defense, he is unlikely to be found guilty. Nevertheless, taxpayers can look forward to footing the bill for more of such cases. Next up: French Muslim groups plan to file charges against Italian journalist Orianna Fallaci for calling Muslims “a billion rats.”

James Bovard, *Quarantining Dissent: How the Secret Service protects Bush from Free Speech* (2004)

When President Bush travels around the United States, the Secret Service visits the location ahead of time and orders local police to set up “free speech zones” or “protest zones,” where people opposed to Bush policies (and sometimes sign-carrying supporters) are quarantined. These zones routinely succeed in keeping protesters out of presidential sight and outside the view of media covering the event.

When Bush went to the Pittsburgh area on Labor Day 2002, 65-year-old retired steel worker Bill Neel was there to greet him with a sign proclaiming, “The Bush family must surely love the poor, they made so many of us.”

The local police, at the Secret Service’s behest, set up a “designated free-speech zone” on a baseball field surrounded by a chain-link fence a third of a mile from the location of Bush’s speech.

The police cleared the path of the motorcade of all critical signs, but folks with pro-Bush signs were permitted to line the president’s path. Neel refused to go to the designated area and was arrested for disorderly conduct; the police also confiscated his sign.

Neel later commented, “As far as I’m concerned, the whole country is a free-speech zone. If the Bush administration has its way, anyone who criticizes them will be out of sight and out of mind.”

...
Pennsylvania District Judge Shirley Rowe Trkula threw out the disorderly conduct charge against Neel, declaring, “I believe this is America. Whatever happened to ‘I don’t agree with you, but I’ll defend to the death your right to say it’?”

Similar suppressions have occurred during Bush visits to Florida. A recent St. Petersburg Times editorial noted, “At a Bush rally at Legends Field in 2001, three demonstrators—two of whom were grandmothers—were arrested for holding up small handwritten protest signs outside the designated zone. And last year, seven protesters were arrested when Bush came to a rally at the USF Sun Dome. They had refused to be cordoned off into a protest zone hundreds of yards from the entrance to the Dome.”

One of the arrested protesters was a 62-year-old man holding up a sign, “War is good business. Invest your sons.” The seven were charged with trespassing, “obstructing without violence and disorderly conduct.”

Police have repressed protesters during several Bush visits to the St. Louis area as well. When Bush visited on Jan. 22, 150 people carrying signs were shunted far away from the main action and effectively quarantined.

Denise Lieberman of the American Civil Liberties Union of Eastern Missouri commented, “No one could see them from the street. In addition, the media were not allowed to talk to them. The police would not allow any media inside the protest area and wouldn’t allow any of the protesters out of the protest zone to talk to the media.”

When Bush stopped by a Boeing plant to talk to workers, Christine Mains and her 5-year-old daughter disobeyed orders to move to a small protest area far from the action. Police arrested Mains and took her and her crying daughter away in separate squad cars.

The Justice Department is now prosecuting Brett Bursey, who was arrested for holding a “No War for Oil” sign at a Bush visit

to Columbia, S.C. Local police, acting under Secret Service orders, established a “free-speech zone” half a mile from where Bush would speak. Bursey was standing amid hundreds of people carrying signs praising the president. Police told Bursey to remove himself to the “free-speech zone.”

...

Bursey was charged with trespassing. Five months later, the charge was dropped because South Carolina law prohibits arresting people for trespassing on public property. But the Justice Department—in the person of U.S. Attorney Strom Thurmond Jr.—quickly jumped in, charging Bursey with violating a rarely enforced federal law regarding “entering a restricted area around the president of the United States.”

If convicted, Bursey faces a six-month trip up the river and a \$5,000 fine. Federal Magistrate Bristow Marchant denied Bursey’s request for a jury trial because his violation is categorized as a petty offense.

...

Some observers believe that the feds are seeking to set a precedent in a conservative state such as South Carolina that could then be used against protesters nationwide.

...

The feds have offered some bizarre rationales for hog-tying protesters. Secret Service agent Brian Marr explained to National Public Radio, “These individuals may be so involved with trying to shout their support or nonsupport that inadvertently they may walk out into the motorcade route and be injured. And that is really the reason why we set these places up, so we can make sure that they have the right of free speech, but, two, we want to be sure that they are able to go home at the end of the evening and not be injured in any way.” Except for having their constitutional rights shredded.

...

Attempts to suppress protesters become more disturbing in light of the Homeland Security Department’s recommendation that local police departments view critics of the war on terrorism as potential terrorists. In a May terrorist advisory, the Homeland Security Department warned local law enforcement agencies to keep an eye on anyone who

“expressed dislike of attitudes and decisions of the U.S. government.” If police vigorously followed this advice, millions of Americans could be added to the official lists of suspected terrorists.

...

Mike van Winkle, the spokesman for the California Anti-Terrorism Information Center told the Oakland Tribune, “You can make an easy kind of a link that, if you have a protest group protesting a war where the cause that’s being fought against is international terrorism, you might have terrorism at that protest. You can almost argue that a protest against that is a terrorist act.”

Van Winkle justified classifying protesters as terrorists: “I’ve heard terrorism described as anything that is violent or has an economic impact, and shutting down a port certainly would have some economic impact. Terrorism isn’t just bombs going off and killing people.”

...

Patrick D. Healey, Favor the Rod, Get the Ax: College Expels Student Who Supported Corporal Punishment (2005)

...

Supporting corporal punishment is one thing; advocating it is another, as [Scott] McConnell recently learned. Studying for a graduate teaching degree at Le Moyne College, he wrote in a paper last fall that “corporal punishment has a place in the classroom.” His teacher gave the paper an A-minus and wrote, “Interesting ideas—I’ve shared these with Dr. Leogrande,” referring to Cathy Leogrande, who oversaw the college’s graduate program.

Unknown to Mr. McConnell, his view of discipline became a subject of discussion among Le Moyne officials. Five days before the spring semester began in January, Mr. McConnell learned that he had been dismissed from Le Moyne, a Jesuit college.

“I have grave concerns regarding the mismatch between your personal beliefs regarding teaching and learning and the Le Moyne College program goals,” Dr. Leogrande wrote in a letter, according to a copy provided

by Mr. McConnell. “Your registration for spring 2005 courses has been withdrawn.”

Dr. Leogrande offered to meet with Mr. McConnell, and concluded, “Best wishes in your future endeavors.”

If the letter stunned Mr. McConnell, the “best wishes” part turned him into a campaigner. A mild-mannered former private in the Army, Mr. McConnell has taken up a free-speech banner with a tireless intensity, casting himself as a transplant from a conservative state abused by political correctness in more liberal New York. He also said that because he is an evangelical Christian, his views about sparing the rod and spoiling the child flowed partly from the Bible, and that Le Moyne was “spitting on that.”

He is working with First Amendment groups to try to pressure Le Moyne into apologizing and reinstating him, and is considering legal action as well as a formal appeal to the college. He says Le Moyne misconstrued his views: he believes children should not be paddled without their parents’ permission. He said that even then, the principal, as the school’s head disciplinarian, should deliver the punishment.

“Judges live in the real world, and I think they would see that Scott got an A-minus on his paper and was expressing views on a campus that supports academic freedom,” said David French, president of the Foundation for Individual Rights in Education, a group based in Philadelphia that is supporting Mr. McConnell. “It’s hard to see a court looking kindly on Scott’s expulsion.”

Dr. Leogrande did not respond to telephone messages. Le Moyne’s provost, John Smarrelli, said the college had the right as a private institution to take action against Mr. McConnell because educators had grave concerns about his qualifications to teach under state law.

...

“We have a responsibility to certify people who will be in accordance with New York State law and the rules of our accrediting agencies,” Mr. Smarrelli said. In Mr. McConnell’s case, he said, “We had evidence that led us to the contrary.”

...

Mr. Smarrelli said that the paper itself was “legitimate” and “reasonable,” because the assignment sought Mr. McConnell’s plan for managing a classroom. Yet Mr. McConnell’s views were clearly not in the mainstream of most teachers’ colleges.

For example, many educators focus on nurturing students’ self-esteem, but Mr. McConnell scoffed at that idea in his paper. He said he would not favor some students over others, regardless of any special needs some might have.

“I will help the child understand that respect of authority figures is more important than their self-esteem,” he wrote.

Some professors and college officials were also concerned that Mr. McConnell wrote that he opposed multiculturalism, a teaching method that places emphasis on non-Western cultures.

In an interview, Mr. McConnell said he disliked “anti-American multiculturalism,” and gave as an example a short story on the Sept. 11 attacks intended for classroom use. The story, published in a teachers’ magazine in 2002 by the National Council for the Social Studies, was about young American boys teasing an Iraqi boy named Osama.

Mr. Smarrelli said Le Moyne had to ensure that its students had the judgment, aptitude, temperament and other skills to succeed in challenging their students.

But Dr. Smarrelli acknowledged that Le Moyne had not warned students like Mr. McConnell that they could be removed for expressing controversial beliefs, nor had the college said that education students must oppose corporal punishment or support multiculturalism.

...

David Horowitz, Why an Academic Bill of Rights is Necessary (2005)

Ohio Senate Bill 24, which has been sponsored by Senator Mumper and is now before this Committee, and which is based on my Academic Bill of Rights, is not about Republicans and Democrats, liberals and conservatives, left and right. It is about what is

appropriate to a higher education, and in particular what is an appropriate discourse in the classrooms of an institution of higher learning.

All higher education institutions in this country embrace principles of academic freedom that were first laid down in 1915 in the famous General Report of the American Association of University Professors, titled “The Principles of Tenure and Academic Freedom.” The Report admonishes faculty to avoid “taking unfair advantage of the student’s immaturity by indoctrinating him with the teacher’s own opinions before the student has had an opportunity to fairly examine other opinions upon the matters in question, and before he has sufficient knowledge and ripeness of judgment to be entitled to form any definitive opinion of his own.”

In other words, an education—as distinct from an indoctrination—makes students aware of a spectrum of scholarly views on matters of controversy and opinion, and does not make particular answers to such controversial matters the goal of the instruction. This is sound doctrine and common sense, and in one form or another it is recognized in the academic freedom guidelines of all accredited institutions of higher learning in the United States.

Unfortunately, it is a principle increasingly honored in the breach and not in the observance in American universities today. All too frequently, professors behave as political advocates in the classroom, express opinions in a partisan manner on controversial issues irrelevant to the academic subject, and even grade students in a manner designed to enforce their conformity to professorial prejudices.

Why this abuse of the academic classroom has occurred in the last academic generation is a matter for historians. Why it has not been remedied by existing institutional supports for academic freedom is the business of Senate Bill 24 and the Academic Bill of Rights.

To anticipate, it is the view of the authors of this legislation that the academic freedom protections to prevent indoctrination in the classroom are generally buried in “faculty handbooks,” as faculty “responsibilities,” never codified as a student right. Therefore when they are neglected there is no remedy for students who are victims of professorial abuse. Nor does

there exist any grievance machinery that specifically recognizes this academic freedom right or that provides a policy for redress. The purpose of Senate Bill 24 and legislation in other states based on the Academic Bill of Rights is to rectify this omission.

It is not an education when a mid-term examination contains a required essay on the topic, “Explain Why President Bush Is A War Criminal,” as did a criminology exam at the University of Northern Colorado in 2003. It is not an education when a professor of property law harangues his class on why all Republicans are racist as happened at the Colorado University Law School in 2004. It is not an education when a widely-used required “Peace Studies” textbook, described by the professor as a “masterpiece,” explains that the Soviet Union was a force for peace in the Cold War and the United States was not, that “revolutionary violence” is the only justifiable violence, and that the United States is the greatest terrorist state – and does so without making students aware that there are other interpretations of this history and other views that should be considered on these matters. This extremist text, *Peace and Conflict Studies*, written by two university professors who explain in their preface that they are partisans of the political left is the required “academic” textbook for students in the Peace Studies course at Ohio State University (Marion).

At Foothills College in California, a pro-life professor compared women who have abortions to the deranged mother Andrea Yates who drowned her six children. The professor then gave D’s and F’s to students who expressed opinions in favor of abortion. Abortion is a matter that is both profoundly controversial and also emotional, and involves the deepest and most personal values. It is also a matter of opinion. It is not the task of a professor to provide his students with politically correct opinions.

It is the task of professors – whether they are politically left or politically conservative—to teach students how to think and not what to think about matters that are controversial. An education should make students aware of the range of scholarly views on a subject, teach students how to marshal

evidence in behalf of a point of view, and instruct them how to make a logical case for their conclusions. An education is not about providing students with the correct conclusions on controversial matters.

We live in democracy that is based on the proposition that there is no correct conclusion available to ordinary mortals, that no one – not even professors – are in possession of absolute truth. If there were only one correct conclusion to all controversial issues there be no need for a multi-party democracy, since the only party necessary would be the one with the truth. No such party exists. No such professor exists. Therefore, Ohio Senate Bill 24 states that “students [shall] have access to a broad range of serious scholarly opinion pertaining to the subjects they study;” and further that: “Students shall be graded solely on the basis of their reasoned answers and appropriate knowledge of the subjects and disciplines they study and shall not be discriminated against on the basis of their political, ideological, or religious beliefs. Faculty and instructors shall not use their courses or their positions for the purpose of political, ideological, religious, or antireligious indoctrination.”

...

Alexis de Tocqueville, Power Exercised by the Majority in America Upon Opinion, Democracy in America, Vol. I (1833)

In America, when the Majority has once irrevocably decided a Question, all Discussion ceases.

...

It is in the examination of the exercise of thought in the United States, that we clearly perceive how far the power of the majority surpasses all the powers with which we are acquainted in Europe. Thought is an invisible and subtle power, that mocks all the efforts of tyranny. At the present time, the most absolute monarchs in Europe cannot prevent certain opinions hostile to their authority [I]n America; as long as the majority is still undecided, discussion is carried on; but as soon as its decision is irrevocably pronounced, every one is silent, and the friends as well as the

opponents of the measure unite in assenting to its propriety. The reason of this is perfectly clear: no monarch is so absolute as to combine all the powers of society in his own hands, and to conquer all opposition, as a majority is able to do, which has the right both of making and of executing laws.

...

In America, the majority raises formidable barriers around the liberty of opinion; within these barriers, an author may write what he pleases; but woe to him if he goes beyond them.

...

[T]here can be no literary genius without freedom of opinion, and freedom of opinion does not exist in America.

John Stuart Mill, Liberty of Thought and Discussion, On Liberty (1859)

...

We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

First: the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common.

Timothy C. Shiell, Campus Hate Speech on Trial (1998)

The Deterrence Argument

In order to justify a campus speech code, universities needed to be able to show, first, that the affected speech caused serious harms that should be addressed by an explicit university policy and punished and deterred by

university sanctions. In its generic form, then, the deterrence argument is this:

1. Campus hate speech causes serious harms that constitute a violation of the Fourteenth Amendment's equal rights guarantee.

2. Serious violations of the Fourteenth Amendment's equal rights guarantee should be punished and deterred by punitive sanctions in accordance with a university policy or "speech code."

Thus 3. Campus hate speech codes designed to prevent and punish hate speech are justified.

...

The First Amendment Argument

[A]dvocates of this model maintain that universities are justified in prohibiting fighting words when they are used to in effect to deny students equal educational and employment opportunities. Their logic is straightforward:

1. The First Amendment does not protect fighting words [and group libel].

2. Some campus hate speech constitutes fighting words [and group libel].

Thus 3. Campus hate speech codes punishing and preventing fighting words [and group libel] do not violate the First Amendment.

...

The University Mission Argument

The general idea shared by all particular versions of the university mission argument is that hate speech is inconsistent with important aims of a university. Stated in its most concise form, its structure is:

1. Universities are empowered to make rules promoting their legitimate aims.

2. A hate speech code will help universities achieve legitimate aims.

Thus 3. Campus hate speech codes are justified.

...

Geoffrey Stone, *Perilous Times: Free Speech in Wartime* (2004)

...

Posner errs, though, when he insists that courts should weigh liberty and security "equally." He bases this judgment on two assumptions—security is as important as liberty, and the nation is as likely to underprotect security as it is to underprotect liberty. I do not take issue with the first assumption. . . . I disagree with the second assumption. Posner acknowledges that on occasion the United States has excessively restricted civil liberties in wartime. But the real lesson of history, he argues, is the opposite. In his view, "[o]fficialdom has repeatedly and disastrously underestimated" dangers to the nation's security; he offers as examples its underestimation of the risk of secession leading up to the Civil War, the danger of a Japanese attack on the United States in 1941, the threat of Soviet espionage in the 1940s, the possibility of the Tet offensive during the Vietnam War, and, of course, the risk of terrorist attacks before September 11.

No doubt, some of this is right. But it is irrelevant. That the government may underestimate these other dangers is no reason to shut our eyes to the fact that it also underestimates the dangers of silencing dissent. The proper response to Posner's insight is for the government to take those other dangers more seriously. The right way to do that, however, is not by stifling free speech .

...

As the Court has learned . . . if the nation is to preserve civil liberties in the face of war fever, the Court must define clear constitutional rules that are not easily circumvented or manipulated by prosecutors, jurors, presidents, or even future Supreme Court justices. Malleable principles, open-ended balances, and vague standards may serve well in periods of tranquility, but they will fail us just at the point when we most need the Constitution.

...

Cass Sunstein, Democracy and the Problem of Free Speech (1993)

The largest point here is that colleges and universities are often in the business of controlling speech, and their controls are hardly ever thought to raise free speech problems. Indeed, controlling speech is, in one sense, a defining characteristic of the university. There are at least four different ways in which such controls occur.

First, universities impose major limits on the topics that can be discussed in the classroom. Subject matter restrictions are part of education. Irrelevant discussion is banned. . . . Schools are allowed to impose subject matter restrictions that would be plainly unacceptable if enacted by states . . .

Second, a teacher can require students to treat each other with at least a minimum of basic respect. It would certainly be legitimate to suspend a student for using consistently abusive or profane language in the classroom. This is so even if that language would receive firm constitutional protection on the street corner.

The problem goes deeper, for—and this is the third kind of academic control on speech—judgments about quality are pervasive. Such judgments affect admissions, evaluations of students in class on paper, and evaluation of prospective and actual faculty as well.

But there is a fourth and more troublesome way in which universities control speech, and this involves the fact that some academic judgments are viewpoint-based, certainly in practice. In many places, a student who defends fascism or communism is unlikely to receive a good grade. In many economic departments, sharp deviation from the views of Adam Smith may well be punished. . . . Viewpoint discrimination is undoubtedly present in practice and, even if we object to it in principle, it is impossible and perhaps undesirable for outsiders to attempt to police it.

Michel Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis (2003)

II. Hate Speech and the Jurisprudence of Free Speech in the United States

Freedom of speech is not only the most cherished American constitutional right, but also one of America's foremost cultural symbols. Moreover, the prominence of free speech in the United States is due to many different factors, including a strong preference for liberty over equality, commitment to individualism, and a natural rights tradition derived from Locke which champions freedom from the state—or negative freedom—over freedom through the state—or positive freedom. In essence, free speech rights in the United States are conceived as belonging to the individual against the state, and they are enshrined in the First Amendment to the Constitution as a prohibition against government interference, rather than as the imposition of a positive duty on government to guarantee the receipt and transmission of ideas among its citizens. Even beyond hate speech, freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies. Indeed, Americans have a deep seated belief in free speech as a virtually unlimited good and a strong fear that an active government in the area of speech will much more likely result in harm than in good. In spite of this, however, there have been significant discrepancies between theory and practice throughout the twentieth century, with the consequence that American protection of speech has been less extensive than official rhetoric or popular belief would lead one to believe. For example, although political speech has been widely recognized as the most worthy of protection, for much of the twentieth century, laws aimed at suppressing or criminalizing socialist and communist views were routinely upheld as constitutional. With respect to communist views, therefore, American protection of political speech has been more limited than that afforded by most other Western democracies.

American theory and practice relating to free speech is ultimately complex and not always consistent. Accordingly, to better understand the American approach to hate speech—which has itself changed over time—it must be briefly placed in its proper historical and theoretical context.

...
Assessment of how hate speech might fare under the four different historical stages is made much more difficult if the four main philosophical justifications for free speech in the United States are taken into proper account. These four justifications can be referred to respectively as: the justification from democracy; the justification from social contract; the justification from the pursuit of the truth; and the justification from individual autonomy.

As we shall see, each of these justifications ascribes a different scope of legitimacy to free speech. Moreover, even different versions of the same justification lead to shifts in the boundaries between speech that requires protection and speech that may be constitutionally restricted, and such shifts are particularly important in the context of hate speech.

The justification from democracy is premised on the conviction that freedom of speech serves an indispensable function in the process of democratic self-government. Without the freedom to convey and receive ideas, citizens cannot successfully carry out the task of democratic self-government. Accordingly, political speech needs to be protected, but not necessary all political speech. If the paramount objective is the preservation and promotion of democracy, then anti-democratic speech in general, and hate and political extremist speech in particular, would in all likelihood serve no useful purpose, and would therefore not warrant protection.

The justification from social contract theory is in many ways similar to that from democracy, but the two do not necessarily call for protection of the same speech. Unlike the other three justifications, that from social contract theory is at bottom procedural in nature. Under this justification, fundamental political institutions must be justifiable in terms of an

actual or hypothetical agreement among all members of the relevant society, and significant changes in those institutions must be made only through such agreements. Just as with justification from democracy, in justification from social contract there is a need for free exchange and discussion of ideas. Unlike the justification from democracy, however, social contract cannot exclude *ex ante* any views which, though incompatible with democracy, might be relevant to a social contractor's decision to embrace the polity's fundamental institutions or to agree to any particular form of political organization. Accordingly, the justification from social contract seems to require some tolerance of hate speech, if not in form then at least in substance.

The justification from the pursuit of the truth originates in the utilitarian philosophy of John Stuart Mill. According to Mill, the discovery of truth is an incremental empirical process that relies on trial and error and that requires uninhibited discussion. Mill's justification for very broad freedom of expression was imported into American constitutional jurisprudence by Justice Oliver Wendell Holmes, and became known as the justification based on the free marketplace of ideas. This justification, which has been dominant in the United States ever since, is premised on the firm belief that truth is more likely to prevail through open discussion (even if such discussion temporarily unwittingly promotes falsehoods) than through any other means bent on eradicating falsehoods outright.

Mill's strong endorsement of free speech was rooted in his optimistic belief in social progress. According to his view, truth would always ultimately best falsehood so long as discussion remained possible, and hence even potentially harmful speech should be tolerated as its potential evils could best be minimized through open debate. Accordingly, Mill advocated protection of all speech so long as it falls short of incitement to violence.

Although Holmes's justification of free expression is very similar to Mill's, his reasons for embracing the free marketplace of ideas differ. Unlike Mill, Holmes was driven by skepticism and pessimism and expressed grave doubts about the possibility of truth. Because of

this, Holmes justified his free marketplace approach on pragmatic grounds. Since most strongly held views eventually prove false, any limitation on speech is most likely grounded on false ideas. Accordingly, Holmes was convinced that a free marketplace of ideas was likely to reduce harm in two distinct ways: it would lower the possibility that expression would be needlessly suppressed based on falsehoods; and it would encourage most people who tend stubbornly to hold on to harmful or worthless ideas to develop a healthy measure of self-doubt.

Like Mill, Holmes did not endorse unlimited freedom of speech. For Holmes, speech should be protected unless it poses a “clear and present danger” to people, such as falsely shouting “fire” in a crowded theater and thereby causing panic. Both Mill’s and Holmes’s justification from the pursuit of truth justify protection of hate speech that does not amount to incitement to violence. Indeed speech amounting to an “incitement to violence” is but one instance of speech that poses a “clear and present danger.” In the end, whether speech incites to violence or creates another type of clear and present danger, it does not deserve protection—under the justification from the pursuit of truth—because it is much more likely to lead to harmful action than to more speech, and hence it undermines the functioning of the marketplace of ideas.

In the end, Mill and Holmes represent two sides of the same coin. Mill overestimates the potential of rational discussion while Holmes underestimates the potential for serious harm of certain types of speech that fall short of the clear and present danger test. The justification from the pursuit of truth is at bottom pragmatic. . . . [B]ecause both the Millian and Holmesian pragmatic reasons for the toleration of hate speech are based on dubious factual claims, they may in the end undermine rather than bolster any pragmatic justification of tolerance of hate speech that falls short of incitement to violence.

Unlike the three preceding justifications, which are collective in nature, the fourth justification for free speech, that from autonomy, is primarily individual-regarding. Indeed, democracy, social peace and harmony through the social contract, and pursuit of the truth, are collective goods designed to benefit

society as a whole. In contrast, individual autonomy and well-being through self-expression are presumably always of benefit to the individual concerned, without in many cases necessarily producing any further societal good.

The justification from autonomy is based on the conviction that individual autonomy and respect require protection of virtually unconstrained self-expression. Accordingly, all kinds of utterances arguably linked to an individual’s felt need for self-expression ought to be afforded constitutional protection. And consistent with this, the justification from autonomy clearly affords the broadest scope of protection for all types of speech.

As originally conceived, the justification from autonomy seemed exclusively concerned with the self-expression needs of speakers. Since hate speech could plausibly contribute to the fulfillment of the self-expression needs of its proponents, it would definitely seem to qualify for protection under the justification from autonomy.

Under a less individualistic—or at least less atomistic—conception of autonomy and self-respect, however, focusing exclusively on the standpoint of the speaker would seem insufficient. Indeed, if autonomy and self-respect are considered from the standpoint of listeners, then hate speech may well loom as prone to undermining the autonomy and self-respect of those whom it targets. This last observation becomes that much more urgent under a stage four conception of the nature and scope of legitimate regulation of speech. Indeed, if the main threat of unconstrained speech is the hegemony of dominant discourses at the expense of the discourses of oppressed minorities, then self-expression of the powerful threatens the autonomy of those whose voices are being drowned, and hate speech against the latter can only exacerbate their humiliation and the denial of their autonomy.

. . .

III. The Treatment of Hate Speech Under International Human Rights Norms and in the Constitutional Jurisprudence of Other Western Democracies

If free speech in the United States is shaped above all by individualism and libertarianism, collective concerns and other values such as honor and dignity lie at the heart of the conceptions of free speech that originate in international covenants or in the constitutional jurisprudence of other Western democracies. Thus, for example, Canadian constitutional jurisprudence is more concerned with multiculturalism and group-regarding equality. For its part, the German Constitution sets the inviolability of human dignity as its paramount value, and specifically limits freedom of expression to the extent necessary to protect the young and the right to personal honor.

These differences have had a profound impact on the treatment of hate speech. In order to better appreciate this, I shall briefly focus on salient developments in three countries and under certain international covenants. The three countries in question are Canada, the United Kingdom and Germany.

A. Canada

It is particularly interesting to start with the contrast between the United States and Canada, two neighboring countries which were once British colonies and which are now advanced industrialized democracies with large immigrant populations with roots in a vast array of countries and cultures. Moreover, while Canada has produced a constitutional jurisprudence that is clearly distinct from that of the United States, the Canadian Supreme Court has displayed great familiarity with American jurisprudence.

Although both the United States and Canada are multiethnic and multicultural polities, the United States has embraced an assimilationalist ideal symbolized by the metaphor of the “melting pot” while Canada has placed greater emphasis on cultural diversity and has promoted the ideal of an “ethnic mosaic.” Consistent with this difference, the Canadian Supreme Court has explicitly refused to follow the American approach to hate speech. In a closely divided decision, the Canadian Court upheld the criminal conviction of a high school teacher who had communicated anti-Semitic

propaganda to his pupils in the leading case of *Regina v. Keegstra*.

He concluded that Jews were inherently evil and expected his students to reproduce his teachings on their exams in order to avoid bad grades.

The criminal statute under which Keegstra had been convicted prohibited the willful promotion of hatred against a group identifiable on the basis of color, race, religion or ethnic origin. The statute in question made no reference to incitement to violence, nor was there any evidence that Keegstra had any intent to lead his pupils to violence.

In examining the constitutionality of Keegstra’s conviction, the Canadian Supreme Court referred to the following concerns as providing support for freedom of expression under the Canadian Charter:

- (1) seeking and attaining truth is an inherently good activity;
- (2) participation in social and political decision-making is to be fostered and encouraged;
- and (3) 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.

Thus, the Canadian protection of freedom of expression, like the American, relies on the justifications from democracy, from the pursuit of truth and from autonomy. The Canadian conception of autonomy, however, is less individualistic than its American counterpart, as it seemingly places equal emphasis on the autonomy of listeners and speakers.

In spite of these affinities, the Canadian Supreme Court refused to follow the American lead and draw the line at incitement to violence. Stressing the Canadian Constitution’s commitment to multicultural diversity, group identity, human dignity and equality, the Court adopted a nuanced approach designed to harmonize these values with those embedded in freedom of expression. And based on this approach, the Court concluded that hate

propaganda such as that promoted by Keegstra did not warrant protection as it did more to undermine mutual respect among diverse racial, religious and cultural groups in Canada than to promote any genuine expression needs or values.

In reaching its conclusion, the Canadian Court considered the likely impact of hate propaganda on both the target-group and on non-target group audiences. Members of the target group are likely to be degraded and humiliated, to experience injuries to their sense of self-worth and acceptance in the larger society, and may as a consequence avoid contact with members of other groups within the polity. Those who are not members of the target group, or society at large, on the other hand, may become gradually de-sensitized and may in the long run become accepting of messages of racial or religious inferiority.

Not only does the Canadian approach to hate speech focus on gradual long-term effects likely to pose serious threats to social cohesion rather than merely on immediate threats to violence, but it also departs from its American counterpart in its assessment of the likely effects of speech. Contrary to the American assumption that truth will ultimately prevail, or that speech alone may not lead to truth but is unlikely to produce serious harm, the Canadian Supreme Court is mindful that hate propaganda can lead to great harm by bypassing reason and playing on the emotions. In support of this, the Court cited approvingly the following observations contained in a study conducted by a committee of the Canadian Parliament:

The successes of modern advertising, the triumphs of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man. We know that under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals. We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

In short, the Canadian treatment of hate speech differs from its American counterpart in

two principal respects: First, it is grounded on somewhat different normative priorities; and second, the two countries differ in their practical assessments of the consequences of tolerating hate speech. Under the American view, there seems to be a greater likelihood of harm from suppression of hate speech that falls short of incitement to violence than from its toleration. From a Canadian perspective, on the other hand, dissemination of hate propaganda seems more dangerous than its suppression as it is seen as likely to produce enduring injuries to self-worth and to undermine social cohesion in the long run.

B. The United Kingdom

Unlike the United States and Canada, the United Kingdom does not have a written constitution. Nevertheless, it recognizes a right to freedom of expression through its adherence to international covenants, such as the European Convention on Human Rights, and through commitment to constitutional values inherent in its rule of law tradition. Moreover, the United Kingdom has criminalized hate speech going back as far as the seventeenth century. The focus of British regulation of free speech has shifted over the years, starting with concern with reinforcing the security of the government, continuing with preoccupation with incitement to racial hatred among non-target audiences, and culminating with the aim of protecting targets against racially motivated harassment. As we shall see, the results of British regulation have been mixed, with significant success against Fascists and Nazis, but with much less success in attempts to defuse racial animosity between whites and non-whites.

Although seditious libel was primarily used to punish those perceived to pose a threat to the monarchy, occasionally, it was used in the context of what today is called "hate speech." Thus, in *Regina v. Osborne* the publishers of a pamphlet that asserted that certain Jews had killed a woman and her child because the latter's father was a Christian were convicted of seditious libel. As a consequence of distribution of the pamphlet some Jews were beaten and threatened with death. As this case involved direct incitement to violence and a clear threat to

the maintenance of public order, it may be best viewed as vindicating government dominance and control rather than as protecting the Jews from group defamation.

Because seditious libel can be used to frustrate criticism of government, it can pose a threat to the kind of vigorous debate that is indispensable in a working democracy. Significantly, as used in the early twentieth century, seditious libel became rather ineffective as convictions could only be obtained upon proof of direct incitement to violence or breach of public order. In 1936, Parliament adopted Section 5 of the Public Order Act. This legislation, which proved useful in combating the rise of British Fascism prior to and during World War II, relaxed the seditious libel standards in two critical respects: first it allowed for punishment of speech “likely” to lead to violence even if it did not actually result in violence; and, second it allowed for punishment of mere intent to provoke violence.

After World War II, the United Kingdom enacted further laws against hate propaganda, consistent with its obligations under international covenants. Thus, in 1965, the British Parliament enacted Section 6 of the Race Relations Act (RRA 1965) which made it a crime to utter in public or to publish words “which are threatening, abusive or insulting” and which are intended to incite hatred on the basis of race, color or national origin.

The RRA 1965 focuses on incitement to hatred rather than on incitement to violence, but it reintroduces proof of intent as a prerequisite to conviction. This makes prosecution more difficult, as evinced by the acquittal in the 1968 *Southern News* case. The case involved a publication of the Racial Preservation Society, which advocated the “return of people of other races from this overcrowded island to their own countries.” At trial the publishers asserted that their paper addressed important social issues and that it did not attempt to incite hatred. Because of the prosecution’s failure to establish the requisite intent, the net result of *Southern News* was the dissemination of its racist views in the mainstream press, and a judicial determination that its message was a legally protected expression of a political position rather than illegal promotion of hate speech.

The problem posed by *Southern News* was remedied by removal of the intent requirement in the Race Relations Act of 1976 (RRA 1976). Moreover, the RRA 1965 did lead to a series of convictions, but a number of these were obtained against leaders of the Black Liberation Movement in the late 1960s, raising disturbing questions if not about the law itself, at least about its enforcement. For example, in *Regina v. Malik*, the black defendant was convicted and sentenced to a year in prison for having asserted that whites are “vicious and nasty people” and for stating, *inter alia*,

I saw in this country in 1952 white savages kicking black women. If you ever see a white man lay hands on a black woman, kill him immediately. If you love our brothers and sisters you will be willing to die for them.

The defendant admitted that his speech was offensive to whites but argued that he had a right to respond to the evils that whites had perpetrated against blacks. In another case, four blacks were convicted of incitement to racial hatred for a speech made at Hyde Park’s Speakers’ Corner in which they called on black nurses to give the wrong injection to white people. The court was unswayed by the defendants’ claim that they were expressing their frustrations as blacks who had to endure white racism.

The laws discussed thus far have focused on threats to the public and on promotion of hatred through persuasion of non-target audiences. In 1986, however, Parliament added Section 5 of the Public Order Act, which made hate speech punishable if it amounted to harassment of a target group or individual, and in 1997 it enacted the Protection from Harassment Act. These provide more tools in the British legal arsenal against hate speech, but have not thus far led to any clearer or more definitive indication of the ultimate boundaries of punishable hate speech in the United Kingdom. In the end, the problem may have to do less with the particular legal regime involved, than with the social and political context in which that regime is embedded. As already mentioned, British legislation has been much

more successful in combating fascism and Nazism than in dealing with hatred between whites and non-whites. Perhaps the reason for that difference is that a much greater consensus has prevailed in Britain concerning fascism than concerning the absorption and accommodation of the large, relatively recent influx of racial minorities.

C. Germany

The contemporary German approach to hate speech is the product of two principal influences: the German Constitution's conception of freedom of expression as properly circumscribed by fundamental values such as human dignity and by constitutional interests such as honor and personality; and the Third Reich's historical record against the Jews, especially its virulent hate propaganda and discrimination which culminated in the Holocaust.

Unlike the United States, and much like Canada, Germany treats freedom of expression as one constitutional right among many, rather than as paramount or even as first among equals. Whereas under the Canadian Constitution, freedom of expression is limited by constitutionally mandated vindications of equality and multiculturalism, under the German Basic Law, freedom of expression must be balanced against the pursuit of dignity and group-regarding concerns.

The contrast between the German approach and other approaches to freedom of speech, such as the American or the Canadian, is well captured in the following summary assessment of the German Constitutional Court's treatment of free speech claims:

First, the value of personal honor always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made to check for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to

personal honor trumps freedom of speech. But if such truths implicate the social sphere, the court once again resorts to balancing. Finally, if the expression of an opinion—as opposed to fact—constitutes a serious affront to the dignity of a person, the value of personal honor triumphs over speech. But if the damage to reputation is slight, then again the outcome of the case will depend on careful judicial balancing. In broad terms, freedom of speech, like other constitutional rights in Germany, is in part a negative right—i.e., a right against government—and, in part a positive right—i.e., a right to government sponsorship and encouragement of free speech. In contrast to the Anglo-American approach, which in its Lockean tradition regards fundamental rights as inalienable and as preceding and transcending civil society, the German tradition regards fundamental rights as depending on the (constitutional) state for their establishment and support. Consistent with this, the more free speech rights are conceived and treated as positive rights, the easier it becomes to pin on the state responsibility for hate speech which it may find repugnant, but which it does not prohibit or punish. Furthermore, the German constitutional system is immersed in a normative framework that is more Kantian than Lockean, thus requiring a balancing of rights and duties not only on the side of the state but also on that of the citizenry.

As in the United States, in Germany freedom of speech is legitimated from the respective standpoints of the justification from democracy, from the pursuit of truth and from autonomy. These justifications are conceived quite differently in Germany than in the United States, however, with the consequence that the nature and scope of free speech rights in Germany stand in sharp contrast to their American counterparts. Indeed, because of its constitutional commitment to “militant democracy,” the German justification from

democracy does not encompass extremist anti-democratic speech, including hate speech advocating denial of democratic or constitutional rights to its targets. The German justification from the pursuit of truth, on the other hand, does not embrace its American counterpart's Millian presuppositions. This emerges clearly from the German Constitutional Court's firm conviction that established falsehoods can be safely denied protection without hindrance to the pursuit of truth. Finally, the German justification from autonomy is not centered on the autonomy of the speakers, as its American counterpart has proven to date. Instead, the German justification implies the need to strike a balance between rights and duties, between the individual and the community, and between the self-expression needs of speakers and the self-respect and dignity of listeners.

The contemporary German constitutional system is grounded in an order of objective values, including respect for human dignity and perpetual commitment to militant democracy. As such, it excludes certain creeds and thus paves the way for content-based restrictions on freedom of speech which would be unacceptable under American free speech jurisprudence. Undoubtedly, the German Basic Law's adoption of certain values and the consequent legitimacy of content-based speech regulation originated in the deliberate commitment to repudiate the country's Nazi past, and to prevent at all costs any possible resurgence of it in the future. Within this context, concern with protection of the Jewish community and with prevention of any rekindling of virulent anti-Semitism within the general population has left a definite imprint not only on the constitutional treatment of hate speech, but also on the evolution of free speech doctrine more generally.

Evidence of this can be found in the Constitutional Court's landmark decision in the 1958 *Luth* Case. *Luth* involved an appeal to boycott a post-war movie by a director who had been popular during the Nazi period as the producer of a notoriously anti-Semitic film. *Luth*, who had advocated the boycott and who was an active member of a group seeking to heal the wounds between Christians and Jews, was enjoined by a Hamburg court from continuing

his advocacy of a boycott. He filed a complaint with the Constitutional Court claiming a denial of his free speech rights.

The Constitutional Court upheld *Luth's* claim and voided the injunction against him, noting that he was motivated by apprehension that the reemergence of a film director who had been identified with Nazi anti-Semitic propaganda might be interpreted, especially abroad, "to mean that nothing had changed in German cultural life since the National Socialist period. . . ." The Court went on to note that *Luth's* concerns were very important for Germans as "[n]othing has damaged the German reputation as much as the cruel Nazi persecution of the Jews. A crucial interest exists, therefore, in assuring the world that the German people have abandoned this attitude. . . ." Accordingly, in balancing *Luth's* free speech interests against the film director's professional and economic interests, the Court concluded that "[w]here the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield."

Germany has sought to curb hate speech with a broad array of legal tools. These include criminal and civil laws that protect against insult, defamation and other forms of verbal assault, such as attacks against a person's honor or integrity, damage to reputation, and disparaging the memory of the dead. Although the precise legal standards applicable to the regulation of hate speech have evolved over the years, hate speech against groups, and anti-Semitic propaganda in particular, have been routinely curbed by the German courts. For example, spreading pamphlets charging "the Jews" with numerous crimes and conspiracies, and even putting a sticker only saying "Jew" on the election posters of a candidate running for office were deemed properly punishable by the courts.

Under current law, criminal liability can be imposed for incitement to hatred, or for attacks on human dignity against individuals or groups determined by nationality, race, religion, or ethnic origin. Some of these provisions require showing a threat to public peace, while others do not. But even when such a showing is necessary, it imposes a standard that is easily

met, in sharp contrast to the American requirement of proof of an incitement to violence.

Perhaps the most notorious and controversial offshoot of Germany's attempts to combat hate speech relate to the prohibitions against denying the Holocaust, or to use a literal translation of the German expression, to engage in the "Auschwitz lie." Attempts to combat Holocaust denials raise difficult questions not only concerning the proper boundaries between fact and opinion, but also concerning the limits of academic freedom.

These issues came before the Constitutional Court in the *Holocaust Denial Case* in 1994. This case arose as a consequence of an invitation to speak at a public meeting issued by a far right political party to David Irving, a revisionist British historian who has argued that the mass extermination of Jews during the Third Reich never took place. The government conditioned permission for the meeting on assurance that Holocaust denial would not occur, stating that such denial would amount to "denigration of the memory of the dead, criminal agitation, and, most important, criminal insult, all of which are prohibited by the Criminal Code." Thereupon, the far right party brought a complaint alleging an infringement of its freedom of expression rights.

Relying on the distinction between fact and opinion and emphasizing that demonstrably false facts have no genuine role in opinion formation, the Constitutional Court upheld the lower court's rejection of the complaint. In so doing, the Court cited the following passage from the lower court's opinion:

The historical fact itself, that human beings were singled out according to the criteria of the so-called "Nuremberg Laws" and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship vis-a-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as part of a group of people who stand out by virtue of their fate and in relation to whom

there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies vis-a-vis each individual the personal worth of [Jewish persons]. For the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him. In short, given the special circumstances involved, Holocaust denial is seen as robbing the Jews in Germany of their individual and collective identity and dignity, and as threatening to undermine the rest of the population's duty to maintain a social and political environment in which Jews and the Jewish community can feel themselves to be an integral part.

Holocaust denial in relation to the Jews in Germany presents a very special case. But what about the fact/opinion distinction in other contexts? Or hate speech and insults against other individuals or groups?

The Constitutional Court rendered a controversial decision bearing on the fact/opinion distinction in the *Historical Fabrication Case*. That case involved a book claiming that Germany was not to be blamed for the outbreak of World War II, as that war was thrust upon it by its enemies. The Court held that the book's claim amounted to an "opinion"—albeit a clearly unwarranted one—and was thus within the realm of protected speech. While who is to blame for the outbreak of the war is clearly more a matter of opinion than whether or not the Holocaust took place, the line between fact and opinion is by no means as neat as the Constitutional Court's jurisprudence suggests. For example, is admission of the Holocaust coupled with the claim that the Jews brought it on themselves a protected opinion or such a gross distortion of the facts as to warrant

equating the “opinion” involved with assertion of patently false facts?

Insults linked to false statements targeting groups other than Jews was at the core of the Constitutional Court’s decision in the *Tucholsky I Case*, which dealt with display of a bumper sticker on a car with the slogan “soldiers are murderers.” The bumper sticker in question had been displayed by a social science teacher who was a pacifist and who objected to Germany’s military role in the 1991 Gulf War. Moreover, the above slogan had a long pedigree in German history as it was the creation of the writer Kurt Tucholsky, an Anti-Nazi pacifist of the 1930s who was stripped of his German citizenship in 1933.

The lower court interpreting the slogan literally found it to be a defamatory incitement to hatred which assaulted the human dignity of all soldiers. By asserting that all soldiers are murderers, the slogan cast them as unworthy members of the community. Based on this analysis, the social science teacher was fined for violating the criminal code’s prohibition against incitement to hatred against an identifiable group within society.

The Constitutional Court, construing the slogan as an expression of opinion, held it to be constitutionally protected speech. In so doing, the Court asserted that the slogan should not be construed literally. Emphasizing that the slogan had been displayed next to a photograph from the Spanish Civil War showing a dying soldier who had been hit by a bullet accompanied by an inscription of the word “why?”; the Court interpreted the message of the slogan as casting soldiers as much as victims as it had as killers. Accordingly, the slogan could be interpreted as an appeal to reject militarism, by asking why society forces soldiers—who are members of society as everyone else—to become potential murderers and to expose them to becoming victims of murder.

The Constitutional Court’s decision provoked an angry reaction among politicians, journalists and scholars. The Court revisited the issue as it reviewed other criminal convictions in cases involving statements claiming that “soldiers are murderers” or “soldiers are potential murderers,” in its 1995 *Tucholsky II Case*. Noting that the attacks involved were not

against any particular soldier but against soldiers as agents of the government, the Court reiterated that the statements involved amounted to constitutionally protected expressions of opinion rather than to the spreading of false facts. The Court recognized that public institutions deserve protection from attacks that may undermine their social acceptance. Nonetheless, the Court concluded that the right to express political opinions critical or even insulting to political institutions, rather than to any segment of the population, outweighed the affected institutions’ need for protection.

These two decisions illustrate some of the difficulties involved in drawing cogent lines between fact and opinion, and between acceptable—and in a democracy indispensable—political criticism and inflammatory excesses threatening the continued viability of public institutions. This notwithstanding, in Germany the prohibitions against hate speech are firmly grounded. The only open questions concern their constitutional boundaries in cases that do not involve anti-Semitism or the Holocaust.

D. International Covenants

Freedom of speech is protected as a fundamental right under all the major international covenants on human rights adopted since the end of World War II, such as the 1948 U.N. Universal Declaration of Human Rights, the 1966 United Nations Covenant on Civil and Political Rights (CCPR), and the 1950 European Convention on Human Rights (ECHR). These covenants, however, do not extend protection to all speech, and some such as the CCPR specially condemn hate speech. A particularly strong stand against hate speech, which includes a command to states to criminalize it, is promoted by Article 4 of the 1965 International Convention on the Elimination of All forms of Racial Discrimination (CERD) Article 4 provides in relevant part, that:

State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify

or promote racial hatred and discrimination in any form. . . .

[State Parties] shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination . . . and also the provision of any assistance to racist activities, including the financing thereof. . . .

Shall declare illegal and prohibit organizations . . . and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law. . . .

The United States attached a reservation to its ratification of CERD, since compliance with Article 4 would obviously contravene current American free speech jurisprudence.

International bodies charged with judicial review of hate speech cases have, by and large, embraced positions that come much closer to those prevalent in Germany than to their United States counterpart. For example, in *Faurisson v. France*, the U.N. Human Rights Committee upheld the conviction of Faurisson under France's "Gayssot Act" which makes it an offence to contest the existence of proven crimes against humanity. Faurisson, a French university professor, had promoted the view that the gas chambers at Auschwitz and other Nazi camps had not been used for the purposes of extermination, and claimed that all the people in France knew that "the myth of the gas chambers is a dishonest fabrication."

The Human Rights Committee decided that Faurisson's conviction for having violated the rights and reputation of others was consistent with the free speech protection afforded by Article 19 of CCPR. Since Faurisson's statements were prone to foster anti-Semitism, their restriction served the legitimate purpose of furthering the Jewish community's right "to live free from fear of an atmosphere of anti-Semitism."

Notwithstanding its support for Faurisson's conviction, the Human Rights Committee noted that the "Gayssot Act" was overly broad in as much as it prohibited publication of bona fide historical research which would tend to contradict some of the conclusions arrived at the Nuremberg trials. Thus, whereas suppression of demonstrably false facts likely to kindle hatred is consistent with United Nations standards, suppression of plausible factual claims or of opinions based on such facts would not be justified even if it happened to lead to increased anti-Semitism.

The European Court of Human Rights has also upheld convictions for hate speech as consistent with the free speech guarantees provided by Article 10 of the ECHR. An interesting case in point is *Jersild v. Denmark*. The Danish courts had upheld the convictions of members of a racist youth group who had made derogatory and degrading remarks against immigrants, calling them among other things, "n[*****]s" and "animals," and that of a television journalist who had interviewed the youths in question and broadcast their views in the course of a television documentary that he had edited. The journalist appealed his conviction to the European Court, which unanimously stated that the convictions of the youths had been consistent with ECHR standards, but which by a twelve to seven vote held that the journalist's conviction violated the standards in question.

The convictions of the youths for having treated a segment of the population as being less than human were consistent with the limitations on free speech for "the protection of the reputation or rights of others" imposed by Article 10 of the ECHR. The conviction of the journalist for aiding and abetting the youths had been premised on the finding that the broadcast had given wide publicity to views that would otherwise have reached but a very small audience, thus exacerbating the harm against the targets of the hate message. The European Court's majority stressed that the journalist had not endorsed the message of his racist interviewees; and had tried to expose them and their message in terms of their social milieu, their frustrations, their propensity to violence and their criminal records as posing important

questions of public concern; concluding that conviction had been disproportionate in relation to the permissible aim of protecting the rights and reputations of the target group because the journalists had no intent of promoting hatred, the legitimacy of his conviction turned on a balancing of his expression rights in reporting facts and conveying opinions about them and the harms imposed by the hate message on its targets. Both the majority and the dissenters on the European Court agreed that balancing was the proper approach. They disagreed, however, concerning how much weight should be borne by the competing interests involved. From the standpoint of the dissenters, the majority placed too much weight on the journalist's expression rights and too little on the protection of the dignity of the victims of hatred. The dissenters emphasized the fact that the journalist had edited down the interviews to the point of principally highlighting the racial slurs, and that he had at no point in the documentary expressed disapproval or condemnation of the statements uttered by his interviewees.

In the end, the disagreements between the majority and the dissent in *Jersild* center on the proper interpretation to be given to the general tenor of the documentary and to the attitude displayed in it by the journalist through his interviews and reports. Accordingly, just as it became plain in the context of hate speech regulation in Germany, prohibitions against crude insults and patently false statements of fact generally seem legally manageable. On the other hand, issues depending on opinions or on drawing the often elusive line between fact and opinion, present much more troubling questions. With this in mind and in light of the different approaches to hate speech outlined above, it is now time to explore how best to deal with hate speech in the context of contemporary constitutional concerns.

...

Kenneth Karst, Equality as a Central Principle in the First Amendment (1975)

The principle of equal liberty of expression underlies important purposes of the first amendment. Three such purposes, not

always distinct in practice, are commonly identified: (1) to permit informed choices by citizens in a self-governing democracy, (2) to aid in the search for truth, and (3) to permit each person to develop and exercise his or her capacities, thus promoting the sense of individual self-worth. As a practical matter, realization of these goals implies realization of the first amendment's equality principle.

...

[The Supreme Court] makes two principal points: (1) the essence of the first amendment is its denial to government of the power to determine which messages shall be heard and which suppressed; "government must afford all points of view an equal opportunity to be heard." (2) Any "time, place and manner" restriction that selectively excludes speakers from a public forum must survive careful judicial scrutiny to ensure that the exclusion is the minimum necessary to further a significant government interest. Taken together, these statements declare a principle of major importance. The Court has explicitly adopted the principle of equal liberty of expression.

...

VI. THE FIRST AMENDMENT AND "EQUAL TREATMENT IN THE VOTING PROCESS"

The Constitution nowhere explicitly confers a right to vote on anyone. But in 1964, the Supreme Court construed article I, section 2, of the Constitution to guarantee the right of a "qualified" person to vote in federal elections. A period of intensive constitutional development had begun. Within the next decade, the Supreme Court came to recognize a constitutional "right to equal treatment in the voting process."

Although this newly fashioned right has been explained largely as a derivation from the equal protection clause, it rests just as soundly on the first amendment's principle of equal liberty of expression. Indeed, the first amendment demands an even greater degree of equality in the electoral process than does the equal protection clause. The first amendment's equality principle applies both to equality among voters and to equality among candidates and parties.

A. First Amendment Foundation for “the Equal Right to Vote”

The core of the principle of equal liberty of expression is that government action may not favor or disfavor expression because of its content. Voting is political expression, not simply in the sense of choosing among candidates and policies, but also in the sense of making a statement about the public issues raised during a political campaign.

Furthermore, voting is the expression of each voter’s claim to the dignity of citizenship. When the Supreme Court embraced the doctrine of “one person, one vote” in *Reynolds v. Sims*, it recognized that voter equality was implicit in the idea of “[f]ull and effective participation by all citizens in state government.” Further, the Court said, quoting itself:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.

The perception of the vote as a “voice” is scarcely new, but it captures nicely the first amendment dimensions of the right to vote.

Just two years after *Reynolds*, the Court heard a challenge to the constitutionality of a poll tax as a condition on voting in a state election, in *Harper v. Virginia State Board of Elections*. The challenge was based not only on the equal protection clause, but also on the first amendment. Voting was analogized by the appellants to lobbying and to pursuing social or political objectives through litigation, both of which had been held to be forms of first amendment activity. Furthermore, voting was said to be, like the privacy of political association, necessary to make the first amendment’s explicit guarantees effective. As the Court had previously said: “Other rights, even the most basic, are illusory if the right to vote is undermined.”

In reversing the three-judge district court’s dismissal, the Court did “not stop to canvass the relation between voting and political expression,” but held that the poll tax as a

condition on voting in state elections was invalid under the equal protection clause. The Harper opinion set the pattern for a series of decisions striking down various types of voter qualifications such as property ownership or lengthy residence in the state. In *San Antonio Independent School District v. Rodriguez*, the Court summarized these decisions, all based on the equal protection clause, by saying there was now a constitutional “right to equal treatment in the voting process.”

Because voting is the most basic act of political expression, the same decisions can be seen as illustrating the equality principle of the first amendment. The poll tax, for example, was defended by Justice Harlan on the ground that the state could rationally conclude:

that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

But this result is precisely what the first amendment’s equality principle prohibits: a selective restriction on expression, based on the ideas and sentiments likely to be expressed. The “stake in community affairs” of a property owner, as a determinant of a point of view, is an impermissible basis for the state’s decision to permit or forbid political expression.

. . .

The voter-qualification cases, seen as first amendment cases, come to this: No citizen can be denied the right to “participate in political affairs or in the selection of public officials” unless that denial is necessary to achieve a compelling state interest. Any denial of a voice in the affairs of the political community demands strict judicial scrutiny because that voice is protected by the first amendment.

Thus far, the first amendment right to vote looks much like the guarantee of equal protection as applied to the “fundamental” interest in voting. A voting qualification based on age, for example, must pass the compelling-

state-interest test under either formula. But recognition of the first amendment right will make a difference where a state disqualifies convicted felons from voting. In *Richardson v. Ramirez*, the Supreme Court upheld such a disqualification on the strength of section 2 of the fourteenth amendment, which, the Court held, limited the applicability of the equal protection case, the disqualification of ex-felons is thus not required to withstand any judicial scrutiny whatever. But within the framework of the first amendment's equality principle, any disqualification of voters must be justified as necessary to achieve a compelling state interest. For the reasons stated by Justice Marshall in *Richardson*, no such justification can be found for disqualifying ex-felons from voting.

Nor will literacy test survive the first amendment right to equality in voting—assuming, that is, that they ever return from the limbo to which congress sent them in 1970. A literacy qualification is related not to maturity of judgment, but to the capacity to be informed through the particular mode of the printed word. In an era when 95 percent of the homes in the country have television sets, turned on for an average of more than five hours per day, the ability to read a newspaper is scarcely required for an understanding of public affairs. More important, many of the illiterate belong to impoverished racial and ethnic minorities; and even to the extent they do not, the illiterate are apt to share significant interests and opinions with those who are disadvantaged in other ways, such as the poor. It is hard to resist the conclusion that literacy test, like property qualifications and poll taxes, have been used to limit the vote to those who can be counted on to be “responsible”—in other words, to vote according to a particular cluster of ideologies. The first amendment's equality principle forbids such a limitation on the voice embodied in the right to vote.

The first amendment's equality principle also casts new light on the Court's apportionment cases. On of the best-known passages of Chief Justice Warren's opinion in *Reynolds v. Sims* is his comment:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.

In dissent, Justice Harlan argued that it would be

More meaningful to note that people are not ciphers and that legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do reflect the places where the electors live.

Of course legislators represent people by representing interests. But the holding of *Reynolds v. Sims* is that a state cannot constitutionally discriminate among voters by giving some interests greater proportional weight than is justified by the number of people who share those interests.

The first amendment's principle of equal liberty of expression demands the same conclusion. Just as the hours available in a public forum may not be weighted according to the content of a messages, because the first amendment protects speakers as well as ideas, political expression by voting may not be weighted according to the content of a vote. Justice Harlan's view is, in a sense, a claim that each interest is entitled to “access” to the legislative halls. But not even the most zealous advocate of a right of access to the media would propose that government set aside a weighted number of a newspaper's columns to assure that a particular point of view be satisfactorily represented.

For the most part, the first amendment's equality principle will produce results in apportionment cases similar to those reached under the equal protection clause. But in some cases, application of a rigorous first amendment analysis will reveal the weaknesses of the equal protection decisions. The Court's recent tolerance for the “de minimis” variations in state-legislative-district equality, for example, is questionable when viewed against the first amendment. And its acceptance of “supermajorities” is a plain violation of the first amendment's equality principle. A two-thirds vote requirement for the passage of a ballot proposition is the clearest example of content

discrimination: a “No” vote equals two “Yes” votes. In *Gordon v. Lance*, the Court impliedly reaffirmed that a weighting of votes that results in discrimination against a “discrete and insular minority,” such as a racial group, would be invalid under the equal protection clause. The first amendment’s equality principle is not so limited, but extends to discrimination against any expression on the basis of its content, regardless of the nature of the disfavored group.

Racial gerrymandering is unconstitutional under either an equal protection (or fifteenth amendment) approach or the principle of equal liberty of expression. But the first amendment provides another reason to abandon the untenable distinction between Southern racial gerrymanders, which are usually held invalid, and Northern racial gerrymanders, which are valid unless proved invidiously motivated. Finally, political gerrymandering, which the present Court seems prepared to accept under equal protection analysis, is vulnerable to the first amendment equality principle because it presents an obvious discrimination by government against political expression on the basis of its content.

The “equal right to vote,” as announced in the Court’s opinions to date, is a right based on the equal protection clause. But, as Justice Brennan recently said, it is also a first amendment right.

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Catherine A. MacKinnon, *Pornography as Defamation and Discrimination* (1991)

Even when a law against group defamation is rejected as censorship, the defamatory words, and the ideas and attitudes they animate and actualize, are conceded to have justified, legitimated, and potentiated the devastation. The words are understood to construct social reality. The epithets from the leaflet which refer to race, religion, and politics, and sometimes even those which refer to sexual orientation, are often granted to be not only offensive but also dangerous; the prejudices they express, mobilize, propagate, and imprint are seen as false and are condemned.

In . . . discussions, one encounters the sense that the reality these terms represent is not happening here and now, at least not the way it was “there” and “then.” These events, it seems, are regarded as essentially over, lurking only in the isolated unpleasant or insensitive remark or in the occasional bizarre but largely impotent incident, like magic marker leaflets published at night by xerox. Nothing large or systematic or cumulative is happening. In the view of most of my interlocutors, the formative experiences of group libel live on in discourse principally as analogy or memory, at most casting a shadow across the future in a tenuous kind of causality. Yet always the question of explanation of the past is anguished over: how could these atrocities have been allowed to happen? What could people have been thinking? How could they have not known or have looked the other way? How could the law have become so perverted as to legalize them? Implicit here is that “we,” here and now, would recognize these past outrages for what they were at the time. “We” would have seen through them, spoken out against them, stood up to them, done something to stop them.

Here and now, there is something virtually never included in the lexicon of group defamation. People are being callously dehumanized, horribly brutalized, and sometimes killed. Verbal, visual, and physical atrocities are committed, demeaning an entire group because of a condition of birth, targeting them for physical atrocities which are being done. This case is distinctive in a number of ways, including the fact that a lot of money is being made from the defamatory materials, and that the connections between the material and specific physical abuses are far better documented than in any other instance. Yet the atrocity is not acknowledged but is widely denied. Its ideas are neither widely identified as false nor generally condemned. On the contrary, the materials are rather widely celebrated, alternately defended as freedom itself and as the price “we” must pay for freedom. Not only is this permitted to happen, it is defended by many as a measure of principle. I refer . . . to pornography and the situation of women.

Part of the problem in this case is the lack of recognition, militant at times, that there

is such a thing as the condition of women of which this body of materials could be a part. In reality, the status and treatment of women has certain regularities across time and space, making gender a group experience of inequality on the basis of sex. Traditionally, women have been disenfranchised, excluded from public life and denied an effective voice in public rules, denied even the use of their own names. Women are still commonly relegated to the least compensated and most degraded occupations. Their forced dependency is exploited and venerated as woman's role; their work is devalued because they are doing it, as women are devalued through devaluing the work they do. Women remain reproductively colonized, subjected to systematic physical and sexual insecurity and violation, and blamed for it. Women are commonly raped, battered, sexually harassed, sexually abused as children, forced into motherhood and prostitution, depersonalized, denigrated and objectified—and told this is just and equal by the left, and inevitable and natural by the right. Women's abilities and contributions continue to be suppressed, their achievements denied and marginalized and, when valued, appropriated, and their children stolen. Women are used, abused, bought, sold, and silenced.

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This condition is imposed by force. Some force comes in the more covert forms of socialization, pressure, and inculcation to passivity and femininity, some in the more overt forms of poverty and sexual violence.

Mostly this reality is elided because neither women nor men like thinking about it, and because men like living it, or at least benefit from it. So its victims go under without a trace. Life and letters are unchanged. Law and politics go on as usual. Virtually nothing is done about any of it, by anyone, anywhere.

Pornography has a central role in actualizing this system of subordination in the contemporary West, beginning with the conditions of its production. Women in pornography are bound, battered, tortured, harassed, raped, and sometimes killed; or, in the glossy men's entertainment magazines, "merely" humiliated, molested, objectified, and used. In all pornography, women are prostituted. This is

done because it means sexual pleasure to pornography's consumers and profits to its providers, largely organized crime. But to those who are exploited, it means being bound, battered, tortured, harassed, raped, and sometimes killed, or merely humiliated, molested, objectified, and used. It is done because someone who has more power than they do, someone who matters, someone with rights, a full human being and a full citizen, gets pleasure from seeing it, or doing it, or seeing it as a form of doing it. In order to produce what the consumer wants to see, it must first be done to someone, usually a woman, a woman with few real choices. Because he wants to see it done, it is done to her.

To understand how pornography works, one must know what is there.

Hearings held by the Minneapolis City Council when our pornography ordinance was introduced there documented the harms of pornography's making and use in proceedings a member of the city's Civil Rights Commission likened to the Nuremberg Trials. The studies of researchers and clinicians documented the same reality women documented from life: pornography increases attitudes and behaviors of aggression and other discrimination by men against women. Women told how pornography was used to break their self-esteem, train them into sexual submission, season them to forced sex, intimidate them out of job opportunities, blackmail them into prostitution and keep them there, terrorize and humiliate them into sexual compliance, and silence their dissent. They told of being used to make pornography under coercion, of the force that gave them no choice about viewing the pornography or performing the sex. They told how pornography stimulates and condones rape, battery, sexual harassment, sexual abuse of children, and forced prostitution. Those not expressly coerced into pornography were there for the same reasons prostitutes are in prostitution: poverty, sexual abuse as children, homelessness, hopelessness, drug addiction, and desperation. Those who say women are in pornography by choice should explain why it is women who have the fewest choices who are in it most.

In the Minneapolis Hearings, women and men spoke in public about the devastating

impact of pornography on their lives. Women spoke of being coerced into sex so that pornography could be made of it. They spoke of being raped in a way that was patterned on specific pornography that was read and referred to during the rape, or repeated like a mantra throughout the rape, or being turned over as the pages were turned over. They spoke of living or working in neighborhoods or job sites saturated with pornography. A young man spoke of growing up gay, learning from heterosexual pornography that to be loved by a man meant to accept his violence, and as a result accepting the destructive brutality of his first male lover. Another young man spoke of his struggle to reject the thrill of sexual dominance he had learned from pornography, and to find a way of loving a woman that was not part of it. A young woman spoke of her father using pornography on her mother, and to silence her protest against her mother's screams, threatening to enact the scenes on the daughter if she told anyone. Another young woman spoke of the escalating use of pornography in her marriage, unraveling her self-respect and belief in her future, destroying any possibility of intimacy, violating her physical integrity. She spoke of finding the strength to leave. Another young woman spoke of being gang-raped by hunters who looked up from their pornography at her and said it all: "There's a live one." Former prostitutes spoke of being made to watch pornography and then duplicate the acts exactly, usually starting when they were children. Many spoke of the self-revulsion, the erosion of intimacy, the unbearable indignity, the shattered self, and the shame, anger, anguish, outrage, and despair they felt at living in a country where their torture is enjoyed, and their screams are heard only as the "speech" of their abusers. They spoke of the silence, and out of the silence, that pornography had imposed on them.

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The testimony, taken as a whole, revealed that the more pornography men see, the more abusive and violent they want it to be. The more abusive and violent it becomes, the more they enjoy it and the more aroused they get. The more abusive and violent it becomes, the less harm they see in what they are seeing or doing.

Over time, the evidence on the harm of pornography has only become stronger. When explicit sex and express violence against women are combined, particularly when rape is portrayed as pleasurable or positive for the victim, the risk of violence against women increases as a result of exposure. It is uncontroversial that exposure to such materials increases aggression against women in laboratory settings, increases attitudes which are related to violence against women in the real world, and increases self-reported likelihood to rape. As a result of exposure, a significant percentage of men, many not otherwise predisposed, as well as the twenty-five to thirty-five percent who report some proclivity to rape a woman, come to believe that violence against women is acceptable. Materials which combine sex with aggression also have perceptual effects which desensitize consumers to rape trauma and to sexual violence. In one study, simulated juries who had been exposed to such material were less able than real juries to perceive that an account of a rape was an account of a rape, through which the victim was harmed.

The most advanced research in this area studies the effects of materials which degrade and dehumanize women without showing violence, as that term is defined in the research. Such material has been shown to lower inhibitions on aggression by men against women, increase acceptance of women's sexual servitude, increase sexual callousness toward women, decrease the desire of both sexes to have female children, increase reported willingness to rape, and increase the belief in male dominance in intimate relationships. For high-frequency consumers, these materials also increase self-reported sexually aggressive behavior.

Men who use pornography often believe that they do not think or do these things. But the evidence shows that the use of pornography makes it impossible for men to tell when sex is forced, that women are human, and that rape is rape. Pornography makes men hostile and aggressive toward women, and it makes women silent. While these effects are not invariant or always immediate, and do not affect all men to the same degree, there is no reason to think they are not acted upon and every reason and

overwhelming evidence to think that they are—if not right then, then sometime, if not violently, then through some other kind of discrimination.

On the basis of this evidence and analysis, Andrea Dworkin and I designed a law—the ordinance whose advocates were libeled in the leaflet mentioned at the outset—that recognizes pornography as a practice of sex discrimination. Our law defines pornography as graphic sexually explicit pictures or words that subordinate women and also include one or more of a number of specified scenarios which typify pornography. Four practices are actionable: coercion into pornography, forcing pornography on a person, assault due to specific pornography, and trafficking in pornography. We did not claim that these atrocities never happen without pornography. We said that sometimes they do, but when it is proven to have happened because of pornography, it should be possible to do something about it. We did not claim that these atrocities are the only things that happen because of pornography. We said that no matter what else happens, this does. Pornography is thus not a prognostication or representation of second class citizenship acted out elsewhere, but an integral dynamic in it, and hence a civil rights violation.

In this light, pornography, through its production, is revealed as a traffic in sexual slavery. Through its consumption, it further institutionalizes a subhuman, victimized, second class status for women by conditioning men's orgasm to sexual inequality. When men use pornography, they experience in their bodies, not just their minds, that one-sided sex—sex between a person (them) and a thing (it)—is sex, that sexual use is sex, sexual abuse is sex, sexual domination is sex. This is the sexuality that they then demand, practice, purchase, and live out in their everyday social relations with others. Pornography works by making sexism sexy. As a primal experience of gender hierarchy, pornography is a major way in which sexism is enjoyed and practiced, as well as learned. It is one way that male supremacy is spread and made socially real. . . . Inequality between women and men is what is sexy about pornography—the more unequal the sexier. In other words, pornography makes sexuality into a key dynamic in gender inequality by viscerally

defining gender through the experience of hierarchical sexuality. On the way, it exploits inequalities of race, class, age, religion, sexual identity, and disability by sexualizing them through gender.

Seen in this way, pornography is at once a concrete practice and an ideological statement. The concrete practices are discriminatory; the ideological statements are defamatory. Construed as defamation in the conventional sense, pornography says that women are a lower form of human life defined by their availability for sexual use. Women are dehumanized through the conditioning of male sexuality to their use and abuse, which sexualizes, hence lowers, women across the culture, not only in express sexual interactions. Pornography makes women a public sexual spectacle and common sexual property, works to lower the public standard of their perception and treatment, terrorizes and humiliates women, and also at times offends their sensibilities. Like group libel's historic atrocities, pornography's effects are known but denied or blinked at while being acted out. The abusive acts are presumptively illegal but pervasively permitted, decried in public and savored in private.

When pornography's reality is examined against the terms of group defamation as a legal theory, some of the theory fits, but much of it does not. Pornography does purvey an ideology about all women; too, pornography of women and men of color sexualizes racism. It is in this sense defamatory. But its ideological impact, the prejudice it engenders, while very real, is only one of its effects and is not the one on which the civil rights approach centrally focuses. The deepest injury of pornography is not what it says, but what it does.

It is possible to say what pornography says without doing what it does. For example, the paragraphs above say what it says but do not do what it does. Its damage neither begins nor ends in its mental content. Although all discriminatory damage says something as well as does something, coercion is not an idea; force is not an argument; assault is not advocacy, nor is trafficking in human beings a discourse. On a deeper level, pornography provides direct sexual stimulation, the experience of which is one of sex, not just the idea of sex. There is no

adequate analogy to this, and no reply in kind exists. Its pleasure is a specific reinforcer for bigotry itself, not an argument about why bigotry is right, nor even a base appeal to bigoted interests. If you think an orgasm is an argument, try arguing with one some time.

The conditions of the production of pornography distinguish it further from the rest of group defamation. Nobody has to violate or use anybody to make most anti-Semitic propaganda. Nobody has to pose for a lynching, i.e. be lynched, to create most Klan hate literature. . . . When a live human being is not used, and the materials are not sex, it makes some sense to discuss the materials as representations or images and to focus on their consequences as the effects of ideas. Their idea content is a substantial vehicle for the harm they do. But, except in a realm of abstraction totally divorced from reality (where most academics seem to prefer to reside), it covers up reality to discuss pornography in these terms. Both pornography and hate literatures are hateful; both propagate invidious group stereotypes; both promote and often instigate violence; both dehumanize. But pornography, because it is also an industry, because its dynamic is sexual, and because the camera requires live fodder, not only springs from abuse and leads to abuse; it is abuse. It is not merely the groundwork or persuasive basis or impelling rationalization, however destructive or immediate, for consequent acts. It is an act.

This is the reason that pornography is most appropriately addressed as discrimination, not defamation. Defamation and discrimination emerge from distinct theoretical and political traditions. The idea of group defamation, like the idea of obscenity, is that group defamation is an idea about a group; discrimination, even when it expresses an attitude, as it always does, is always recognized as an act. Defamation is a tort addressing reputational harm to individuals; it is only derivatively applied to groups. Discrimination is first and always a group-based concept, even when applied to one person at a time. The law of defamation since *New York Times v. Sullivan* has been explicitly circumscribed by First Amendment safeguards because state laws against individual libel, and with it group libel, have been thought potentially

to compromise freedom of expression. But discrimination that takes a verbal form has never—not until pornography was challenged as sex discrimination—been regarded as protected by the First Amendment.

Most common forms of discrimination are significantly accomplished through words: “you’re fired,” “it was essential that the understudy to my Administrative Assistant be a man,” “whites only,” “[m]ale help wanted,” “did you get any over the weekend?” “sleep with me and I’ll give you an ‘A’,” and “walk more femininely, talk more femininely, dress more femininely, wear makeup, have [your] hair styled, and wear jewelry.” Nearly every time a refusal to hire or promote or accommodate is based on a prohibited group ground, some verbal act either constitutes the discrimination or proves it. When words are not the discriminatory act itself, like sexually harassing comments are, for example, they prove that the treatment is based on a prohibited group ground. In the discrimination context, verbal expressions are actionable per se or are evidence of actionable practices, not protected speech; they are smoking guns, not political opinion. No sexual harassment defendant to my knowledge has ever claimed his sexually harassing remarks were protected expression. Not yet.

Not even clearly symbolic conduct such as cross burning has been considered protected by the First Amendment, even though, unlike pornography, it is pure expression. Cross burning inflicts its harm through its meaning as an act which promotes racial inequality through its message and impact, engendering terror and effectuating segregation. Its damages to equality rights [are] not symbolic but real. Cross burning does not so much harm a group’s reputation as it effectuates terror, intimidation, and harassment on a group basis. The First Amendment frame on the issue, taken as exclusive, sees what is said but not what is done. When the traditions of defamation and discrimination confront each other, the First Amendment questions how equality can exist without free expression, and the Fourteenth Amendment questions how expression (or anything else) can ever be free without equality.

Defamation and discrimination imagine their harms differently. Defamation addresses

harm to group reputation, discrimination to group status and treatment. But to the degree status is a matter of reputation, and reputation a matter of status, they overlap. Whether the treatment is verbal, symbolic, or physical, being treated as a second class citizen certainly furthers the second class reputation of the group of which one is a member. Segregated lunch counters or toilets or water fountains were not challenged as defamatory symbolic expression, nor defended because of what they said—that is, as symbolic speech or as expressions of political opinion—although they were arguably both expressive and political. Racial segregation in education was not regarded as protected speech to the extent it required verbal forms, such as laws and directives, to create and sustain it. Nor was it regarded as actionable defamation against African-Americans, although a substantial part of its harm was the message of inferiority it conveyed, as well as its negative impact on the self-concept of Black children. Yet the harm of segregation and other racist practices is at least as much what it says as what it does. Just as with cross burning, what it says is indistinguishable from what it does. Considered this way, it can be said that pornography does substantial reputational damage to women, but the harm does not end there. The civil rights approach to pornography does not center on its defamatory aspects any more than the civil rights approach to segregation centered on its defamatory aspects, although they are there in both cases.

Pornography is propaganda, an expression of male ideology, a hate literature, an argument for sexual fascism. It conveys ideas like any systematic social practice does. It is also, like most group defamation, often immoral, tasteless, ugly, and boring. But none of this is what pornography distinctively is, how it works, or what is most harmful about it.

The theory of group defamation does not adequately encompass the reality of pornography. One has to wonder whether it adequately encompasses the reality of group defamation either. For instance, building on the individual libel model, some laws of group defamation require that the statements be proven false or permit truth as a defense. While much of what visual pornography says about women is a pack of lies, it actually has to happen to be

made, and in that sense is empirically true. What it shows happened to the person it shows it happening to: what you see is what she got. Most group defamation contains a similar mix of lies with imposed realities. The stereotypes defamation presents begin false and remain largely false, but to the extent the stereotypes are imposed on a group, they will accurately describe at least some of its members sometimes. Success in forcing the world to correspond to a defamatory image, as in making the world a pornographic place, makes defamation both more true and arguably more damaging, not less, but it is, for that reason, legally regarded as less defamatory, or not illegal as defamation at all, where truth is a defense.

As another example, the law of group libel generally restricts the promotion of hatred, or hatred and contempt. Hatred is an extreme feeling of negative animus which can express itself verbally or physically. Discrimination begins with an assumption of human status and focuses on deviations in treatment from that standard. If a man chains his dog in his backyard, most people probably will not say that the dog's civil rights are violated. If a man chains a woman in his basement, maybe they will. It does not matter if he loves her or hates her. What matters is how he treats her and what that treatment and its permissibility say about what a woman socially is. Perhaps, in terms of human rights, such treatment can be considered hateful regardless of his subjectivity. But the bottom line of discrimination, I think, is less do they hate and more will they kill. Hatred rationalizes and impels genocide, certainly, but so do some things far colder, like self-interest, sense of superiority, or fun, and something far more banal, like indifference or system. In the case of women and men, love deals at least as much death, and so does something hotter, like pleasure. The fact that pornography so often presents itself as love, indeed resembles much of what passes for it under male dominance, makes its construction as hate literature a challenging exercise in demystification, to say the least. The concept of discrimination aims not at what is felt by perpetrator or victim or what is said as such, but at what is done, including through words.

A related issue in the contrast between defamation and discrimination is the mental element of “willfulness” or a least knowledge of falsity required in many group defamation statutes. Sincere sex bigots, which the consumption of pornography creates, would presumably be exempt. Discrimination, on the other hand, need not always be intended or meant to be discriminatory. Indeed, after dealing with unconscious bigots, it can be an improvement to have one’s humanity recognized enough to have it willfully degraded. This is no less the case for the standard examples of group defamation than it is for pornography.

This analysis suggests that an equality theory may remedy some of the same inadequacies for group defamation that it has for pornography. A discrimination theory of defamation would center on its harm to subordinate groups. Group libel is an equality issue when its promotion undermines the social equality of a target group that is traditionally and systematically disadvantaged. Group defamation promotes the disadvantage of disadvantaged groups. Group-based enmity, ill-will, intolerance, and prejudice are the attitudinal engines of the exclusion, denigration, and subordination that comprise social inequality. Without bigotry, social systems of enforced separation and apartheid would be unnecessary, impossible, and unthinkable. Stereotyping and stigmatization of historically disadvantaged groups through group hate propaganda shape their social image and reputation, arguably controlling the opportunities of individual members more powerfully than their individual abilities do. It is impossible for an individual to receive equality of opportunity when surrounded by an atmosphere of group hatred or contempt.

In this light, group defamation can be seen as a specific kind of discriminatory practice, a verbal form inequality takes. Anti-Semitism promotes the inequality of Jews on the basis of religion and ethnicity. White supremacy promotes inequality on the basis of race, color, and sometimes ethnic origin. Group defamation in this sense is not the mere expression of anti-Semitic or white supremacist opinion but a practice of discrimination similar to sexual harassment and other discriminatory acts that take verbal form. It is arguably an

integral link in systemic discrimination which keeps target groups in subordinated positions through the promotion of terror, intolerance, degradation, segregation, exclusion, vilification, violence, and genocide. The nature of the practice can be seen and proven from the damage it does, from immediate psychic wounding to consequent physical aggression. Where advocacy of genocide is part of group defamation, an equality approach to its regulation would observe that to be liquidated because of the group you belong to is the ultimate inequality.

Thus, any nation that has a constitutional guarantee of equality can potentially defend a group defamation statute that is challenged as a violation of freedom of expression on equality grounds. A law against group defamation promotes equality and opposes inequality. It would violate any constitutional equality provision in existence for a legislature to pass a law authorizing the promotion of hatred on the basis of sex, race, religion, and national origin. It follows that governmental action against promoting group hate is protected under constitutional equality provisions. Just as governmental action to promote group hatred would violate a constitutional equality provision, governmental action to prohibit group hatred promotes constitution-based equality.

Once laws against group defamation can be supported as well as challenged on a constitutional level, the tension between equality and speech would be resolved by whatever standards constitutional conflicts are accommodated. Typically, the courts would decide whether the group libel provision burdened expression significantly or at all, and whether its regulation promoted equality as unintrusively as possible, and in a way a legislature could have found effective. The balancing would be done however balancing is done, but it would be two constitutional rights in the balance, not just one constitutional right against a nice idea or good manners or political sensitivity or standards of civility. Considered as defamation, the harms are comparatively trivialized, and the state interest is obscured, disabling the constitutional defense of such laws against First Amendment attack. When the

equality interest is recognized, focusing on lived consequences rather than message content, practices like lynching, cross burning, and pornography are revealed as expressive forms inequality takes, and the constitutional balance shifts.

Analyzing group defamation in equality terms recasts many well-worn issues in free expression debate. Perhaps the most startling concerns the dogma that there is no such thing as a false idea for purposes of constitutional analysis of speech. When equality is recognized as a constitutional value and mandate, the idea that some people are inferior to others on the basis of group membership is authoritatively rejected as the basis for public policy. This does not mean that ideas to the contrary cannot be expressed. It should mean, however, that social inferiority cannot be imposed through any means, including expression.

Because society is made of language, distinguishing talk about inferiority from verbal imposition of inferiority may be complicated at the edges but is nonetheless very clear in most instances. At the very least, such practices would not be constitutionally insulated from regulation on the ground that the ideas they express cannot be regarded as false. And attempts to address such practices should not be considered invalid because, in taking a position in favor of equality, they assume that the idea of human equality is true. There is no requirement that the state remain neutral when inequality is practiced—quite the contrary. Expressive means of practicing inequality have never been recognized as exceptions.

In the United States, the receptivity of the law of free speech to an equality theory of group defamation can be partially assessed from courts' responses to the sex discrimination ordinance against pornography. The U.S. Court of Appeals for the Seventh Circuit in *American Booksellers Association v. Hudnut* found that the ordinance violated the First Amendment guarantee of freedom of speech. The court reached this conclusion in spite of its agreement that pornography contributed materially to rape and other sexual violence, was a form of subordination in itself, and was partly responsible for second class citizenship in various forms, including economic ones. In

some passages, the court conceded that pornography is a practice. Yet protecting the pornography was held to be more important than avoiding or remedying its harms. Indeed, the court held that pornography's importance as speech can be measured by its effectiveness in doing the harm that it does.

The civil rights law against pornography was held to be a form of discrimination on the basis of "viewpoint" because it was not neutral on the subject of sex-based exploitation and abuse. By this standard, every discriminatory practice and every anti-discriminatory law expresses a point of view. Acts express ideas, yet they are legally restricted and do not have to be proven expressionless first. Segregation expresses the view that Blacks are inferior to whites; rulings against segregation express the contrary view. Segregation is not therefore protected speech, nor are rulings against it considered "thought control." Affirmative action plans and anti-discrimination policies are not regarded as discrimination on the basis of viewpoint, although they prohibit the view that Blacks are inferior to whites from being expressed by discriminating against them, including by telling them "you're fired" for the wrong reasons. This remains true even though deinstitutionalizing segregation does a great deal to undermine the point of view it expresses, just as making pornography actionable as sex discrimination would delegitimize the ideas the practice advances. Under the ordinance, misogynist attitudes toward women and sexuality can be expressed; they just cannot be practiced in certain ways, such as when verbal and visual subordination based on sex are trafficked. What the *Hudnut* court missed is both that acts speak and that speech acts.

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Now that the law has adopted the point of view of the pornographers on women's rights as its basis for state policy, holding that the pornography is more important than the women they know it harms, one might ask again the same questions that are asked of the classic experiences of group defamation. Why the silence? Why the complicity? How can "we" let this go on? How can it be officially permitted? How can the law be so twisted as to collaborate in it? What are people thinking? Don't they

know? Don't they see? Don't they care? Perhaps the lack of explanation for the success of past campaigns of group defamation is connected with the lack of recognition of present ones. Why have most of you not heard all this before? Why have those who have seen the pornography not seen it in this way? Now that you know, why will most of you find satisfying reasons to do nothing about it?

Michael A. Olivas, Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom" (1993)

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The search for truth requires that scholars receive the protection of academic freedom in posing new, controversial, or unpopular ideas in their teaching and research. The tradition of academic freedom has been translated into practice by several means, particularly constitutional interpretations of the First Amendment penumbral rights protecting the freedoms of inquiry, thought, and choice of what to teach. These rights of academic freedom are most evocatively articulated by Justice Douglas in *Griswold v. Connecticut*:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

. . . [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom

of the entire university community. Without those peripheral rights the specific rights would be less secure.

First Amendment protection requires that state action be present, and may therefore provide only minimal protection for faculty in private institutions. As a result, protection of academic freedom in private institutions must stem from state constitutional protections that reach private institutions or from contract principles. Contract law may provide protection if AAUP Principles on Academic Freedom and Tenure or other customs or practices are adopted in the employment contract (expressly or by implication). Recently, as a result of collective bargaining or other organized labor activity, there has been a trend towards explicit protection of academic freedom in faculty contracts.

II. BACKGROUND: ACADEMIC FREEDOM AND GENERAL CONFLICTS BETWEEN TEACHERS AND INSTITUTIONS

The most interesting debates regarding our traditional understanding of academic freedom have been attempts to reconcile the concept's essentially paradoxical nature: It protects quite expansively the scholarly enterprise from outside interference (grand juries, witch-hunting public officials, funding agencies, and other assorted patrons, critics, and "do-gooders"), but only grants limited protection to professors' intramural speech or classroom activities against institutional interests. For scholars in this fertile field, academic freedom has been a search for the perfect professional paradigm.

A. Theories of Academic Freedom

The eminent historian, Walter Metzger, describes the AAUP's 1940 Statement as "three axiomatic dedications to principle," but allows that such "conceptual mappings" chart a hilly terrain:

And though most who do these conceptual mappings divide academic freedom . . . into three main parts, some

insist that good logic would divide it into only two (freedom to teach and freedom to do research, arguably the only professionally relevant freedoms, with citizen or extramural freedom ceded to the large neighboring country of ordinary civil liberties), and a few would divide it into four (the three that go with the faculty's rules plus one attached to the students' status) or even five (all of the four individual academic freedoms, along with institutional academic freedom, also known as institutional autonomy).

One of the most careful legal scholars of academic freedom, William Van Alstyne, has consistently tried to draw principled distinctions between free speech in general and the more particular concept of academic freedom. The Supreme Court has characterized academic freedom as a "special concern" of the First Amendment. The concepts of free speech and academic freedom are symmetrical and overlapping, not synonymous. Van Alstyne has noted that the AAUP's 1915 Declaration set out academic freedom protections for professors, but also exacted reciprocal professional obligations, including the obligation to adhere to faculty norms and standards both in teaching and in reviewing other colleagues' work. The 1915 Declaration established contours for faculty peer evaluations which should only be overridden by higher institutional bodies when impartial professorial review procedures and norms are not employed.

Mark Yudof characterizes academic freedom as encompassing "three faces": personal autonomy; government expression; and institutional authority. In a series of well-researched essays, Dean Yudof has explored these three faces, arguing persuasively against a unitary notion of academic freedom, insisting instead on consideration of the "multiple strands of the concept." Matthew Finkin, in contrast, argues for a single, well-developed professional autonomy face. He identifies as a possible historical antecedent "the pre-industrial artisanal ideal," "an ideal to which the nation may be returning in some aspects of the unfolding law of employment." Usefully, Professor Finkin

provides examples of how his conception of academic freedom would operate in a world governed not by the traditional rationale expressed in *Pickering v. Board of Education*, which granted broad protection to the speech of public employees, but by an emerging view articulated in *Connick v. Myers*, which accords greater weight to public employers' need for worker "discipline . . . and . . . harmony."

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In a nutshell, expression of controversial ideas and criticism of the status quo must be protected, even at the risk of discomfort for the teacher or class, when a professor is teaching within her field. Accordingly, a graduate student who wished to discuss men's and women's spatial-reasoning skills in a class he was teaching on "comparative animal behavior" but who feared prosecution under the university's hate speech code, convinced a federal court that the code endangered his First Amendment rights. But academics still must adhere to professional standards in voicing their views

This "professorial function" approach protects classroom utterances so long as they meet professional standards and result from training, developed expertise, and scrupulous care in presenting material. Conversely, a mathematician who insisted that $2+2=5$ could be fired for failing to meet professional measures of competence; an English teacher, police file clerk, or telephone operator, though, could not be fired for holding such a belief. While the calculus grows more complex for interdisciplinary fields, peer-review journals and tenure committees routinely invoke the professional standard of care. Professional standards are, in short, common in academic practice.

A necessary corollary, however, is that a heightened core of professional protection need not translate into more protection for "intramural utterances" (nonprofessorial speech) than nonacademics receive. Thus, a philosophy professor who writes a pornographic novel, or a university president who makes an obscene and harassing phone call from campus, should not be able to claim any more or less protection than any member of the community. To broaden protection of such intramural speech, a more principled path is to exceed *Connick* and expand

everyone's political speech rights, rather than concocting an overbroad conception of academic freedom. Faculty should be entitled to special consideration only in pursuing academic endeavors (hence "academic" freedom), such as in the classroom. Extending the protections of academic freedom to extra-academic speech, in this light, is unprincipled.

There should therefore be a permeable border between professorial speech and nonprofessorial speech. Professor David Rabban argues for a similar approach; in distinguishing between academic freedom and the general free speech clause, he urges:

The distinctive professional functions of professors provide the basis for applying a special first amendment concept to them. But what is the first amendment justification for treating the aprofessional speech of professors differently from the speech of anyone else?

The only plausible justification is that the line between professional and aprofessional speech may be controversial, and that protection for clearly aprofessional speech is needed to give "breathing room" to the professional speech that is the special subject of academic freedom. Such a drastic prophylactic rule is unnecessary and would be likely to generate more resentment against the "special pleading" of professors than even a narrow and convincing conception of academic freedom inevitably does. A generous definition of professional speech is a feasible and better response to this legitimate concern.

There are legitimate first amendment reasons for protecting the political speech of public employees generally. Indeed, the Supreme Court has done so while rejecting the "right/privilege" distinction popularized by Holmes. But as the Supreme Court has recognized, it is the free speech clause, not the special first amendment right of academic freedom, that provides the constitutional basis for this protection.

Under Rabban's attractive approach, courts would produce a "coherent and convincing specific conception of constitutional academic freedom," specifically acknowledging professional speech by teachers and distinguishing it from other protected speech. This theory harmonizes well with the approach I advocate, where core professorial speech is broadly protected, although still subject to norms of professional practice.

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Richard Delgado & Jean Stefancic, Ten Arguments Against Hate-Speech Regulation: How Valid? (1996)

Now consider three paternalistic justifications for opposing hate-speech rules:

(1) Permitting racists to utter racist insults allows them to blow off steam harmlessly. Minorities accordingly are safer than they would be under a regime of antiracism rules. We will refer to this as the "pressure valve" argument.

(2) Free speech has been minorities' best friend. Persons interested in achieving reform, such as minorities, should resist placing any fetters on freedom of expression. This we term the "best friend" objection.

(3) More speech—talking back to the bigot—rather than regulation is the solution to racist speech. Racism is a form of ignorance: dispelling it through reasoned argument is the only way to get at its root. Talking back to the aggressor also is empowering. It reduces victimization, strengthens one's own identity, and reinforces pride in one's heritage. This we call the "talk back" argument.

Each of these arguments is paternalistic, as we mentioned, invoking the interest of the group seeking protection. Each is seriously flawed; indeed, the situation is often the opposite of what its proponents understand it to be. Let us examine these arguments in detail.

1. The Pressure Valve Argument

The pressure valve argument holds that rules prohibiting hate speech are unwise because they increase minorities' jeopardy. Forcing racists to bottle up their emotions means that they will be more likely to say or do something hurtful later. Free speech serves as a pressure valve, allowing tension to dissipate before it reaches a dangerous level. If minorities understood this, the argument goes, they would reject antiracism rules. The argument is paternalistic; it says the rules, which you think will help you, will only make matters worse. If minorities knew this, they would join in opposing them.

How valid is this argument? Hate speech may well make the speaker feel better, but it does not make the victim safer. On the contrary, psychological evidence shows that permitting one person to say or do hateful things to another increases, rather than decreases, the chance that he or she will do so again. Moreover, others may come to believe that they may follow suit. We are not mechanical objects. Our behavior is more complex than the laws of physics that describe pressure valves, tanks, and such other mechanical things. Unlike them, we use symbols to construct our social world, a world that contains categories and expectations for "black," "woman," "child," "teacher," "inner-city gang member," and so on. Once these categories are in place, they govern perception. They also govern the way we speak and act toward members of those groups in the future.

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Allowing persons to stigmatize or revile others thus makes them more aggressive, not less so. Once the speaker comes to think of another as a deserved-victim, his or her behavior may easily escalate to bullying and physical violence. Stereotypical treatment also tends to generalize—what we do teaches others that they may do so as well. Pressure valves may be safer after letting off steam, but human beings are not.

2. Free Speech as Minorities' Best Friend

Many liberals argue that the First Amendment historically has been a great friend

and ally of social reformers. The national president of the ACLU, for example, argues that without free speech Martin Luther King, Jr. could not have changed America as he did. And so for the environmental movement, women's rights, gay liberation, and so on. This argument is paternalistic, based on the supposed best interest of minorities. If they understood this best interest, the argument goes, they would not ask to bridle speech.

The argument oversimplifies the history of the relationship between racial minorities and the First Amendment. In fact, minorities often have made greatest progress when they acted in defiance of that amendment. The original Constitution protected slavery in several provisions, while the First Amendment existed alongside that institution for nearly 100 years. Free speech for slaves, women, and other outsiders was simply not a significant concern for the drafters, who appear to have thought of the First Amendment primarily as a source of protection for the kind of refined political and artistic discourse they and their class enjoyed.

Even later, when abolitionism and civil rights activism broke out, examination of the role of speech in reform movements shows that the relationship of the First Amendment to social advance is not so straight forward as First Amendment absolutists maintain. In the 1960s, for example, Martin Luther King, Jr. and others did use speech to kindle America's conscience. But as often as not, the First Amendment (as then understood) did not protect them. They rallied, were arrested and convicted; sat in, were arrested and convicted; marched, were arrested and convicted. Their speech was deemed too forceful, too disruptive. Many years later their convictions might be reversed on appeal, at the cost of thousands of dollars and a great deal of gallant lawyering. But the First Amendment as then understood helped much less than we like to think.

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The landscape of current First Amendment exceptions betrays these forces in operation. Our system has carved out or tolerated dozens of "exceptions" to free speech: official secrets; libel; conspiracy; plagiarism; copyright; misleading advertising; words of threat; disrespectful words uttered to a judge,

teacher, or other authority figure; and many others. These exceptions, enacted at the insistence of a powerful group, seem familiar and acceptable, as indeed perhaps they are. But the idea of a new exception to protect some of the most defenseless members of society, young minority undergraduates at predominantly white campuses, produces consternation: the First Amendment must be a seamless web.

But it is we who are caught in a web—the web of the familiar. The First Amendment seems to us commonplace, useful, and valuable. It reflects our sense of the world, allows us to make distinctions, tolerates exceptions, and gets things done in a way we assume will be equally valuable for others. But the history of the First Amendment, as well as the landscape of current exceptions, shows that it is much more valuable to the majority than to the minority, more useful for confining change than propelling it.

3. The “More Speech” Argument

Some First Amendment purists argue that minorities should talk back to the aggressor. For example, Nat Hentoff writes that antiracism rules teach people of color to depend on whites for protection, while talking back emphasizes self-reliance and strengthens one’s self-image as an active agent in charge of one’s own destiny. The talk-back approach draws force from the First Amendment principle of “more speech,” according to which additional discussion is always a preferred response to a message some listener finds troubling. Hentoff and others oppose hate-speech rules, then, not so much because they limit speech, but because they believe minorities should learn to speak out. A few offer another advantage: a minority who speaks out will be able to educate the utterer of a racially hurtful remark. Racism is the product of ignorance and fear. If a victim of racist hate speech explains matters, she may alter the speaker’s perception so he or she no longer will utter racist remarks.

Like many paternalistic arguments, this one is offered virtually as an article of faith. In the nature of paternalism, those who offer the argument are in a position of power. They believe themselves able to make things so merely by asserting them. They rarely offer

empirical proof of their argument, because none is needed. The social world is as they say because it is theirs: they created it that way.

Unfortunately, things are not as asserted. Those who hurl racial epithets do so because they feel empowered to do so. One who talks back is seen as issuing a direct challenge to that power. Often racist remarks are delivered in several-on-one situations in which responding in kind would be foolhardy. Indeed, many cases of racial homicide began in just this way: a group badgered a black person; the black talked back; and paid with his life. Other racist remarks are uttered in a cowardly fashion, by means of graffiti scrawled on a campus wall under cover of darkness, or by a flyer placed outside a black student’s door. In these situations, more speech is simply unfeasible.

Racist vitriol is rarely a mistake that could be corrected or countered by discussion. How could one respond to: “N_____, go back to Africa. You don’t belong at the university”? Would one say: “Sir, you do not understand. According to prevailing ethics and constitutional interpretation I, an African American, am of equal dignity and entitled to attend this university in the same manner as others. Now that I have explained this, will you please modify your remarks in the future?”

The notion that talking back is safe for the victim or educative for the racist is deeply fallacious. It ignores the power dimension to racist remarks, requires minorities to run very considerable risks, and treats a hateful message as an invitation for discussion. Even when successful, talking back is a burden. Why should minority undergraduates, already burdened with their own educational responsibilities, be charged with educating others?

The three paternalistic arguments do not survive analysis. Neither current doctrine nor liberal policies pertaining to minorities’ well-being dictate that there should not be antiracism rules. Could there be other reasons—perhaps associated with the conservative camp? A second group of arguments all concern the idea of victimization and tend to be associated with neoconservatives, including some of color.

4. The Waste-of-Time Argument

Many such writers argue that mobilizing against hate speech is a waste of precious time and resources. Donald Lively, for example, urges that civil rights leaders should have better things to do. Concentrating on hate-speech reform, he writes, is myopic and able, at best, to benefit only a small number of minority persons. Instead of “picking relatively small fights of their own convenience,” reformers should be examining “the obstacles that truly impede” racial progress, namely inadequate legal doctrine and financial savvy. Dinesh D’Souza writes that campus radicals champion hate-speech regulation because it is easier than working hard and getting a first-rate education. Henry Louis Gates wonders why this minor issue attracts the attention of so many academics when so much more serious work remains to be done.

But is it so clear that working to control hate speech is a waste of time and resources? What neoconservative writers may neglect is that eliminating hate speech goes hand in hand with combating what they call “real racism.” Certainly, being the victim of hate speech is a less serious misfortune than being denied a job, a mortgage, or an educational opportunity. But it is equally true that a society that speaks and thinks of minorities disparagingly is tolerating an environment in which these more active forms of discrimination will occur frequently. First, hate speech, acting in concert with a panoply of media imagery, constructs and reinforces a picture of minorities in the mind of the public. This picture or stereotype, which varies from era to era, is rarely positive: minorities are happy and carefree, oversexed, criminal, treacherous, untrustworthy, immoral, stupid, and so on.

A related reason why neoconservatives ought not throw their weight against hate-speech rules has to do with latter-day racism. Most neoconservatives, like many whites, think that acts of out-and-out discrimination are rare. The racism that remains is subtle, “institutional,” “latter-day,” lying in the arena of unarticulated feelings, practices, and patterns of behavior on the part of institutions and individuals. A focus on speech and language may be one of the few ways to address and cure this kind of racism.

Thought and language are closely connected. A speaker asked to reconsider his or her use of language may for the first time reflect on the way he or she thinks about a subject. Our choice of word, metaphor, or image betrays the attitude we have about a person or subject. No better tool than a focus on language exists to deal with this form of subtle or latter-day racism. Since neoconservatives are among the leading proponents of the idea that this form of racism is the only one that remains, they should think carefully before opposing measures that might curb it. Of course, speech codes would not reach every form of disparaging speech or depiction. But a tool’s unsuitability to redress every aspect of a problem is surely no reason to refuse to deploy it where it is effective.

[S]uccess is much more within reach than the toughlove crowd acknowledges. A host of Western democracies have instituted laws against hate speech and hate crime. Some, like Sweden, Great Britain, and Canada, have traditions of respect for free inquiry rivaling ours. In recent years, several hundred college campuses have instituted student conduct codes penalizing face-to-face racial insults, many in order to advance interests the campus saw as necessary to its function, including protecting diversity or providing an environment conducive to learning. Powerful actors like government agencies, the writers’ lobby, industries, and so on have always been successful at coining free speech “exceptions” to suit their interest—copyright, false advertising, words of threat, defamation, libel, plagiarism, words of monopoly, and many others. But the strength of the interest behind these exceptions seems no less than that of a black undergraduate subjected to vicious abuse while walking late at night on campus. New regulation is of course examined skeptically in our laissez-faire age. But the history of free speech doctrine, and especially the careers of the many “exceptions,” shows that need and policy have a way of being converted into law. The same may well happen with the hate-speech movement.

5. The Bellwether Argument

A further argument is that hate speech should not be driven under ground but allowed

to remain out in the open. The racist who one does not know, it is argued, is more dangerous than the one who one does. Moreover, on a college campus, incidents of racism or sexism can serve as useful spurs for discussion and self-examination. Steve Carter writes that regulating racist speech will leave minorities little better off than they are now, while screening out “hard truths about the way many white people look at . . . us.” D’Souza echoes this argument when he points out that hate-speech crusaders miss a valuable opportunity. When racist graffiti or fraternity parties proliferate, minorities should reflect on the possibility this may indicate a basic problem with affirmative action itself. An editor of *Southern California Law Review* considers antiracism rules tantamount to “sweeping the problem under the rug,” while “keeping the problem in the public spotlight . . . enables members (of the university community) to attack it when it surfaces.”

How should we see this argument? In one respect, it does make a valid point: the racist who is known, in most cases, is less dangerous than the one who is not. What the argument ignores is that there is a third alternative—the racist who is cured or at least deterred by official rules and policies from exhibiting the behavior he or she once did. Since most conservatives believe that laws and penalties do change conduct—indeed are among the strongest proponents of heavy penalties for crime—they ought to concede that campus guidelines against hate speech and assault would decrease those behaviors. Of course, regulation has costs of its own—something even we would concede—but this is a different argument from the bellwether one.

Other neoconservatives argue that silencing the racist might deprive the campus of the “town hall” opportunity to discuss and analyze issues of race when racist incidents come to light. But campuses could hold those discussions anyway. Even the best-drafted rules will not suppress hate speech entirely; there will continue to be some incidents of racist speech and behavior. The difference is that now there may be campus disciplinary hearings, which virtually guarantee the “town hall” discussions the argument assumes desirable. Because the bellwether argument ignores that rules will have

at least some deterrent effect and that there are other means of assuring campuswide discussions short of allowing racial invective to flourish, the argument deserves little weight.

6. Victimization

Another objection many neoconservatives raise is that prohibitions against verbal abuse encourage minorities to see themselves as victims. Instead of rushing to campus authorities every time something wounds their feelings, minority group persons ought to learn either to speak back or ignore the offensive behavior. A system of rules and hearings reinforces that they are weak, that their lot in life is to be victimized rather than assertive. Carter writes that anti-hate-speech rules are the special favorite of those “whose backgrounds of oppression make them especially sensitive to the threatening nuances that lurk behind racist sentiment.” Lively warns that these rules end up reinforcing a system of “supplication and self-abasement,” D’Souza that they prevent interracial friendships and encourage a “crybaby” attitude; Gates that they reinforce a “therapeutic” mentality and an excessive preoccupation with feelings.

Would hate-speech rules have these dire effects? Not at all—in part because other alternatives will remain as before. No African American or gay student is required to file a complaint when targeted by verbal abuse. He or she can always talk back or ignore it if he or she prefers. Hate-speech rules simply provide one more avenue of recourse for those who wish to take advantage of them. Filing a complaint might even be considered one way of taking charge of one’s destiny: One is active, instead of passively “lumping it” when racial invective strikes. Notice that we do not raise the “victimization” issue with other offenses we suffer, such as having a car stolen or a house burglarized. Nor do we encourage those victimized by these crimes to “rise above it” or talk back to their victimizer. Might it be because we secretly believe that a black who is called “n_____” by a group of whites is in reality not a victim? If so, it would make sense to encourage him not to dwell on the event. But this is different from saying that filing a complaint

increases victimization. Moreover, it is simply untrue: filing a civil rights complaint does not cause other wise innocuous behavior to acquire the capacity to harm.

A related neoconservative argument is that hate-speech rules are injurious to other values that we hold, such as equal treatment of offenders. The rules will end up punishing only what ignorant or blue-collar students do and say. Refined, but much more devastating expressions of contempt of the more highly educated will go unpunished. . . . Lively and D'Souza make versions of the same argument.

In one respect, the classist argument is plainly wrong. Both blue-collar and upper-class members of the campus community will be prohibited from uttering racial slurs and epithets. Most hate-speech codes penalize serious face-to-face insults based on race, ethnicity, and a few other factors. They thus penalize the same harmful speech—for example, “N_____, go home; you don’t belong at this university”—whether spoken by the billionaire’s son or the coal miner’s daughter. If the prep school product is less likely to speak words of this kind, or to utter only intellectualized versions. . . , this may be because he is less racist in a raw sense. Many social scientists believe prejudice tends to be inversely correlated with educational level and social position; the wealthy and well educated may well violate hate-speech rules less often than others do.

7. Two Wrongs Don’t Make a Right

A final neoconservative argument holds that hate speech may be wrong but prohibition is not the way to deal with it. Gates, for example, warns that two wrongs do not make a right and laments that our legal system seems to have abandoned Henry Kalven’s ideal of civil rights and civil liberties as perfectly compatible goods for all. Lively writes that campaigns to limit speech end up backfiring against minorities because free speech is a vital good and even more essential for minorities than others.

But we routinely deploy prohibitory rules in connection with dozens of other kinds of speech we have decided we don’t like, ranging from disrespectful speech to an authority figure, to shouting fire in a crowded theatre and many

others. Regulation always has costs. But it also has benefits—symbolic as well as real. The same should be true of hate-speech rules. It’s worth noting that the most common alternative conservatives tout—more speech—has costs, too. The black undergraduate called a n_____ as he walks home from the library late at night by five toughs—and who then talks back to his offenders—may end up severely beaten. Talking back later, such as through a letter to the editor or a campus forum, does not correct the actual offenders. Besides, as we noted, why should minority or gay undergraduates or women, already saddled with the demands of their own education, be charged with constantly going around educating others?

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8. Where Would We Draw the Line?

Take the drawing-the-line argument first. It is no doubt true that a rule that penalizes on-campus hurling of face-to-face racial slurs would require some line drawing. What does on-campus mean? Is an epithet hurled at three African-American students from twenty feet away “face-to-face”? Is water buffalo, or honkey, or dumb baboon, a racial slur? These are indeed difficulties but they are no greater than those attending other, long-accepted doctrines that limit speech we do not like, such as libel, defamation, plagiarism, copyright, threat, and so on. Our system of law has opted for a regime of simply stated rules, trading the benefit of certainty in core cases in return for a degree of uncertainty at the periphery. Everyone knows what a clear-cut case of plagiarism looks like; at the margin we are less sure. Hate-speech rules should be no different.

9. Reverse Enforcement

The same is true with reverse enforcement. Some authorities may indeed begin charging black students with hate speech directed against whites. But the American experience with hate-speech rules shows that this is not a major concern, nor is it in most Western countries with a liberal tradition. If reverse enforcement occasionally happens, it is not necessarily a bad thing—if in fact the black

or Mexican has harassed or terrorized a fellow student who is white or Asian. If the fear is that college deans and other administrative officers are so racist that they will invent or magnify charges against minority students in order to punish or expel them from campus, this is entirely implausible. Figures from U.S. News and World report show that college administrators and faculty harbor less anti-black animus than the average American, even than the average college student. Indeed, it is the very concern of campus administrators over dwindling black numbers that underlies enactment of most hate-speech rules.

10. Chilling and Censoring

A final version of the administrability fear is that whoever is put in charge of enforcing hate-speech rules will overdo it in the opposite direction—will grab power and begin extending the crusade into areas such as classroom speech or editorials in the campus newspaper where speech ought to be free. With properly drafted hate-speech rules this expansion should not occur and appears not to be occurring. Like other Western societies that have enacted hate-speech rules, campuses do not report a lessening of respect for free speech and inquiry. Indeed, minorities and political dissidents feel freer to speak, attend school, and otherwise participate in public life. The level of dialogue goes up not down.

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**Charles R. Calleros, Paternalism,
Counterspeech, and Campus Hate-Speech
Codes: A Reply to Delgado and Yun (1996)**

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Of course, rules that restrain speech carry their own educational message, a message of censorship, which should be reserved for the most egregious abuses of speech. In some cases, moreover, an educational response alone is more constructive and healing than one that is coupled with prior restraint of speech or subsequent discipline. Indeed, disciplinary proceedings may dilute the educational measures by diverting attention from the inquiry into bigotry and

redirecting it to an equally newsworthy controversy about restraints on speech.

For example, in the case . . . of [a] racist poster at A.S.U., the campus community used the racist poster as a “wake-up call” about the need for multicultural diversity. In initial discussions about the poster, students concluded that it reflected fear and ignorance and that it revealed a general gap in the education of many students. The need for multicultural education consequently became a theme of the campus counterspeech, which in turn helped to persuade the Faculty Senate to include a course in American diversity as part of the undergraduate breadth requirement. Had the dormitory banned racially offensive posters, the speaker might have been deterred from revealing his bigotry, or a staff member might have removed the poster before it was found by the four African-American women who exposed it to the entire campus community. The lesson of the poster was a painful one, but the campus community learned from it and acted on it. The campus affirmatively used the hateful speech to underscore the need for multicultural education, a truth that was underscored by its collision with the error of hostile racial stereotyping. Moreover, the campus was successful in its educational response precisely because it kept public attention focused on the problem of bigotry and ignorance; it did this by avoiding any action that would raise a competing issue regarding protection of speech.

Delgado and Yun argue that rules against hateful speech will not entirely deprive campuses of information about bigotry, because they are not likely to suppress all hate speech. However, it is possible that such rules would provoke the least dangerous kinds of speakers to spew offensive speech: those who use outrageous language simply to make a point about the breadth of their freedom of speech. A speaker with a more troubling agenda might observe the rule against bigoted speech but engage in more injurious conduct that leaves less of a paper trail than does a hateful poster or other public utterance.

For example, in another case on the A.S.U. campus, residents of a dormitory complained about a partially nude female pinup displayed on the outside of a resident’s door.

The display was not obscene under legal standards but was offensive to many who saw it. Two female staff members responded by organizing a dormitory meeting in which the students could air their views on the matter. Unfortunately, before the meeting could take place, university police confiscated the poster, thus violating free speech by singling out the offensive poster among many other similarly displayed posters on the basis of its content. Within a week, the police department admitted its error, returned the poster (which the resident chose not to display again) and stated that it would leave such matters to the residence hall staff in the future.

In my discussions of this event with students, I have suggested that the poster, though offensive to many, served an important educative purpose: it warned other residents of the dormitory about the apparent values of the person engaging in the display. If a student objectified women to such a degree that he displayed a female pinup on the outside of his door, the most conspicuous forum from which to exclaim his identity to every passerby, one could reasonably wonder—and a group discussion at the dormitory could examine—whether he was likely to display any respect for the autonomy of women who visited his room. The display on his door arguably served as a warning to women on his floor: “Until you learn more about this person, enter at your own risk and with your guard up.” A rule prohibiting such a display might have deterred him from revealing his values, thus depriving a trusting visitor of valuable information or a residence hall advisor of the incentive to secure assurances of proper behavior from him.

In sum, bigotry or the potential for discrimination is sometimes best revealed. On the other hand, the information value of speech that warns of a speaker’s bigotry is not so great that a campus would affirmatively encourage its bigoted students to reveal their most hostile feelings at every turn.

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