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HATE SPEECH AND THE FIRST AMENDMENT: ON A COLLISION COURSE?

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I. INTRODUCTION

ON November 20, 1991, the *Villanova Law Review* and the Philadelphia Bar Association jointly sponsored a Symposium to commemorate the two-hundredth anniversary of the ratification of the Bill of Rights. The Symposium was entitled "Hate Speech and the First Amendment: On a Collision Course?" An illustrious array of panelists was assembled that included Floyd Abrams, First Amendment litigator and partner at Cahill Gordon & Reindel; Charles R. Lawrence III, Professor of Law at Stanford University School of Law and Visiting Professor of Law at Georgetown University Law Center; Frederick Schauer, Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University; and Nadine Strossen, Professor of Law at New York Law School and President of the American Civil Liberties Union.

A. *The Hate Speech Debate*

The current debate over the validity of hate speech¹ regula-

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1. Although definitions vary, Nadine Strossen has defined "hate speech" as

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tions grapples with the myriad of interpretations regarding the scope of the First Amendment.² The hate speech debate continues a historical argument concerning the meaning of the First Amendment value of free speech and its relationship to other core constitutional values such as liberty, justice and equality.³ The central question is under what circumstances the First Amendment freedom of speech should yield to other values.⁴

any speech that conveys a message of group-based hatred. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 488 (1990).

2. The First Amendment states that "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." U.S. CONST. amend. I.

3. An important guide to interpreting seemingly ambiguous values in the Constitution is its Preamble, which reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.; see also Gilbert Paul Carrasco & Congressman Peter W. Rodino, Jr., "Unalienable Rights," *the Preamble, and the Ninth Amendment: The Spirit of the Constitution*, 20 SETON HALL L. REV. 498, 505-506 (1990) (suggesting that Preamble's promise of "the Blessings of Liberty" may be realized through construction of Ninth Amendment and asserting that this construction encompasses more than liberty *simpliciter* referred to in Fifth and Fourteenth Amendments).

4. A fundamental yet essentially resolved conflict is between those commentators who would interpret the First Amendment "absolutely" and those who believe that there are certain overriding values that justify finding exceptions to First Amendment freedom of speech. See, e.g., Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960). As an advocate of the absolutist approach to First Amendment interpretation, Justice Black stated:

[T]he decision to provide a constitutional safeguard for a particular right, such as . . . the right of free speech protection of the First [Amendment], involves a balancing of conflicting interests. . . . I believe . . . that the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights. . . . Courts have neither the right nor the power . . . to attempt to make a different evaluation

Id. at 879. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). In discussing a general theory of constitutional interpretation, Judge Bork stated:

The difference between our historically grounded constitutional freedoms and those the theorists, whether of the academy or of the bench, would replace them with is akin to the difference between the American and French revolutions. The outcome for liberty was much less happy under the regime of the abstract "rights of man" than it has been under the American Constitution. . . . Those who made and endorsed our Constitution knew man's nature, and it is to their ideas, rather than to the temptations of utopia, that we must ask that our judges adhere.

Id. at 355.

For discussion of a viewpoint contrary to the textualism of Justice Black and

The core of the present debate centers on whether hate speech, and its implications for our society, presents the unavoidable circumstance in which one very important freedom—equality—must be protected at the expense of another equally important freedom—speech.

The Symposium panelists gathered to present their views on this legal conundrum and to discuss the growing challenges that hate speech presents to society and, more specifically, to our legal system. Every year the morass of constitutional jurisprudence thickens and becomes increasingly more difficult to decipher and apply. It is apparent that this legal confusion is hindering the efforts of schools, employers and municipalities to give legal effect to their intolerance for hatred and inequality. Although lawyers are being given increasing guidance by the courts, the legal landscape is dynamic. This Symposium provided the panelists an opportunity to comment on some attempts at hate speech regulation and to explore the direction that the law might take in light of some recent important court decisions.

B. *Four Distinct Views of Speech Regulation*

As demonstrated by the four distinct views presented at the Symposium, the legal community is currently far from reaching a consensus on how to address hate speech and hate crimes in general.

Participating in the Symposium as a preeminent litigator of constitutional law, Floyd Abrams has long been a defender of First Amendment freedoms—particularly the freedom of speech. He vigorously opposes hate speech regulation because, according to Abrams, such regulation violates the most important precept of

the originalism of Judge Bork, see BERNARD SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON* (1968). Schwartz lucidly articulates the tension inherent in any conflict between constitutional values. Arguing against an interpretivist approach to the First Amendment, Schwartz stated:

The words of the First Amendment cannot be given the absolute effect in law which they have in language. Without the freedoms guaranteed by that Amendment, there would, to be sure, be no free society at all. But the rejection of one extreme—giving no effect to the Amendment—does not mean that we must embrace the contrary extreme—giving it unlimited effect. The First Amendment freedoms are not ends in themselves, but only means to the end of a free society. The First Amendment freedoms are vital, but their exercise must be compatible with the preservation of other rights essential in a democracy and guaranteed by the Constitution.

Id. at 262.

the First Amendment: government may not prohibit expression simply because it disagrees with the message.

Abrams believes that the Supreme Court has already seriously undermined the First Amendment by treating expression as a factor to be "weighed on a scale" against relevant state interests. Abrams asserts that state interests are best served by an uncompromised freedom of speech and that short-term compromises in the form of speech regulation will ultimately undermine the long-term goal of equality. In support of his position, Abrams notes that hate speech regulations have historically been used against the very groups they were intended to protect. Accordingly, he asserts that the ultimate price of restricting speech, even in the name of equality, is not a price worth paying. In the end, Abrams believes that the regulation of hate speech would oblige the regulation of all offensive speech, and as the "consensus of untouchable content" unravels, little recognizable free speech theory will remain.⁵

Nadine Strossen, a civil libertarian, advocates a strong presumption against the validity of hate speech regulations. As a "Guardian for Liberty," she condemns sexism, racism, homophobia and all forms of bias.⁶ Thus, for Strossen, protecting the First Amendment creates a conflict with her ongoing fight for equality. Strossen uses the Symposium to expand the discussion of what we traditionally view as hate (i.e. racially motivated) speech to include gender-based offenses such as sexual harassment.

Strossen maintains that hate speech in the public forum must be protected. On the other hand, she asserts that hate speech in certain other settings should not receive the same level of constitutional protection. Strossen focuses on hate speech that is used to harass individuals on university campuses and in the workplace and argues that such speech should be regulated in these settings. Her major premise is that hate speech should not receive constitutional protection at the expense of equality. Because the need for equality is particularly compelling in the contexts of education and employment, Strossen believes that speech in these settings should be subjected to greater, although narrow, regulation.

5. See generally Floyd Abrams, *A Worthy Tradition: The Scholar and the First Amendment*, 103 HARV. L. REV. 1162 (1990) (reviewing HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988)).

6. David Gonzalez, *A Guardian for Liberty*, N.Y. TIMES, Jan. 28, 1991, at A14; see also *A New ACLU Head and an Old Threat: First Woman President Talks About Dangers to Freedom of Speech*, BOSTON GLOBE, June 2, 1991, at 71.

As meaningful equality requires more than merely opening doors, the courts and Congress have acted to protect employees from harassment, and universities have enacted codes to protect students. Strossen believes that both situations require the courts to scrutinize closely the context of any challenged speech. In the educational setting, Strossen stresses that the speech in question must be analyzed with strict scrutiny, and that factors such as the time, place, pattern of conduct, and relationship of the parties are critical in determining whether the speech is protected by the Constitution. In the employment setting, key factors to be considered include the public or private nature of the forum, the target of the speech, the size of the audience, and the relationship of the parties.⁷ Strossen cautions, however, that the expansion of hate speech regulation beyond a limited set of contexts may undermine the central guarantee of free speech without necessarily advancing equality.

Frederick Schauer utilizes a sociological approach to address the hate speech debate, expanding on the traditional legal analysis to include a focus on cultural phenomena. Initially, Schauer questions the salience of the hate speech issue and examines the link between the identification of the problem and the emergence of numerous proposals for its regulation. His analysis also includes a review of the American belief that "sticks and stones may break my bones but names will never hurt me" and its impact on hate speech regulation.

Schauer argues that speech is not harmless and that, in fact, names may hurt you. He hypothesizes that one possible basis for the widespread emergence of proposals for hate speech regulation is the erroneous presupposition that speech is protected because it is harmless. A corollary to this presupposition is that the regulation of harmful speech is therefore justifiable. Herein lies the confusion present in the hate speech debate because, according to Schauer, speech is not protected merely because it is harmless; rather, speech is protected despite the harm that it may cause.

Schauer suggests that the present course of the hate speech debate may result in a reaffirmation of the belief that speech is

7. As a basis for a discussion on hate speech in the workplace, Strossen analyzes *Robinson v. Jacksonville Shipyards, Inc.*, in which a female shipyard employee brought suit against her employer, alleging discrimination evidenced by a hostile work environment caused in part by the display of sexually oriented photographs. See *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991).

protected because it is harmless. Despite this, Schauer recognizes the impact on society that the debate is having. The process begins with victims of hate speech who, by advocating regulation, call attention to the reality that such speech is actually harmful. It is the awareness of this harm that has prompted the many calls for regulation. Schauer states that the logical reaction to harm in our Millian world is to seek prohibition of the harmful conduct. In reality, Schauer believes that most proposed hate speech regulations are underinclusive and fail to fully address the range of potential harms. The hate speech regulations, however, assume a more symbolically important role by increasing public awareness of the harmful potential of "free speech."

Charles Lawrence stands as the premier advocate of the constitutionality of hate speech regulations. Lawrence believes that First Amendment doctrine must be guided by the principle of antisubordination. This principle focuses on the injuries caused by hate speech and recognizes that hate speech has historically been used to separate and silence minorities. Lawrence argues that the desire to achieve equality and to preserve First Amendment rights, such as freedom of speech for all, mandates the implementation of hate speech regulations.

Professor Lawrence has demonstrated in a variety of ways how hate speech is harmful to its victims and inconsistent with core constitutional values.⁸ He maintains that hate speech suppresses the value of full and equal citizenship and the value of free expression. According to Lawrence, hate speech perpetuates systems of caste and subordination, and denies its victims the ability to exercise legal rights that are protected by the Constitution and civil rights statutes. Lawrence effectively argues that

8. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990) [hereinafter *If He Hollers Let Him Go*]. Professor Lawrence has stated:

The experience of being called "nigger," "spic," "Jap," or "kike" is like receiving a slap in the face. The injury is instantaneous. There is neither an opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech. The harm to be avoided is both clear and present. . . . If the purpose of the first amendment is to foster the greatest amount of speech, then racial insults disserve that purpose. Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow.

Id. at 452; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing need for "judicial exploration of the cultural meaning of governmental actions with racially discriminatory impact [as] the best way to discover the unconscious racism of governmental actors").

well-established Supreme Court precedent, such as *Brown v. Board of Education*,⁹ already provides the necessary constitutional framework for hate speech regulation.

In contrast to Floyd Abrams, Lawrence differs on the appropriateness of balancing individual interests against government interests. When dealing with hate speech regulation, Lawrence asserts that courts should recognize the need for equality as the compelling governmental interest that requires a balancing of interests, rather than utilize a presumption of unconstitutionality. Lawrence suggests that a refusal to balance these interests—effectively a refusal to regulate hate speech—requires the subordinated groups, the victims of hate speech, to bear the entire burden of inequality and unfairly to pay the price for the societal benefit of free speech.¹⁰

The Symposium demonstrated that there is a very broad range of opinions regarding hate speech regulation. Reflecting the current state of the law, there are many different arguments that address the implications of hate speech and the need to institute regulation. Each distinguished speaker gave us a different perspective, and each chose to address varied components of this very complicated subject. The remaining sections of this Introduction will provide an overview of the topic of speech regulation and a framework for consideration of the viewpoints presented by the Symposium participants. In addition, these sections will introduce additional perspectives to be considered in striking a balance between free speech and equality.

II. HATE SPEECH REGULATION IN AMERICA—PAST, PRESENT AND FUTURE

The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.¹¹

9. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

10. See Lawrence, *If He Hollers Let Him Go*, *supra* note 8, at 472-73. Lawrence has written previously that “[w]henever we decide that racist hate speech must be tolerated because of the importance of tolerating unpopular speech we ask blacks and other subordinated groups to bear a burden for the good of society—to pay the price for the societal benefit of creating more room for speech.” *Id.* at 472.

11. THOMAS IRWIN EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 15 (1970).

A. *Speech Regulation in America*

The United States is a nation that, unfortunately, is still torn with racism, bigotry and hate, despite a long history of attempts to eradicate this social tragedy.¹² Hate crimes are alive and well in all of society's institutions, including the home, the workplace and the schools. Legislators, employers and university administrators are continuing to fight against these destructive forces by, among other means, attempting to curtail and punish hate speech. However, to the extent that hate speech is "speech," it is guaranteed a high degree of protection under the First Amendment. Because good intentions and just social reasons are not the sole determinants of the constitutionality of speech regulations, the burden is on the courts to decide which values will be protected and which will be subordinated.

Historically, the Supreme Court has recognized a distinction between constitutionally protected speech and an absolute freedom of speech. It is well settled that the First Amendment does not grant an unlimited license to speak freely.¹³ "Fighting

12. The violent aftermath of the Rodney King trial recently demonstrated the persistent and ever-increasing tension in society presented by racism and hate. Newspaper and magazine headlines told the story. See Janice Castro, *A Jarring Verdict, an Angry Spasm; Acquittals in the King-Beating Trial Spark Disbelief, Rage and Rioting*, TIME, May 11, 1992, at 10; Marc Lucey & Shawn Hubler, *Rioters Set Fires, Loot Stores; 4 Reported Dead*, L.A. TIMES, April 30, 1992, at A1; Richard A. Serrano & Tracy Wilkerson, *All 4 in King Beating Acquitted, Violence Follows Verdicts; Guard Called Out*, L.A. TIMES, April 30, 1992, at A1. See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944) (discussing many aspects of African American life in America, including "etiquette of discussion" of race relations).

13. See, e.g., *Konigsberg v. State Bar*, 366 U.S. 36 (1961). The Court in *Konigsberg*, through Justice Harlan, stated:

Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Id. at 49-51 (citations omitted); see also *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

words"¹⁴ and obscene speech¹⁵ are the primary categories of speech that the Court has recognized as not worthy of constitutional protection and therefore subject to complete proscription. In numerous other areas the Court has accorded speech less than absolute protection.¹⁶ Since the mid-1970s, however, the Court

14. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (establishing "fighting words" doctrine). The "fighting words" doctrine provides that states may ban abusive epithets addressed to individuals if they are inherently likely to provoke violent reaction. Perhaps *Chaplinsky* is best known for Justice Murphy's *obiter dictum* in which he stated:

[I]t 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 have 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.

Id. at 571-72 (footnotes omitted); *cf.* *Cohen v. California*, 403 U.S. 15, 20 (1971) (distinguishing *Chaplinsky* on grounds that dialogue in *Cohen* not directed at particular individuals and holding that government may not restrict public dialogue involving unwelcome words, symbols or ideas).

15. See *Roth v. United States*, 354 U.S. 476 (1957). In discussing the constitutional protection that should be afforded obscene material, the *Roth* Court stated:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . .

. . . .
All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .

Id. at 484; see also *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing guidelines for identifying obscenity as unprotected expression).

16. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (discussing elements of defamation necessary for recovery by public officials). The *Sullivan* Court stated:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80; see also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (holding First Amendment does not protect defamatory speech from state libel regulations); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (establishing minimum requirements of fault in actions for defamation of private individuals); *cf.* *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (establishing group libel standards). In addition to defamation, other speech that may be abridged includes that which is

has been reluctant to expand the categories of restrictable speech beyond the limited categories already defined. Although the Court has discussed related forms of antagonistic speech, until recently it had never specifically addressed the constitutional protection afforded to hate speech.

1. *The Constitutionality of Hate Speech Regulations: R.A.V. v. City of St. Paul*

The Supreme Court's decision in *R.A.V. v. City of St. Paul*,¹⁷ decided in June 1992, provides the most specific analysis of hate speech regulation to date. In *R.A.V.*, the Court reviewed the constitutionality of a city hate crime ordinance.¹⁸ The defendant in *R.A.V.*, a juvenile, allegedly violated the ordinance when he burned a cross in the middle of the night in the backyard of an African American family's home.¹⁹ Despite the Minnesota Supreme Court's interpretation that the ordinance only proscribed "fighting words," the United States Supreme Court ruled that the ordinance was facially invalid under the First Amendment.²⁰ The Court held that the ordinance was unconstitutional because it only restricted hate speech that fell within certain specified disfavored topics; such a limitation constituted content-based discrimination.²¹

intended and likely to produce imminent lawless action, commercial speech and, in some contexts, indecent speech, to name just a few. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech inducing imminent lawless action); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (commercial speech); *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726 (1978) (indecent speech).

17. 112 S. Ct. 2538 (1992).

18. See *id.* The St. Paul Bias-Motivated Crime Ordinance provided:

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

Id. at 2541 (citing ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

19. *Id.*

20. *Id.* The trial court held that the ordinance was overbroad and, therefore, invalid because it prohibited expressive conduct that is protected by the First Amendment. *Id.* The Minnesota Supreme Court ultimately reversed the trial court's decision. *In re R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991). The Minnesota Supreme Court held that the ordinance was not overbroad because it only applied to conduct and expression that amounted to "fighting words." *Id.* As a result, the United States Supreme Court stated that its review was bound by the narrow interpretation of the ordinance articulated by the Minnesota Supreme Court. *R.A.V.*, 112 S. Ct. at 2542.

21. *R.A.V.*, 112 S. Ct. at 2547. The Court stated that although the ordi-

The *R.A.V.* decision dramatically changed the law of speech regulation and sent a strong signal that the Supreme Court intends to maintain a firm stance against any new form of speech regulation. The *R.A.V.* Court articulated a new, unprecedented, unanticipated and somewhat nonsensical notion of First Amendment underinclusiveness: the decision established that a restriction on “fighting words” will only survive constitutional review if all “fighting words” are proscribed, and a State cannot target “fighting words” specifically related to protected classes or groups. The implementation of effective hate speech regulations will, apparently, be a slow and limited process, at least for the near future.

The next case in which the Supreme Court may offer further guidance on the topic of hate crime regulation is *Wisconsin v.*

nance banned “fighting words” that related to race, color, creed, religion or gender, it was unconstitutional to limit coverage to these specific topics. *Id.* The Court further stated that “[t]hose 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.” *Id.* Ultimately, the Court concluded that the First Amendment did not permit the City of St. Paul to place “special prohibitions on those speakers who express views on disfavored subjects.” *Id.*

In arriving at its holding in *R.A.V.*, the Court was not unanimous in its rationale. In a concurring opinion, Justice Stevens argued that selective regulation of speech is not “presumptively invalid”—even if content-based—and may be constitutionally permissible if “the legislature’s selection is based on a legitimate, neutral, and reasonable distinction.” *Id.* at 2564-66 (Stevens, J., concurring). Justice Stevens challenged the majority’s assertion that the ordinance improperly regulated expression based on viewpoint. *Id.* at 2571 (Stevens, J., concurring). He chose to view the ordinance as one that regulated on the basis of the harm caused by the specified expression. *Id.* (Stevens, J., concurring). Justice Stevens stated:

Contrary to the suggestion of the majority, the St. Paul ordinance does *not* regulate expression based on viewpoint. . . .

. . . .
The St. Paul ordinance is evenhanded. In a battle between advocates of tolerance and advocates of intolerance, the ordinance does not prevent either side from hurling fighting words at the other on the basis of their conflicting ideas, but it does bar *both* sides from hurling such words on the basis of the target’s “race, color, creed, religion or gender.” . . .

. . . .
In sum, the St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. . . .

Id. at 2570-71 (Stevens, J., concurring).

Mitchell.²² In *Mitchell*, an African American juvenile received an enhanced sentence under Wisconsin's hate crime penalty enhancing statute for participating in the aggravated battery of a white juvenile shortly after seeing the film "Mississippi Burning."²³ A jury found Mitchell guilty of violating the hate crime statute because he had intentionally selected the victim based on the victim's race.²⁴ The Wisconsin Supreme Court reversed the conviction, holding that the statute was unconstitutional because it enhanced punishment for certain crimes based on the perpetrator's reason for selecting the victim, thus punishing constitutionally protected thought.²⁵ The Wisconsin Supreme Court further held that because the statute requires the use of the offender's speech to prove motive, the statute unconstitutionally threatens to chill free speech.²⁶

The logic used by the Wisconsin Supreme Court in the *Mitchell* case poses a threat to the entire body of civil rights law under the guise of freedom of expression. Speech and intent are not addressed by the Wisconsin hate crime statute in a vacuum, but are only proscribed when connected to overt, harmful conduct.²⁷ Indeed, the approach of this statute is similar to the way in which all proscriptions against intentional discrimination are effected. Under the Equal Protection Clause of the Fourteenth Amendment, race, or ethnicity based conduct is only proscribable because of its discriminatory animus.²⁸ To undermine this fundamental principle is to pull the rug out from under the entire edifice of civil rights jurisprudence.

2. *Regulating Hate Speech at Universities*

Hate speech continues to be a serious problem at our colleges and universities. Incidents of hate speech and other hate-motivated expressions are actually increasing on American col-

22. *Wisconsin v. Mitchell*, 485 N.W.2d 807 (Wis. 1992), *cert. granted*, 113 S. Ct. 810 (1992).

23. *Id.* at 809.

24. *Id.* at 808-09.

25. *Id.* at 815-17.

26. *Id.*

27. *Id.* at 809 n.1.

28. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (discussing need to show that discriminatory purpose is motivating factor behind government action before violation of Fourteenth Amendment can be established); *Washington v. Davis*, 426 U.S. 229 (1976) (reviewing disproportionate impact of police entrance exam; discussing necessity of purposeful discrimination to find violation of Fourteenth Amendment).

lege campuses. In recent years, more than 250 universities have experienced incidents of bigotry characterized by racism, sexism and homophobia.²⁹ Nearly one million students have been victimized by the physical and emotional pains of hate-based actions.³⁰

In response to this problem, approximately 200 universities have enacted codes prohibiting offensive speech and/or conduct that demean persons on the basis of race, gender, religion, ancestry or sexual orientation.³¹ Many university administrators believe that these regulations are necessary to ensure that all students are afforded equal access to education.³² These university codes, however, are under fire as being violative of students' First Amendment rights, and thus far the universities seem to be losing the battle.³³

29. See Ronald J. Riccio, *Schools' Daze: Free Speech v. Freedom from Fear*, 129 N.J. L.J., Oct. 10, 1991, at 15. According to Riccio, "[o]ne need look no further than our nation's university campuses, that home away from home for our supposedly brightest and most talented future leaders, to recognize the sad reality that bigotry is flourishing in the United States." *Id.*; see also U.S. COMM'N ON CIVIL RIGHTS, BIGOTRY AND VIOLENCE ON AMERICAN COLLEGE CAMPUSES 3-11 (1990) (discussing extent and causes of bigotry on American university campuses).

30. Riccio, *supra* note 29, at 15. Of these one million victims of bigotry, at least twenty-five percent have been harassed on multiple occasions. *Id.*

31. See CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *CAMPUS LIFE: IN SEARCH OF COMMUNITY* 19, 137-38 (1990) (discussing results of survey that indicated 60% of colleges and universities surveyed had written policies on bigotry, racial harassment or intimidation and another 11% were developing similar policies); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 29, at 13-15 (discussing actions taken by Pennsylvania State University in attempt to eliminate bigotry on campus).

32. See Patricia B. Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests*, 16 J.C. & U.L. 573, 579 (1990). Universities have a legitimate interest in ensuring equal access to education for all students. *Id.* Hodulik asserts that "[h]arassment impedes the educational process, and interferes with the educational pursuits of its victims. It damages individuals, impairing their ability to function in the academic environment." *Id.*

33. See CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *supra* note 31, at 19-23 (noting practical difficulties in regulating speech). Public and state university regulatory codes necessarily have First Amendment implications because such attempts constitute "state action." See, e.g., *Doe v. University of Michigan*, 721 F. Supp. 852, 853 (E.D. Mich. 1989) (noting that public universities such as Michigan are state-chartered and therefore involve state action as compared to private institutions such as Yale that are not subject to First Amendment limitations); Hodulik, *supra* note 32, at 576 (noting need of Wisconsin, a state institution, to balance duty to provide equal access to education with students' First Amendment rights). The problem presented by many of these regulations, which is noted by reviewing courts, is that the regulations create content-based restrictions on speech. Restrictions are deemed to be content-based if they are based on communicative impact and single out ideas or infor-

The University of Michigan³⁴ and the University of Wisconsin³⁵ (both public institutions) recently found themselves in United States district courts defending their regulatory codes. Both codes were found unconstitutional, by two different courts, on two grounds: (1) the codes were overly vague, and (2) they violated the overbreadth doctrine.³⁶ These decisions indicate

mation "(a) because of the specific message or viewpoint such actions express, or (b) because of the effects produced by awareness of the information or ideas such actions impart." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 789 (2d ed. 1988).

34. *University of Michigan*, 721 F. Supp. 852. The University of Michigan instituted its campus-wide antidiscrimination code, entitled *The University of Michigan Policy on Discrimination and Discriminatory Harassment*, as a response to increasing occurrences of racist incidents on its campus. *Id.* at 856. Under the University of Michigan's code, students 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.

2. Sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex or sexual orientation where such behavior:

[statute repeats subparagraphs a., b. & c. of § 1. cited above]

Id. The policy's prohibitions were limited strictly to academic and educational areas including classroom buildings, libraries and laboratories. *Id.*

35. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991). Similar to the University of Michigan, the University of Wisconsin adopted its code to help control racist and discriminatory expression. *Id.* at 1164-65. Under Wisconsin's code, students could be disciplined:

(2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university authorized activity.

(b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances.

Id. at 1164 (citing WIS. ADMIN. CODE § UWS 17.06(2)(a)-(b)).

36. See *UWM Post*, 774 F. Supp. at 1177, 1180-81 (holding that Wisconsin's policy prohibited protected speech and as applied forced students to guess re-

that the courts are unwilling to create a constitutional exception for campus hate speech regulations, regardless of whether such speech undermines the academic mission. In addition, these decisions also suggest that all future university codes will need to track closely the limited categories of unprotected speech—as defined by the Supreme Court—or risk being overturned.

B. *Some Additional Grist For the Mill*

Although neither this Symposium nor the Supreme Court's landmark decision in *R.A.V.*,³⁷ which was rendered some seven months later, resolved the debate over hate speech, both events advanced the jurisprudential development of the controversy. In considering the richness of the views of the Symposium participants, there are two perspectives that might be useful in striking a balance between speech and equality. First, there is the international norm which is quite different from the traditional American notion of free speech. Second, if the American tradition is the preferred point of departure, an analysis of hate speech regulation should include a candid recognition that an absolute view of the First Amendment has long since been abandoned. In practice, the Court has abandoned absolutism in favor of establishing a hierarchy of values that subordinates freedom of speech to many other social values.

1. *International Norms*

The international community clearly views hate speech as volatile, injurious and subject to proscription.³⁸ The most definitive evidence of this is found in two widely adopted international instruments: (1) the International Convention on the Elimination of All Forms of Racial Discrimination, and (2) the International Covenant on Civil and Political Rights.³⁹ The Convention on Ra-

garding conduct that might be proscribed); *University of Michigan*, 721 F. Supp. at 864-67 (holding that Michigan's rule was overbroad because it covered speech that did not have tendency to incite violence; rule was vague because unclear whether restricted speech actually had to demean listener or whether speaker need only intend to demean listener for speech to come within rule).

37. For a discussion of *R.A.V. v. City of St. Paul*, see *supra* notes 17-21 and accompanying text.

38. See Norman Redlich, *Racist Speech, The American Constitution, and the Community of Nations: Can the Conflicting Values Be Reconciled?*, TEL AVIV L. REV. (forthcoming 1993) (manuscript copy at 4-5; copy on file with *Villanova Law Review*) (discussing international condemnation of hate speech as evidenced by international covenants and conventions).

39. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 22, 1966, art. 4, 660 U.N.T.S. 212, 218, 220

cial Discrimination mandates punishment for “all dissemination of ideas based on racial superiority or hatred, [or] incitement to racial discrimination,” and does “not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”⁴⁰ Similarly, the Covenant on Civil and Political Rights proscribes “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence.”⁴¹

Given the consistent level of interracial tension that has plagued our country, one would have difficulty reaching the seemingly optimistic conclusion, as some have, that “the American protection for ‘hate speech’ is probably a luxury that American society can afford in light of the overwhelming national consensus condemning such speech, and the adoption of a broad body of law that condemns acts of discrimination.”⁴² In fact, Canada—the country perhaps most similar to the United States—was not able to reach such a conclusion. In upholding the constitutionality of anti-hate propaganda laws, the Supreme Court of Canada stated that such laws “are one part of a free and democratic society’s bid to prevent the spread of racism, and their rational connection to this objective must be seen in such a context.”⁴³ The court also stated:

Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treat-

[hereinafter Convention on Racial Discrimination] (128 countries were parties to this Convention as of December 1989); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 20, 999 U.N.T.S. 171, 178 [hereinafter Covenant on Civil and Political Rights] (87 countries were parties to this convention as of December 1990). See generally Redlich, *supra* note 38, manuscript at 4-5.

40. Convention on Racial Discrimination, *supra* note 39, art. 4, paras. (a), (c), 660 U.N.T.S. at 220.

41. Covenant on Civil and Political Rights, *supra* note 39, art. 20, para. 2, 999 U.N.T.S. at 178.

42. Redlich, *supra* note 38, manuscript at 10. Professor Redlich suggests that Americans should be aware that international intolerance of hate speech is based on a different value system. *Id.* manuscript at 10-11.

43. *R. v. Keegstra*, 3 S.C.R. 697, 770 (1990) (Can.).

ment on the basis of group affiliation.⁴⁴

Incitement to racial violence is outlawed in most liberal democracies, including Great Britain and most of Western Europe. Moreover, it would appear that interracial and interethnic relations are persistently strained in the United States when compared to most other nations in the world, and particularly when compared to those nations with the most similar social and juridical norms. If the American jurisprudential model continues to incorporate hierarchical analysis in the interpretation of the First Amendment, it appears that the international trend should, at a minimum, inform the normative calculus.

2. *The American Tradition*

Those who believe that the American legal tradition is the sole basis for First Amendment analysis must recognize that American legal precedent subordinates free speech to many other values. Read literally, the First Amendment appears to absolutely prohibit the government from taking any action that would impede an individual's freedom to speak.⁴⁵ Were this the current state of the law, I would agree that regulation of hate speech is unconstitutional. The Supreme Court, however, has not interpreted the First Amendment as granting an absolute license to speak freely in all situations.⁴⁶ Rather, the Court has carved out several categories of speech that are not constitutionally protected against government proscription and has recognized additional categories that receive a reduced level of protection.⁴⁷ The Court has held that defamation, obscenity, and "fighting words" are not entitled to the same level of protection granted other types of speech.⁴⁸ Given that the Court has provided for these exceptions, one must conclude that there are other social values that are held in higher esteem than the freedom of speech. Therefore, the constitutional review of hate speech regulations should identify those values that underlie these current First

44. *Id.* at 777.

45. For the text of the First Amendment, see *supra* note 2.

46. See, e.g., *Roth v. United States*, 354 U.S. 476, 483 (1957) ("[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance."). For a further discussion of the Supreme Court's interpretation of the First Amendment, see *supra* note 16.

47. For a discussion of those categories of speech receiving reduced levels of constitutional protection, see *supra* notes 13-16 and accompanying text.

48. For a discussion of these categories of speech, see *supra* notes 14-16 and accompanying text.

Amendment exceptions and compare them to the values underlying any proposed exceptions.

I propose, and some of the Symposium commentators agree, that some of the values underlying the prohibition of hate speech are already values that the Supreme Court has held to be at least as important as the freedom of speech.⁴⁹ Freedom from physical harm is one such value. The persons at whom hate speech is directed suffer both psychological and physical harm.⁵⁰ In creating the “fighting words” exception to the First Amendment, the Court prioritized the need to protect certain groups of people by placing narrow restrictions on the rights of others to be abusive and to express themselves in a manner that is likely to lead to physical harm.⁵¹ Protection from emotional and psychological injury, which often manifests itself physically, is consistent with the value underlying the fighting words doctrine and should be accorded appropriate constitutional recognition. Moreover, in recognizing the important value of equal protection in proscribing race, or ethnicity-based fighting words or other proscribable conduct, it is not necessary to dispense with the jurisprudence of overbreadth and vagueness. Freedom of expression is also a precious right, and narrowly tailored legislation is essential. Finally, it has been observed that hate speech is used to suppress the willingness of its victims to exercise their own right to freedom of

49. See Symposium, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1989). Mari Matsuda has come even further, observing that

if I were to give primacy to any one right, and if I were to create a hierarchy, I would put equality first, because the right of speech is meaningless to people who do not have equality.

.
The values at the heart of the first amendment are the values of personhood—that each human being is special and deserves a place in this society in their beliefs and their personal consciousness. From that value I derive my position that we need to limit hate speech.

Id. at 360.

50. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137-39 (1982) (noting that racial stigmatization may cause “humiliation, isolation and self-hatred” as well as physical harm such as high blood pressure); see also Mari J. Matsuda, *Public Response To Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2336 (1989) (“Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis and suicide.” (footnote omitted)).

51. For a discussion of the “fighting words” exception to the First Amendment, see *supra* note 14 and accompanying text. See also TRIBE, *supra* note 33, § 12-10, at 849-53 (describing development of “fighting words” doctrine in *Chaplinsky* and later cases).

speech.⁵² Consequently, hate speech regulation should not be viewed as an exception, but instead a buttress to the freedom of speech.

It remains to be seen just how far the Court is prepared to go in striking down regulation of “speech” that seeks to curb or punish that which cannot be justified by any theory of ideas. This Symposium has not definitively answered that question, but it has certainly provided thoughtful insight toward a reconciliation of what all seem to agree are extremely precious competing social values.

52. See Lawrence, *If He Hollers Let Him Go*, *supra* note 8, at 468 (observing that racism “coercively silence[s] members of those groups who are its targets”).

