



Faculty Scholarship

2009

Racist

Robert E. Steinbuch

University of Arkansas at Little Rock William H. Bowen School of Law, resteinbuch@gmail.com

Follow this and additional works at: http://lawrepository.ualr.edu/faculty_scholarship



Part of the [Law and Race Commons](#)

Recommended Citation

Robert Steinbuch, *Racist*, 25 Harv. BlackLetter L.J. 199 (2009).

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

RACIST

*Robert Steinbuch**

Racist has become a largely meaningless term of political invective-like . . . Liberal, Neocon[servative], name your favorite term of political invective. In the opinionation business, being called a racist isn't so much an insult as an occupational hazard. As often as it's thrown around, the term Racist has come to mean anybody you really, really dislike. Or just really, really disagree with.¹

So said the newspaper of record in Little Rock, Arkansas—the Democrat-Gazette—the city in which I live and teach law. Disturbingly, I have heard the same sentiment from others—some of whom are quite learned.² I am troubled by this idea, not only because I think that it is wrong but because I think that it is wrongheaded. I have never been called a racist.³

* Visiting Associate Professor of Law, University of Georgia School of Law. Associate Professor of Law, University of Arkansas at Little Rock, William H. Bowen School of Law. J.D. from, and John M. Olin Law & Economics Fellow at, Columbia Law School. B.A. and M.A. from the University of Pennsylvania. Former attorney with the United States Department of Justice, and the United States Senate Committee on the Judiciary. The author wishes to thank Professor Pearl Steinbuch, Rabbi Pinchus Ciment, Professor J. Thomas Sullivan, and Professor Frances Fendler for their guidance and contributions.

1. Editorial, *End this Farce: The Law School Follies of '08*, ARK. DEMOCRAT-GAZETTE, Mar. 19, 2008, at 18.
2. A friend suggested to me that those who equate the charge of "racist" with the label of, say, "conservative" may be doing so to reclaim the word in the fashion that the Gay-rights movement has attempted to reclaim the term "queer." See, e.g., FEAR OF A QUEER PLANET xi (Michael Warner ed., 1993). I believe that this analogy is misplaced. The term "queer" had been used as an insulting and degrading version of "gay," but it does not embody a different or additional meaning. In contrast, "racist" is not simply a degrading version of "liberal" or "conservative." "Racist," as discussed, refers to the evil of judging people based on their genetic associations rather than personal qualities. "Liberal" and "conservative" merely refer to a political philosophy. In order to equate "racist" with "liberal" or "conservative," we would not only have to strip the pejorative from "racist"—as is being attempted with "queer"—but we would have to remove its essential meaning as well.
3. In an Op-Ed in *The New York Times*, Nicholas D. Kristof discusses a University of Chicago on-line psychological test that serves as a proxy for racist biases. In the test, available at <http://backhand.uchicago.edu/Center/ShooterEffect/>, participants encounter a series of 100 black and white men, each holding either a gun or another object. Each participant is charged with shooting the gunmen and holstering the firearm for the unarmed. If the participant shoots blacks more quickly than whites, describes Mr. Kristof, this shows racial bias—as does the more rapid holstering of the gun when confronted with unarmed whites over unarmed blacks. Mr. Kristof recounted that

[t]o my horror, I turn out to be a racist. . . . I shot armed blacks in an average of 0.679 seconds, while I waited slightly longer—0.694 seconds—to shoot armed

Had I been, however, I would have been deeply offended and hurt, because the label of “racist” constitutes a demonstrably negative epithet.

The label of “racist” disparages its recipient precisely because it properly conveys the evil of hatred towards mankind. As a practicing Jew, I can personally attest to this evil—having experienced discrimination throughout my academic and professional life in forms varying from insensitivity and intolerance, to outright verbal and physical hostility.⁴ I would do my family an injustice, however, if I did not make clear that my experiences pale in comparison to the discrimination that many of my

whites. Conversely, I holstered my gun more quickly when encountering unarmed whites than unarmed blacks. Take the test yourself and you’ll probably find that you show bias as well.

Nicholas D. Kristof, *Our Racist, Sexist Selves*, N.Y. TIMES, Apr. 6, 2008, at 14, available at <http://www.nytimes.com/2008/04/06/opinion/06kristof.html?ex=1208318400&en=9976f14f38576d88&ei=5070&emc=eta1>. I took this test. I shot armed whites more quickly than armed blacks, and I holstered my weapon more quickly with unarmed blacks than with unarmed whites—showing no racial bias against blacks based on the claims about the validity of the test. As much as I agree with the conclusion suggested by those who would endorse the validity of the test, I have my doubts as to whether the test is scientifically reliable.

4. Some question whether Judaism is a race in addition to a religion. The Second Circuit stated:

Jews . . . are today generally not considered a distinct race. . . . [However], the Supreme Court’s case law firmly and clearly rules that Jews count as a “race” under certain civil rights statutes enacted pursuant to Congress’s power under the Thirteenth Amendment. . . . [T]hese cases not only extend the protections of Reconstruction Era civil rights statutes, now codified at 42 U.S.C. §§ 1981 and 1982, to Jews understood as a “race,” they also implicitly rule that the Thirteenth Amendment . . . protects Jews as a race.

United States v. Nelson, 277 F.3d 164, 176–77 (2d Cir. 2002) (citing *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 611 (1987)); see *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987). Others question the usefulness of the inquiry itself.

[For the purposes] of describing human diversity[, t]oday, geneticists use the term “ancestry” or “populations” when describing how groups of people have evolved. . . . The overwhelming majority of Jewish populations throughout the world . . . share a common Middle Eastern ancestry on the male line that goes back to ancient Israel 4000 years ago, when, according to the Bible, Abraham founded the Israelite line. In other words, as the lead researcher Michael Hammer commented, “[Jews] are really a single ethnic group coming from the Middle East.”

Interview by Aron Hirt-Manheimer & Joy Weinberg with Jon Entine, *Cracking the Code*, REFORM JUDAISM, Spring 2008, at 28, 30–31. Nonetheless, Jews have undoubtedly suffered throughout history due to their status as Jews. For example, then Congressman—and later United States Senator—Morris Sheppard (Democrat from Texas) wrote in 1906:

[I]t seems unthinkable that death and torture and exclusion should have been the[] [Jewish people’s] fortune through so many ages and that today they suffer the most ferocious and inexorable discriminations in eastern Europe. This last condition is the foulest stain on our civilization, the darkest indictment of our time. If Protestants were wronged in eastern Europe as are the Jews—and I, a Protestant, make the assertion—protests would be thundered from the leading powers and the peoples of the earth, protests which unheeded would be reinforced with battleships.

MORRIS SHEPPARD, AN ADDRESS TO THE YOUNG MEN’S AND WOMEN’S CULTURE SOCIETY OF TEMPLE RODEPH SHOLOM, CONTRIBUTIONS OF THE HEBREW PEOPLE TO HUMAN ADVANCEMENT (1906), reprinted in ORATORY OF THE SOUTH 171, 174 (Edwin DeBois Shurter, ed., 1908).

relatives suffered. My father, for example, lived under both Nazi occupation and Stalinist rule during World War II. His ordeal could fill a book, but the highlights—if I can use this word to describe such difficulties—include traveling for two months in a freight train to spend a year in a barbed-wire encircled prison camp in Siberia. He and his fellow prisoners lived in unheated huts without plumbing or electricity, under the constant watchful eye of the Soviet military. My father was a child, but the adults were taken daily by armed guard to perform manual labor. During the Siberian winter, the old and weak died, while the young and strong fought over the limited food available. My father's experiences, though dreadful, were nonetheless preferable to those of my numerous relatives who were directly tortured and murdered by the Nazis.⁵ Thus, I feel that I am particularly aware of the horrors of racial discrimination.

I am equally sensitive to the accusation of racism, as well as the particular dangers of the wrongful accusation of such, *i.e.*, race-baiting. Race-baiting constitutes the specific genre of name-calling that “impl[ies] that there is an underlying race based motive in the actions of others towards the group baited, where *none in fact exists*.”⁶ Race-baiting etymologically and historically relates to red-baiting, the act of “accusing someone . . . of being communist. . . . The term [has been] used mainly with the intention of discrediting the individual's or organization's political views.”⁷ Indeed, red-baiting has a particularly pernicious and shameful past. During two historic periods in the United States, the 1920s and the 1950s, the mere assertion of an association with communism bore dramatically negative consequences, including suicides, destroyed careers, and devastated families.⁸ Several industries, including the film industry, “banned those named and a whole lot of others for decades.”⁹ Race-baiting equally devastates its subjects.

While never having been labeled a racist, I have been called both a liberal and a conservative (usually not at the same time). Neither offended me—regardless of the accuracy. Putting election-year rhetoric

-
5. Interestingly, the Nazis clearly viewed Jews as a race not a religion and exercised their prejudice based on their racial perception of Jews. United States Holocaust Memorial Museum, Nazi Racism, <http://www.ushmm.org/outreach/racism.htm> (“Hitler and other Nazi leaders viewed the Jews not as a religious group, but as a poisonous ‘race,’ which ‘lived off’ the other races and weakened them”). The Equal Employment Opportunity Commission states that “[e]qual employment opportunity cannot be denied any person because of his/her racial group or *perceived racial group*.” EEOC, Race/Color Discrimination, <http://www.eeoc.gov/types/race.html> (last visited Apr. 10, 2008) (emphasis added).
 6. Reference.com, Race-baiting, <http://www.reference.com/search?r=13&q=Race%20baiting> (last visited Apr. 4, 2008) (emphasis added).
 7. Reference.com, Red-baiting, <http://www.reference.com/browse/wiki/Red-baiting> (last visited Apr. 4, 2008).
 8. *Id.*; David Cole, *Are you Now or Have You ever been a Member of the ACLU?*, 90 MICH. L. REV. 1404, 1404 (1992) (“In 1930, Hamilton Fish created the House Special Committee to Investigate Communist Activities, initiating a spate of witch[-]hunting and blacklisting that was continued into the late 1950s by [the infamous] Senator Joseph McCarthy and the House Special Committee on Un-American Activities.”).
 9. Christopher Reed & Mike Ellison, “Red-baiting” *Denouement in Hollywood*, THE GUARDIAN (London), Mar. 20, 1999, at 9, available at http://film.guardian.co.uk/The_Oscars_1999/Story/0,,36566,00.html#article_continue.

aside, neither liberals nor conservatives are evil. They are, at worst, misguided at times. As such, the labels "liberal" and "conservative" simply are not pejorative. Liberal- or conservative-baiting does not exist.

Indeed, when I studied for my two degrees in political science from the University of Pennsylvania, I routinely engaged in discussions and debates about, *well*, political science. My classmates and I regularly described individuals or their views by their political orientation. In fact, we often tried to convince each other of the merits of liberal or conservative views. Other times we tried to persuade each other that both were virtuous, while even other times we argued that neither provided the answer. We never, however, suggested that these political views were evil, and we never considered the labels "liberal" and "conservative" invective.

That is not to say that some have not tried to use political designations to attack others. For example, when then Vice President George H. W. Bush ran for President, he and fellow Republicans made a calculated decision to label his opponent, former Massachusetts Governor Michael Dukakis, a "liberal."¹⁰ But when Vice President Bush did so, Governor Dukakis "accepted the label . . . declaring, 'I'm a liberal in the tradition of Franklin Roosevelt and Harry Truman and John Kennedy.'" ¹¹

True, left-of-center politicians have not always willingly worn the label "liberal." But when Democrats have avoided the term, they have not done so because the "liberal" label is a pejorative. Rather, they have disfavored the description based on the understanding that at least since World War II most voters do not self identify as "liberal;" most left-of-center voters choose the term "progressive."¹² We saw exactly this distinction being employed in the recent presidential campaign: former presidential candidate and then United States Senator Hillary Clinton, in response to the question whether "she would describe herself as a 'liberal,'" ¹³ said "I prefer the word 'progressive.'" ¹⁴ Based on the same un-

10. Robin Toner, *Dukakis Asserts He Is a "Liberal," But in Old Tradition of His Party*, NY TIMES, Oct. 31, 1988, available at <http://query.nytimes.com/gst/fullpage.html?res=940DE5DD1F30F932A05753C1A96E948260>. In saying that "Liberal" is not a "dirty word," Alan Colmes, the Liberal commentator declared "I'm proud to be a liberal. . . . There is nothing wrong with being a liberal." Alan Colmes on *Hannity and Colmes*, (Fox News broadcast Apr. 17, 2008) (available at <http://www.foxnews.com/video2/video08.html?playerId=videolandingpage&streamingFormat=FLASH&referralObjec=Ce1af0034-0645-49d5-bd78-e75d3fb2aaed&referralPlaylistId=949437d0db05ed5f5b9954dc049d70b0c12f249>) (select "Newt Gingrich" video; quote starting at 1:35 remaining). See generally, PROUD TO BE LIBERAL (Robert Lasner & Elizabeth Clementson eds., 2006); Alan Colmes's Liberaland, <http://liberaland.com/>.

11. *Id.*

12. Susan Page & Jill Lawrence, *Does "Massachusetts Liberal" Label Still Matter?*, USA TODAY, July 26, 2004, available at http://www.usatoday.com/news/politics/elections/nation/president/2004-07-25-mass-liberal_x.htm ("[T]he label of liberal has fallen on hard times. Many now prefer 'progressive.' In a USA TODAY poll [taken in 2004], [only] 20% of voters called themselves 'liberal.'").

13. David Paul Kuhn, *Dems Wary of "Liberal" Label; GOP Embraces "Conservative"*, USA TODAY Nov. 12, 2007, available at http://www.usatoday.com/news/politics/2007-11-12-liberal-conservative_N.htm.

14. *Id.* However, Hillary Clinton advisor and former White House Counsel Lanny Davis said "I am an unapologetic liberal Democrat. I don't even use the word progres-

derlying logic, conservatives have not shied away from the eponymous label,¹⁵ as one poll in “October 2005 . . . note[d that] sixty-one percent of Americans considered themselves ‘conservative’ or ‘very conservative.’”¹⁶ As such, Republicans typically not only accepted the label “conservative,” they have embraced it.¹⁷ Thus, while “liberal” is not derogatory, it may exemplify sub-optimal marketing.

In this paper, I investigate the difference between the labels “racist,” on the one hand, and “liberal” and “conservative,” on the other, in four contexts: employment, admission to the bar, the use of preemptory challenges in jury selection, and defamation law. I conclude that the otherwise able *Democrat-Gazette* got it wrong: the epithet “racist” is significant and harmful, unlike the generally benign classifications “liberal” and “conservative.”

The lesson: the label “racist” is a pernicious pejorative and is generally recognized by the law as such. It should not be bandied about frivolously, but, rather, should be reserved for those situations in which actual racial discrimination exists.

I. DEFINITIONS

One dictionary defines “racist” as:

n.

“a person with a prejudiced belief that one race is superior to others[;]

racialist[;]

bigot - a prejudiced person who is intolerant of any opinions differing from his own.”¹⁸

adj.

1. racist - based on racial intolerance; “racist remarks”[;]

racial - of or characteristic of race or races or arising from differences among groups; “racial differences”; “racial discrimination”[;]

2. racist - discriminatory especially on the basis of race or religion[;]

sive.” Interview by Bill O’Reilly with Lanny Davis, *O’Reilly Factor*, (Fox News television broadcast May 1, 2008).

15. *See id.*

16. Bruce Walker, *The Greatest News Yet in the Battleground Poll*, INTELLECTUAL CONSERVATIVE: CONSERVATIVE AND LIBERTARIAN POLITICS, Oct. 10, 2006, <http://www.intellectualconservative.com/2006/10/10/the-greatest-news-yet-in-the-battleground-poll/>.

17. *See, e.g.*, Press Release, John McCain 2008, Former Oklahoma Governor Supports McCain: *McCain’s Conservative Principles Attract Keating’s Support* (Feb. 20, 2007), available at <http://www.vote-john-mccain-2008.com/Informing/News/PressReleases/a509cad0-30bc-4673-af8d-fab9295ca0b9.htm> (last visited April 18, 2008) (“‘John McCain has been an honored servant of our country and his experience making common sense *conservative* policy sets him apart,’ said [Former Oklahoma Governor Frank] Keating. ‘Our country learned powerful lessons from President Reagan, and Senator McCain’s *conservative* convictions and effective approach are a living testament to his philosophies.’”) (emphasis added).

18. Thefreedictionary.com, *Racist*, <http://www.thefreedictionary.com/racist> (last visited Apr. 3, 2008).

anti-semite, antiblack[;]

discriminatory, prejudiced - being biased or having a belief or attitude formed beforehand; "a prejudiced judge."¹⁹

Other dictionaries similarly equate "racist" with "racism."²⁰ Adjacent to these definitions are pictures of, inter alia, a hooded individual that appears to be a Ku Klux Klan member and a Nazi swastika.²¹

The numerous definitions of liberal and conservative include:

liberal-

adj.

1.

a. Not limited to or by established, traditional, orthodox, or authoritarian attitudes, views, or dogmas; *free from bigotry*.

b. Favoring proposals for reform, open to new ideas for progress, and tolerant of the ideas and behavior of others; broad-minded. . . . characteristic of a political party founded on or associated with principles of social and political liberalism, especially in Great Britain, Canada, and the United States. . . .

n.

1. A person with liberal ideas or opinions.

2. **Liberal** A member of a Liberal political party.²²

conservative -

adj.

1. Favoring traditional views and values; tending to oppose change. . . .

a. Of or relating to the political philosophy of conservatism.

b. Belonging to a conservative party, group, or movement. . . .

n.

1. One favoring traditional views and values.

2. A supporter of political conservatism. . . .²³

19. *Id.*; see Princeton's Wordnet, Racist, <http://wordnet.princeton.edu/perl/webwn?s=racist&sub=Search+WordNet&o2=&o0=1&o7=&o5=&o1=1&o6=&o4=&o3=&h=> (last visited Apr. 3, 2008) ("racist, racialist (a person with a prejudiced belief that one race is superior to others) (based on racial intolerance) 'racist remarks'. . . . antiblack, anti-Semite (discriminatory especially on the basis of race or religion)").

20. Merriam-Webster Online, Racism, <http://www.merriam-webster.com/dictionary/racism> (last visited Apr. 3, 2008) (defining racism as "1: a belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race[;] 2: racial prejudice or discrimination."); Dictionary.com, Racist, <http://dictionary.reference.com/browse/racist> (defining racism "a belief or doctrine that inherent differences among the various human races determine cultural or individual achievement, usually involving the idea that one's own race is superior and has the right to rule others") (last visited Apr. 3, 2008).

21. Thefreedictionary.com, Racist, <http://www.thefreedictionary.com/racist> (last visited Apr. 3, 2008).

22. Thefreedictionary.com, Liberal, <http://www.thefreedictionary.com/liberal> (last visited April 3, 2008) (emphasis added).

23. Thefreedictionary.com, Conservative, <http://www.thefreedictionary.com/conservative> (last visited Apr. 3, 2008).

No pictures or symbols were provided with these definitions for “liberal” and “conservative” as was done by the same dictionary for “racist.”²⁴

These definitions start to highlight the distinction between calling someone “racist,” versus “liberal” or “conservative.” As one former Democratic Vice Presidential candidate said, calling someone “racist . . . is inflammatory.”²⁵ The legal ramifications of calling someone “racist” make clear that the charge is serious and pejorative.

II. EMPLOYMENT

The accusation and substantiation of the appellation “racist” often spawn significant consequences in the employment context. The designation as a “liberal” or “conservative,” in contrast, typically lacks negative effects in employment. Indeed, pursuant to the United States Constitution, those designations usually *may not* be the basis for adverse employment actions.

For example, when one employee sued his employer for “subject[ing him] to interviews regarding his alleged ‘racist remarks,’”²⁶ the court not only said that the employer could investigate an allegation that an employee is a racist, the court held that the employer *must* investigate: “An employer has a duty to investigate a charge that one of its employees has engaged in discriminatory conduct.”²⁷ If the charge is confirmed upon investigation, racist remarks alone properly serve as a basis for punishment in the workplace.²⁸ Indeed, adverse employment actions for racist comments are not only permitted, they are virtually demanded. If an employer does not rectify racist statements of its employees, that employer itself may become subject to a Title VII claim for a hostile work environment.²⁹

Moreover, while the accurate charge of racism results in sanction to the racist in the employment context, the false charge that someone is a racist is so serious that if an employee makes such an accusation, an employer is justified in taking adverse action against that employee.³⁰ In

24. *Id.*; accord Thefreedictionary.com, Liberal, <http://www.thefreedictionary.com/liberal> (last visited Apr. 3, 2008); Thefreedictionary.com, Neoconservative, <http://www.thefreedictionary.com/neoconservative> (last visited Apr. 3, 2008).

25. Interview by Sean Hannity & Alan Colmes with Geraldine Ferraro, *Hannity and Colmes* (Fox News television broadcast Apr. 3, 2008).

26. *Burke v. Sears-Roebuck*, 1999 WL 358915, at *2 (E.D. Pa. June 2, 1999) (citing *Scott v. Western State Hospital*, 658 F. Supp. 593, 598 (W.D. Va. 1987)).

27. *Id.*

28. *E.g.*, *Jones v. Cargill, Inc.*, 490 F. Supp. 2d 978, 984–86 (N.D. Iowa 2007).

29. *E.g.*, *Cortes-Devito v. Vill. of Stone Park*, 390 F. Supp. 2d 706, 712 (N.D. Ill. 2005) (citing Title VII, 42 U.S.C. § 2000e-2(a)(1)).

Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee “because of such individual’s race, color, religion, sex, or national origin.” . . . In *Hishon*, we rejected the argument that Title VII infringed employers’ First Amendment rights. And more recently . . . we cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (citations omitted).

30. *Taylor v. Carmouche*, 214 F.3d 788, 793–94 (7th Cir. 2000).

Taylor v. Carmouche,³¹ for example, an employee was disciplined for falsely accusing a supervisor of being a racist. The Seventh Circuit listed the possible ramifications of wrongly asserting that someone is a racist: The "penalty [for the false approbation of "racist"] is delivered in a slander action, in a perjury prosecution, in an award of attorneys' fees for making unsubstantiated allegations, or in the workplace by a suspension."³²

Accusing someone of being a racist may prompt an investigation. If the accusation proves true, it will often result in a disciplinary action, while a false accusation may result in suspension. The label or identification as a "liberal" or a "conservative," however, generally constitutes an impermissible basis for adverse employment actions. The Supreme Court discussed the improper evaluation of a government employee's political affiliation in employment actions in *Elrod v. Burns*:³³

The *Elrod* plaintiffs were Republican non-civil service employees in the Cook County, Illinois sheriff's office who were dismissed or threatened with dismissal following the election of a Democratic sheriff. . . . [T]he Supreme Court held that, as a general rule, the practice of dismissing public employees for political patronage reasons violates the First Amendment.³⁴

The Supreme Court recognized that "if the government could deny a benefit to a person because of his constitutionally protected [political] speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."³⁵ The Court did create one exception to this prohibition on considering employees' political beliefs in employment actions regarding government employees: government employers may consider their employees' political views or statements in those limited circumstances where the political orientation is necessary for the effective performance of the specific *policy-making* position.³⁶

In 1990, the Supreme Court, in *Rutan v. Republican Party of Illinois*,³⁷ again addressed the issue of considering government employees' political beliefs in employment actions, this time "with respect to former and current low-level public employees . . . who alleged a deprivation of their First Amendment rights because they were deprived of various employment opportunities including promotions, transfers, and recalls because they did not support the prevailing political party."³⁸ The Supreme Court endorsed its previous ruling by holding that although these employees were not legally entitled to positive employment benefits such as promotions, the "denial of them based on political affiliation or support is an

31. *Id.*

32. *Id.*

33. 427 U.S. 347 (1976).

34. *Regan v. Boogertman*, 791 F. Supp. 57, 59 (E.D.N.Y. 1992) (citing *Elrod v. Burns*, 427 U.S. at 360).

35. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

36. *Elrod*, 427 U.S. at 372-73; see *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

37. 497 U.S. 62 (1990).

38. *Boogertman*, 791 F. Supp. at 59.

impermissible infringement on the First Amendment rights of public employees."³⁹

In fact, courts have held that even membership in communist (much less liberal or conservative) organizations alone could not disqualify government employment. For example, one court held invalid a Veterans Administration hospital's inquiry into whether a resident ever belonged to a communist organization or even advocated the violent overthrow of the United States government.⁴⁰ The court held "there is no indication that his political associations, let alone his beliefs, will have any effect whatsoever on his ability or willingness to meet his professional and ethical responsibilities for the care and treatment of patients with whom he will come into contact."⁴¹

Courts have similarly recognized that private employers can be held liable for wrongful termination when those employers consider political viewpoint in employment decisions. For example, in *Novosel v. Nationwide Ins. Co.*,⁴² the Third Circuit in a diversity action upheld the validity of a state cause of action by an employee asserting wrongful termination based on his refusal to support the employer's political agenda.⁴³

Indeed, Congress also pursued similar policies when it legislated the employment rules for the District of Columbia's private nonprofit "Legal Services Corporation, . . . [which] provid[es] financial support for legal assistance in non[-]criminal proceedings or matters to persons financially unable to afford legal assistance."⁴⁴ In doing so, Congress required that "[no] political test or political qualification shall be used in selecting, appointing, promoting, or taking any other personnel action with respect to any officer, agent, or employee of the Corporation."⁴⁵ Unsurprisingly, then, when one employee of the Legal Services Corporation sued the Corporation "assert[ing] that [] new conservative board members . . . replaced liberal officers of the Corporation with conservative[s] . . . [and] terminated hi[m],"⁴⁶ the federal district court handling the matter remanded the case to state court for consideration of this claim as an element in the plaintiff's private state causes of action for wrongful termination.⁴⁷

III. BAR ADMISSIONS

The accusation and substantiation of the appellation "racist" generally disqualifies candidates applying to a state bar. The designation as a "liberal" or "conservative," in contrast, does not carry such negative effects.

39. *Id.* at 59–60 (citing *Rutan v. Republican Party of Illinois*, 497 U.S. 62 at 72–74).

40. *Shapiro v. Roudebush*, 413 F. Supp. 1177 (D. Mass. 1976).

41. *Id.* at 1181.

42. 721 F.2d 894 (3d Cir. 1983).

43. *Id.* at 895–99.

44. 42 U.S.C. § 2996b(a) (2000).

45. 42 U.S.C. § 2996d(b)(2) (2000).

46. *Hedges v. Legal Services Corp.*, 663 F. Supp. 300, 301 (N.D. Cal. 1987).

47. *Id.* at 305.

Would-be lawyers have been rejected admission to the profession for being deemed racist: "Mr. Hale, who graduated from law school and passed the bar examination, was rejected by the Illinois Bar[']s [] Committee on Character and Fitness last December. The panel said his racist activities demonstrated that he did not have the fitness of character to qualify as a lawyer."⁴⁸ Hale *did not advocate violence*, but outwardly made racist comments and advocated racist policies.⁴⁹ Both the Illinois Supreme Court and the United States Supreme Court declined to hear Hale's appeal of the Illinois bar's decision.⁵⁰ He then filed a Section 1983 action, which was denied by the district and circuit court.⁵¹ The accurate label of "racist" prevented Hale from practicing law.

In contrast, the Supreme Court in *Law Students Civil Rights Research Council, Inc. v. Wadmond*⁵² held that New York employed a valid process for admission to the state bar *because* there was, *inter alia*, "no showing of an intent to penalize political beliefs."⁵³ Indeed, even during the height of the Cold War the Supreme Court, in *Konigsberg v. State Bar*,⁵⁴ recognized that mere political belief—including membership in the Communist party—alone does not suffice to deny admission to the bar. The case reveals that

Konigsberg would *not* be rejected for admission to the bar merely because he might be found to be a member of the Communist Party, but only after the Committee made an evaluation of Konigsberg's knowledge of the organization's purposes [to violently overthrow the government] and his intent to pursue them.⁵⁵

Given that a bar applicant seeks "admission to a profession dedicated to the *peaceful and reasoned settlement* of disputes between men, and between a man and his government,"⁵⁶ unlike question regarding political *beliefs*, "a State is constitutionally entitled to make [] an inquiry [about the support for the *violent overthrow* of the government] of an applicant."⁵⁷

IV. PEREMPTORY CHALLENGES IN JURY SELECTION

The exercise of peremptory juror strikes by counsel based on those attorneys' racist views violates the Constitution, while the Constitution provides no similar bar for strikes based on political views. This contrast further highlights the stark difference between the label "racist" versus the labels "conservative" and "liberal."

48. Mike Allen, *A Question of Character; Beyond the Bar Exam*, N.Y. TIMES, July 11, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9F05E2DA123CF932A25754C0A96F958260>.

49. *Hale v. Comm. on Character & Fitness for Ill.*, 335 F.3d 678, 679 (7th Cir. 2003).

50. *Id.* at 681.

51. *Id.*

52. *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971) (quoting *Konigsberg v. State Bar*, 366 U.S. 36 (1961)).

53. *Id.* at 163 (quoting *Konigsberg v. State Bar*, 366 U.S. 36 (1961)).

54. 366 U.S. 36 (1961).

55. *Shapiro v. Roudebush*, 413 F. Supp. 1177, 1181 (Mass. App. Div. 1976) (emphasis added).

56. *Law Students Civil Rights Research Council, Inc.*, 401 U.S. at 166 (emphasis added).

57. *Id.*

Historically, the use of peremptory challenges allowed parties to remove prospective jurors without giving any reason for their removal.⁵⁸ These challenges had been one of the last refuges of generally unchecked behavior by attorneys. “[I]n the 1980s[, however, c]ritics claimed that white prosecutors used their peremptory challenges to remove African Americans from the jury when the criminal defendant was also African American.”⁵⁹ The Supreme Court tackled this issue in *Batson v. Kentucky*,⁶⁰ where

Petitioner, a black man, was indicted in Kentucky on charges of second-degree burglary and receipt of stolen goods. On the first day of trial in Jefferson Circuit Court, the judge conducted *voir dire* examination of the venire, excused certain jurors for cause, and permitted the parties to exercise peremptory challenges.⁶¹

The case revolved around the concern that “[t]he [white] prosecutor used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected.”⁶² The defense challenged the prosecutor’s removal of the black veniremen, alleging that such action violated the defendant’s Sixth and Fourteenth Amendment rights to a jury drawn from a cross-section of the community.⁶³ During the trial, the judge “observed that the parties were entitled to use their peremptory challenges to ‘strike anybody they want to.’”⁶⁴

The Supreme Court held that prosecutors cannot make race-based peremptory strikes of jurors regardless of the “strategic goal” pursued.⁶⁵ The evil redressed was that of prosecutors’ improperly ascribing a predis-

58. BLACK’S LAW DICTIONARY 245 (abridged 8th ed. 2004).

59. *Id.*; see *Georgia v. McCullom*, 505 U.S. 42, 50 (1992) (“Until *Edmonson*, the cases decided by this Court that presented the problem of racially discriminatory peremptory challenges involved assertions of discrimination by a prosecutor.”).

60. 476 U.S. 79 (1986).

61. *Id.* at 82–83.

62. *Id.* at 83.

63. *Id.*

64. *Id.*

65. See *id.* at 89.

More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. [In] *Strauder v. West Virginia*, 100 U.S. 303 (1880)[, we] . . . laid the foundation for the Court’s unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn. In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. . . . Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

Id. at 85 (citations omitted). The Court, in *Lockhart v. McCree*, later emphasized that the harm is not only to the litigants, but also to society itself:

The exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an “appearance of unfairness.” . . . [S]uch exclusion improperly deprive[s] members of these often historically disadvantaged groups of their right as citizens to serve on juries in criminal cases.

476 U.S. 162, 175 (1986); see also *Powers v. Ohio*, 499 U.S. 400, 413 (1991).

position to potential African American jurors based solely on their race. The prosecutor stereotyped black jurors as unable to see beyond their own race and make rational decisions. This conduct exemplified racist behavior on the part of the prosecutor.⁶⁶ The Court ruled that this racial discrimination violated the Fourteenth Amendment's Equal Protection Clause.⁶⁷ Thereafter, the Court extended the prohibition on the racist use of peremptory challenges to private parties in civil trials.⁶⁸

In 1992, one important issue involving peremptory challenges remained unresolved by the Supreme Court—the exercise of peremptory challenges by criminal defendants. The inquiry here was whether criminal defendants—imbued with the Constitutional protections afforded no other actors proceeding through the judicial system in America—could exercise race-based peremptory challenges. The Supreme Court, in *Georgia v. McCullom*,⁶⁹ said no.

The Court began its analysis by declaring that “[f]or more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause.”⁷⁰ *McCullom* contains instructive facts: the white defendants were charged with assaulting two African-Americans, and “[b]efore jury selection began, the prosecution moved to prohibit [defendants] from exercising peremptory challenges in a racially discriminatory manner. The State explained that it expected to show that the victims’ race was a factor in the alleged assault.”⁷¹

66. The Supreme Court rightly rejected the idea that blacks could be excluded from juries on the assertion that, simply because they are black, they must harbor biases against whites. The Court held that “we may not accept as a defense to racial discrimination the very stereotype the law condemns.” *Powers*, 499 U.S. at 410. The Court had previously held that “[i]n our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption as a *Per se* rule that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.” *Ristaino v. Ross*, 424 U.S. 589, 596 n.8 (1976). And the Court later “reaffirm[ed] [] that the exercise of a peremptory challenge must not be based on either the race of the juror or the racial stereotypes held by the party.” *Georgia v. McCullom*, 505 U.S. at 44.

67. *Batson*, 476 U.S. at 89.

68. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

69. 505 U.S. 42 (1992).

70. *Id.* at 44 (“Last Term this Court held that racial discrimination in a civil litigant’s exercise of peremptory challenges also violates the Equal Protection Clause”).

71. *Id.* at 44–45.

According to the State, counsel for respondents had indicated a clear intention to use peremptory strikes in a racially discriminatory manner, arguing that the circumstances of their case gave them the right to exclude African-American citizens from participating as jurors in the trial. Observing that 43 percent of the county’s population is African-American, the State contended that, if a statistically representative panel is assembled for jury selection, 18 of the potential 42 jurors [from the available pool chosen for each petit jury] would be African-American. With 20 peremptory challenges, respondents therefore would be able to remove all the African-American potential jurors. Relying on *Batson*. . . the Sixth Amendment, and the Georgia Constitution, the State sought an order providing that, if it succeeded in making out a *prima facie* case of racial discrimination by respondents, the latter would be required to articulate a racially neutral explanation for peremptory challenges.

Id. at 45 (citations omitted).

Thus, in contrast to the *Batson*-type cases, here the defendants were white—rather than black—and the defense counsel—rather than the prosecutor—desired to exclude jurors based on race. While those *McCullom* facts contrast with *Batson*, the facts in common are more telling: in both cases whites wanted to exclude blacks from jury service based on the whites' stereotyping of blacks' views and actions. That is, the whites sought to exclude blacks because of the whites' racist views. In both cases the whites assumed that blacks could not and would not provide a fair verdict—but, rather, would either (1) vote to acquit black defendants merely because they also are black (*Batson*-type cases) or (2) would vote to convict white defendants merely because the victims were black and the defendants were white (*McCullom*-type cases). This is racist and wrong, and the Court said so: "Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal."⁷²

While constitutional jurisprudence prohibits decision-making based on racist beliefs, it unquestionably permits exercising peremptory challenges based on political biases. For example, in *State v. Morton*,⁷³ the New Jersey Supreme Court held that if the defendant did not want two decidedly conservative pro-death penalty jurors seated due to the defense counsel's bias as to these jurors' impartiality, the defendant could simply have exercised his peremptory challenges.⁷⁴ Here, like the race-based peremptory challenges discussed above, counsel ascribed an improper predisposition to the jurors—but this time based on the jurors' political views rather than their race. The bias in this instance was the implied belief that pro-death penalty jurors would automatically vote to convict notwithstanding guilt. While the ascribed predisposition was not inherently valid—as evidenced by the discussion of employing peremptory challenges rather than those for cause—the court accurately reasoned that the attorney could, nonetheless, freely employ his political-orientation bias against these jurors.

Political-view discrimination by attorneys in jury selection is simply not considered the evil that race discrimination is in the same context. *Batson* and its progeny rightly reflect the notion that racism is a unique evil that must be eradicated. And these cases demonstrate the singular seriousness with which the Supreme Court, our legal and political system, and our society in general address accusations of racist behavior.

In addition, the Supreme Court has shown particular attention to ensuring that jurors *themselves*—rather than the attorneys who chose them—also do not harbor racist views. The Supreme Court held that in certain circumstances courts *must* voir dire on the issue of racial bias of jurors. No such concern exists for the presence of liberal or conservative jurors and their potential for affecting the litigation's outcome.

72. *Id.* at 50.

73. 155 N.J. 383 (N.J. 1998).

74. *Id.* at 459–60.

In *Ham v. South Carolina*,⁷⁵ the Supreme Court reviewed the trial judge's actions in a case in which a black civil rights worker was on trial for the possession of marijuana.⁷⁶ At the trial, his defense "was that law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed on the drug charge."⁷⁷ The defendant received an 18-month sentence, and he appealed the trial court's failure to interrogate the jurors on the subject of racial prejudice.⁷⁸ The Supreme Court held that the Fourteenth Amendment *required* such an inquiry under the circumstances of that case:⁷⁹

Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands of fairness,' . . . and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race, we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice.⁸⁰

Telling of the uniqueness of racism and the charge thereof was the Court's response to the defendant's assertion that he had a right to inquire as to whether any jurors held a bias against those sporting facial hair, as defendant also wore a beard. The court, in *rejecting* that idea, declared:

While we cannot say that prejudice against people with beards might not have been harbored by one or more of the potential jurors in this case, this is the beginning and not the end of the inquiry as to whether the Fourteenth Amendment required the trial judge to interrogate the prospective jurors about such possible prejudice.⁸¹

The Court concluded:

Given the traditionally broad discretion accorded to the trial judge in conducting *voir dire*, and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe [defendant's] constitutional rights were violated when the trial judge refused to put this question.⁸²

Indeed, the contrast in language that the Court used for addressing racists, when compared to what it used for beards, is telling:

The inquiry as to racial prejudice derives its constitutional stature from [] firmly established precedent . . . and [] a principal purpose as well as from the language of those who adopted the Fourteenth Amendment. The trial judge's refusal to inquire as to

75. 409 U.S. 524 (1973).

76. *Id.* at 526.

77. *Id.* at 525.

78. *Id.* at 526.

79. *Id.*

80. *Id.* at 527 (citations omitted).

81. *Id.* at 527-28.

82. *Id.* at 528.

particular bias against beards . . . does not reach the level of a constitutional violation.⁸³

The Court, however, has been nuanced—if not simply hesitant—in its application of this principle. For example,

In *Aldridge v. United States*, counsel for a black defendant sought to have the Court put a question to the jury as to whether any of them might be prejudiced against the defendant because of his race. [The Court] held that it was reversible error for the Court not to have put such a question, saying “the Court failed to ask any question which could be deemed to cover the subject.” More recently, in *Rosales-Lopez v. United States*, we held that such an inquiry as to racial or ethnic prejudice need not be made in every case, but only where the defendant was accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. . . . “Because the obligation to empanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*.”⁸⁴

While *Hamm* and *Aldridge* required the inquiry into racial animus, and *Rosales-Lopez* expressed limitations of that rule, in

Ristaino v. Ross, [the Supreme Court] held that the Constitution does not require a state-court trial judge to question prospective jurors as to racial prejudice in every case where the races of the defendant and the victim differ, but in *Turner v. Murray*, [the Supreme Court] held that in a capital case involving a charge of murder of a white person by a black defendant such questions must be asked.⁸⁵

The Supreme Court recognized that “the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice,”⁸⁶ although “the trial court retains great latitude in deciding what questions should be asked on *voir dire*.”⁸⁷ The Court continued that

[i]n *Aldridge* and *Ham* we held that the subject of possible racial bias must be ‘covered’ by the questioning of the trial court in the course of its examination of potential jurors, but we were careful not to specify the particulars by which this could be done. We did not, for instance, require questioning of individual jurors about facts or experiences that might have led to racial bias.”⁸⁸

83. *Id.* (citations omitted).

84. *Mu’Min v. Virginia*, 500 U.S. 415, 422–23 (1991) (citing *Aldridge v. United States*, 283 U.S. 308 (1931); *Rosales-Lopez v. United States*, 451 U.S. 182 (1981)).

85. *Id.* at 423–24 (citing *Ristaino v. Ross*, 424 U.S. 589 (1976)).

86. *Id.* at 424.

87. *Id.*

88. *Id.* at 431.

In *United States v. King*,⁸⁹ the Southern District of New York further highlighted the importance of asking potential jurors probing questions to determine whether they have any racial biases. Regarding “the delicate area of possible racial bias” of jurors, the court in a criminal case against Don King, the well-known boxing promoter, stated that “[i]t is no doubt a difficult thing for any person to admit to any degree of racial bias, but to do so for publication might well require what the theologians used to call heroic virtue. The importance of *voir dire* in uncovering racial bias would be hard to overestimate.”⁹⁰

The court’s language in *King* embodies the critical point presented throughout this paper—that racist behavior and the appellation “racist” are dreadful. The former proves terrible for both racists and the remainder of society, because racists themselves suffer from the control of that evil and society suffers by having to cope with it. The latter is awful (but justified) for the racists, because they are “outed” for their evil. Indeed, that explains the court’s emphasis on the difficulty of disclosing such bias and the demand for judicial intervention to ensure such disclosure.

Unfortunately, not all courts have been so vigorous in the application of the principle of ferreting out racism among jurors. In *Sterling v. Dretke*,⁹¹ the Fifth Circuit upheld the district court’s conclusion that counsel’s failure to inquire as to racial animus of a juror that the attorney knew had used racial epithets was not, under the circumstances in the case, ineffective assistance of counsel.⁹² In *Sterling*, the juror in issue used the term “nig**rs”⁹³ to refer to African-Americans at the time of trial and after.⁹⁴ Apparently, the defense counsel knew the witness and believed that their relationship would inure to the benefit of the defendant and that the juror was not a racist notwithstanding his use of the racial slur.⁹⁵ The Fifth Circuit upheld the trial court’s determination that the defense attorney’s actions fell within the sphere of appropriate “strategy.” Apparently, the ethically-questionable strategy of relying on a personal relationship—seemingly undisclosed—coupled with the trial attorney’s untested perception that the juror was not bigoted was a sufficient “strategy” to trump the obligation to merely inquire into the potential racial animus of a prospective juror.⁹⁶

89. 911 F. Supp. 113 (S.D.N.Y.1995).

90. *Id.* at 117.

91. *Sterling v. Dretke*, 117 Fed. App’x. 328, 330 (5th Cir. 2004), *cert. denied*, 544 U.S. 1053 (2005).

92. *Id.* at 333.

93. This is how the Fifth Circuit wrote the word. It is worthy to note that the Fifth Circuit found the use of term so terrible that it could not even quote it, but insufficiently harmful under the circumstances to warrant reversal.

94. *Id.* at 331.

95. *Id.* at 331–32. (“Walther also stated he has some very close friends who are African-American; using the term ‘nig**r’ did not make him a racist; and he did not consider himself to be a racist.”).

96. *Id.* at 332. (“While Dunn did not question any potential jurors about racial bias, he stated this decision rested on his belief that he very seldom receives truthful answers.”). The Supreme Court has rejected similar logic under different circumstances: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is

V. DEFAMATION

Defamation law “aims at protecting reputation and good name against false and derogatory comments.”⁹⁷ To prove a defamation claim, a plaintiff must show that someone communicated a statement that “would diminish the esteem in which the plaintiff is held.”⁹⁸

Civil and religious law have long recognized redress for harmful statements about another: “In the medieval English law, oral statements demeaning to others were punished as sin in the Church courts.”⁹⁹ During the early to middle part of the first common-era millennium, the penultimately controlling Jewish legal text—the Talmud—described three exclusive circumstances that will prevent a soul from elevating out of Gehinnom (roughly equivalent to Hell¹⁰⁰): (1) adultery,¹⁰¹ (2) invasion of privacy and other public humiliation, and (3) the making of derogatory comments (*e.g.*, defamation).¹⁰² The Talmud characterizes the latter two as verbal *ona’ah* (roughly, wrongdoing),¹⁰³ which the Talmud discusses along side of monetary *ona’ah*—essentially fraud.¹⁰⁴ Indeed, “[v]erbal *ona’ah* is a greater sin than monetary *ona’ah*.”¹⁰⁵ It “is tantamount to assassination, since it destroys his social status and personal honor.”¹⁰⁶ The Torah¹⁰⁷—

not what the Sixth Amendment prescribes.” *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

97. 2 DAN B. DOBBS, *THE LAW OF TORTS* 1117 (2001).

98. *Id.* at 1120.

99. *Id.* at 1117.

100. GEMARA, *TRACTATE BEITZAH*, SCHOTTENSTEIN EDITION Glossary (1997). See *Isaiah* 66:24.

101. Of these three categories of sin, only adultery is prohibited in the Ten Commandments. *Exodus* 20:1-14. Adultery is a capital offense in Biblical law. TANACH, *STONE EDITION* 184 (1996).

102. ADIN STEINSALTZ, *TALMUD*, STEINSALTZ EDITION, VOLUME III, 226 (1990) (referencing the harm caused by specific wrongs including defamation, the Talmud teaches that “[e]ven if the wrongdoer tries to atone for his sin by compensating the victim, the anguish he caused [by, in this instance, defamation] can never be completely undone.”). The Talmud offers as an example of defamation the mere *suggestion* that had a person been more scrupulous he might not have become ill or his children might not have died because that “is tantamount to accusing the sufferer or the deceased of being a sinner.” *Id.* at 225. The proscription on verbal *ona’ah* is so strict that “not only are outright insults forbidden, but so are remarks made facetiously, if they are likely to cause others distress.” *Id.*

103. *Id.* at 223 (describing verbal *ona’ah* as “anguish . . . caused to other people by hurting their feelings. . . . [T]wo types of transgression are subsumed under th[is] category . . . (1) Causing a person financial loss through one’s words, and (2) putting another person to shame.”). *Id.*

104. *Id.*

105. *Id.* at 226.

106. *Id.* The Talmud further explains: “If someone overcharges or underpays, he can recompense the victim by simply paying the difference. But verbal *ona’ah* is not subject to [correction through] restitution. Even if the wrongdoer tries to atone for his sin by compensating the victim, the anguish he caused can never be completely undone.” *Id.* The Talmud further teaches that while “[e]very sin is [generally] punished by the hand of a messenger, and not directly by the hand of [G-d], [there is an] except[ion] for the sin of *ona’ah*, for which [G-d] himself exacts immediate punishment. . . . [G-d] takes a special interest in avenging the[se] sins.” *Id.* at 232.

107. The Torah refers to the first five books of the Old Testament, customarily viewed by Jews and Christians as dictated by G-d to Moses on Mt. Sinai after the Jewish people

the highest source of Jewish law—provides for earthly punishment for defamation in the form of financial damages.¹⁰⁸ In modern civil law, defamation is actionable in every state.¹⁰⁹

Labeling someone a “racist” can be defamatory. In *MacElree v. Philadelphia Newspapers Inc.*,¹¹⁰ the defendant newspaper “reported on a brawl at Lincoln University.”¹¹¹ The article referred to the then district attorney and stated that “Lincoln’s lawyer accused [the D.A.] of ‘electioneering—[and that the D.A. was] the David Duke of Chester County running for office by attacking Lincoln.’”¹¹² The court in *MacElree* articulated that these accusations of racism may be actionable as defamation: “Although [mere] accusations of racism have been held not to be actionable defamation, it cannot be said that every such accusation is not capable of defamatory meaning as a matter of law.”¹¹³ As the New Jersey Supreme Court held in *Ward v. Zelikovsky*,¹¹⁴ non-actionable assertions of “racism” do not imply any supporting factual basis—thus constituting mere opinion; in contrast, accusations of “racism” implying or accompanied by reasonably specific statements that are capable of objective proof of falsity are actionable.¹¹⁵ The *Ward* court articulated the fact-opinion dichotomy concerning accusations of racism (the “fact-opinion test”¹¹⁶):

left the captivity of 210 years of slavery in Egypt. See Jewish Virtual Library, *The Written Law (The Torah)*, http://www.jewishvirtuallibrary.org/jsourc/Judaism/The_Written_Law.html; Commentary by Rashi (Rabenu Shlomo Yitzchaki, the Jewish sage of the early second millennium of the common era) *Exodus 12:40-41, available at* http://www.chabad.org/library/bible_cdo/aid/9873/showrashi/true/jewish/Chapter-12.htm.

108. *Deuteronomy* 22:13-19 (fine of 100 silver shekels).

109. 2 DAN B. DOBBS, *THE LAW OF TORTS* 1119 (2001).

110. 544 Pa. 117 (Pa. 1996).

111. *Merriweather v. Phila. Newspapers, Inc.*, 61 Pa. D. & C.4th 423, 436-37 (2002).

112. *Id.* at 437.

113. *MacElree*, 544 Pa. at 127.

114. 136 N.J. 516, 539 (1994).

115. *Id.*

116. RESTATEMENT (SECOND) OF TORTS § 566 (1974) sets forth the considerations of the fact-opinion test:

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

* * *

. . . . A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability. The defendant cannot insist that the undisclosed facts were not defamatory but that he unreasonably formed the derogatory opinion from them. This is like the case of a communication subject to more than one meaning. As stated in § 563, the meaning of a communication

Whether an accusation of bigotry is actionable depends on whether the statement appeared to be supported by reasonably specific facts that are capable of objective proof of truth or falsity. The statement might explicitly refer to those specific facts or be made in such manner or under such circumstances as would fairly lead a reasonable listener to conclude that he or she had knowledge of specific facts supporting the conclusory accusation. For example, a claim of bigotry could include claims that the selected person had engaged in specific acts such as making racist statements, failing to associate with or to act with courtesy toward people of a particular race, denying another employment or advancement because of race or religion, or posting signs that carried a racist message.¹¹⁷

The court in *MacElree* essentially applied the fact-opinion test when it held that “[t]he statement we are presented with here could be interpreted as more than a simple accusation of racism. . . . [T]he statement could be construed to mean that appellant was acting in a racist manner in his official capacity as district attorney.”¹¹⁸

As the court stated,

a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. A charge of racism clearly could have such an effect on the individual so charged.¹¹⁹

The court concluded that

[w]here such a possibility exists, it is up to the jury as fact finder to determine its existence. This is not to say that every accusation of racism is defamatory. Accordingly, it remains “the function of the court to determine whether the challenged publication is capable of a defamatory meaning.”¹²⁰

In another defamation case involving the accusation of “racism,” a New York court applied the fact-opinion test to hold that the use of the term was actionable because of the presence of defamatory facts that could be proven false.¹²¹ The court held that the defendant’s assertion “that plaintiff’s office cubicle contained a statuette of a black man hanging from a white noose, was false as alleged by plaintiff, [such that] defendants’ views premised on such statement, published under the

is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.

It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication.

117. *Zelikovsky*, 136 N.J. at 539.

118. *MacElree*, 544 Pa. at 126.

119. *Id.* at 127 (internal quotations removed).

120. *Id.*

121. *Como v. Riley*, 287 A.D.2d 416, 416 (N.Y. App. Div. 2001).

heading 'Racism,' are not immune from redress for defamation as non-actionable statements of opinion."¹²²

Moreover, the mere use of the phrase "in my opinion," will not convert actionable words into protected speech. As the Supreme Court stated in *Milkovich v. Lorain Journal Co.*:¹²³

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion."¹²⁴

This is not to say that the Democrat-Gazette's position is without any support. Indeed, in discussing the fact-opinion test, the Seventh Circuit presented the position that the Democrat-Gazette essentially posits. In *Stevens v. Tillman*,¹²⁵ the court held that:

Accusations of "racism" no longer are [alone] "obviously and naturally harmful." The word has been watered down by overuse, becoming common coin in political discourse Formerly a "racist" was a believer in the superiority of one's own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races Politicians sometimes use the term much more loosely, as referring to anyone (not of the speaker's race) who opposes the speaker's political goals—on the "rationale" that the speaker espouses only what is good for the jurisdiction (or the audience), and since one's opponents have no cause to oppose what is beneficial, their opposition must be based on race. The term used this way means only: "He is neither for me nor of our race; and I invite you to vote your race." . . . That may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning. The term has acquired intermediate meanings too. The speaker may use "she is a racist" to mean "she is condescending to me, which must be because of my race because there is no other reason to condescend" — a reaction

122. *Id.*

123. 497 U.S. 1 (1990).

124. *Id.* at 14 (citations omitted, citing, inter alia, RESTATEMENT (SECOND) OF TORTS, brackets in original).

125. 855 F.2d 394 (7th Cir. 1988).

that attaches racial connotations to what may be an inflated opinion of one's self — or to mean “she thinks all black mothers are on welfare, which is stereotypical.” Meanings of this sort fit comfortably within the immunity for name-calling.¹²⁶

While the Democrat-Gazette would undoubtedly find solace in this portion of Judge Easterbrook's opinion in *Stevens*, the same Judge understandably held later in *Taylor v. Carmouche*¹²⁷ that the statement “‘Felton is a racist’ is defamatory, and a person who makes an unsupported defamatory statement may be penalized without offending the First Amendment.”¹²⁸ Thus, Easterbrook's opinions reflect his recognition of the two classes of cases involving the accusation that someone is a “racist”—one class being defamatory under the law, the other not.

The problem with the Democrat-Gazette's view, therefore, lies not in the fact that it ignores the law, but rather in its failure to account for the other half of the equation—those instances in which accusations of racism suggest the existence of or present defamatory facts. A benign explanation for the newspaper's omission may be the limited space available for any one editorial—coupled with the bounded attention of a busy readership. And with an able paper such as the Democrat-Gazette, this conclusion may suffice. I will posit one possible additional motivation, however. Newspapers are quite often the subject of defamation lawsuits. By not only acknowledging, but fostering, the Seventh Circuit's observation that “[t]he word [“racist”] has been watered down by overuse, becoming common coin in political discourse,”¹²⁹ the Democrat-Gazette could save itself and other newspapers exposure to significant liability and damages. This is not to say that the editorial board intentionally pursued this strategy, but its conclusion may result from “unconscious bias.”¹³⁰

In contrast to the potential liability for the charge of “racism,” no cause of action exists for falsely labeling someone a “liberal” or a “conservative.” Indeed, I have found no cases where a plaintiff alleged that the appellation “liberal” or “conservative” was defamatory. This in itself is quite telling.

126. *Id.* at 402.

127. 214 F.3d 788 (7th Cir. 2000). See *supra* notes 30–32 and accompanying text for a further discussion of the case.

128. *Id.* at 793.

129. *Id.*

130. For a discussion of the theory of “unconscious bias” see Sara R. Benson, *Reviving the Disparate Impact Doctrine to Combat Unconscious Discrimination: a Study of Chin v. Runnels*, 31 T. MARSHALL L. REV. 43 (2005) (“[T]he majority of discrimination today results from unconscious biases and preferences. Psychological and sociological data suggest that unconscious discrimination occurs with high frequency in this country.”); Kristof, *supra* note 3 (“[T]he evidence is overwhelming that most Americans have unconscious biases . . .”). For an introduction to this topic in the context of Critical Race Theory, see Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1490 (2004) (“Unconscious racism is today's enemy.”).

The 1935 Delaware case of *Snavely v. Booth*¹³¹ offers some further insight into this inquiry. In *Snavely*, the superintendent of a school district sued certain members of the board of education for defamation stemming from the latter's accusations that the superintendent advocated the teaching of contraception and the rejection of religious-based approaches to unplanned pregnancies of school children.¹³² While this view would be considered liberal today, it was undoubtedly much more so in the context of the time—which the court explicated:

A statute of this state requires that at least five verses of the Holy Bible be read on every school day, and it may well be supposed that these defendants, being members of the board of education, conceived that one of the purposes of the statutory requirement is that morality be taught from the standpoint of Christianity, and that young children be imbued with that idea of chaste conduct which the Christian religion teaches, a religion which is part of our common law. From the viewpoint of the writers of the letter it would not be in conformity with the intention of the legislature, nor would it meet with the approval of many parents, to permit the public schools to be made the breeding grounds for the propagation of ethical opinions cherished by the biologically minded.¹³³

With this in mind, the court held that the accusation of a decidedly liberal position constituted “a conflict of view, opinion, [or] theory.”¹³⁴ As such, the defendants “were entitled to their opinion that morality is founded upon rectitude of conduct and purity of life.”¹³⁵ The court held that to hold “[o]therwise, [would result in] court calendars [] be[ing] crowded with defamation actions between . . . *conservative* and *liberal*, for the vindication of theories and opinions, and verdicts of juries will be arrived at from prejudice and not from fact.”¹³⁶

While the traditional political labels of “liberal” and “conservative” have not given rise to defamation actions, the Supreme Court has held the label “communist” can be defamatory: “Respondent also falsely labeled petitioner a ‘Leninist’ and a ‘Communist-fronter.’ These accusations are generally considered defamatory.”¹³⁷ Indeed, Justice Powell employed the fact-opinion test in finding defamatory the label of “communist.”¹³⁸

131. 176 A. 649 (Del. 1935).

132. *Id.* at 653–54.

133. *Id.* at 654 (citations omitted).

134. *Id.* at 654.

135. *Id.* at 653.

136. *Id.* at 654 (emphasis added).

137. *Gertz v. Robert Welch*, 418 U.S. 323, 332 n.4 (1974).

138. *Id.* at 339–40. The Supreme Court further explained in *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 61–62 (2d Cir. 1980) (“The alleged libels in *Gertz*, which were deemed sufficiently ‘factual’ to support an action for defamation, included . . . charges that he was a ‘Leninist’ or ‘Communist-fronter’. The sort of idea which can never be false was illustrated by reference to Thomas Jefferson’s Inaugural Address, where the President argued for freedom for those ‘who would wish to dissolve this Union or change its republican form.’”) (citations omitted).

The same analysis applies to accusations on the other extreme of the political spectrum. In *Buckley v. Littell*,¹³⁹ the defendant branded William Buckley with the terms “fellow traveler” of “fascism” and the “radical right.”¹⁴⁰ The court ruled that these “concepts whose content is so debatable, loose and varying . . . are unsusceptible to proof of truth or falsity.”¹⁴¹ The First Circuit clarified, explaining that “statements that are too vague to constitute defamation generally fall into the category of epithets, such as ‘communist,’ or ‘absolute barbarian, lunkhead, meathead, and nut.’”¹⁴² In contrast, the *Buckley* court compared the vague charges of fascism in that case with a specific factual charge of association with “the Fascisti, or the Nazis, or the Falangists, or a mythical Fascist Party of America.”¹⁴³ The court implied the latter charge *would* give rise to a defamation claim.¹⁴⁴

Thus, we see that while political labels in the middle of the spectrum—“liberal” and “conservative”—are not subject to defamatory meaning, labels at the extreme—“communist” and “fascist,” like the extreme label of “racist”—may defame, subject to the fact-opinion test. In fact, we can draw the hopefully uncontroversial conclusion that the more extreme the label, the more likely it could—and should—give rise to an actionable defamation claim.

VI. HATE CRIMES

The final area that I analyze to demonstrate the incomparability of the label “racist” with “liberal” and “conservative” is perhaps the most obvious—hate crimes and penalty enhancements for race-motivated crimes. Both statutes and penalty guidelines provide for significantly greater punishment when a crime is committed by someone motivated by racism—i.e., a racist. No such increase in punishment exists for those who committed the same crimes when motivated by political beliefs such as liberal or conservative ideologies.

Many states have hate-crime laws that recognize a separate crime for acts committed with, inter alia, racist beliefs.¹⁴⁵ New York’s law is a good example and, in part, reads:

139. 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

140. *Id.* at 894.

141. *Id.*

142. *Stanton v. Metro Corp.*, 438 F.3d 119, 131 (1st Cir. 2006) (citations omitted). *But see Idema v. Wager*, 29 Fed. App’x. 676, 678–679 (2d Cir. 2002) (suggesting that the epithet of “communist” might survive a motion to dismiss).

143. *Buckley*, 539 F.2d at 893–94 n.11.

144. *See id.* It is worth noting that the labels “fascist” and “Nazi,” are generally – and properly – considered the same as “racist.” As such, these labels have moved from political designations to the approbation set out for singular treatment in this article.

145. Many other states have hate crime statutes or otherwise focus greater attention on crimes solely because they are motivated by racist thought. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/12-7.1 (2005) (“A person commits hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another . . ., regardless of the existence of any other motivating factor . . ., he commits assault, battery, aggravated assault, misdemeanor theft, criminal trespass . . ., misdemeanor criminal damage to

§ 485.05. Hate crimes

1. A person commits a hate crime when he or she commits a specified offense and either:

(a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or

property, criminal trespass to vehicle . . . [or] real property, mob action or disorderly conduct.”); DEL. CODE ANN. tit. 11 § 1304 (1997) (“Any person who commits, or attempts to commit, any crime as defined by the laws of this State, and who intentionally . . . [s]elects the victim because of the victim’s race, religion, color, disability, sexual orientation, national origin or ancestry, shall be guilty of a hate crime.”); MASS. GEN. LAWS ANN. ch. 22C, § 32 (1992) (“‘Hate crime’ [is] any criminal act coupled with overt actions motivated by bigotry and bias including, but not limited to, a threatened, attempted or completed overt act motivated at least in part by racial, religious, ethnic, handicap, gender or sexual orientation prejudice, or which otherwise deprives another person of his constitutional rights by threats, intimidation or coercion, or which seek to interfere with or disrupt a person’s exercise of constitutional rights through harassment or intimidation.”); CAL. PENAL CODE § 422.55 (2004) (“‘Hate crime’ means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: (1) Disability. (2) Gender. (3) Nationality. (4) Race or ethnicity. (5) Religion. (6) Sexual orientation. (7) Association with a person or group with one or more of these actual or perceived characteristics.”); R.I. GEN. LAWS § 42-28-46 (1994) (“‘Hate crime’ means any crime motivated by bigotry and bias, including, but not limited to threatened, attempted, or completed acts that appear after investigation to have been motivated by racial, religious, ethnic, sexual orientation, gender or disability prejudice.”); VT. STAT. ANN. tit. 13, § 1455 (1999) (“Hate-motivated crimes [statute increases penalties to a] person who commits, causes to be committed or attempts to commit any crime and whose conduct is maliciously motivated by the victim’s actual or perceived race, color, religion, national origin, sex, ancestry, age, service in the armed forces of the United States, handicap . . . , sexual orientation or gender identity.”); OHIO REV. CODE ANN. § 2927.12 (1986) (“(A) No person shall violate [the following penal] section[s] . . . by reason of the race, color, religion, or national origin of another person or group of persons. (B) Whoever violates this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation.”); OR. REV. STAT. § 166.165 (2008) (“Two or more persons acting together commit the crime of intimidation in the first degree, if the persons: (a)(A) Intentionally, knowingly or recklessly cause physical injury to another person because of the actors’ perception of that person’s race, color, religion, sexual orientation or national origin; or (B) With criminal negligence cause physical injury to another person by means of a deadly weapon because of the actors’ perception of that person’s race, color, religion, sexual orientation or national origin; (b) Intentionally, because of the actors’ perception of another person’s race, color, religion, sexual orientation or national origin place another person in fear of imminent serious physical injury; or (c) Commit such acts as would constitute the crime of intimidation in the second degree, if undertaken by one person acting alone.”); WASH. REV. CODE § 9A.36.080 (1993) (“A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim’s race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap”).

(b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.¹⁴⁶

*New York v. McDowd*¹⁴⁷ put this statute to the test. In *McDowd*, the defendant “told a real estate agent that if a house for sale on defendant’s street were to be sold to blacks, defendant would burn it down and that defendant posted numerous flyers of a racist nature including ‘Niggers Beware’ and ‘KKK.’”¹⁴⁸ The court found no constitutional impediment to imposing a greater penalty for a crime when racist beliefs motivated that crime.¹⁴⁹

Myriad such cases exist. For example, in *Missouri v. Callen*,¹⁵⁰ the defendant was permanently rejected

[f]rom donating at [a local] plasma center for distributing KKK pamphlets. . . . [Defendant] continued to visit the plasma center every three to six months. Every time he went to the center, [he was] told [] to leave and [he was] not allow[ed] [] to donate plasma. On each occasion, [defendant] made racist remarks. . . . He also, on several occasions, wore a KKK hat and displayed KKK paraphernalia. . . . [He also] drove a truck with KKK marked on it and [had] a KKK flag hanging from the antenna. . . . [Later defendant sent] a racist letter . . . on KKK stationery. . . .¹⁵¹

The defendant’s “conduct . . . manifest[ed] his racial animosity. . . . Thus, [held the appellate court,]. . . the trial court could have reasonably found that Mr. Callen’s trespass . . . was motivated by . . . race.”¹⁵²

146. N.Y. PENAL LAW § 485.05 (2003). Separately, New York has an elevated assault charge known as aggravated harassment. N.Y. PENAL LAW § 240.30. Several factors can elevate an ordinary assault to the more serious aggravated version of the crime, including if the defendant “[s]trikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person’s race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct.” *Id.* This section has been ruled constitutional, on the grounds that it does not restrict speech but instead “prohibit[s] violence and physical intimidation based upon bigotry.” *People v. Miccio*, 589 N.Y.S.2d 762 (N.Y. Crim. Ct. 1992).

147. 773 N.Y.S.2d 531 (N.Y. Sup. Ct. 2004).

148. *Id.* at 532. In describing the New York hate-crime statute, the court said that a person commits a ‘hate crime’ when he commits a ‘specified offense’ . . . in whole or substantial part because of a belief or perception regarding the race of a person, regardless of whether the belief or perception is correct [W]hen a person is convicted of a hate crime . . . the hate crime is deemed to be one category higher than the specified offense which he committed.

Id. at 532 n.1–2.

149. *Id.* at 533.

150. 97 S.W.3d 105 (Mo. Ct. App. 2002).

151. *Id.* at 111.

152. *Id.* The court previously upheld the constitutionality of the hate-crime statute. *Id.* at 109.

Indeed, the breadth of the application of such statutes should not be underestimated. The defendant in *Illinois v. Davis*¹⁵³ yelled “‘Nigger, I am going to kick your black ass,’” before proceeding to beat the victim “literally, senseless.”¹⁵⁴ Illinois prosecuted the defendant under its hate crime statute.¹⁵⁵ The court in *Davis* held that while the defendant’s comments were “reprehensible and *per se* racist, there is less indication that the assault was *motivated* by racial animus. . . . This case may be . . . an aggravated battery that is transformed into a hate crime by reason of the spoken word ‘nigger.’”¹⁵⁶ Nonetheless, the court held that “[t]hese observations aside, we rule to affirm defendant’s conviction.”¹⁵⁷ Thus, although the charge that the defendant was motivated by racist views was—according to the court—a weak one, its command sufficed to convict the defendant of the heightened-penalty hate crime.

In addition, in the *B.C.* case, the Illinois Supreme Court held charges that the defendants “knowingly committed the offense of disorderly conduct” because they “displayed patently offensive depictions of violence toward African-Americans in such an unreasonable manner as to alarm and disturb [the victim] and provoke a breach of the peace,” sufficient to state a claim as a “violation of the hate crime statute.”¹⁵⁸ In this case, the Illinois Supreme Court held that the victim of the crime need not be, or perceived to be, a member of the hated group, as long as the perpetrator was motivated by the requisite racist views in committing the crime.¹⁵⁹

153. 674 N.E.2d 895 (Ill. App. Ct. 1997).

154. *Id.* at 895.

155. *Id.* at 897.

156. *Id.* at 898 (emphasis in original).

157. *Id.* The Court referenced cases from other jurisdictions in discussing the requisite racial animus to show a hate crime. Those cases also serve well to provide a sampling of the types of behavior that have given rise to criminal liability under hate-crime statutes: “*People v. MacKenzie*, 34 Cal. App. 4th 1256, 1264, 1266, 40 Cal. Rptr. 2d 793, 796-97 (1995) (before brandishing a .45-caliber handgun at a black family, white defendant said: ‘This is my [f—ing] neighborhood, I’m sick of you mother [f—ing] bozo niggers; ‘Nigger bitch, you’re dead’; ‘You are just as [f—ed] as those f—ing nigger dope dealers in Oakland’); *People v. Superior Court (Aishman)*, 32 Cal. App. 4th 1350 (1993) (group of white men, one tattooed with a swastika and ‘Thank God I’m White,’ talk about ‘hitting home runs with Mexicans’ before driving to a Hispanic neighborhood and beating three Mexican men with baseball bats); [*Wisconsin v.] Mitchell*, 508 U.S. 476, 480 [(1993)] (After seeing the movie “Mississippi Burning,” a member of a group of young black men said, ‘Do you all feel hyped up to move on some white people?’ and ‘You all want to [f—k] somebody up? There goes a white boy; go get him,’ before the group beat a white 14-year-old causing brain damage); *Richards v. State*, 608 So. 2d 917 (Fla. App. 1992) (before assaulting a black man, white assailant said, ‘I am tired of you [f—ing] niggers being down here. Got a job? Boat people . . . You niggers down here playing music and keeping me up); *Dobbins v. State*, 605 So. 2d 922 (Fla. App. 1992) (group of ‘skin-heads’ beat Jewish youth, saying, ‘Die Jew boy’); *Ayers v. State*, 335 Md. 602, 611, 645 A.2d 22, 26 (1994) (group of white men decided to ‘go nigger hunting’); *People v. Prisinzano*, 170 Misc. 2d 525, 648 N.Y.S.2d 267 (1996) (white neighbor constructed and burned cross on the lawn of the neighboring home as black prospective buyers visit).” *Id.* at 880 (some citations omitted) (brackets within internal quotations in original).

158. *In re B.C.*, 680 N.E.2d 1355, 1363 (Ill. 1997). The court did not expressly address the constitutional issues. *Id.* at 1364.

159. *Id.* at 1362.

The uniqueness of the jurisprudence regarding racists and racist beliefs is reflected in an Illinois appellate court's observation in *Illinois v. Buck*,¹⁶⁰ that the "holding [in *B.C.*] has never been applied outside the realm of the hate crime statute."¹⁶¹

In addition to hate crime statutes, many jurisdictions—including the federal government—allow for sentencing enhancements in crimes where the defendant demonstrably harbored racist motivations. The Supreme Court weighed in on this issue in *Wisconsin v. Mitchell*.¹⁶² The Court held that penalty enhancements for committing a crime when motivated by racism are constitutional and do not violate the First Amendment.¹⁶³ In that case, the defendant's "sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race."¹⁶⁴ Aggravated battery "ordinarily carries a maximum sentence of two years' imprisonment [in Wisconsin]. But because . . . [the defendant] had intentionally selected his victim because of [his] race, the maximum sentence for [the defendant's] offense was increased to seven years."¹⁶⁵

The Wisconsin Supreme Court advanced the argument against the enhancement based on racist thought. It held that the statute "'violates the First Amendment directly by punishing . . . offensive thought.' . . . '[T]he statute punishes . . . the *reason* the defendant selected the victim, the *motive* behind the selection.' And . . . 'the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees.'"¹⁶⁶ The Wisconsin Supreme Court also found the statute unconstitutionally overbroad.¹⁶⁷ That court, as described by the United States Supreme Court, held that "in order to prove that a defendant intentionally selected his victim because of the victim's protected status, the State would often have to introduce evidence of the defendant's prior speech, such as racial epithets . . . [which the court considered] protected speech."¹⁶⁸

The United States Supreme Court disagreed with the Wisconsin High court. The statute, said the Court, simply "enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all."¹⁶⁹ The Court held this constitutional. The "'Constitution does not erect a *per se* barrier to the admission of evidence concerning [] beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.' Thus, . . . the sentencing

160. 838 N.E.2d 187 (Ill. App. Ct. 2005).

161. *Id.* at 201.

162. 508 U.S. 476 (1993).

163. *Id.* at 485–90.

164. *Id.* at 479.

165. *Id.* at 480 (citations omitted).

166. *Id.* at 482 (citations omitted).

167. *Id.*

168. *Id.* The Wisconsin court also "distinguished antidiscrimination laws, which have long been held constitutional, on the ground that the Wisconsin statute punishes the 'subjective mental process' of selecting a victim because of his protected status, whereas antidiscrimination laws prohibit 'objective acts of discrimination.'" *Id.*

169. *Id.* at 485 (emphasis added).

judge [may] take into account the defendant's racial animus towards his victim."¹⁷⁰

Indeed, accusations of hate crimes are quite often handled with special attention due to their importance and sensitivity. For example, the town of Dexter, Maine employs the following procedure for racially-motivated hate crimes. First, it "refer[s] the complaint to [a senior officer] for an initial investigation."¹⁷¹ Then, the investigatory results are "forwarded to the Maine Attorney General's Office, Civil Rights Division. Any prosecution that is deemed appropriate under the State's hate crimes or bias laws is conducted by the State of Maine, and not by the Town of Dexter or its police department."¹⁷²

For sure, however, the Supreme Court has recognized limits to punishing racist thought. In *R.A.V. v. City of St. Paul*,¹⁷³ the defendant constructed a

cross [and] then allegedly burned [it] inside the fenced yard of a black family. . . . 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, 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."¹⁷⁴

Notably, St. Paul's statute was unlike most hate-crime statutes and all penalty enhancements, in that the punishment for the racist view was not tied to some other criminal act. The racist view and *expression* was the substance of the criminalization itself, and, accordingly, impacted most directly the First Amendment. The Court declared "that burning a cross in someone's front yard is reprehensible," but held that "St. Paul has sufficient means at its disposal to prevent such behavior without adding [a violation of] the First Amendment to the fire."¹⁷⁵ Indeed, the Court emphasized this point: "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."¹⁷⁶ St. Paul's statute failed constitutional scrutiny because it did not enact "a general 'fighting words' law," but, rather, "silenc[ed]

170. *Id.* at 486. The Court also rejected the overbreadth argument as "speculative." *Id.* at 489.

171. *Austin v. Town of Dexter*, 522 F. Supp. 2d 38, 49 (D. Me. 2008).

172. *Id.*

173. 505 U.S. 377 (1992).

174. *Id.* at 379–80.

175. *Id.* at 396.

176. *Id.* at 392 (citations omitted) (emphasis added).

speech on the basis of its content.”¹⁷⁷ The Court highlighted that “[t]hat 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 benignly) disagree.”¹⁷⁸

That we punish and sentence crimes more severely because the perpetrators are motivated by racist beliefs—and do nothing of the sort for crimes motivated by liberal or conservative ideology—perhaps best demonstrates that the label “racist” is singular in its opprobrium and wholly dissimilar to the labels “liberal” and “conservative.”

VII. CONCLUSION

Being branded a “racist” carries severe repercussions in, inter alia, employment, admission to the bar, jury selection and service, and the punishment of crime. Further, wrongfully accusing someone of racism can give rise to an actionable claim for defamation as long as the assertion implies or presents underlying assertions able to be proven false. In contrast, political affiliation generally has no place in employment decisions, bar admission, jury service, and the punishment of crime. And false accusations of liberal or conservative affiliation are simply not actionable.

My father lived under both fascist and communist rule, and when he came to the United States, he fought against discrimination, including racial segregation. He experienced bigotry that many of us could not even imagine. He would have been the first to say that the appellation of “racist” is deprecatory precisely because it rightly reflects the evil of mass hatred. If we discontinue recognizing the pejorative nature of the label, we risk losing sight of the immorality of the discrimination that it seeks to indict.

Finally, to the authors of Democrat-Gazette’s editorial that equated the label “racist” with the descriptions “liberal” and “conservative,” I offer the following friendly suggestion. Conduct a test. Put a bumper sticker on your car and a pin on your cardigan with the words “I AM A LIBERAL.” Do this for a week. Note the reactions you receive. In the following week, change the words on the sticker and pin to “I AM A

177. *Id.* In addition, hate speech codes, typically found at universities, have attempted to restrict racist speech. David L. Hudson Jr., *Hate Speech and Campus Speech Codes*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/speech/pubcollege/topic.aspx?topic=campus_speech_codes (last visited Apr. 28, 2008). Advocates “charge that hate speech subjugates minority voices and prevents them from exercising their own First Amendment rights.” *Id.* Demonstrating the particular seriousness with which universities have attempted to treat racist speech, “[m]ore than 350 public colleges and universities regulated some forms of hate speech . . . [by] 1995.” *Id.* However, “[t]he speech codes that have been challenged in court have not fared well. Courts have struck these policies down as being either overbroad or vague.” *Id.* In *Doe v. University of Michigan*, 721 F. Supp. 852, 868 (E.D. Mich. 1989), the court concluded about the University of Michigan’s hate speech code that “[w]hile the Court is sympathetic to the University’s obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech.”

178. *R.A.V.*, 505 U.S. at 396.

RACIST." Do this for a week. Note the reactions. I suspect that this experiment will do more to convince you of this article's thesis than anything that I have written.