CROSS BURNING, HATE SPEECH, AND FREE SPEECH IN AMERICA

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Cross burning remains a persistent problem in America and a difficult issue for a theory of free speech. Cross burning is a difficult problem for the country because it is a vestige of our history of slavery and apartheid. While slavery officially ended in 1863[1] and constitutionally in 1865,[2] apartheid continued another 100 years, ending only during the 1960s when the Warren Court dismantled its formal structure.[3] Burning a cross is a reminder that some Americans yet believe in white supremacy, racial persecution, or ethnic hatred. Burning a cross is a "symbol of hate," as the Supreme Court recently observed.[4] Cross burning is hate speech.

Cross burning is hate speech because it conveys a message of hate, a hatred based on racial identity.[5] Cross burning does not convey a pleasant message; it is a vile statement and an affront to our sense of justice. But it is a message all the same. And because it is a message, cross burning merits consideration as to whether it is protected speech. It would be nice simply to wash the vileness away, as if cleansing the social fabric could restore some element of justness. But social reality is never so simple, and censorship of any idea is problematic for a system of freedom of expression.

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1. In 1863, President Lincoln issued his Emancipation Proclamation (Preliminary Proclamation September 22, 1862). MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 32 (2001).

2. The adoption of the Thirteenth Amendment formally ratified President Lincoln's Emancipation Proclamation. The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

3. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2, 12 (1967) (holding anti-miscegenation statute unconstitutional).

4. Virginia v. Black, 538 U.S. 343, 344 (2003) (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 771 (1995) (Thomas, J., concurring)).

5. I am concerned with messages of hate. Hate speech is commonly known as speech that insults or degrades based on a person's race, religion, gender, or other personal identifying characteristic. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989) (defining racist hate speech). I use the term hate speech in this regard too, although I am mainly concerned with cross burning and its message of ethnic and racial hate in this article.

So we are left with the problem of what to do with cross burning. Is it protected expression? Should it be censored? Is there some other way? How to handle cross burning and, more broadly, other messages of ethnic hate is a difficult problem for a system of freedom of expression. The problem is difficult, first, because hate speech of this sort imposes the burden of its dissemination on its victims. Auditors of hate speech feel justifiably attacked, outraged, or, in the worst case, threatened by hate speech. The harms are quite real. Victims targeted by hate speech naturally experience "spirit murder,"[6] "hatred or self-hatred," or a sense of degradation or "worthlessness."[7] It is asking quite a lot of targets of hate speech to chin up and bear the slings and arrows of invective for the greater good of society.

The problem of cross burning is difficult, secondly, because its message of hate is not simply or uniformly understood; cross burning can have several meanings. For example, burning a cross in public as part of a rally of the Ku Klux Klan ("KKK") reasonably conveys a group message of shared ideological belief in the purity of the cause of white supremacy,[8] whatever merits there are to that cause. However, burning a cross in the dead of night on the property of a black neighbor is hard to interpret as anything other than a threat or an intimidation—Get out or else![9] Threats or intimidation communicate a message of impending violence and are ordinarily thought beyond the protection of the First Amendment for good reason. Or cross burning might be, as Justice Thomas observed, simply "terroristic conduct . . . [that is] not expression" and therefore far beyond the pale of the First Amendment.[10] Sorting out the meanings of cross burnings is, as we can see, a challenge.

Consideration of cross burning, and hate speech more generally, forces us to confront ultimate questions as to the prioritization of the core values that comprise the constitutional order. Naturally, hate speech tests the limits of our commitment to the ideal of free expression of ideas. But free speech is not absolute, and evaluation of cross burning is not simply a matter of determining its merit under the First Amendment, although this is important. Cross burning may implicate, as well, other values of

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6. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129, 151 (1987).

7. Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1169 (1994); *see also* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452–57 (discussing the effect of hate speech on victims).

8. *Black*, 538 U.S. at 354.

9. *Id.* at 355–57; R.A.V. v. City of St. Paul, 505 U.S. 377, 432 (1992) (Stevens, J., concurring).

10. *Black*, 538 U.S. at 394 (Thomas, J., dissenting).

constitutional, personal, or social dimension. For example, all people have a right to live where they like and in substantially the manner they like as a matter of equal citizenship. Personal freedom of movement and residence is part of the fundamental core of equality protected by the Constitution.[11] Likewise, all people have a right to live in peace and security, confident that their safety and well-being are secure. We might think of these interests as ones of personal security, certainly a first duty of government, since it is an essence on which the social order is formed at all: to protect us from the wildness of the state of nature.[12] Burning a cross in the dead of night on a person's property without permission reasonably implicates these concerns of equal entitlement to personal security. All people are entitled to "equal protection of the laws."[13]

So, we can see that the problem of cross burning, like the problem of hate speech, is not an easy one. Its resolution calls for a careful assessment of the interests that may be asserted in juxtaposition to our overriding commitment to a system of free expression. No axiomatic reference to free speech or to equality will yield satisfactory solutions. Instead, what is needed is a careful assessment of the interests at stake, their relationship to speech, and their interaction to one another in order to determine how to settle a case. We need to achieve sound accommodations between free speech and social reality.

Reflecting the persistence of the problem, hate speech generally and cross burning specifically have been major topics of Supreme Court jurisprudence over the last ten years. Two Supreme Court cases have dealt with cross burning: *R.A.V. v. City of St. Paul*[14] and the recent *Virginia v.*

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11. *See* Saenz v. Roe, 526 U.S. 489, 500–04 (1999) (guaranteeing equal right to travel and accompanying right to reside for U.S. citizens under Privileges and Immunities Clause); Shapiro v. Thompson, 394 U.S. 618, 629–42 (1969) (grounding fundamental right to travel and accompanying right to reside in Fourteenth Amendment).

12. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."); THOMAS HOBBES, LEVIATHAN (1651), *reprinted in* MODERN POLITICAL THOUGHT: READINGS FROM MACHIAVELLI TO NIETZSCHE 170–71 (David Wootten ed., Hackett Publ'g Co. 1996) ("[D]uring the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man. . . . [A]nd the life of man [is] solitary, poor, nasty, brutish, and short."); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 1991 DUKE L.J. 507, 514–15.

13. U.S. CONST. amend. XIV, § 1; Heyman, *supra* note 12, at 511–12.

14. 505 U.S. 377 (1992).

Black.[15] In *R.A.V.*, the Court invalidated a St. Paul ordinance prohibiting bias-motivated conduct, including cross burning, that had been used to sanction teenagers who assembled a cross from the parts of a chair and then placed it on the property of a newly-moved-in neighbor of African-American heritage, at night, and set it aflame.[16] The Court invalidated the ordinance because it selectively proscribed only fighting words based on "race, color, creed, religion or gender"[17] as compared to the broader category of fighting words. However, in the recent case of *Black*, the Supreme Court found that a Virginia statute that proscribed cross burning could be constitutional if the act was performed with intimidation,[18] notwithstanding *R.A.V.*'s innovative reformulation of the doctrine of content neutrality that led many to interpret the doctrine to ban prohibitively distinctions among topics of speech. One year after *R.A.V.*, the Court sustained in *Wisconsin v. Mitchell*[19] a Wisconsin statute that enhanced criminal penalties for hate-inspired crimes even though biased thought stood at the root of the acts.[20]

Viewed as a trilogy, *R.A.V.*, *Mitchell*, and *Black* provide a useful prism within which to evaluate cross burning and hate speech within the American system of freedom of expression. How properly to protect expression and yet address the underlying problems of bias and hate are critical projects for a system of freedom of expression. Free speech remains the deepest commitment of the American constitutional order, with justification. Yet, bias and hate are personally and socially extremely destructive phenomena that have deep roots in and yet infect American society. We must find some way to honor our commitment to free speech and yet achieve respect for others, a concept we can root in equality: the equal status we each possess as members of society.

My argument is that free speech should be presumptively protected within the constitutional order for reasons, among others, of autonomy, human personality, and promotion of democracy. In this respect, free speech should effectively be placed off limits. The focus of governmental attention should not be on regulating speech, except in exigent circumstances, but rather on regulating the underlying behavior that gives rise to bias or hate. A focus on behavior can centrally direct attention to the

15. 538 U.S. 343 (2003). In a similar fact pattern, in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 767–70 (1995), the Court found that the KKK had an Establishment Clause and religious speech right to display a cross on a state-owned plaza.

16. 505 U.S. at 379–81, 391.

17. *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

18. 538 U.S. at 363.

19. 508 U.S. 476 (1993).

20. *Id.* at 479.

legitimate dangers to personal and social welfare that hate speech can further. In the context of cross burning, these dangers are real and serious: threat, intimidation, harassment, terror, and violence, to measure part of their external manifestation. My strategy of identifying specific harms closely associated with speech and then directly addressing them (through, for example, regulation, education, or legislative programs) illustrates a useful way to handle serious individual and social harms arising from bias and yet remain true to our long-standing commitment to free discussion.

Concretely, my strategy urges, first, that speech be separated from conduct to the extent possible so that speech can be carefully evaluated and, where present in sufficient quantity, protected. Second, my strategy urges clear focus on the conduct elements that inevitably arise from the dissemination of speech so that their nature and seriousness can be understood. Use of this strategy can help direct attention to the serious harm that can ensue from invidious bias, forming the logical focus of regulation. Two regulatory mechanisms are available. First, bias-motivated thought that transforms to harmful overt conduct violates personal security and can be proscribed as hate crimes. The contrast between *R.A.V.* and *Mitchell* illustrates this distinction between hate speech and hate crimes. Second, hate speech that seriously threatens issues of personal security (e.g., threat, intimidation, harassment) is proscribable. The contrast between *R.A.V.* and *Black* shows how this can be accomplished. Thus, as we consider the problem of cross burning and hate speech, we can see that a way is apparent to deal effectively with bias and hatred in a manner consistent with free speech.

To accomplish these purposes, the article proceeds as follows. Part I describes why free speech justifiably is the preferred value of the American constitutional order. Free speech is rightly preferred as a matter of text, liberty, and facilitation of public deliberation, the lifeblood of the democracy and the culture. Part II examines how free speech interacts with issues of personal security in the trilogy of Supreme Court cases that deals with cross burning and bias-motivated behavior. A careful look at *R.A.V.*, *Mitchell*, and *Black* illustrates the complicated manner in which bias-motivated behavior interacts with free speech and how these tensions may be resolved within the complex framework of First Amendment law erected by the Court. Part III examines why every person is entitled to an inviolable core of personal security. Issues of personal security reasonably entitle people to protection from threat, intimidation, abuse, and violence. Necessarily, issues of personal security will clash with free speech in instances of cross burning. Part IV demonstrates how reasonable accommodations can be made between these values, separating speech from

conduct, and how some balance may thereby be achieved between free speech and equality.

I. FREE SPEECH AS OUR PREFERRED VALUE

Free speech is rightly the preferred value of the American constitutional order. The textual mandate of the Free Speech Clause, providing that "Congress shall make no law . . . abridging the freedom of speech,"[21] reasonably yields an absolutist orientation. The Free Speech Clause states in plain and simple language that government shall make *no* law abridging free speech. The words thereby communicate with clarity that speech is to be free and unfettered, immune from official regulation.[22] By contrast, circumscription of communication freedoms in a manner typical of European constitutions reasonably yields a more limited scope to expression.[23] Text matters; the unfettered American constitutional language promotes an absolutist approach to free speech.

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21. U.S. CONST. amend. I. I only consider the Free Speech Clause in this article.

22. In this respect, Justice Black had it right: "The phrase 'Congress shall make no law' is composed of plain words, easily understood. . . . [T]he language [is] absolute." Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960). "Of course the decision to provide a constitutional safeguard for [free speech] involves a balancing of conflicting interests. . . . [But] the Framers themselves did this balancing when they wrote the Constitution . . . . Courts have neither the right nor the power to . . . make a different evaluation . . . ." *Id.* at 879; *accord* Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law . . . abridging' to mean *no law abridging*.").

23. *See, e.g.*, GRUNDGESETZ [GG] [Constitution] art. 5 (F.R.G.).

> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.
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> (2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour.
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> (3) Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.

Id.

See also Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 10, §§ 1–2, 213 U.N.T.S. 221, 230 (modified Nov. 1, 1998).

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

It is true that free speech has never been interpreted to protect absolutely all expression, with justification. It makes little sense to protect "threats [that can] instill fear, incitement [that can] provoke violence, [or] false advertising [that can] defraud," to name a few examples of harmful speech.[24] Speech must be regulated, in instances, to prevent serious harm to people or society and when it violates the rights of others. No basic right can absolutely and unqualifiedly be manifested in a constitutional order. Restraint on freedom is part of the price of joining society. However, free speech, emphatic in language and romantic in appeal, speaks to our innate desire for liberty like no other right.

It is logical that the Framers would have crafted the Free Speech Clause in absolute terms. The integrity of thought, conscience, and expression lies at the root of the Enlightenment ideal of man as a free and autonomous person. Freedom to think as you like, speak, or not speak as you like, and listen as you like, are indispensable qualities to a free human being. And it was the genius of the Enlightenment to urge freedom for man from the bondage of censorial authorities and their natural tendency to control or other coercion. Natural law thinkers like John Locke[25] and Immanuel Kant[26] laid the basis for a free speech based on autonomy. In these respects, the Free Speech Clause preserves the ability of a person to control his or her thought process and to engage in expression according to his or her motivations. The express enumeration of free speech in the Constitution is a limitation of government in this regard. People control their own thought process and the nature of discussion, not government. Free speech is an essence on which the social order is founded.

We might also rightly consider free speech to be the preferred value of the Constitution because free thought and dissemination of ideas is crucial

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> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id.

24. Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 651 (2002).

25. JOHN LOCKE, A LETTER CONCERNING TOLERATION (Prometheus Books 1990) (1689); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

26. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Robert Paul Wolff ed. & Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785).

to the development of human capacity and human personality and the functioning of democratic society. Free speech is the most direct expression of human personality in society.[27] Communicative development is constitutive expression of human personality.[28] Free speech is thus vital to human identity and human dignity because communication is an indispensable element of who we are as a people and how we constitute ourselves. In these respects, we can say free speech is essential because it is crucial to the process of human development and is thereby directed, idealistically, to the hope of realizing a more capable and better person.[29]

Free speech also helps us achieve "a more perfect polity"[30] because it is vital to the formation and facilitation of the democracy. Free speech is the main structural mechanism by which democracy determines its purposes. The give and take of free discussion introduces and then sharpens ideas or aims, and these are ultimately sifted through debate and either discarded or settled upon as policies or objectives. Free speech performs a similar function with respect to the building of the culture. In these respects, "[f]ree speech is essential to political [and cultural] freedom."[31] Political freedom is the "ultimate safeguard of all other rights."[32]

Free speech is rightly viewed as both intrinsically and instrumentally valuable. Intrinsically, free speech is valuable because it promotes and reflects human personality and is an essence of human dignity. Autonomy to think, listen, and speak for oneself is essential to a free and self-determining human being. Free speech theorists have captured aspects of this justification for expression as resting on a basis of individual self-

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27. Lüth Case, 7 BVerfGE 198, 208 (1958) (F.R.G.), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 368–75 (1989).

28. *See generally* Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law*, *in* STOCKTAKING IN GERMAN PUBLIC LAW: GERMAN REPORTS ON PUBLIC LAW 117 (Bullinger & Starck eds., 2002), *available at* http://www.germanlawjournal.com/article.php?id=212 (last visited Jan. 8, 2005).

29. As Justice Harlan famously observed:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971).

30. *Id.*

31. Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1358 (1998).

32. *Id.*

fulfillment,[33] self-realization,[34] or liberty.[35] Free speech is also properly viewed as valuable for the consequences it furthers. Most notably, free speech promotes the formation and structuring of political will, which directs the scope and purposes of democracy, as we have observed. Free speech theorists have captured elements of this justification for expression as resting on a basis of self-government or democracy.[36] Free speech rests on this web of multiple values, as compared to reliance on any single foundational value. The complexity of social reality defies attempts to confine the significance of free speech to any one value.[37]

We might also observe the Supreme Court's construction of free speech law in a manner that evidences a prioritization of free expression within the constitutional order. Consider, for example, the overbreadth doctrine, which suspends normal constitutional standing requirements on the assumption that any member of society has an interest in the free exchange of ideas that might otherwise be chilled by application of a statute that reaches legal expression while also proscribing illegal expression.[38] Or consider the role of intent or motive in law. In most areas of law, intent or motive is crucial. Consider contract, tort, and criminal law, to name a few areas where intent matters. However, intent or motive is irrelevant in significant areas of free speech law.[39] Rules of strict liability, a mainstay of tort law, have no place in defamation law because of their stifling impact on expression rights.[40] Likewise, mental or emotional injuries are off limits in free speech, whereas they are widely recognized in criminal (assault, threat) and tort law (intentional infliction of emotional distress). And the Court has deliberately

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33. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

34. MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9–40 (1984).

35. *See generally* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

36. The classic work is ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (2d ed. 1965).

37. Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 428–31 (1992); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1628, 1640–41 (1987).

38. Gooding v. Wilson, 405 U.S. 518, 521–22 (1972). The scope of the overbreadth doctrine was later lessened in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *Osborne v. Ohio*, 495 U.S. 103 (1990).

39. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988).

> Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude . . . . [W]hile . . . bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

Id. Of course, intent is relevant in other areas of free speech law. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (test for incitement); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (test for actual malice defamation).

40. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

structured speech rules so that free debate has "breathing space"[41] to survive and thrive amidst the innate social pressure to control and shape opinions in popular ways. "Breathing space" functions as a regulatory free zone, designed to encourage a vibrant exchange of ideas. All of these structural devices crafted by the Court aim to promote a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[42] And the Court's colorful image animates the spirit of free speech generally. The Court's deliberate insulation of free speech from the normal rules marking the path of law speaks to its prioritization of expression as an ultimate, preferred value of the constitutional order. The Court treats free speech as special and different from ordinary law.

Because of the prioritization of free expression in the constitutional order, the Supreme Court has curtailed the ability of government to regulate speech. Speech is handled independently and differently than the normal criteria on which behavior is assessed.[43] Critical to this project is commitment to the doctrine of content neutrality, which delimits official power over estimation of ideas. Rather than authorities determining the quality of ideas, each of us makes this determination, according to our best lights. Erection of the methodology of defined categories of unprotected speech usefully channels official attention away from regulating speech and toward regulation of those narrow categories of speech so imbued or closely linked with serious harm. The categorical methodology is a more pragmatic version of absolutism.[44] It is the Court's translation of absolute language to workable rules of law. All speech is protected unless it fits within one of the narrowly drawn exceptions. The narrow definitions of these unprotected categories are designed to tailor closely governmental regulation to the underlying harm.

For example, in the *Brandenburg v. Ohio*[45] incitement test, speech may be proscribed only when the speaker intends to cause imminent unlawfulness and such unlawfulness is imminently likely to occur.[46] The test is geared to limiting regulation of serious unlawful action that is

41. *Falwell*, 485 U.S. at 56.

42. *Sullivan*, 376 U.S. at 270.

43. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 145 (1995).

44. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 109–10 (1980).

45. 395 U.S. 444 (1969).

46. As phrased by the Court, the two-part incitement test protects expression "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

imminently likely to break out as a consequence of the speech. The justification for regulation is that the speech is just then gestating into action. The speaker is punished less for the speech and more for the conduct in which he or she can be seen to be imminently participating.[47]

Definition of other proscribable areas operates similarly, as we observe with respect to fighting words,[48] actual malice defamation,[49] child pornography,[50] and the like, with obscenity[51] being the most prominent exception to this methodology. These modern reformulations of the clear and present danger test call for demonstration of a close connection between speech and subsequent harm to justify regulation.[52] The Court has been largely faithful to this methodology, allowing regulation of speech only upon demonstration of serious harm closely and causally linked to the speech.

The consequence of the Court's careful handiwork is that freedom of expression has been substantially removed from the control of majoritarian forces and community restraints. So constructed, free speech is a presumptively protected zone of freedom—a haven, really, within which people are largely free—free to ponder and free to voice their thoughts, emotions, or aspirations without fear of punishment. In this sense, freedom of expression is the "archetypal American liberty, representing, [in a manner], the idea of freedom [itself]."[53] Drawing on the natural law base of the Constitution, free speech is perhaps the main area of society, blocked out by the charter, where a citizen can best realize the ideal of freedom. A person can test himself or herself, evaluate or reevaluate perspectives or identities, and search for and find deeper meanings. In this way, free speech harkens back to the wild and romantic within us.

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47. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 827 (2001).

48. *Cohen v. California*, 403 U.S. 15, 20 (1971), redefined the test formulated in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), to require that fighting words must be "those personally abusive epithets which, when addressed to the ordinary citizen, are . . . inherently likely to provoke violent reaction." So defined, we can see that fighting words are directed to proscribing one-on-one incitement to violence, whereas the *Brandenburg* test is geared to preventing more-than-one or crowd incitement to violence.

49. Public officials or figures may recover for defamation only when statements are made with actual malice—"that is, with knowledge that it was false or with reckless disregard of whether it was false or not." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

50. *See* New York v. Ferber, 458 U.S. 747, 756–65 (1982) (holding child pornography proscribable upon showing of sexual abuse of child in production of material that then exists as permanent record to torture child psychologically).

51. *See* Miller v. California, 413 U.S. 15, 36–37 (1973) (holding that obscenity is proscribable without any proof of its concrete harm).

52. POST, *supra* note 43, at 106.

53. EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 191 (2002).

Rather than expression, behavior has come to be the central domain for official action. The dichotomy between speech (protected)/conduct (unprotected) largely drives free speech law. Of course, we understand speech/conduct to be a largely pragmatic distinction, separating the line between protected expression and unprotected action. Conceptually, all expression is both speech and action. For example, quintessential speech actions like reading and writing, speaking and listening involve certain physical motor conduct. Conversely, physical behavior like handing out materials on the street, wearing a jacket, or burning an object can constitute speech to the extent these types of conduct communicate an idea. In some basic way "[e]very idea is an incitement"[54] to action. Thought or inspiration drives human behavior. And because expression grows out of and helps form social relationships, expression might be seen as action.[55] Thus, what actually is speech or conduct is a complicated question as a matter of epistemology. But First Amendment law is not epistemology. Rather, free speech is a constitutional domain. For our purposes, we understand the speech/conduct distinction as a useful organizing principle, guiding the Court, and us, through determinations on expression. Speech/conduct is a way of making sense of our world.[56]

To be protected constitutionally, behavior must possess sufficient communicative qualities.[57] For example, the burning of a cross in both *R.A.V.* and *Black* possessed clear communicative qualities. By contrast, to the extent behavior possesses little or no communicative qualities, there is little reason to accord it extraordinary protection from official regulation. Government is justified in regulating troubling behavior bereft of communication.[58] Arson, trespass, or intimidation, manifested in *R.A.V.* or *Black*, would be examples of proscribable behavior, as would assault and

54. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."). *See also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.").

55. POST, *supra* note 43, at 310.

56. Eberle, *supra* note 7, at 1193–94.

57. Spence v. Washington, 418 U.S. 405, 409 (1974). The Court has focused on communication as the touchstone for determining First Amendment protection. The Court has viewed communication from the perspective of both the speaker and the listener. "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting *Spence,* 418 U.S. at 410–11).

58. Eberle, *supra* note 7, at 1194.

battery, as in *Mitchell*. Implementation of a speech/conduct methodology, as illustrated, helps direct government to its proper sphere: regulating legitimate behavioral interests, which implicate concerns of public health, safety, and welfare that are independent of speech.

Stated a different way, to the extent government targets communicative harm, the First Amendment is implicated,[59] and the regulation is presumptively unconstitutional under standard First Amendment rules. If communicative harm is the only basis for the regulation, the act is unconstitutional unless the speech itself is harmful. The proper domain for government is noncommunicative harm. This is a different perspective on the speech/conduct dichotomy. There is some straightforward logic to First Amendment doctrine, and we should use it when we can.

The Court's commitment to this structure of a system of freedom of expression promotes and safeguards free speech, which in turn promotes and safeguards individual and collective self-determination. From an individual perspective, participation in free speech, whether as a speaker or a listener, presents the opportunity to present or learn new ideas or views, articulate or consider other perspectives, or try out or discover aims, intentions, or desires. Free speech always holds out hope. Like a trial balloon, it is easier to float an idea by words than to put it into action. Thinking and speaking out ambitions allows a person to test ideas before putting them to the hard crucible of experience. Free speech always presents the opportunity to re-evaluate and reconstitute one's life.[60] In this sense, free speech is linked integrally to personal decisionmaking and individual self-realization.[61] It is a main way by which we become a more "capable citizenry" and more fully developed, "perfect" people.[62]

From a collective perspective, free speech provides the communicative structure for the formation of public opinion and the common will. The give-and-take of ideas and views forms a critical interaction of opinions, forming the raw stuff of attitudes, objectives, or policies. In this way, a consensus or collective self-determination is achieved. Free speech is critical to democratic self-government because free speech provides the medium through which democracy determines its purposes.[63]

These purposes of free speech are especially served through public discourse, the domain of speech concerning discussion of "ideas and

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59. Rubenfeld, *supra* note 47, at 777.

60. Eberle, *supra* note 7, at 1181.

61. *Id.*

62. Cohen v. California, 403 U.S. 15, 24 (1971).

63. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 278–85 (1991).

opinions on matters of public interest and opinion." [64] Public discourse facilitates the critical interaction of ideas and views, the core melting pot of society, from which social identity and consensus can be achieved.[65] As developed by Robert Post, public discourse creates a "protected space" for speech "in ways relevant for democratic self-governance."[66] The protected space facilitates rational reflection and self-control.[67] Self-rule may thereby become rule by law.[68]

These purposes of free speech may be served by other forms of speech as well, although not as intensely. For example, debate over pornography can be debate over the direction of a community. Debate over professional advertising can be debate over the profession itself and the identity and character of individual practitioners.

In these respects, free speech forms an important connection among us all. It is a bond we share. Republicans and Democrats, people on the right or the left, orthodox believers in religion or atheists, democrats or anarchists, all stand on equal footing as participants in the open process of free speech. Anybody can think or say, listen or respond, as they like, subject to First Amendment rules. Structurally, the First Amendment provides the haven for this critical dialogue.

The process of free speech, including its free flow, is not perfect. Not all ideas worth being heard are communicated. Not everyone has, or believes they have, equal access and equal opportunity to participate in free speech. There are strong arguments worth considering that free speech, like society, reflects too much the voices of the powerful, dominant, or entrenched.[69] Minority or dissenter groups may feel intimidated or excluded from the sometimes harsh and raucous process of free speech; in fact, sometimes they may be.

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64. Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988).

65. Robert C. Post has elaborated the crucial role performed by public discourse in his seminal work. *See* POST, *supra* note 43, at 119–78; Post, *supra* note 63, at 278–317; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990).

66. POST, *supra* note 43, at 310.

67. *Id.*

68. *Id.*

69. Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 171–72 (1994) (noting that results obtained from marketplace of ideas are preordained because of reigning paradigm that forms status quo; status quo locks in racist attitudes); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 881–83 (1994) (noting that the linkage between the white male majority interpretive community and free speech is so strong that the First Amendment offers little protection to groups that are not part of power structures); Lawrence, *supra* note 7, at 472–76.

We have built and accepted an image of ourselves as free, autonomous, hearty, self-reliant individuals participating in the free exchange of ideas.[70] These are the ideals we believe in and on which we have structured free speech. But we must be frank. These ideals may be more valuable as aspirations than actually-attainable goals. And these ideals may, in fact, reflect the views of the dominant "majority."[71] We "might reasonably question whether all people are sufficiently mature or enlightened or [disposed temperamentally or culturally] to shrug off debased ideas or glean the gem of truth or the better angelic qualities of human nature amidst the swirl" of free speech.[72] Citizens may not, in fact, be autonomous. Rather, their choices may be constrained or, worse, manipulated by government, economic power, the media, or the like.[73] Not all of us have the strong dose of courage and self-reliance that participation in free speech according to this ideal often requires. There are problems in the structure and process of free speech that merit attention and solution.

However questionable the empirical basis for free speech may be, the Court is nevertheless committed to open debate, with justification. First, free speech helps us achieve a better understanding of reality, a better approximation of truth.[74] For example, free speech helps facilitate understanding of the character and content of people and society. When people speak, they reveal part of themselves—their aims, aspirations, emotions, or character. The transparency facilitated by free speech, in turn, reveals truths—insights and inspirations as well as problems and dangers. In these respects, free speech might itself reflect its own structural problems, leading us to awareness and, hopefully, solution, like a self-cleansing agent. For example, capturing of the process of free speech by the strong and dominant can enlighten us as to the hijacking of free speech. We might then

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70. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.").

71. Delgado & Yun, *supra* note 69, at 882–83.

72. Eberle, *supra* note 7, at 1179.

73. POST, *supra* note 43, at 330.

74. Here we might note Justice Holmes's famous view. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.

Id.

be spurred on to address this structural deficiency by creating a more inclusive process of free speech. Second, free speech captures and promotes our ideals of freedom, tolerance, and equality (for example, in guaranteeing everyone the opportunity to participate and speak without censorship) as well, if not better, than most other freedoms. So, while not perfect, free speech facilitates and captures human capacity, aspiration, and emotions better than most basic freedoms.

For these reasons, we can see that each person has an interest in keeping the channels of communication open because each person has an interest in being able to think or say what they like with relative impunity. Life being what it is, a person can never tell when exercise of the right is needed. What seems a position of influence or satisfaction today may crumble tomorrow. Free speech assures that a person can speak up for himself or herself and voice his or her concerns. It is in this sense worthwhile to design First Amendment rules to function in pathological periods—"those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[75] We need free speech most in times of stress in order to safeguard ourselves and our interests. Pitching free speech in times of stress builds a strong network of protection, which can better aid us in times of glory as well. The equal opportunity to communicate helps assure broad support for the right to engage in free speech. In this way, some social consensus coalesces around the free speech project.

Of course, free speech does not exist by virtue of social consensus or majoritarian grace. Free speech exists by right. However, social consensus favoring free speech is nevertheless significant because wide support helps protect against the tendency to regulate views we find unfavorable or distasteful. Like a base or a web, support from multiple, interlinked sources is more stable. So buttressed, free speech can better withstand the passions that inevitably flow from heartfelt controversies. By contrast, if support for free speech is confined to one or a narrow set of girders it, like a tower, may fall when the inevitable onslaught ensues. Learning to protect speech we hate in order to safeguard the speech we like is an important principle on which to build a network of support for free speech.[76] Respecting others'

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75. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985); *see also* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES xiii (2d ed., Atheneum 1969) (1941) ("The real value of freedom of speech is not to the minority that wants to talk, but to the majority that does not want to listen.").

76. United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate.").

views, learning how to endure false or distasteful ideas, and learning toleration—of ourselves and others—is important for self-growth and social growth in a democratic society.

Exploring largely the path suggested by distinguishing speech from conduct, the Court has resolved most of the central questions of free speech. These central points include identifying and solidifying the core of the Amendment,[77] elucidating the values furthered by free speech,[78] demonstrating how additional slices of social reality can be brought within the ambit of the First Amendment without undercutting through doctrinal-dilution-settled areas of higher ranked speech,[79] illuminating the justifications that exist on which to assess aspects of social reality for inclusion within the First Amendment,[80] and establishing a workable methodology for assuring a vibrant system of free expression.[81] These are tremendous accomplishments, and the free speech project has largely been successful; an important legacy of the twentieth century that yet inspires us.

With the foundation of First Amendment law largely settled, the direction of free speech should now profitably shift toward assessing and sharpening the frontiers of the Amendment and reaching better understandings of the relation of speech to social reality so that we can achieve more precise accommodations between speech and conduct. There is, of course, always much to be gained from considering and confirming

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77. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964) (identifying the core of the First Amendment as political speech and its central point as the ability to criticize the government and its officials).

78. *See, e.g.*, Miller v. California, 413 U.S. 15, 26 (1973) ("At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection."); Cohen v. California, 403 U.S. 15, 25 (1971) ("[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."); *N.Y. Times Co.*, 376 U.S. at 269 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." (quoting Stromberg v. California, 283 U.S. 359, 369 (1931))); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

79. *See generally* Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976). For elaboration of this theme, see Eberle, *supra* note 37, at 428–31.

80. Eberle, *supra* note 37, at 457–60.

81. Central to First Amendment methodology is the doctrine of content neutrality, established in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95–99 (1972), and application of searching scrutiny to proffered reasons for regulating speech now conventionally resulting in strict scrutiny analysis.

the core truths of the First Amendment and holding to core beliefs about the Amendment amidst the inevitable flurry and gales put to it by the hard realities of concrete cases. Exploring theoretical dimensions of free speech, confirming or expanding its essences, is something we can never get enough of. But the more profitable direction of the Amendment at present lies in mapping out its frontiers and achieving better understandings of the interaction of free speech with social reality as a way of bringing greater clarity to doctrine and guiding decisionmaking.

Two great questions "are at issue. First, how to capture the more complete meaning of the First Amendment. . . ."[82] This will involve a careful assessment of the communicative act based upon justifications of free speech value, such as pursuit of truth, information, personal and social decisionmaking, and the like. Second, we need to understand better and isolate more effectively those elements of social reality that legitimately present harm to people or society when furthered or drawn out by speech without doing damage to the First Amendment.[83]

The frontier of this enterprise is likely to be in areas located at the fringe of the Amendment. Hate speech, cross burning, pornography, and workplace speech are examples of what we may call fringe speech. These areas legitimately possess communicative content based upon value determined vis-á-vis established free speech justifications. Yet, these areas also may present legitimate harms or problems, to individuals or society, that properly may call for regulation in order to safeguard people or the social order. For example, cross burning is not always a matter of pure expression. Many instances of cross burning are imbued with elements of both speech (expression of hate) and conduct (for example, threat, intimidation, harassment). Determining which of speech or conduct predominates, or whether speech elements can be separated from conduct particles, in any one instance, is not an easy question. Consideration of speech at the fringe will inevitably force recognition of the innate tensions, ambiguities, and contradictions inherent in the interaction of communication with social reality, as we see in relation to the case of cross burning. These tensions "pose great challenges to the substance and stability of the First Amendment and to our reasoning [abilities]."[84]

For these reasons, consideration of the case of cross burning is a good topic to pursue these inquiries relating to the ambit of the First Amendment, our ability to understand the relationship between communication and social reality, and our need to reach proper accommodations between the domains

82. Eberle, *supra* note 7, at 1151.
83. *Id.*
84. *Id.*

of speech and conduct. Assessing the trilogy of *R.A.V. v. City of St. Paul*[85] (unconstitutionality of viewpoint discrimination within proscribed categories), *Wisconsin v. Mitchell*[86] (constitutionality of penalty enhancement for hate crimes), and *Virginia v. Black*[87] (unconstitutionality of statutory presumption of intimidation but constitutionality of a hate speech statute that targets cross burning as a subject matter species of intimidation) will be a quite useful forum within which to pursue these inquiries. Understanding the dynamics posed by these cases illustrates, first, how communicative acts may be evaluated so that elements of expression may be gleaned and, if substantial enough, merit protection under the Amendment. These cases further demonstrate how underlying instances of conduct or context involving situations of privacy or behavior in the process of gestating into conduct (intimidation, threat, harassment) might be profitably identified so that relevant regulation may be tightly tailored. So separating elements of communication from elements of conduct, and then focusing on the problems presented by the conduct in order to design an effective regulatory approach, is a useful strategy for solving free speech issues. Such an approach provides a way to expand our universe of free speech and yet protect people and society from legitimate harms. To accomplish these purposes, we need first to obtain a clear understanding of the complicated issues of free speech law at issue in the trilogy of cases.

II. THE PROBLEM OF HATE SPEECH AND THE FIRST AMENDMENT: *R.A.V.*, *MITCHELL*, AND *BLACK*

The problem of hate speech, especially cross burning, is well illustrated by the behavior at issue in *R.A.V.*, *Mitchell*, and *Black*. The facts of *R.A.V.* serve as a warning to us of the deep-seated bias that yet infects American society. On June 21, 1990, a group of white teenagers in St. Paul, Minnesota, a predominately white city, assembled a cross from the remnants of a broken chair in the early morning.[88] Once completed, they scaled the fence of a black family that lived near the house of one of the teenagers, erected the cross there, and set it aflame.[89]

This burning of the cross can reasonably be interpreted only as a message of hate directed at the targeted victims, the Jones family, who "had recently moved into the white, working class neighborhood to escape urban

85. 505 U.S. 377 (1992).
86. 508 U.S. 476 (1993).
87. 538 U.S. 343 (2003).
88. *R.A.V.*, 505 U.S. at 379.
89. *Id.*

ills" and pursue a better life.[90] Burning a cross in this context is deliberately provocative, like wearing a white, hooded robe before a black audience or wearing Nazi paraphernalia before a Jewish audience. It is a sad fact of American life that the problem of hate speech continues despite the high profile of the issue and its attempted solution over the last fifteen years. It must be that racism "is the living consequence of the history that has produced us."[91]

The teenagers' actions could have been punished as a threat, arson, or criminal damage to property, but St. Paul chose instead to prosecute the teenagers on the basis of its bias-motivated crime ordinance, which prohibited conduct "arous[ing] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[92] The Supreme Court judged this ordinance to be content-based and, worse, viewpoint-based[93] because it foreclosed discussion upon the selective topics of discrete and insular minorities, such as people identified by a racial, religious, or other unpopular trait.[94] Commitment to the doctrine of content neutrality is a pole star of First Amendment law.

Yet, while content neutrality is an essence on which the modern First Amendment has been built, no one had previously thought to apply the doctrine to fighting words, a category of speech long considered to be outside the ambit of the First Amendment.[95] However, the Supreme Court did just that and, in so doing, undertook a substantial reconception of the architecture of the First Amendment. The Court extended the reach of content neutrality to unprotected categories of speech, reconceived the value

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90. Eberle, *supra* note 7, at 1140 n.18.

91. POST, *supra* note 43, at 291.

92. *R.A.V.*, 505 U.S. at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)). The St. Paul Bias-Motivated Crime Ordinance provided:

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

Id. The history is discussed in Eberle, *supra* note 7, at 1141.

93. *R.A.V.*, 505 U.S. at 393–96. Selective censorship of speech is highly disfavored. Content-based discrimination singles out speech by topic and is conventionally subject to a judicial test of strict scrutiny. Viewpoint-based discrimination, a subset of content discrimination, singles out speech by view or idea. It is even more highly disfavored than content discrimination because silencing particular views or ideas is the very essence of censorship. Eberle, *supra* note 7, at 1170–72, 1174–78.

94. *R.A.V.*, 505 U.S. at 395–96.

95. Fighting words were first judged to be unprotected speech in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

of fighting words and, by implication, other areas of unprotected speech, challenging previous constructs.[96] The Court also highly favored speech interests over those of equal protection,[97] and set out a refurbished doctrinal framework for assessing official regulation of speech,[98] among other instances. All of this occurred notwithstanding that the Court could easily have disposed of the case by resort to the overbreadth doctrine.[99] *R.A.V.* is easily among the most complicated of free speech cases.

One year later the Court decided *Wisconsin v. Mitchell*.[100] The Court's decision to uphold the penalty-enhancement hate crime statute that was under review had the effect of ameliorating some of the harshness of *R.A.V.*'s seeming near-absolute commitment to free speech. The facts at issue in *Mitchell* were no less horrifying than those at the root of *R.A.V.* A group of young black men and boys were discussing a scene from the movie "Mississippi Burning."[101] The scene depicted a white man beating a young black boy, who was praying.[102] Shortly after the discussion, the group saw a

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96. For example, as Justice Scalia observed:

> What [prior Court statements on categories of unprotected speech] mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.

R.A.V., 505 U.S. at 383–84.

97. The Court invalidated the regulation notwithstanding its recognition that the equality interest in living where a person desired was compelling. *Id.* at 395.

98. Within proscribable categories, content discrimination can occur when the speech "consists entirely of the very reason the entire class of speech at issue is proscribable" (Exception One), when the object of the discrimination is to control "particular 'secondary effects' of the speech" (Exception Two), or when a "content-based subcategory of . . . speech . . . [is] swept up incidentally within the reach of a statute directed at conduct rather than speech" (Exception Three). *Id.* at 388–89. There is also a general catch-all, when "there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390. *R.A.V.*'s extensive doctrinal revision is examined in detail in Eberle, *supra* note 7, at 1144–46, 1152–59.

99. *R.A.V.*, 505 U. S. at 397 (White, J., concurring). Justice Blackmun's accusation of the majority now seems prescient:

> [T]his case will . . . be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity,' neither of which is presented here.

Id. at 415–16 (Blackmun, J., concurring). For why this is so, see *infra* text accompanying notes 119–123.

100. 508 U.S. 476 (1993).

101. *Id.* at 480.

102. *Id.*

young white boy walking toward them from across the street.[103] When the white boy passed the group, the defendant, Todd Mitchell, said, "You all want to fuck somebody up? There goes a white boy; go get him." [104] The group rushed the boy and beat him severely, rendering him unconscious.[105] He remained in a coma for several days.[106]

At first glance, *Mitchell* would appear to be distinguishable from *R.A.V.* since the defendants' behavior in *Mitchell* objectively involved overt conduct, the physical commission of criminal battery. By contrast, the behavior at issue in *R.A.V.* involved elements of speech and conduct. The burning of a cross was a symbolic communication of hate that triggered the First Amendment because St. Paul sought to regulate it under its bias-motivated crime ordinance. Other aspects of the behavior at issue in *R.A.V.* were plainly proscribable conduct elements: terroristic threats, arson, and criminal damage to property. If all that separated the two cases was the difference between targeting speech (*R.A.V.*) and conduct (*Mitchell*), the duet would make for a clean distinction in First Amendment law. We all know that the First Amendment protects speech, but not conduct.

But *Mitchell* was more complicated than that. And so if the cases do make for a distinction between speech and conduct, more explanation is required. Because the crimes were racially motivated, Wisconsin enhanced the penalty under its hate crime statute. The constitutionality of the statute thus centered on the regulation of discriminatory motive. Only bias-motivated crimes incurred higher penalties; non-bias-motivated crimes incurred normal penalties. The statute's targeting of bias could be construed as targeting thought, since belief (like bias) comes from the mind. And the thought process, of course, lies at the wellspring of ideas and actions. Thus, we can now see that central First Amendment concerns were at stake.[107] So thought the Wisconsin Supreme Court, which viewed such regulation of discriminatory motive as a type of Orwellian thought control. "[I]n a free society one's belief should be shaped by his mind . . . rather than coerced by the State."[108]

How to estimate the scenario in *Mitchell* thus became all important. In the view of the Supreme Court, the hate crime statute was aimed at conduct,

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103. *Id.*

104. *Id.* (quoting Brief for Petitioner at 4–5).

105. *Id.*

106. *Id.*

107. As observed by the Court, "[T]he assertion that the State has the right to control the moral content of a person's thoughts . . . may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment." Stanley v. Georgia, 394 U.S. 557, 565–66 (1969).

108. State v. Mitchell, 485 N.W.2d 807, 811 (Wis. 1992), *rev'd*, 508 U.S. 476 (1993) (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977)).

not speech, and therefore was a permissible content-neutral regulation which incidentally affected speech. The statute targeted conduct because it regulated overt criminal acts, such as the battery at issue in *Mitchell.* The penalty enhancement regime applied only upon the commission of an underlying criminal act. Once the act had been performed and proven beyond a reasonable doubt, the bias motive could be taken into account. Thus, since the quality of thought (depraved) played no role in determining criminality, it was not at the root of the state action. Only after the regulation had been applied to make out the crime was bias relevant, in sentencing. Bias was then a consideration, as are other motives for crimes.[109]

This manner of separating speech from conduct is a plausible way of interpreting the fact pattern. Use of this methodology usefully facilitates a focus on the underlying conduct that society properly should reprove. Bias-motivated acts have no place in a society based upon equality. When bias appears, society should rightly condemn it. Acts of racism, sexism, or other forms of invidiousness reasonably cause greater damage than non-bias-motivated acts, as the Court recognized.[110] The regime in *Mitchell* appropriately directs government attention to the harms that result from bias-motivated acts. The proper strategy is to punish such conduct, even more severely, in order to discourage bias and hate. As importantly, this strategy can accomplish this goal without impairing a system of freedom of expression. The impact on speech is, by reasonable calculation, incidental since speech considerations can only come into play after an underlying crime has been committed. In such a situation, there is reduced danger of censorship or other manipulation of ideas because the object of official regulation is behavior, not speech.

Interestingly, the Wisconsin Supreme Court saw the case differently, valuing speech more highly than the United States Supreme Court. Viewing the statute as targeting abstract thought, the Wisconsin Supreme Court saw serious First Amendment risks. The state supreme court's view was plausible as well, for targeting thought cuts to the wellspring of the process

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109. Eberle, *supra* note 7, at 1200–02.

110. *Mitchell*, 508 U.S. at 487–88.

> [B]ias-inspired conduct . . . is thought to inflict greater individual and societal harm. For example, . . . bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest . . . . The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

Id.

of reasoning, a core free speech concern. Accordingly, the Wisconsin Supreme Court urged a much heavier weighting of free speech over equality. For its part, the Supreme Court seemed satisfied that no realistic danger of censorship or other manipulation of ideas was afoot in sustaining the hate crime statute.

For our part, it is helpful to see these alternative perspectives: the Wisconsin Supreme Court viewed speech in more absolutist terms, as compared to the United States Supreme Court, which sought some reasonable accommodation between free speech and equality. The difference in perspective between the two supreme courts illustrates differences in the valuation of speech and also the quite difficult accommodations to be made when speech interacts with social reality. Only careful reasoning involving a careful assessment of the values and interests at issue can yield sound judgments. In fact, the position of both courts was plausible. Which of the two positions prevailed has more to do with commitment to sets of constitutional values than any rightness in deciding the case. Most likely, the United States Supreme Court used *Mitchell* to mark out clear limits to the more absolutist speech views in *R.A.V.*, whereas we can observe, too, that the Wisconsin Supreme Court was following the absolutist rhetoric of *R.A.V.* more literally.

Viewing speech through the lens of the United States Supreme Court, the distinction between *R.A.V.* and *Mitchell* makes sense. The hate speech regulation in *R.A.V.* was unconstitutional because it targeted speech. The hate crime regulation in *Mitchell* was constitutional because it targeted conduct. Targeting speech, of course, is strongly disfavored and presumptively invalid because of the high estimation we accord free speech. In *R.A.V.*, official curtailment of discourse over politically incorrect fighting words constituted such censorship. Targeting conduct, however, is a legitimate role of government; it is what government does to realize the public's health, safety, and welfare. Accordingly, a hate crime statute constructed like the one in Wisconsin is proper. Through *R.A.V.* and *Mitchell* the Court has marked out a boundary between speech and conduct, an elusive enterprise no doubt.

Marking out the path between speech and conduct would also seem to be the Court's motivation in its recent decision in *Virginia v. Black*.[111] In *Black* the Court held that a tightly written statute targeting cross burning with intimidation could pass constitutional muster.[112] However, a prima facie provision of the statute that allowed an inference of intent to intimidate to

111. 538 U.S. 343 (2003).
112. *Id.* at 361–63.

be drawn from the act of burning a cross was properly held to be facially unconstitutional because it allowed the state to presume what it needed to prove: intent to intimidate.[113] This created a serious risk of censorship by allowing the state to short circuit the properly demanding process of proving that regulation is justified. As a matter of theory and correctly developed doctrine, free speech is protected unless government makes its case. Default rules favor free speech.

Because the statute targeted cross burning, it constituted subject matter discrimination. The issue for resolution by the Court was whether such subject matter discrimination was justifiable. In the view of the plurality and shifting majority of the Court, singling out cross burning was permissible because the reason for the regulation—intimidation—was the very basis on which the act was proscribable.[114] Thus, the Court found that the Virginia statute fit into the first exception listed by the Court in *R.A.V.* as to when subject matter discrimination is permissible.[115] According to the

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113. *Id.* at 363–64.

114. A majority of the Court (Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, and Breyer) held that the "First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." *Id.* at 363.

A plurality of the Court (Chief Justice Rehnquist and Justices Stevens, O'Connor, and Breyer) further held the prima facie provision unconstitutional because, among other things, "[i]t allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission." *Id.* at 366.

Justices Kennedy, Souter, and Ginsburg dissented because the statute constituted a form of viewpoint discrimination (suppression of expression of white supremacy) and does not fall within *R.A.V.*'s exceptions. *Id.* at 380–87 (Souter, J., concurring in part and dissenting in part). They concurred in the majority's invalidation of the prima facie provision as applied to Black. *Id.* at 380–81.

Justice Thomas dissented because (1) cross burning is conduct with no expressive components and therefore does not implicate the First Amendment, and (2) even if it did, the prima facie provision is merely an inference (not an irrebuttable presumption) and still requires a jury to find each element to be beyond a reasonable doubt. *Id.* at 388–400 (Thomas, J., dissenting). Justice Scalia further dissented, on grounds similar to Justice Thomas, as to the prima facie provision. *Id.* at 379–80 (Scalia, J., concurring in part and dissenting in part).

115. In *Black*, the Court observed:

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.

Id. at 363.

majority, Virginia was simply regulating "a particularly virulent form of intimidation."[116]

To the dissenters on the Court, such subject matter discrimination was not neutral, as justified under the *R.A.V.* exception to content discrimination, but viewpoint-based because targeting cross burning is targeting a message of white supremacy, however despicable or civically embarrassing that message may be.[117] Since the Virginia law targeted speech as well as intimidation, it could not fit within *R.A.V.*'s first exception of particular virulence. Or, the majority could be read "as treating *R.A.V.*'s virulence exception in a more flexible, pragmatic manner than the original illustrations would suggest."[118] Alternatively, and more realistically, it was also possible to view the majority's justification of content discrimination as based upon *R.A.V.*'s catchall exception, concluding "that there is no realistic possibility that official suppression of ideas is afoot."[119]

The dissenters' view seems pretty plausible, and correct as a matter of reading *R.A.V.* Recall that in *R.A.V.* the Court invalidated the selective proscription of fighting words targeted at politically unpopular groups notwithstanding that politically incorrect fighting words are more virulent than other fighting words given the high degree of combustibility that the topics of "race, color, creed, religion or gender" have.[120] Nevertheless, the Court saw targeting of ideas and not targeting of harm in *R.A.V.* Yet, in *Mitchell* the Court conceded as much, noting that bias-based behavior inflicted greater harm than other behavior.[121] The Court's acknowledgment in *Mitchell* deeply undercuts *R.A.V.* Keep in mind that *Black* built on

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The Court in *Black* based its conclusion upon the first exception to the rule against content discrimination noted in *R.A.V.*, 505 U.S. at 388.

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

Id.

116. *Black*, 538 U.S. at 363.

117. *Id.* at 382–84 (Souter, J., concurring in part and dissenting in part). Justice Souter's opinion was joined by Justices Kennedy and Ginsburg.

118. *Id.*

119. *Id.* at 384 (quoting *R.A.V.*, 505 U.S. at 390).

120. *R.A.V.*, 505 U.S. at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

121. 508 U.S. at 487–88.

Mitchell. Cross burning with intimidation could be selectively targeted because it is "a particularly virulent form of intimidation."[122] So far so good.

But if cross burning with intimidation may be singled out because of its virulence, we might ask: Why can't cross burning with fighting words on politically incorrect topics be likewise singled out? Both instances involve communication: cross burning in *Black*, cross burning in fact, and a range of other expression statutorily barred in *R.A.V.* Both instances involve expression considered to be within an unprotected category—intimidation in *Black*, fighting words in *R.A.V.* Both instances are particularly virulent species of the communication, for exactly the same reason: race. Both instances thereby involve the targeting of vulnerable groups in society, which logically can be thought to inflict greater harm—racism in *Black*, racism and, more generally, other invidiousness in *R.A.V. Black* and *R.A.V.* are more alike than unlike.

Yet, rather than viewing the dispute among the Justices as a dispute over *R.A.V.* and First Amendment doctrine—although it is that—it seems more fruitful to view their dispute as one over the value of and commitment to free speech. To the majority, speech would seem to have a more consequentialist value, depending somewhat on the ultimate ends promoted. Because intimidation is threatening—especially in the context of race—the communicative value of cross burning could be limited in service of equality ideals, including those of personal security. By contrast, Justice Souter and the dissenters who joined him valued speech more as an end in itself, as valuable in and of itself. The nonconsequentialist view of these dissenters tends to treat all speech as alike, leaving to auditors the choice as to how to use or abuse speech. Such a nonconsequentialist view tends toward a more absolutist position on speech. Justice Souter was additionally concerned about fidelity to doctrinal consistency. "The fault line that split the Court reflects a [serious] debate over the value of speech with deep roots in political theory and First Amendment law."[123]

For our purposes here, it is enough to observe that *Black*, like *Mitchell*, has the effect of softening the more absolutist view of speech advanced in *R.A.V.*, yielding a narrower scope to the *R.A.V.* doctrine. This may have been the main motivation of the Court. In upholding the Virginia statute, *Black* seems to illuminate a way in which hate speech could be regulated: targeting hate speech that bears a tight causal connection to proscribable conduct elements, such as threats, intimidation, or harassment. *Black* thus further illustrates how separating speech from conduct can be a sound

122. *Black*, 538 U.S. at 363.

123. Eberle, *supra* note 7, at 1148–49 (discussing philosophical roots of this debate).

strategy in achieving sensible accommodations between speech and social reality. The line between speech and conduct is becoming clearer.

The narrow distinctions to be made in classifying actions as speech or conduct, as illustrated in our review of *R.A.V.*, *Mitchell*, and *Black*, suggest an approach of fine-tuning the relationship between the First Amendment and social reality. Certainly these cases involve the weighty issue of what to do with hate speech and thus seem on par with the big questions of free speech raised in earlier cases, such as those involving the status of public defamation,[124] offensive speech,[125] or obscenity.[126] *R. A. V.*, in particular, constituted major doctrinal renovation.[127] But in another respect, the trilogy of cases raises less central questions of free speech, such as the permissibility of content discrimination within a category of unprotected speech[128] or conduct.[129] While certainly not all major issues of free speech theory have been resolved, nor reasonably could they, the trend of much current Supreme Court case law concerning speech involves issues more on the periphery of free speech theory than in the center.[130] *R.A.V.*, *Mitchell*, and *Black* are emblematic of this development in certain respects. This suggests a maturity of First Amendment doctrine. Having resolved many central questions, we can afford to concentrate on more peripheral issues. The content and context of factual settings, governmental motives, and purposes of regulations are all important in making these adjustments.

The facts of *Black* are illustrative. The difference in context between the cross burnings by defendant Black and those by defendants O'Mara and Elliot shows, like the difference between *R.A.V.* and *Mitchell*, another line

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124. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

125. Cohen v. California, 403 U.S. 15, 26 (1971).

126. Miller v. California, 413 U.S. 15, 36–37 (1973).

127. *See supra* notes 95–98 and accompanying text.

128. *Black*, 538 U.S. at 363 (permitting content discrimination within category of intimidation); *R.A.V.*, 505 U.S. at 393–96 (prohibiting content discrimination within category of fighting words impermissible).

129. *Mitchell*, 508 U.S. at 487–88.

130. This is especially the case for recent commercial speech decisions, which mainly involve application to a range of scenarios of the basic test for commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564–66 (1980). *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 377 (2002) (restricting specific compounded drugs is unconstitutional); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565–66 (2001) (regulating outdoor and point-of-sale tobacco advertising is unconstitutional); *cf.* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 441–42 (2002) (allowing city to prohibit more than one adult entertainment business in same building under logic of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250–51, 256 (2002) (affirming principle of *New York v. Ferber*, 458 U.S. 747 (1982), that child pornography is proscribable upon showing of sexual abuse of and psychological harm to actual child victims, not cyber-created child images).

fixing the boundary of the First Amendment. In August 1998 Barry Black led a Ku Klux Klan ("KKK") rally in Carroll County, Virginia.[131] Members of the KKK gathered on private property, with the permission of the owner who was present, and spoke their minds as to what they believed in.[132] They talked badly about Blacks and Mexicans, spoke of randomly shooting Blacks, talked about President Clinton and Hillary Clinton, and complained of how their tax money went to Blacks.[133] At the conclusion of the rally, the crowd circled a twenty-five- to thirty-foot cross and set it on fire.[134] As the cross burned, the KKK played *Amazing Grace* over the loudspeakers.[135]

Earlier that year, on the night of May 2, 1998, Richard Elliott and Jonathan O'Mara drove a truck onto the property of Elliot's neighbor, James Jubilee, in Virginia Beach, Virginia, planted a cross, and set it on fire.[136] Their apparent motive was to "get back" at Jubilee, who earlier had complained to Elliot's mother about Elliot's shooting of firearms in his backyard.[137] The incident was eerily reminiscent of that at issue in *R.A.V.*

The actions of Black, O'Mara, and Elliot subjected them to the Virginia statute prohibiting cross burning with intimidation,[138] which Virginia had passed in 1950 to help discourage cross burnings, which the KKK has used as a means of intimidating Black Americans since World War II.[139] The three men were convicted under the statute. On appeal, the Virginia Supreme Court overturned the convictions, in reliance on *R.A.V.*, finding the statute to be facially unconstitutional because it discriminated on the basis of content by selectively targeting only cross burning intimidations as compared to the broader category of intimidation.[140] The Supreme Court reversed the Virginia Supreme Court, reasoning that *Black* was consistent with *R.A.V.* because the basis for the subject matter discrimination—

131. *Black*, 538 U.S. at 348.
132. *Id.*
133. *Id.* at 349.
134. *Id.*
135. *Id.*
136. *Id.* at 350.
137. *Id.*
138. The statute, as amended, provided:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 Felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

VA. CODE ANN. § 18.2-423 (Michie 1996), *cited in Black*, 538 U.S. at 348.
139. *Black*, 538 U.S. at 355.
140. *Id.* at 351.

intimidation—was the very reason that made for its proscribability, as we have discussed.[141]

The dispute among the courts (state supreme courts and United States Supreme Court) and Justices on the Supreme Court suggests differences in the valuation of speech and also the difficulty of the problem in making sound judgments about cross burnings. Burning a cross in the dead of night in the fenced-in yard of a neighbor might constitute protected speech.[142] But such conduct might also be proscribable as arson,[143] criminal damage to property,[144] or as intimidation.[145] Burning a cross as part of a public demonstration is protected,[146] as is the public display of a cross.[147] The difficult judgments to be made over such similar fact patterns calls for great precision in thinking and the exercise of careful, pragmatic judgment. To accomplish this, we need a strategy that accords free speech its justifiably high value, but yet is sensitive to the dynamics of the close interaction speech has with social reality.

I suggest this strategy. First and foremost, we need to focus on the communicative value presented by communicative acts. To the extent an act is sufficiently communicative, it should be protected absent exigent circumstances. Free speech should be preferred over other values absent exigent circumstances for the reasons set forth in Part I. However, our focus on speech should not blind us to the important countervailing interests that often arise when speech interacts with social reality. These social interests comprise appropriate objectives for governmental attention, helping to assure the public health, safety, and welfare. A focus on conduct can bring into clearer view those social interests that merit attention. So, separating speech from conduct can provide a sound way by which society can address legitimate concerns of public health, safety, and welfare without impinging on free speech. Quite useful to this enterprise is understanding issues of personal security, such as the interest in being free from fear or violence. Understanding personal security helps clarify concrete harms independent of speech that merit regulation.

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141. *Id.* at 363.

142. *See R.A.V.*, 505 U.S. at 391; Black v. Commonwealth, 553 S.E.2d 738, 743–44 (Va. 2001), *aff'd in part, vacated in part sub nom.* Virginia v. Black, 538 U.S. 343 (2003) (vacating the state supreme court's decision in the cases of *O'Mara* and *Elliot*, but affirming the decision in *Black*).

143. *R.A.V.*, 505 U.S. at 380 n.1.

144. *Id.*

145. *Black*, 538 U.S. at 347–48.

146. *Id.* at 366.

147. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 769–70 (1995).

III. PERSONAL SECURITY

R.A.V., *Mitchell*, and *Black* all deal with behavioral actions that cross the line and reasonably constitute crimes. Acts of arson, assault, and threats (*R.A.V.*); assault and battery (*Mitchell*); and intimidation (*Black*) are justifiable subjects of a criminal code. Such actions target a person who is intruding in some important way into the province of another. These cases show how communicative actions can intrude upon the rights and interests of another person, forming one important aspect of the complicated process of interaction between speech and social reality.

It is useful to examine the reasonable set of interests that any person has as a member of society. I group these interests under the term "personal security" because they are indispensable to the safety and well-being of a person. Examination of the dimensions of a person's legitimate claim to personal security can help clarify the strong interests that underlie and help constitute a person. This examination can help better identify the personal interests at stake in crimes like assault, battery, threat, intimidation, harassment, or other invasion of privacy. We can then get a better sense of the strong personal interests that may lie in juxtaposition to speech. *R.A.V.*, (assault, threat, and trespass), *Mitchell* (assault and battery), and *Black* (intimidation) illustrate how these values of personal security can come into conflict with free speech.

Clearly bringing into focus interests of personal security offers a path for proper governmental attention. By focusing on issues of personal security, government can properly address legitimate matters of health, safety, and welfare independent of speech. This approach offers a useful strategy whereby important personal and social concerns may be addressed while yet securing our commitment to free speech.

Every person has a rightful claim to personal security. We can think of personal security as dominion over mind and body. Dominion over the mind protects the integrity of the interior dimension to human being, including thoughts, feelings, and emotions. Dominion over the body protects exterior dimensions to human being, demarcating a person as distinct and separate from others.[148]

The interior dimension to human being is protection of the inner citadel. Every person has a right to feel secure, confident, and sure of his or her well-being and safety. We might think of this as an aspect of the right to live in peace. Living in peace means at least freedom from fear, terror, abuse, or violence. These forces threaten the inner citadel and reasonably place a person in a state of insecurity. Thus, we might think of personal

148. *See* Heyman, *supra* note 31, for a deeper investigation of this theme.

security as encompassing the freedom to live in peace, with peace of mind and tranquility.

The interior dimension to personal security is hard to conceptualize because it is not visible or concrete. Unlike the exterior dimension, its border is not manifest in physical behavior that encroaches upon it. Instead, the border of interiority is marked by threats to the psyche. Threatening behavior assaults the inner peace of a person. Yet, we can measure assaults on the inner citadel, too. To be recognized in the law, the assault must seriously place a person in fear of harm.

An example of an assault on the inner citadel is a "true threat," defined by the Supreme Court as "encompass[ing] those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."[149] Intimidation, too, is a type of true threat, "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[150] The essence of true threats and intimidation is the placing of a person in fear of impending harm. Such behavior is plainly an assault on a person's inner citadel.

Other actions also may impinge upon a person's inner citadel. For example, harassment or other serious abuse might interfere with a person. Harassment is behavior that targets a person through unwelcome personal abuse so severe it alters the conditions of the target's life or working conditions.[151] Harassment is unreasonable interference with a person's life functions, such as a job, school, or living situation. Abusive behavior may be so pervasive in effect and influence that it creates an objectively hostile environment.[152] Thus, harassment might occur as a matter of a general workplace or other setting, not just as a result of individual targeting. The essence of harassment is abusive behavior that limits a person's ability to perform life functions. Freedom from harassment is empowerment of a person's autonomy.

There might also be other unreasonable invasions of privacy involving "substantial privacy interests . . . being invaded in an essentially intolerable manner."[153] Captive audience—holding people hostage to a message—

149. *Black*, 538 U.S. at 359 (citing Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)).

150. *Id.* at 360.

151. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986); *see* Eberle, *supra* note 7, at 1188–90, 1196 (discussing limitations on speech in cases of harassment).

152. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

153. Cohen v. California, 403 U.S. 15, 21 (1971).

would be a paradigm of this.[154] The doctrine of captive audience protects people from being forced to audit messages they wish to avoid but cannot reasonably escape.[155]

Likewise, the exterior dimension to human being protects the integrity of a person as well. Every person has a right to bodily integrity and freedom from unwanted touching and bodily contact. Dominion over person means that the person controls contact with his or her body. Invasion of the exterior sphere by another is invasion physically of the person. The exterior dimension is easier to conceptualize. Here personal security protects a person from unwanted touching and bodily contact. Thus, personal security would protect against physical invasion of the self. Assault, battery, and a host of other crimes or torts would map out part of the border of this exterior dimension.

Both the interior and exterior dimensions to human being are indispensable elements of a healthy and fulfilling human personality. Since interior and exterior components of personality are, ultimately, elements of a person that are within a person's dominion, they can be considered attributes of human dignity.

We can now see that both interior and exterior dimensions to human personality are crucial components of personal security. Every person needs a base of personal security in order to function and live completely and well. People cannot, in fact, engage freely in free speech if they do not feel secure. In this sense, free speech depends on personal security.[156] Physical harms or its threat can impair the ability of a person to function. Safeguarding personal security, accordingly, is a first duty of government.[157] The core of the social contract is that we as citizens obtain security from violence or harm in return for some sacrifice of our liberty. Protecting personal security, thus, is a root basis on which the social contract is formed.

Each of us as citizens has a legitimate claim to equal access and equal opportunity to the goods of society and equal guarantee of security from harm within society. That fundamental core of the social compact was made

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154. *E.g.*, Frisby v. Schultz, 487 U.S. 474, 487 (1988) (upholding regulation of focused picketing that "trapped" a doctor and his family in their house "in an attempt to force the doctor to cease performing abortions").

155. Eberle, *supra* note 7, at 1190–93. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) ("[R]estrictions have been upheld . . . when . . . the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." (citation and footnote omitted)).

156. Heyman, *supra* note 31, at 1310, 1359.

157. Heyman, *supra* note 12, at 511–12.

manifest with the enactment of the Fourteenth Amendment.[158] Thus, we can see that claims to personal security possess an equality component as well, rooted in equal protection. So observed the Supreme Court with justification in *R.A.V.*[159] Basic human rights include the right "to live in peace where [you] wish."[160]

Focusing on issues of personal security can help identify the core personal interests that lie at the heart of the social compact: securing public health, safety, and welfare. Since personal security interests are rooted in protection against unwanted behavior, the focus of governmental attention will likewise fix on addressing the problematic behavior. This approach is useful, first, as a way of addressing personal and social harms that are likely to arise from behavior. It is also useful as a strategy to protect speech. By focusing on the behavior that gives rise to the unwanted conduct, government will properly shift its attention away from speech and toward the behavior that is harmful. The approach has the benefit of insulating speech significantly from regulation.

The trilogy of *R.A.V.*, *Mitchell*, and *Black* presents a good setting in which to examine this methodology. Each case involves important issues of free speech. In *R.A.V.*, the question was the propriety of viewpoint-based excision of unprotected fighting words.[161] *Mitchell* involved whether thought viewed as improper could be targeted in enhancing criminal penalties.[162] *Black* concerned the plausibility of subject matter discrimination within the category of unprotected intimidation and, more broadly, the scope of *R.A.V.*[163] Importantly, both *Mitchell* and *Black* additionally demonstrate a sound means of addressing hate and bias in society. The lesson of *Mitchell* is to focus on hate crimes, not hate speech. The lesson of *Black* is likewise not to regulate hate speech, but instead to target the species of hate speech that curtails interests of personal security,

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158. The Fourteenth Amendment provides, in relevant part, "any State . . . [shall not] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

159. 505 U.S. at 395.

160. The full quote reads:

> [St. Paul] assert[s] that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them.

Id.

161. *Id.* at 380–81.

162. 508 U.S. at 482–83.

163. *Black*, 538 U.S. at 347–48, 363.

like freedom from intimidation. These are valuable lessons that merit examination.

Yet, each of these cases also spotlights serious issues of conduct that implicate issues of personal security. In *R.A.V.*, teenagers jumped a neighbor's fence and burned a cross on his property in the middle of the night.[164] That behavior is legitimately proscribable as arson or intimidation, as the Court noted.[165] In *Mitchell*, young black men severely beat a white boy.[166] That behavior is sanctionable as criminal assault and battery. In *Black*, defendants burned crosses—Black at a public KKK rally, Elliot and O'Mara in the yard of a neighbor at nighttime—and were charged with intimidation under the Virginia cross burning statute.[167]

Each of these cases presents issues involving the interface of speech and social reality that are not easy to resolve. The speech interests involved in the cases are important, involving content discrimination (*R.A.V.* and *Black*), censorship (*R.A.V.*), and thought control (*Mitchell*). But the behavior was also problematic: arson (*R.A.V.*), trespass (*R.A.V.*), intimidation (*R.A.V.* and *Black*), and assault and battery (*Mitchell*). Cases like these test the limits of a system of freedom of expression. They are the hard cases of free speech. And because they are hard, they usefully illuminate the boundary between speech and conduct. Their resolution calls for careful consideration of the factors at issue: context, factual setting, official motives and purposes, and the values of the social order. Separating speech from conduct helps focus the question as to what is at stake so that proper attention can be directed to the underlying behavior at the root of the issue. Focusing on speech questions in this fashion helps direct attention to the serious conduct at issue, and away from the speech, so that we may reach resolutions of these questions in a manner that addresses the problems and yet upholds our commitment to free speech. Let us now turn to employing this methodology.

IV. HATE SPEECH AND THE FIRST AMENDMENT

Hate speech must be treated under the same rubric of principles that comprise the First Amendment as apply to any speech. Under established First Amendment methodology, all speech is presumptively protected unless serious, imminent harm can be proven. There are certainly arguments to be made and considered as to whether current First Amendment doctrine

164. 505 U.S. at 380.
165. *Id.* at 380 n.1.
166. 508 U.S. at 480.
167. 538 U.S. at 349–50.

favors speech too highly or whether a different configuration should be made over where to draw the line between protected and unprotected expression. But it is a matter of the integrity of the law that hate speech be accorded the same treatment as other speech. The American free speech model is yet one based upon individualist and autonomy considerations, not equality or pluralist concerns. Consequently, "hate speech should ordinarily be allowed free dissemination, like other offensive, outrageous, insulting, or disquieting speech," absent exigent circumstances.[168]

This does not mean, of course, that every forum or every manner of dissemination be available to vent hate. There are appropriate recognized limitations on speech, and these limitations apply to hate speech as well. For example, hate speech may not incite an immediately violent response nor substantially invade a person's privacy interests in an intolerable manner.[169] Impinging on these core interests of personal security, as well as others, forms an important limitation on speech, including hate speech. Focusing clearly on personal security can help delineate a bound on hate speech or other hate-motivated behavior.

Reference to personal security usefully identifies the problematic behavior that properly forms a focus of governmental regulation in order to safeguard individual or public health, safety, or welfare. For example, interior dimensions to personal security safeguard a person's sense of security and confidence in his or her well-being. Accordingly, government is justified in protecting a person against threats, intimidation, assaults, harassment, and the like. Exterior dimensions to personal security protect a person's right to bodily integrity and freedom from unwanted touching and bodily contact. Government is appropriately justified, therefore, in safeguarding a person against battery and other unwanted physical contact.

Understanding the dimension of personal security illuminates more clearly the domains of speech and conduct. Personal security interests form the boundary of a person upon which conduct may not legitimately infringe. Such unconsented conduct, in turn, demarcates the domain of speech. Speech is limited by harm caused to others. One source of such harm is curtailment of a person's personal security. The main bounds on speech to be drawn from behavior violating personal security are conduct (because it invades the body of a person) and conductlike elements that arise from the manner in which speech is disseminated (because it infringes upon a person's inner citadel). Assault and battery would be examples of illegitimate conduct; threat and intimidation examples of proscribable

168. Eberle, *supra* note 7, at 1205.

169. Cohen v. California, 403 U.S. 15, 20–21 (1971).

conductlike elements that we recognize as problematic instances of context. We can thus see how resort to personal security helps identify troubling behavior justifiably in need of regulation.

More precise regulation of hate-inspired behavior may be achieved by employing the methodology of separating speech from conduct advocated here. By isolating conduct from speech, we may direct precise regulation to the problematic behavior in need of redress while yet maintaining our commitment to free speech. We can also achieve a better understanding of the domains of speech and conduct, and thereby reach sounder accommodations between speech and social reality. Understanding the ways in which speech interacts with social reality is critical to reaching more precise knowledge as to the domains of speech and conduct, and crucial to understanding the proper role of government. Use of this strategy in addressing hate and bias can aid some tentative resolution of this difficult problem.

Let us now turn to unraveling the problem presented by hate-inspired behavior by separating proscribable conduct elements from protected speech elements more carefully so that real harms can effectively be isolated and dealt with, leaving speech protected to the extent possible. The trilogy of *R.A.V.*, *Mitchell*, and *Black* provides useful guidance. Each of these cases involves instances where speech and conduct are combined and it therefore becomes crucial to determine whether speech or conduct is most relevant in the circumstance. The cases also offer a legal structure to evaluate the problem. First, hate speech (including cross burning), without more, is protected speech (*R.A.V.*).[170] Second, hate speech disseminated in a manner that causes harm is proscribable (*Black*) based upon the harm.[171] This distinction between *R.A.V.* and *Black* is one of content regulation (*R.A.V.*) and context regulation (*Black*). Third, hate crimes can be regulated (*Mitchell*).[172] The distinction between *R.A.V.* and *Mitchell* illustrates this distinction between speech and conduct. Let us now turn to addressing the particular harms that are legitimately proscribable in connection with hate speech. These harms are ones of conduct (physical behavior) and context (harms arising through dissemination of speech).

170. *R.A.V.*, 505 U.S. at 380, 396.
171. *Black*, 538 U.S. at 358–63.
172. *Mitchell*, 508 U.S. at 488–90.

A. Conduct: Hate Crimes

Cardinal to First Amendment law is that while government may not regulate undesirable speech, it may regulate undesirable conduct. Accordingly, it is important to identify the domain of conduct that properly forms the focus of regulation. The line between speech and conduct is elusive. But some clarity can be achieved by separating speech from conduct in the manner illustrated by the Court in *R.A.V.* and *Mitchell*. Governmental targeting of speech (viewpoint discrimination) is improper (*R.A.V.*), whereas governmental targeting of behavior (assault and battery) is proper (*Mitchell*).

The rule of *Mitchell* opens up an important avenue for society to address the problem of hate. Hate-inspired behavior that violates an individual's exterior dimension to personal security may be punishable as a hate crime under a carefully written criminal code. Crucial to a hate crime regime is that the regime must target behavior, not speech. For example, in *Mitchell* the statute targeted overt criminal action—assault and battery.[173] Under the operation of the statute, the speech component (motive) could only be taken into account once the underlying crime (assault and battery) had been proven.[174] Only then could punishment of the hate crime be enhanced based upon recognition of its greater severity meriting greater disapproval as compared to nonhate crimes.

Bifurcation of consideration of the elements of the crime from consideration of the appropriate penalty to be assessed is therefore important for several reasons. First, so separating speech from conduct facilitates careful targeting of the particular behavior that properly merits reproval. Regulation of disturbing behavior is a logical and direct way for government to address harm. Regulation can help channel behavior toward more socially acceptable norms. Regulation can also hasten change of the underlying behavior that gives rise to hate and bias. Under a hate crime regime, much of what is problematic about hate in society can be regulated, including the disturbing behavior at the root of the trilogy of cases—arson or criminal damage to property (*R.A.V.*) and assault and battery (*Mitchell*).

Second, while a hate crime regime properly targets improper behavior, speech is largely insulated from official action. Speech elements (motive, intent, thoughts) can only be taken into account in sentencing, after the criminal act has been proven beyond a reasonable doubt. Thus, speech is not the object of regulation. Serious harm must exist apart from the communication itself to justify regulation. The main focus of free speech—

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173. *Id.* at 480 (citing WIS. STAT. §§ 939.05, 940.19, 939.645 (1989–90)).
174. *Id.*

the act of communication—is substantially off-limits to government. A focus on proving the criminal act beyond a reasonable doubt helps assure this. There is thus substantially reduced, if not minimal, danger of censorship or other threat to free speech interests.[175] Any governmental targeting of speech is improper, and the teaching of *R.A.V.* is that courts will monitor official performance very carefully to safeguard speech. The actions of the Virginia Supreme Court in *Black* and the Wisconsin Supreme Court in *Mitchell* demonstrate how courts can be diligent in this endeavor. In this respect, the hate crime regime of *Mitchell* is a paradigm of how employing a strategy of separating speech from conduct can fine-tune sanction of hate-motivated behavior while remaining true to our commitment to free speech.

Third, a hate crime regime allows society to enhance penalties for hate crimes and thereby express its grave reproach of this individual and socially destructive behavior. Hate crime codes are a testament to society's commitment to protect the safety and welfare and uphold the dignity of all citizens. In this respect, hate crime regimes are measures of society's commitment to equality. The laws are expressions of solidarity with victims of hate, especially minorities. The health, safety, and welfare of all people is to be protected, which these laws help evidence. Proactive governmental intervention along these lines can hasten the full integration of all people within society and better hasten the movement toward full and equal citizenship of all members of society.

B. Context: Threat, Intimidation, Harassment

An additional fruitful avenue for regulation of hate speech is addressing harms that may be present in the manner of the speech's dissemination. The focus of this regulatory strategy is the context of the speech, not its content. The distinction between *R.A.V.* (targeting content of speech) and *Black*, as formulated by the Court, illustrates this difference. The actors in *Black* could express hate by burning a cross. But they could not burn a cross in an intimidating manner. The problem for actors Elliot and O'Mara was that burning a cross on the property of another without permission, especially at nighttime, constituted intimidation. The intimidation was proscribable, not the expression. Actor Black shows that burning a cross in public, as part of a demonstration, is protected expression.

Identifying and isolating particular contextual problems associated with speech can, like a hate crime regime, result in more precise regulation of the

175. Eberle, *supra* note 7, at 1203–04.

specific harms arising from speech. The effectiveness of this regulatory strategy depends upon identifying clearly the harms justifying regulation. "Key to identifying these [harms] is the speech/conduct dichotomy."[176] And key to identifying conduct elements meriting regulation is the idea of personal security.

As we have learned, personal security forms the boundary of a person. Conduct that infringes upon a person's boundary violates that person's personal security. The manner in which speech is communicated can infringe upon a person's inner citadel, violating personal security. For example, communication of threat or intimidation is communication of impending harm or violence. A person naturally senses fear or terror faced with a threat or an intimidation. Fear or terror disturbs a person's inner tranquility and sense of security, disrupting the inner psyche. We can thus see how threat or intimidation is an infringement of personal security.

The essence of the harm posed by threat or intimidation is fear—fear that the violence or harm will occur. Threat or intimidation is thereby proscribable for the fear it engenders. Such fear and its disruption of life is the essence of a threat or an intimidation. There is a legitimately recognizable interest in protecting people from such fear. Threats and intimidation also raise the "possibility that . . . threatened violence will occur."[177] Every person has a right to be safe and secure.

Thus, we can see that the manner of expression—threat or intimidation—is the harm, not the expression itself. This is the distinction between context (intimidation) and content (hate speech). The harm—threat or intimidation—is identifiable and separable from the speech. Government may therefore target the harm. In this way, we can see how a strategy of separating speech from conduct can usefully steer government toward legitimate objectives apart from speech.

We can also see how use of this strategy is helpful in understanding the interaction of speech with social reality. Contextual harms like threat or intimidation are forms of communication that are in the process of transforming into conduct. There is a speech component—the communication. But these communications are not pure speech because they comprise more than communication. There is also a conduct component—the element of fear arising from the insinuation that the conduct—violence—might occur. But these communications are also not pure conduct because no overt conduct has occurred. Threat or intimidation can lead to violence, but is not yet violence. If the fear is realized, and the

176. *Id.* at 1195.

177. Virginia v. Black, 538 U.S. 343, 360 (2003) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

violence or harm occurs, it is no longer a threat or an intimidation. Then the behavior is the act of violence, itself proscribable as criminal conduct. Threats and intimidation are somewhere between speech and conduct. They are classic examples of what Justice Douglas once famously referred to as "speech . . . brigaded with action."[178] The close association of threats and intimidation with action is what makes them proscribable.

Or, in the strategy advocated here, separation of conduct—fear of impending violence—from speech provides a clear reason for government to act. Under this regulatory strategy, it is all-important to separate conduct elements (for example, threat or intimidation) from speech elements (for example, cross burning). The distinction between *R.A.V.* and *Black* illustrates this principle again. Targeting a form of expression—politically incorrect fighting words—is unconstitutional (*R.A.V.*) because the harm targeted is communication. Targeting a mode of expression pregnant with harm—intimidation—is constitutional (*Black*) because the harm targeted violates a person's personal security. Similarly precise thinking and regulation is necessary for this strategy.

And this is the great significance of *Black*. *Black* authorizes regulation of hate speech that is communicated in a manner that curtails an individual's personal security.[179] In *Black*, the infringement of personal security was intimidation.[180] But since intimidation is itself a subset of true threats, true threats are likewise proscribable under the rule of *Black*, reasoning no doubt implicit in the case. It is not much of a leap to recognize other infringements of personal security that fall within the rule of *Black* as well. Logical areas to regulate under the rule of *Black* include harassment, abuse, coercion, duress, and other substantial invasion-of-privacy interests in an intolerable manner, such as captive audience.[181] Examination of these concepts would show that they all encompass behavior that infringes the boundary of a person and violates in some way interests in personal security. For our purposes, we will concentrate on threat and intimidation as examples of contextual harm to illustrate the technique.

Understanding why threats or intimidation are distinguishable from speech and therefore proscribable is one thing. Determining whether a fact instance is a threat or an intimidation is another. To determine the constitutional status of such a communication, it is necessary to assess carefully the content and context of the communication and the purpose of

178. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (per curiam) (Douglas, J., concurring).
179. *Black*, 538 U.S. at 359–60.
180. *Id.*
181. Eberle, *supra* note 7, at 1190–93, 1196–97, 1211–12.

the regulation. A review of the behavior at issue in *Black* and *R.A.V.* illustrates how this may be done with respect to cross burning.

The facts of *Black* illuminate graphically this distinction. The difference in context between cross burning by Black as compared to cross burning by O'Mara and Elliot demonstrates the difference between improper regulation of content (Black) and proper regulation of context (O'Mara and Elliot). Black's cross burning occurred in the context of a KKK rally venting hate and opinion over the body politic. The cross burning was publicly displayed on the private property of an owner who himself attended the rally and granted permission for the activities.[182] The cross burning was not directed at anyone. Rather, it was directed at the world at large. Thus, evaluating the act, it is hard to attribute any conduct or harm to the instance except the act of cross burning itself. Cross burning, without more, is simply communication. And communicative harm cannot be the basis for regulation under the First Amendment. Thus, the logical conclusion is that this instance of cross burning involved protected speech and cannot therefore be regulated.

By contrast, the behavior of O'Mara and Elliot involved more than the act of cross burning, the essence of the communicative act under review. Separable from the speech were distinct conduct elements. These white men drove a truck onto the property of Elliot's neighbor, Jubilee, a black man, and his family, without Jubilee's permission during the night.[183] They then planted a cross on Jubilee's property and set it afire.[184] This behavior constitutes identifiable conduct elements (trespass, arson, damage to property) and context elements (targeting a person in reprisal for complaints about shooting guns). Moreover, these conduct elements reasonably place a person in fear of harm or impending violence, making out the essence of intimidation.[185] Burning a cross at night on someone's property without permission constitutes invasion of privacy and of personal security, smacking more of a targeting of that person than any public communication. In view of America's history of racism and lynching, it is hard to understand white people's cross burning on a black person's property as something other than a threat or an intimidation—a communication of impending violence or harm. The imagery is too graphic and the association is too clear. It is thus understandable that Justice

182. *Black*, 538 U.S. at 348–49.

183. *Id.* at 350.

184. *Id.*

185. "After seeing the cross, Jubilee was 'very nervous' because he 'didn't know what would be the next phase,' and because 'a cross burned in your yard . . . tells you that it's just the first round.'" *Id.*

Thomas, a black man raised in poor circumstances in Georgia during our period of apartheid, would consider the act to be "profane."[186] Thus, this act of cross burning was hate speech communicated with intimidation. While the content of the speech (hate) might be communicated, the manner of its dissemination (intimidation) is beyond the pale and subject to appropriate regulation. Separating speech from conduct in this manner demonstrates how precise regulation of harm may be achieved.

The facts of *R.A.V.* also illustrate how focusing on issues of personal security can illuminate underlying behavior appropriate for regulation. Like O'Mara and Elliot's behavior, much of the conduct under review in *R.A.V.* was proscribable because it was behavior that violated someone's personal security: threat, arson, criminal damage to property. What made for a determination of unconstitutionality in *R.A.V.* was governmental targeting of the speech (selective regulation of politically incorrect fighting words), not the underlying behavior giving rise to the speech. Thus, we can see *Black* and *R.A.V.* impart the fundamental lesson of the First Amendment: regulation of speech is presumptively unconstitutional whereas regulation of conduct is the legitimate domain of government. Understanding the domains of speech and conduct is crucial to understanding the legitimate role of government, which these cases help illuminate.

There is a broader lesson of *Black* with important implications for American society. Hate speech regulation is constitutional insofar as the regulation targets identifiable harm present in the manner of the speech's dissemination. The harms identifiable under the rule of *Black* are ones that curtail an individual's personal security—threat, intimidation, harassment, coercion, duress, and so on. These harms cause great damage to people and society, singeing the soul of the target and the community, recalling in all its horror our country's history of racial persecution. These harms are, in fact, acts of racism. We can thus see that the gloss *Black* puts on *R.A.V.* is important because it empowers society to censure and address singularly behavior that is racist or that gives rise to racism.

In this manner, *Black* opens up an avenue for society to redress racism. Importantly, regulation under this rule facilitates direct regulation of the behavior that is itself problematic. Such a direct approach is more likely to redress problems associated with the underlying racism present in society. Further, the regulatory strategy has the added benefit of mainly leaving communication alone, consistent with the constitutional prioritization of free speech. And the regulatory approach helps to guarantee the personal security of each member of society, including society's most vulnerable

186. *Id.* at 388 (Thomas, J., dissenting).

members—minorities and unpopular groups without much power to affect change within society. In this way, the approach can be a step toward achieving equal citizenship for all members of society. *Black* thus forges some better accommodation of equality in relation to free speech, as compared to *R.A.V.*

C. *Hate Speech*

Stripping away the problematic conduct associated with hate speech—hate crimes, hate intimidation, hate threats, and other hate harm—and subjecting it to targeted regulation can be an effective way to address the serious problem of hate and bias in society. This direct regulatory approach has the advantage of regulating the underlying racist behavior that lies at the root of cross burning or other expression of bias. Direct regulation of racism, sexism, or other hate can retard the formation and expression of bias. Proactive regulation combating racism and bigotry can help reshape the community we live in so that hate and bias will be rightly viewed as deviant and unacceptable social behavior.[187] Especially effective in facilitating such a transformation is the design and implementation of programs that are inclusive of all citizens. Proactive affirmative action, equal opportunity, and anti-discrimination programs can be effective tools to fight racism and better achieve full integration of all members of society.

Such a change in policy can influence attitudes which, in turn, can affect the formation of values that constitute individual and communal identities. Importantly, such transformation of values will come about through the self-determining process of democratic self-government. Thus, the change will be freely chosen, consistent with the values of autonomy and liberty that mark the American constitutional order. This would be an example of the self-cleansing function of free speech; free speech itself would be the process that would identify the problem of hate in society and, through its dynamics of discussion and public deliberation, settle upon a freely chosen value structure based upon equality. The process of democratic self-government offers the best hope for fighting the causes of hate speech.

Still, regulation of bias behavior is regulation of conduct, the particular province of government. But it is not regulation of hate speech. We are still left with the issue of how to treat hate speech, a difficult question for a system of freedom of expression, which must now be faced.

Our deep commitment to free speech teaches us that messages of hate are better confronted openly in the free exchange of ideas rather than silencing

187. POST, *supra* note 43, at 311–12.

them through the force of law. Free speech reveals that a problem in American society is racism. Racist speech is a manifestation of the underlying racism present in society. We should fight racism through the design and implementation of hate crime, hate intimidation, and hate threat regimes, together with direct regulation of racism, as described above.

We should also fight racist speech. But because racist speech is speech, it must be confronted on the terms and justifications appropriate to free speech as a matter of the integrity of the law. Confrontation of hate speech is better than its suppression for many reasons, which have been extensively discussed,[188] but yet merit some brief discussion here as well.

First, a system of free speech teaches that it is better to learn to confront and tolerate unpleasant messages, like hate, than suppress them.[189] Government and majoritarian forces naturally desire to exert their influence, and speech is no exception. Unpopular speech, like hate speech, offensive speech, or pornography, is especially susceptible to regulation. Censoring unpopular speech is a natural response to social pressure.[190] Yet, censoring unpopular speech because of its unpopularity simply imparts the lesson that might makes right. Political power has more to do with legality than merit, an argument more in keeping with the state of nature than the system of law. If hate speech is to be defeated, it must be defeated on the basis of its idea, not by force.

Further, censoring hate speech does not solve the problem of hate, but simply drives it underground, where it can seethe with great anger. There is great danger that repressed speech will emerge from its shadows to wreak havoc on society. "[F]ear breeds repression . . . repression breeds hate . . . hate menaces stable government . . . ."[191] People are more likely to blow up a building, or worse, when they feel aggrieved and silenced.

Second, it is always risky to exclude completely any idea from free discussion. Absent demonstration of clear, concrete harm posed by the speech—the methodology of the First Amendment—"there may be no [principled] basis on which to distinguish [undesired] speech from protected

188. *Id.* at 293–97, 310–31; Eberle, *supra* note 7, at 1204–09. *See generally* Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996) (critiquing postmodern censorship theories); Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?*, 25 S. ILL. U. L.J. 243 (2001) (arguing for very limited restrictions on hate speech).

189. *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting) ("I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.").

190. Eberle, *supra* note 7, at 1206.

191. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

speech."[192] The architecture of the First Amendment—spheres of differently ordered categories of protected speech where the highest valued speech is zealously protected through application of a searching judicial test of strict scrutiny—might thereby be undermined, perhaps causing a meltdown of the carefully constructed set of principles that comprise the modern First Amendment. For if hate speech can be banished because of its unpleasantness, what is there to stop the banishing of other speech simply based upon its provocation or vileness? What of offensive speech, defamation or, even, in terms of banality, commercial speech? In place of our system of free expression we might be left with a regime based simply upon majoritarian preference: speech ordered by its popularity, not by the merit of its communicative value. We might thus inherit a free speech based on democracy, alongside its counterpart in the First Amendment, free exercise of religion.[193]

Third, censoring hate speech undercuts the individualist and collective autonomy values that support free speech itself, both as a constitutive element of human personality and as a means to democratic self-government.[194] Autonomy has facilitated the development of our system of freedom of expression and will sustain it in the future. It is important for individual and social freedom that we maintain free speech, at least, as the one protected haven in society where a person can be free.[195] Thus, even if there is little merit to hate speech as a form of expression, it should be protected on account of the process of free speech itself—placing control over expression in the hands of the people.[196]

Fourth, "it is constructive for individuals to vent their messages of [hate]." Allowing all people to speak their minds implicates the core autonomy value at the root of free speech described above.[197] Participation in the process of free speech renders that person a stakeholder in the free speech project, adding further support for the enterprise of free speech.

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192. Eberle, *supra* note 7, at 1206.

193. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990). The Court noted:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

194. Eberle, *supra* note 7, at 1206.

195. *See supra* text accompanying notes 52–54.

196. Eberle, *supra* note 7, at 1206.

197. *Id.*

Further, venting hate can be cathartic, diffusing social stress, and perhaps averting greater catastrophes.[198]

Still, while these are all good reasons for protecting hate speech, there is yet a more basic and urgent reason to do so. Ultimately, hate speech should be protected because it reveals important truths about our world.

> Through hate speech we learn about the ugliness of the world. We learn about the ugliness of speakers' messages [and] minds, thoughts grounded in ugly ideas, such as racism, sexism, genocide, . . . ethnic cleansing [or *jihad*]. Unfortunately, our world, or part of it, is . . . ugly. So long as this remains the state of affairs, ugly speech must have its forum.[199]

Suppressing hate speech would simply conceal the ugliness and perhaps dangerously mislead us as to the reality of the world.[200] It is healthy, and necessary, to be reminded of the reality that the world is ugly.

"Ultimately, therefore, the truth is too important to suppress. We need truth to recognize evil in the world. Only by recognizing evil, can we face it and hope to change it."[201] Thus, there is a place in the marketplace of ideas for hate speech because it reveals the truth of hate. Knowing hate is the best way by which we can recognize and confront the ugliness that underlies its expression.[202] In the honesty of revelation and forcefulness of confrontation, we might be able to ameliorate some of the ugliness of our world, cleansing more effectively the social fabric of this vileness. We might thereby learn greater tolerance and respect for others.[203]

Ultimately, "true civility in discourse" will come about only through realization of true "civility in society."[204] "We will never have true

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198. EMERSON, *supra* note 33, at 7 (1970). Allowing speakers to vent can defuse social conflict

> because people are more ready to accept decisions that go against them if they have a part in the decision-making process. . . . [Free speech] thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability and change.

Id.

199. Eberle, *supra* note 7, at 1207 (footnote omitted).

200. *Id.*; *see also* Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283, 301 (allowing hate speech gives us insight into speaker's views).

201. Eberle, *supra* note 7, at 1207.

202. *Id.* at 1207–08.

203. Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 128 (1992).

204. Farber, *supra* note 200, at 302.

civilization until we have learned to recognize the rights of others,"[205] an important part of which is each person's entitlement to a sphere of personal security. Respecting the boundaries of others is a mark of civility.

We must change our nature and conduct in order to bring this about. Thus, the real response to hate speech is to change ourselves and our world. We have not been forceful enough in our condemnation of hate. We have not exerted a strong enough effort in fighting bias-motivated behavior. We need to implement the ideal of equality as intensively as we have implemented the ideal of free speech.

V. CONCLUSION

Cross burning has been a prominent feature of recent Supreme Court case law, reflecting a certain unease still present in America over the place of race in society, notwithstanding the country's formal commitment to equality since at least 1868, the date the Fourteenth Amendment was adopted. The graphic expression of hate and white supremacy transmitted by cross burning is a reminder that we still have a long way to go in order to overcome the vestiges of our racist past. The message of cross burning is to impart this hard truth.

As a matter of constitutional law, cross burning forces us to confront core values of the constitutional order—free speech and equality—and settle upon a determination of commitment to one or the other or, in some way, both. This is no easy matter, and a number of calculations are possible. The Court has mainly chosen free speech—wisely I think—out of acknowledgment of the integral role free speech plays in facilitating personal freedom and democracy, principles firmly established in First Amendment law.

Yet, does promotion of free speech inevitably have to mean sacrifice of equality or other interests of individual or social welfare? This is a difficult question about which we need to think carefully and providently, considering deliberately the plain realities of the case, in order to see if we might be able to structure sound solutions that preserve interests of free speech and yet uphold commitments to equality and preservation of individual welfare as well. This is an area where an approach of "thinking small, concentrating on the concrete problem," sifting through the possibilities, and striving for a wise solution has much to offer.[206]

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205. Will Rogers Memorial Archives, *Will Rogers Says...*, *at* http://www.willrogers.org/willsays_quotes. html (last visited Nov. 18, 2004).

206. Eberle, *supra* note 37, at 508.

A strategy of separating speech from conduct to the extent possible is a methodology that can be useful in this regard. Pursuant to this methodology, first, free speech will be presumptively favored and will be protected, absent exigent circumstances, in keeping with established doctrine and our commitment to free speech. Second, so shielding speech diverts official attention from expression and toward legitimate individual and social interests that need redress. Third, a byproduct of this approach is sharpening the focus on the proper role of government: targeting illicit behavior, but not impairing the system of freedom of expression. Fourth, legitimate interests meriting official attention can be more clearly identified by recognizing the conduct and contextual elements that connect to or are associated with particular acts of communication apart, of course, from the communication itself. Fifth, such conduct and contextual elements can clarify the bounds of free speech, demarcating more clearly the domains of speech and conduct. Sixth, crucial to understanding appropriate limitations on free speech is recognition of the domain of personal security that each person possesses as a matter of the integrity of that person. Exterior dimensions to personal security protect a person from unwanted bodily contact. Interior dimensions to personal security protect a person's inner citadel.

The framework of First Amendment law erected by the Court in *R.A.V.*, *Mitchell*, and *Black* can be seen as a way of navigating a path between the values of free speech and equality. Unpacking this maze of law, we can observe that *Mitchell* and *Black* smooth the sharp edges of *R.A.V.*'s more absolutist commitment to free speech, illustrating a way by which some better accommodation between free speech and equality may be achieved. *Mitchell* empowers government to address proactively overt criminal behavior that targets a person based upon disfavored status, such as race. *Mitchell* thereby helps secure the exterior dimension to personal security. *Black* empowers government to address behavior that targets a person through fear engendered, such as intimidation, threat, or similar terror. *Black* thereby helps secure the interior dimension to personal security.

Since the formulation of modern First Amendment doctrine, we have largely been faithful to the free speech project. There is no good reason to depart from that commitment. Yet, commitment to free speech does not inevitably have to mean neglect of individual welfare and egalitarian interests. The importance of cases like *Mitchell* and *Black* is that they open up avenues by which society can fight racism and the factors that give rise to it. We need to pursue these avenues more vigorously so that we might better realize equality and justice. But we should not restrict freedom in the process.

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