Tennessee Law Review

Volume 82
Issue 2 *Winter 2015*

Article 2

2015

ON FREE, HARMFUL, AND HATEFUL SPEECH

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Judicially recognized and relatively unobjectionable and uncontroversial exceptions to the coverage and protection of the First Amendment to the United States Constitution are grounded, in part, on affirmative answers to the question whether certain speech creates or could create actual or potential harms to, and result in negative consequences for, individuals and societal interests. This article, focusing on speech-related harm and, more specifically, the speech-related harms of hate speech, makes a descriptive claim and poses a normative question. The descriptive claim: Assessment of harm has long been a feature of the United States Supreme Court's free speech jurisprudence and decisions in which the Court has determined that some speech is constitutionally prohibited and other speech has been unconstitutionally abridged. The normative question: Should the Court adopt and employ an explicit harm-assessment analysis in hate speech cases? Discussing this query and concluding that such an approach should be an element of First Amendment analysis in this area of the law, the article suggests the need for judicial and scholarly consideration of and engagement with this important issue.

"The First Amendment has always had a delicate relationship with harm. Although any robust free speech principle must protect at least some harmful speech despite the harm it may cause, much public rhetoric, academic commentary, and even legal doctrine seems often to deny this now well understood dimension of freedom of speech."[1]

"A . . . conceptual challenge that impedes the proper application of hate speech prohibitions is a mistaken propensity to focus on the nature of the ideas expressed, rather than on the likely effects of the expression. The repugnant content of expression may sidetrack litigants from the proper focus of the analysis."[2]

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1. Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 81.

2. Saskatchewan Human Rights Trib. v. Whatcott, [2013] S.C.R. 11 (Can.), para. 49.

INTRODUCTION

"Congress shall make no law . . . abridging the freedom of speech . . . ."[3] This command, found in the First Amendment to the United States Constitution, provides a "safeguard against governmental suppression of points of view with respect to public affairs."[4] The amendment prohibits governmental restriction of speech and expressive conduct based solely on governmental disapproval of the ideas and viewpoints expressed therein, and "on the . . . ground that some or many . . . find what is said or written offensive . . . ."[5] The First Amendment protects, among other things, the marketplace of ideas,[6] and the Free Speech Clause is "critical to the advancement of knowledge, the transformation of tastes, political change, cultural

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3. U.S. CONST. amend. I.

4. Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 22 (1992).

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

6. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). *But see* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 6–24 (1989) (arguing that the marketplace of ideas theory is not persuasive); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (asserting that the assumption and theoretical underpinnings of the marketplace of ideas model are implausible in a modern society); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 467 ("Blacks and other people of color are equally skeptical about the absolutist argument that even the most injurious speech must remain unregulated because in an unregulated marketplace of ideas the best ideas will rise to the top and gain acceptance.").

expression, and other purposes and consequences of constitutionally protected speech."[7]

What constitutes an abridgement of "the freedom of speech"?[8] What is (and what is not) "free speech"? Unless one adopts an absolutist view of the First Amendment,[9] the axiom that all speech is "free" and not subject to governmental proscription is not an accurate statement of constitutional law. Non-absolutists must therefore grapple with the question whether certain communications are protected by or may be proscribed without running afoul of the First Amendment. Some approach and seek answers to this question by balancing the at-issue speech against the weight of competing public or private interests.[10] Others employ a categorization approach and determine whether the at-issue speech falls within a protected (for example, political speech) or unprotected (for example,

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7. Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's* R.A.V. *Decision*, 61 TENN. L. REV. 197, 202 (1993).

8. For a discussion of freedom of expression, which "has always been thought to cover more than what is literally speech, that is, spoken language," see LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 7–12 (2005). "'The freedom of speech,' lawyers like to point out, is not quite the same thing as 'freedom of speech.' The latter is a concept that anyone can define. The former is a term with a legal history, even as of 1789." GARRETT EPPS, AMERICAN EPIC: READING THE U.S. CONSTITUTION 99 (2013).

9. A First Amendment absolutist posits that the language "Congress shall make no law . . . abridging the freedom of speech" means just that: "Congress shall make NO LAW abridging speech." STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 13 (1990); *see also* EPPS, *supra* note 8, at 102 (noting that in "the categorical language of the First Amendment . . . [t]here is no modifier or limiter"); RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 23–24 (1992) (discussing absolute absolutism—no permissible restraints or penalties on speech—and qualified absolutism—providing absolute protection to a narrowly defined "freedom of speech").

Justice Hugo Black believed that the text of the First Amendment meant that Congress could not make any law abridging free speech "without any 'ifs' or 'buts' or 'whereases.'" Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting); *see also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 412–13 (1994) ("[F]rom the beginning Black's First Amendment opinions had pointed toward the idea of the heart of it as an 'absolute.' . . . 'The Bill of Rights means what is says and there are absolutes in it,' he told his clerks."). Justice William O. Douglas thought that the First Amendment's "ban of 'no' law" abridging First Amendment rights was "total and complete." CBS v. Democratic National Committee, 412 U.S. 94, 156 (1973) (Douglas, J., concurring in judgment).

10. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring in affirmance); Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843 (2005).

obscenity) category.[11] Furthermore, courts ask whether governmental restrictions on speech are content-based ("justified on the basis of the impact of the message"),[12] content-neutral ("justified by reasons unrelated to the message"),[13] or viewpoint-based ("the government has 'taken sides' on an issue, regulating because it disagrees with a particular view on an ideological spectrum").[14]

A number of exceptions to the coverage and protection of the First Amendment are well established,[15] and "most people who insist on the importance of free speech also accept that in some cases

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11. *See* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1185–88 (2000). The categorization approach sets out bright line rules distinguishing speech protected by the First Amendment from speech falling outside the protective scope of the amendment. Thus, the category of political speech is protected and other categories of speech, such as fighting words and obscenity, are not protected. "Categorization may be acceptable, or at least more acceptable, when it rests upon adequate explanations of why a particular category is protected or unprotected, but categorization is also subject to the criticism that it consists largely of conclusory statements, covert balancing, and overgeneralizations." Ronald Turner, *Regulating Hate Speech and the First Amendment: The Attractions of, and Objections to, an Explicit Harms-Based Analysis*, 29 IND. L. REV. 257, 267 (1995).

12. 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 13:35 (2013) (Content-based restrictions are presumptively unconstitutional as they carry with them the real risk that the government may prefer some messages and communications over others.).

13. *Id.* at § 13:35 (Content-neutral laws restrict speech without regard to the message conveyed; for example, a ban on billboards would be content neutral because all messages are treated the same and the restriction applies across the board to all speakers affected by the regulation.).

14. *Id.* at § 13:35. A viewpoint-discriminating government "makes the point of view of the speaker central to its decision to impose, or not to impose, some penalty." CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 12 (1993). The Supreme Court has applied heightened scrutiny to laws that discriminate on the basis of viewpoint. *See* Nev. Comm. on Ethics v. Carrigan, ___ U.S. ___, 131 S. Ct. 2343, 2349 (2011). Viewpoint-based restrictions are also content-based, as "government cannot silence one side in a debate without making content crucial. But not all content-based restrictions are viewpoint-based. The key difference between a content-based and a viewpoint-based restriction is that the former need not make the restriction depend on the speaker's point of view." SUNSTEIN, *supra* at 12.

15. *See* Ronald K.L. Collins, *Foreword: Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 417–22 (2012/2013) (listing five categories of unprotected speech and forty-three types of unprotected expressions); Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562 (1989) ("It is an entrenched feature of first amendment doctrine that the coverage of the first amendment does not extend to all linguistically communicative acts.").

speech acts may be regulated and criminalized."[16] For instance, the First Amendment does not protect the infringement of a copyright or trademark[17] or plagiarism[18] and is not a constitutional shield allowing one to: engage in blackmail or a criminal conspiracy;[19] commit perjury;[20] disclose classified information and official state secrets;[21] breach the peace;[22] or place another person in a false light.[23] Other cases in which the First Amendment does not provide protection talk about "fighting words."

> Some emphasize incitement to violence. Others follow the doctrine of criminal law in regard to verbal threats or the incitement or procuring of any criminal offense. Some say that obscenity and certain forms of hardcore pornography may be regulated in certain circumstances; almost everyone says this about child pornography. Some recognize an exception for defamation, at least defamation of private individuals. Not everyone recognizes all these exceptions, but almost everyone recognizes some of them.[24]

Indeed, "even the briefest glimpse at the vast universe of widely accepted content-based restrictions on communications reveals that

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16. JEREMY WALDRON, THE HARM IN HATE SPEECH 144 (2012).

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

18. *See generally* RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM (2007) (recounting and analyzing the history of plagiarism and its philosophical and ethical issues).

19. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005).

20. *See* United States v. Alvarez, ___ U.S. ___,132 S. Ct. 2537, 2546 (2012).

21. *See* Snepp v. United States, 444 U.S. 507 (1980).

22. *See* Schenck v. United States, 249 U.S. 47 (1919).

23. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).

24. WALDRON, *supra* note 16, at 145; *see also* Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 366–67 (2009) ("The current legal landscape contains many exceptions and special doctrine corresponding to speech that society has decided it may legitimately punish. Some of these are: words of conspiracy; libel and defamation; copyright violation; words of threat; misleading advertising; disrespectful words uttered to a judge, police officer, or other authority figure; obscenity; and words that create a risk of imminent violence."); Honorable John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1296 (1993) ("[T]he framers did not intend to provide constitutional protection for false testimony . . . or conspiracies among competitors to fix prices. The Amendment has never been understood to protect all oral communications, no matter how unlawful, threatening, or vulgar it may be.").

the speech with which the First Amendment deals is the exception and the speech that may routinely be regulated is the rule."[25] It is thus more accurate to say that speech can be and is lawfully regulated in certain circumstances, with courts deciding whether certain speech and expression is or is not "free" from government proscription.

Judicially recognized and relatively unobjectionable and uncontroversial exceptions to the First Amendment, like those mentioned in the preceding paragraph, are grounded, in part, on affirmative answers to the question: whether the at-issue speech created or could create actual or potential harms and negative consequences. Speech and expression can undeniably cause harm. That which is free for the speaker and writer can be harmful to and impose costs on the listener and reader; thus, speech is not free to and for all. But any and all findings of speech-related harm do not automatically render constitutional governmental proscriptions challenged by those claiming First Amendment protection. Harmful speech is often protected "not because it is harmless, but despite the harm it may cause" as "existing understandings of the First Amendment presuppose that legal toleration of speech-related harm is the currency with which we as a society pay for First Amendment protection."[26] What separates legally tolerable from legally intolerable harms? What is the currency of harm in concept and reality, and should we not be concerned that in certain contexts some members of an "us" and "them" society[27] will pay a high, indeed too high, a price for the free-speech interests of others? How can one know that particular speech and its consequent harms fall on the constitutional or unconstitutional side of the First Amendment line?

This article focuses on speech-related harm[28] and, more specifically, the speech-related harms of hate speech.[29] I make a

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25. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

26. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992).

27. *See generally* JAMES A. MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY (2003) (analyzing the chasms created by religion being at the heart of American politics).

28. "Harm," as used and understood herein, refers to both a narrow conception in which "harm must be due to a single act, and must injure the interests of some identifiable individual," and a broader conception in which "a harm can be due to a series of acts none of which is individually harmful, and it can injure the interests of a group, rather than any identifiable individual." ISHANI MAITRA & MARY KATE MCGOWAN, *Introduction*, *in* SPEECH AND HARM: CONTROVERSIES OVER FREE SPEECH 4 n.1 (Ishani Maitra & Mary Kate McGowan eds., 2012).

descriptive claim and pose a normative question. The descriptive claim: assessment of harm (including costs and negative consequences) has long been a feature of the Supreme Court's free-speech jurisprudence. Part I, examining harm assessment and Court rulings validating speech restrictions, and Part II, discussing harm

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This discussion of the harms of hate speech does not extend to and is not concerned with offensive speech. *See* WALDRON, *supra* note 16, at 106 ("I do not believe that it should be the aim of these [anti-hate-speech] laws to prevent people from being offended. Protecting people's feelings against offense is not an appropriate objective for the law.") (bracketed material added); Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145 (2013) (noting the bifurcation between offensive and threatening speech).

29. Any definition of "hate speech" may tend to prejudice or shape and predetermine the discussion of the subject. For various definitions, see Saskatchewan Human Rights Trib. v. Whatcott, [2013] S.C.R. 11 (Can.), para. 44 ("Hate speech often vilifies the target group by blaming its members for the current problems in society" and "delegitimizes the target group by suggesting its members are illegal or unlawful, such as labeling them 'liars, cheats, criminals and thugs' . . . a 'parasitic race' or 'pure evil.'"); DAVID BOONIN, SHOULD RACE MATTER?: UNUSUAL ANSWERS TO THE USUAL QUESTIONS 205 (2011) ("[H]ate speech refers to verbal or written attacks on people that target them because of their group membership, where this at least includes their race or ethnicity and may well include other characteristics like religion, gender, and sexual orientation."); JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 14 (2005) (stating that the term "[h]ate speech is generally reserved for verbal attacks that target people on the basis of their immutable characteristics, or any form of 'speech attacks based on race, ethnicity, religion and sexual orientation or preference.'"); ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 211 n.1 (2002) ("[H]ate speech" refers to "antisocial oratory that is intended to incite persecution against people because of their race, color, religion, ethnic group, or nationality, and has a substantial likelihood of causing such harm."); Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 964, 965 (2009) (noting Human Rights Watch's definition of hate speech as "any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women"); Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 105 n.2 (1992) ("[H]ate speech is any form of speech that produces any of the harms which advocates of suppression ascribe to hate speech: loss of self-esteem, economic and social subordination, physical and mental stress, silencing of the victim, and effective exclusion from the political arena."); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989) (discussing three characteristics of racist speech: "the message is of racial inferiority," is "directed against a historically oppressed group," and "is persecutorial, hateful, and degrading"); Schauer, *supra* note 26, at 1349.

For more on definitions of hate speech, see WALDRON, *supra* note 16, at 8 (providing definitions found in Canada, Denmark, Germany, New Zealand, and the United Kingdom).

assessment and Court findings of unconstitutional abridgements of speech, provide support for this descriptive claim via a selected and not exhaustive survey of Court decisions involving governmental prohibition of speech wherein the harm of the at-issue speech is an aspect of the case. The normative question: Should the Court adopt and employ an explicit harm-assessment analysis in hate speech cases? Taking up this question, Part III examines decisions in which the Court and individual Justices assess the posited harms of hate speech in the course of ruling on the constitutionality of state abridgments of "the freedom of speech"[30] and considers two hate-speech decisions by the Supreme Court of Canada and that court's harm-assessment approach. Expressing the view that a harm-assessment analytic should be part of the First Amendment analysis in this area of the law, Part III then suggests the need for a debate concerning the development and deployment of an explicit harm-assessment analysis applicable to hate speech regulations, and calls for judicial and scholarly engagement with this important issue.

I. HARM-ASSESSMENT AND CONSTITUTIONAL PROHIBITIONS

Certain speech and expression can expose others to speech-related harm, negative consequences, and costs. This part provides a survey of cases in which governmental regulation and prohibition of speech was challenged, the issue of harm was explicitly or implicitly part of the discussion and the Supreme Court's decisional calculus, and the Court answered in the negative whether the at-issue speech was protected by the First Amendment.

In early Twentieth-Century decisions, the Court affirmed the criminal convictions of individuals charged with violating the federal Espionage Act of 1917. Writing for a unanimous Court in *Schenck v. United States*,[31] Justice Oliver Wendell Holmes stated that the inquiry must be made in each case as to "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[32] During times of war "things might be said that in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[33] Again writing for a unanimous Court in *Frohwerk v. United*

30. *See supra* note 8 and accompanying text.
31. Schenck v. United States, 249 U.S. 47, 49 (1919).
32. *Id.* at 52.
33. *Id.*

States,[34] Justice Holmes opined that the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language."[35] And in *Debs v. United States*,[36] Justice Holmes' opinion for yet another unanimous Court examined a speech by Eugene V. Debs, "the main theme" of which "was Socialism, its growth, and a prophecy of its ultimate success."[37] Justice Holmes determined that the evidence demonstrated "that if in that speech [Debs] used words tending to obstruct the [military] recruiting service he meant that they should have that effect. The principle is two well established and too manifestly good sense to need citation of the books."[38] As can be seen, in these cases the Court was concerned about and validated the criminalization of what it considered to be a particular speech-related harm—the creation of a clear and present danger subject to (in the Court's view constitutional) Congressional regulation.[39]

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34. 249 U.S. 204 (1919).

35. *Id.* at 206.

36. 249 U.S. 211 (1919).

37. *Id.* at 213.

38. *Id.* at 216 (bracketed material added).

39. Espionage Act convictions were also affirmed in subsequent cases decided by the Court over the dissent of Justice Holmes. In *Abrams v. United States*, 250 U.S. 616 (1919), Holmes opined that "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment." *Id.* at 630 (Holmes, J., dissenting). In *Gitlow v. New York*, 268 U.S. 652 (1925), a dissenting Justice Holmes adhered to the clear and present danger test but found no such danger in the case before the Court. He wrote:

> 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. The only differences between expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.

Id. at 673 (Holmes, J., dissenting); *see also* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., joined by Holmes, J., concurring) ("To justify suppression of free speech there must be reasonable ground that the danger apprehended is imminent . . . that the evil to be prevented is a serious one."); Dennis v. United States, 341 U.S. 494 (1951) (application of the federal Smith Act to defendants convicted of conspiring to organize the Communist Party and to teach and advocate the overthrow of the United States by force and violence did not violate the First Amendment; the statute was applied to a clear and present danger and the legislature had the right to prevent that danger).

For more on Justice Holmes and the First Amendment, see THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND

In its 1942 decision in *Chaplinsky v. New Hampshire*,[40] the Court affirmed the conviction of Walter Chaplinsky. Chaplinsky said to a police officer, "You are a God damned racketeer" and "a damned Fascist," and stated that "the whole government of Rochester are Fascists or agents of Fascists."[41] The Court, in an opinion by Justice Frank Murphy, announced that "it is well understood that the right of free speech is not absolute at all times and under all circumstances," and that "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[42]

These limited classes include the "lewd and the obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[43] These

> utterances are no[t an] essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[44]

The operation of the harm-assessment analytic—the Court determined that the infliction of injury and breach of the peace removes such speech form the protection of the First Amendment—is on full display in *Chaplinsky*.[45]

CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013).

40. 315 U.S. 568 (1942).

41. *Id.* at 569.

42. *Id.* at 571–72.

43. *Id.* at 572.

44. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

45. In a subsequent decision, the Court upheld the conviction of a soap box speaker who refused a police order to stop making a speech in which he called the mayor of Syracuse, New York a "champagne-sipping bum" and the American Legion a "Nazi Gestapo," and told a crowd that "negroes . . . should rise up in arms and fight for their rights." Feiner v. New York, 340 U.S. 315, 320 (1951). The Court concluded that the arrest was the "means which the police, faced with a crisis, used in the exercise of their power and duty to preserve the peace and order." *Id.* at 321. In the Court's view, Feiner was not convicted for what he said; the police were motivated by "a proper concern for the preservation of order and the protection of the general welfare." *Id.* at 319.

The constitutionality of state laws prohibiting the sale of obscene materials to minors and criminalizing child pornography have been considered by the Court. In *Ginsberg v. New York*,[46] the Court held—in an opinion by Justice William J. Brennan, Jr.—that a New York law prohibiting the sale of obscene materials to minors under the age of 18 did not violate the First Amendment. The challenged law "expressly recognizes the parental role in assessing sex-related material harmful to minors according to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors."[47] A dissenting Justice William O. Douglas, joined by Justice Hugo Black, wrote that he could not say that the Court erred in concluding that the type of literature proscribed by the law "does harm."[48] But, he argued, the First Amendment "was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature."[49] He opined:

> Today, this Court sits as the Nation's board of censors. With all respect I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old.[50]

Another New York law criminalizing child pornography withstood constitutional review in *New York v. Ferber*.[51] In that case, a harm-assessing Court concluded that the distribution of films and photographs depicting sexual activity by minors "is intrinsically related to the sexual abuse of children" as such materials "are a permanent record of the children's participation, and the harm done to that child is exacerbated by their circulation."[52] The "nature of the harm to be combated requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age."[53]

A city ordinance prohibiting the showing of adult motion pictures at theaters located within one thousand feet of a residential zone,

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46. 390 U.S. 629 (1968).
47. *Id.* at 639 (quotation marks omitted).
48. *Id.* at 654 (Douglas, J., dissenting).
49. *Id.* at 655.
50. *Id.* at 656.
51. 458 U.S. 747 (1982).
52. *Id.* at 759.
53. *Id.* at 764.

single or multiple-family dwelling, church, park, or school was held to be constitutional in *City of Renton v. Playtime Theatres, Inc.*[54] Justice (later Chief Justice) William H. Rehnquist, writing for the Court, reasoned that the ordinance was not aimed "at the content of the films shown" at adult theaters "but rather at the secondary effects of such theaters on the surrounding community."[55] The ordinance was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of urban life."[56] In addition, the ordinance provided the city with "'a reasonable opportunity to experiment with solutions to admittedly serious problems'" via a narrowly tailored law "affect[ing] only that category of theaters shown to produce the unwanted secondary effects."[57]

In a subsequent decision, a deeply divided Court rejected the claim that an Indiana public indecency law's prohibition of totally nude dancing violated the First Amendment. The plurality opinion in *Barnes v. Glen Theatre, Inc.*[58] determined that, despite its incidental limitations on some expressive activity, the law was justified given the "statute's purpose of protecting societal order and morality," and the state's effort to prevent the "evil" of public nudity "whether or not it is combined with expressive activity."[59] A concurring Justice Antonin Scalia argued that

> [o]ur society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional [sense] . . . immoral. . . . [T]here is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."[60]

Justice David H. Souter, concurring, argued that the state's interest "in preventing prostitution, sexual assault, and other criminal activity" was sufficient to justify enforcement of the law in the

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54. 475 U.S. 41 (1986).

55. *Id.* at 47.

56. *Id.* at 48 (internal quotation marks and brackets omitted).

57. *Id.* at 52 (quoting Young v. American Mini Theatres, Inc., 437 U.S. 50, 71 (1976)).

58. 501 U.S. 560 (1991).

59. *Id.* at 568, 571 (plurality opinion).

60. *Id.* at 575 (Scalia, J., concurring in the judgment) (bracketed material added); *see also id.* (American society prohibits certain activities because they are immoral, including "sadomasochism, cock fighting, bestiality, suicide, drug use, prostitution, and sodomy.").

context of adult entertainment given the correlation of nude dancing with other evils "unrelated to the suppression of free expression."[61] In dissent, Justice Byron Raymond White, joined by Justices Thurgood Marshall, Harry A. Blackmun, and John Paul Stevens, contended that the purpose of the challenged law was "to protect the viewers from what the State believes is the harmful message that nude dancing communicates."[62]

The harms of residential picketing were assessed in *Frisby v. Schultz*.[63] Holding that residential picketing prohibitions can serve the legitimate interest in protecting residential privacy and the unwilling listener, the Court stated that targeted picketing directed at an individual in her home "inherently and offensively intrudes on residential privacy" and can have a "devastating effect . . . on the quiet enjoyment of the home."[64] And a state law regulating "sidewalk counseling" near a reproductive health care facility was upheld in *Hill v. Colorado*,[65] wherein the Court ruled that the challenged law legitimately protected an unwilling listener's right to be let alone and right to passage without obstruction.[66]

More recently in *Garcetti v. Ceballos*,[67] a deeply divided Court, in an opinion by Justice Anthony M. Kennedy, held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[68] Accordingly, the Court rejected the First Amendment action of Richard Ceballos, a deputy district attorney who claimed that he was subjected to retaliatory employment actions because he authored a memorandum recommending the dismissal of a pending criminal case.[69] In writing

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61. *Id.* at 583, 586 (Souter, J., concurring).

62. *Id.* at 591 (White, J., dissenting).

63. 487 U.S. 474 (1988).

64. *Id.* at 486.

65. 530 U.S. 703 (2000).

66. *See id.* at 718; *see also* McCullen v. Coakley, ___ U.S. ___, 134 S. Ct. 2518 (2014) (state law making it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to a place other than a hospital where abortions are performed violates the First Amendment); Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994) (criminal statute prohibiting any person from knowingly approaching within eight feet of another person near a health care facility without that person's consent did not violate the First Amendment).

67. 547 U.S. 410 (2006).

68. *Id.* at 421.

69. Ceballos was concerned that an affidavit used to obtain a search warrant contained serious misrepresentations. He prepared and submitted to his superiors a memorandum noting his concerns, and the supervisors decided to proceed with the

the memorandum Ceballos did "what he was employed to do" and was not acting or speaking as a citizen, Justice Kennedy reasoned.[70] While a public employee has a right to speak as a citizen on matters of public concern,[71] providing First Amendment protection for employment-duty communications would displace "managerial discretion by judicial supervision," would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and separation of powers," and would bring into "existence . . . a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job."[72] The potential harm animating the Court's decision and reasoning was, not the harm to Ceballos' claimed free-speech rights, but to the employer's operational concerns and to the demands that would be placed on the judiciary under a legal regime protecting the asserted right.

Justice Stevens, dissenting, asserted that "it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."[73] Justice David Souter, joined by Justices Stevens and Ruth Bader Ginsburg, argued that the

> private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.[74]

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prosecution. Ceballos was called as a witness by the defense and expressed his concerns about the affidavit; the trial court rejected the challenge to the warrant. Ceballos alleged that the employer retaliated against him because of the memorandum.

70. *Garcetti*, 547 U.S. at 421, 422.

71. *See* City of San Diego v. Roe, 543 U.S. 77 (2004); Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Township High School Dist. 205, 391 U.S. 563 (1968). "The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment." *City of San Diego*, 543 U.S. at 80.

72. *Garcetti*, 547 U.S. at 423, 426.

73. *Id.* at 427 (Stevens, J., dissenting).

74. *Id.* at 428 (Souter, J., dissenting).

And Justice Stephen Breyer, rejecting the Court's rule as "too absolute," called for judicial balancing of the employee's interest in commenting on a matter of public concern and the interest of the state-employer in promoting efficient public services performed by and through its workers.[75] Ceballos' speech was "professional speech—the speech of the lawyer."[76] Further,

> [w]here professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad governmental authority in likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances.[77]

In *Morse v. Frederick*,[78] the Court asked whether a high school student had a First Amendment right to display a 14-foot banner stating "BONG HiTS 4 JESUS" at a school-sanctioned and supervised event.[79] Seeing the banner, and believing that it encouraged illegal drug use, the school's principal confiscated the banner, and with the subsequent approval of the school board, suspended the student for ten days.[80] Chief Justice John G. Roberts, Jr., writing for the Court, characterized the banner's message as "cryptic" and noted that the student claimed "that the words were just nonsense meant to attract television cameras."[81] He agreed, however, with the principal's "pro-drug interpretation of the banner," an interpretation based on the belief that high school students would understand "bong hit" as referring to smoking marijuana and would construe the banner as advocating or promoting the illegal use of drugs.[82] Thus, the Chief Justice determined, the principal reasonably concluded that "failing to act

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75. *Id.* at 445, 446 (Breyer, J., dissenting). On judicial balancing, see Barenblatt v. United States, 360 U.S. 109, 126 (1959) ("Where First Amendment rights are asserted . . . resolution of the issue always involves a balancing . . . of the competing private and public interests at stake in the particular circumstances shown.").

76. *Garcetti*, 547 U.S. at 446 (Breyer, J., dissenting).

77. *Id.* at 447.

78. 551 U.S. 393 (2007).

79. Joseph Frederick and his friends held up the banner as Olympic relay torchbearers and camera crews passed through Juneau, Alaska en route to the Winter Olympics in Salt Lake City, Utah. *Id.*

80. *Id.* at 398–99.

81. *Id.* at 401.

82. *Id.* at 401, 402.

would send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[83] The Court's harm assessment—the promotion of the illegal use of drugs and the dangers of such use to students where school officials do not communicate an anti-drug-use stance by confiscation of the banner and suspension of the student-speaker—was central to its determination that the at-issue speech was not protected by the First Amendment.

Consider *Holder v. Humanitarian Law Project*.[84] Federal law makes it a crime to "knowingly provid[e] material support or resources to a foreign terrorist organization."[85] Two United States citizens and six domestic organizations challenged this law claiming, among other things, that the statute criminalized their speech and interactions with the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTEE).[86] The "plaintiffs propose[d] to 'train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes'"[87] and also on how to petition representative bodies, including the United Nations, for relief.[88] In addition, the plaintiffs sought to "'engage in political advocacy on behalf of Kurds living in Turkey,' and 'engage in political advocacy on behalf of Tamils living in Sri Lanka.'"[89]

A six-Justice majority of the Court, in an opinion by Chief Justice Roberts, held that the statute did not violate the plaintiffs' freedom of speech:

> Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the Governments of Turkey

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83. *Id.* at 410.

84. 561 U.S. 1 (2010). For more on this case and the Court's ruling, see David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project, *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147 (2012); David Cole, *The Roberts Court's Free Speech Problem*, N.Y. REV. BOOKS (June 28, 2010, 10:55 a.m.), http://www.nybooks.com/blogs/nyrblog/2010/jun/28/roberts-courts-free-speech-problem/.

85. 18 U.S.C. § 2339B (2012).

86. *Holder*, 561 U.S. at 10.

87. *Id.* at 36 (quoting Humanitarian Law Project v. Mukasey, 552 F.3d 916, 921 n.1 (9th Cir. 2009), *amending*, 509 F.3d 1122 (9th Cir. 2007)).

88. *Id.* at 15 (citing *Mukasey*, 552 F. 3d at 921 n.1).

89. *Holder*, 561 U.S. at 37 (quoting *Mukasey*, 552 F.3d at 921 n.1); *id.* at 41–43 (Breyer, J., dissenting).

> and Sri Lanka, human rights, and international law. They may advocate before the United Nations. . . . Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.[90]

Reasoning that material support intended to support peaceful and lawful conduct "can further terrorism by foreign groups," Chief Justice Roberts opined that "[s]uch support frees up other resources within the organization that may be put to violent ends."[91] Such support "helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks" and "also furthers terrorism by straining the United States' relationship with its allies and undermining cooperative efforts between nations to prevent terrorist attacks."[92] Finding dubious the proposition that one can distinguish material support for a terrorist group's violent and nonviolent activities, the Chief Justice deferred to Congressional findings and the executive branch's conclusion that "all contributions to foreign terrorist organizations . . . will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities."[93] Congress sought "to prevent imminent harms in the context of international affairs and national security, [and] is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."[94]

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90. *Id.* at 25–26.

91. *Id.* at 30.

92. *Id.* at 30, 32.

93. *Id.* at 33 (internal quotations and citations omitted).

94. *Id.* at 35 (citing Zemel v. Rusk, 381 U.S. 1, 17 (1965)). A dissenting Justice Breyer, joined by Justices Ginsburg and Sotomayor, objected that "the Government [had] not met its burden of" demonstrating that prohibiting the plaintiffs' speech served the "compelling interest in combating terrorism." *Id.* at 41 (Breyer, J., dissenting). In his view, the plaintiffs' "activities involve the communication and advocacy of political ideas and lawful means of achieving political ends," and "the subjects the plaintiffs wish to teach . . . concern political speech." *Id.* at 42 (Breyer, J., dissenting). Unlike Chief Justice Roberts, Justice Breyer declined to defer to the views of Congress and the executive branch. The Court "failed to insist upon specific evidence, rather than general assertion" as it deprived the plaintiffs of their First

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As can be seen in the cases discussed in this part, the Court has considered and rejected First Amendment challenges to various governmental prohibitions and criminalization of certain speech and expression. These exemplars support the descriptive claim that in declining to provide First Amendment coverage and protection, the Court assessed—among other things—the speech-related harms, negative consequences, and costs of the at-issue speech as it placed that speech on the lawfully speech-restrictive side of the constitutional-unconstitutional side of the First Amendment line.

II. HARM-ASSESSMENT AND UNCONSTITUTIONAL ABRIDGEMENTS

"What precisely constitutes 'freedom of speech'? And just when does a law abridge that freedom?"[95]

In *Cohen v. California*,[96] Robert Paul Cohen was convicted of malicious or willful disturbance of the peace after he wore a jacket displaying the phrase "Fuck the Draft" in a corridor of a Los Angeles County courthouse.[97] Setting aside the conviction, the Court, per Justice John Marshall Harlan, observed that Cohen wore the jacket . . . "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."[98] The case did not involve obscenity and erotic expression or fighting words directly and personally insulting others, Justice Harlan noted, and was not an instance in which the state employed its police power to prevent a speaker's intentional provocation of a group.[99] Persons in the courthouse "could effectively avoid further bombardment of their sensibilities simply by averting their eyes," and there was no evidence that persons unable to avoid Cohen's expressive conduct

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Amendment protections. *Id.* at 62; *see also* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 730 (2011) (*Holder* "allowed the government to prohibit speech that in no way advocated terrorism or taught how to engage in terrorism solely because the government felt that the speech assisted terrorist organizations. The restriction on speech was allowed without any evidence that the speech would have the slightest effect on increasing the likelihood of terrorist activity.").

95. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 160 (2010).

96. 403 U.S. 15 (1971).

97. *Id.* at 15.

98. *Id.* at 16 (quoting People v. Cohen, 1 Cal. App. 3d 94, 97–98, 81 Cal. Rptr. 503, 505 (1969)).

99. *See id.* at 20.

objected to it.[100] "[W]hile the . . . four-letter word litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."[101]

The constitutionality of a school district's prohibition of the wearing of black armbands by students publicizing their objections to and supporting a truce in the Vietnam War was the issue before the Court in *Tinker v. Des Moines Independent Community School District*.[102] Learning that students planned to wear the armbands, a policy adopted by school principals provided that students wearing the armband "would be asked to remove it" and would be suspended if they refused to do so.[103] Three students wore the armbands to their schools and were suspended.[104] "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Justice Abe Fortas wrote in his opinion for the Court.[105] The wearing of the armbands "was closely akin to 'pure speech,'" he reasoned, "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance . . . ."[106] While school authorities were concerned that the wearing of the armbands could cause a disturbance, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[107] "[T]o justify the

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100. *Id.* at 21–22.

> Assuming that even Justice Harlan would have agreed that one cannot avert one's eyes until one's eyes have seen what one would want to avert them from, the issue then turns on how much, if at all, the mind and the memory will retain that which one wishes he had not seen in the first place.

Schauer, *supra* note 1, at 106.

101. *Cohen*, 403 U.S. at 25.

102. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

103. *Id.*

104. *Id.*

> [S]chool authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these.

Id. at 510.

105. *Id.* at 506.

106. *Id.* at 505, 508.

107. *Id.* at 508.

prohibition of a[n] . . . expression of opinion, [the state] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," such as a showing "that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."[108] In the absence of facts which may have reasonably led a school official to "forecast substantial disruption . . . or disorders on the school premises," the students' wearing of the armbands "to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them" were constitutionally protected forms of expression.[109] Accordingly, the Court held that the school district's policy prohibiting the wearing of armbands violated the First Amendment.[110]

Before the Court in *Texas v. Johnson*[111] was a First Amendment challenge to Gregory Johnson's conviction for burning an American flag.[112] The state argued that the conviction was justified by its interest in preventing breaches of the peace.[113] Justice Brennan's five-Justice majority opinion, finding no actual or threatened disturbance of the peace, determined that the state's argument would "eviscerate [the Court's] holding in *Brandenburg*" *v. Ohio*.[114]

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108. *Id.* at 509; *see also id.* at 513 (student conduct which "materially disrupts classwork or . . . invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech").

109. *Id.* at 514.

110. *Id.* Justice Black wrote a dissenting opinion in which he "disclaim[ed] any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." *Id.* at 526 (Black, J., dissenting). In his view, the armbands "did divert students' minds from their regular lessons" and "diverted them to thoughts about the highly emotional subject of the Vietnam war." *Id.* at 518. Allowing students to "defy and flout orders of school officials . . . is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary." *Id.* at 518. Justice Black opined, further, that "it is nothing but wishful thinking to imagine that young, immature students will soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils." *Id.* at 525. He would not subject the schools "to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students." *Id.* at 525.

111. 491 U.S. 397 (1989).

112. *Id.* at 402.

113. *Id.* at 409.

114. *Id.*; *see* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), discussed *infra* note 248 and accompanying text.

Nor did Johnson's flag burning fall within the class of prohibited fighting words: "No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs."[115] Texas also argued that Johnson's conviction was justified by "its interest in preserving the flag as a symbol of nationhood and national unity."[116] Justice Brennan was not persuaded. "The Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others."[117] Given the "bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," the state could not constitutionally "foster its own view of the flag by prohibiting expressive conduct relating to it."[118]

Four Justice dissented. Chief Justice Rehnquist, joined by Justices White and Sandra Day O'Connor, argued that Johnson's flag burning—like Chaplinsky's provocative words—conveyed nothing more that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for the purposes of the First Amendment: it is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a public breach of the peace.[119]

For Chief Justice Rehnquist, "flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others."[120] Assessing the harm of flag burning, he wrote that "one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning."[121]

In a separate dissent, Justice Stevens wrote that the interest in preserving the "value of the flag as a symbol cannot be measured"

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115. *Johnson*, 491 U.S. at 409.

116. *Id.* at 413.

117. *Id.* at 411.

118. *Id.* at 414–15; *see also* United States v. Eichman, 496 U.S. 310, 312 (1990) (striking down federal anti-flag-burning law as violative of the First Amendment).

119. *Johnson*, 491 U.S. at 431 (Rehnquist, C.J., dissenting) (quoting Chaplinsky v. New Hampshire, 315 U.S. 569 (1942)).

120. *Id.* at 432.

121. *Id.* at 435.

and "is both significant and legitimate."[122] In his view, the nation's "commitment to free expression" did not mean that the United States did not have the power to forbid the desecration of the flag.[123] "The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay."[124] Flag burning tarnishes the value of the flag, Justice Stevens argued, a "tarnish . . . not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag . . .—be employed."[125]

In *Citizens United v. Federal Election Commission*,[126] the Court, per Justice Kennedy, held that the federal "[g]overnment may not [constitutionally] suppress political speech on the basis of the speaker's corporate identity,[127] and that a federal law banning "corporate independent expenditures" for electioneering communications violated the First Amendment.[128] In so holding, the Court rejected the government's argument that "corporate political speech" can be prohibited as a means of preventing corruption or the appearance of corruption.[129] The Court noted that its earlier decision in *Buckley v. Valeo* concluded that this anticorruption interest, sufficient to permit limits on direct contributions to candidates, was "inadequate to justify [the ban] on independent expenditures.[130] "[I]ndependent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" and "[l]imits on [such] expenditures . . . have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption."[131] Disagreeing with the Court on this issue, Justice Stevens (joined by Justices Ginsburg, Breyer and Sotomayor) argued that "even technically independent expenditures can be corrupting in much the same way as direct contributions."[132] Indeed, he opined, a "substantial body of evidence" suggests that corporation-crafted

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122. *Id.* at 437 (Stevens, J., dissenting).

123. *Id.*

124. *Id.*

125. *Id.* (citations omitted).

126. 558 U.S. 310 (2010).

127. Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. at 365.

128. McConnell v. Federal Election Comm., 540 U.S. 93 (2003), overruled by *Citizens United*, 558 U.S. at 365.

129. *Citizens United*, 558 U.S. at 356.

130. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 25, 45 (1976) (per curiam)).

131. *Id.* at 357.

132. *Id.* at 458 (Stevens, J., concurring in part and dissenting in part).

issue ads helping or harming a candidate "began to corrupt the political process in a very direct sense."[133]

> Many corporate independent expenditures, it seemed, had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements. In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.[134]

As can be seen, Justices Kennedy and Stevens differed in their assessments of the corruptive harm and negative consequences of independent expenditures.

United States v. Stevens[135] addressed and answered in the affirmative the question of whether 18 U.S.C. § 48's criminalization of the commercial creation, sale, or possession of certain depictions of animal cruelty, including "crush videos," violated the First Amendment.[136] The government argued that depictions of annual cruelty should be added to five categories of permissible content-based restrictions recognized by the Court: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[137] Chief Justice Roberts' opinion for the Court rejected that argument, stating that the Court does not have a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment" based on "an ad hoc balancing of relative social costs and benefits."[138] While the prohibition of animal cruelty has a historical basis, the Chief Justice was "unaware of any similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment, and the Government points us to none."[139] Moreover, Chief Justice Roberts rejected, as "startling

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133. *Id.* at 454–55.

134. *Id.* at 455.

135. 559 U.S. 460 (2010).

136. *Id.* at 468. Crush videos "depict women slowly crushing animals to death 'with their bare feet while wearing high heeled shoes,' sometimes while 'talking to the animals in a kind of dominatrix patter' over '[t]he cries and squeals of the animals, obviously in great pain.'" *Stevens*, 559 U.S. at 465–66 (quoting H. R. Rep. No. 106-397, p. 2 (1999)).

137. *Id.* at 468–69.

138. *Id.* at 470, 472. These categories are "'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'" *Id.* at 468–69 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

139. *Id.* at 469 (emphasis in original).

and dangerous," the government's proposal of a test balancing the value of the speech against its social costs.[140] The First Amendment "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits"; the amendment "itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."[141]

The sole dissenter in *Stevens*, Justice Samuel A. Alito, Jr. argued that "the harm caused by the underlying crimes" (including the torture and suffering of the animals) "vastly outweighs any minimal value that the depictions might conceivably be thought to possess."[142] Congress having been "presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos," Justice Alito did not "believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue."[143]

In its 2012 *Knox v. SEIU, Local 1000* decision, the Court held that a public-sector union violated the First Amendment when it sought the payment of a special assessment and dues increase by nonunion employees.[144] A class action filed against the union "on behalf of 28,000 nonunion employees" alleged that those workers had been "forced to contribute" to the union's political fund.[145] As noted in Justice Alito's majority opinion, California law's agency shop provision,[146] authorizing the exaction of compulsory fees from

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140. *Id.* at 470.

141. *Id.* Subsequent to the Court's decision, Congress passed the Animal Crush Video Prohibition Act of 2010, Pub. L. 111-294, and expressed its view that "many animal crush videos are obscene" and therefore not protected by the First Amendment. Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, § 2(6), 124 Stat. 3177 (2010). The statute exempts from its coverage "any visual depiction of[:] customary and normal veterinary or agricultural husbandry practices;" "the slaughter of animals for food;" or "hunting, trapping, or fishing." 18 U.S.C. § 48(e)(1) (2012).

142. *Stevens*, 559 U.S. at 495, 498 (Alito, J., dissenting).

143. *Id.* at 493.

144. ___ U.S. ___, 132 S. Ct. 2277 (June 21, 2012). For an excellent discussion and analysis of *Knox*, see Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights after* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023 (2013).

145. *Knox*, 132 S. Ct. at 2286. The special assessment involved a 25% increase in fees, with the additional monies to be used to build a "Political Fight-Back Fund" which would be used to support the union's political objectives in upcoming California elections. *Id.* at 2285–86.

146. California law provides that where a majority of pubic-sector employees in a bargaining unit select a union as the collective-bargaining representative of all the employees in the unit, employees working in such an "agency shop" cannot be

nonunion employees, "constitute[s] a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'"[147] This imposition is tolerated because union collection of fees prevents free riding by nonunion employees who enjoy the employment benefits obtained by the union in collective bargaining.[148] Justice Alito observed that this compulsion of the payment of agency fees by nonunion employees is "an anomaly—one that we have found to be justified by the interest in furthering 'labor peace,'" and he declined to revisit the issue of the constitutionality of compulsory fees in the context of a union's collection of annual dues.[149] Nor did he address the constitutionality of the default rule requiring objecting nonunion employees to opt out of paying the non-chargeable share of union dues. Characterizing the opt-out requirement as "a remarkable boon for unions" carrying with it the risk that a nonunion employee's fees could be used to further the union's political and ideological objectives,[150] Justice Alito nevertheless concluded that permitting union collection of regular and annual fees from nonmembers under the opt-out regime approached but did not cross "the limit of what the First Amendment can tolerate."[151]

Turning his attention to the union's collection of the special assessment, Justice Alito saw no justification for further impingement on nonunion employees' First Amendment rights beyond that already imposed by the opt-out requirement applicable to the payment of annual dues.[152] "The general rule—individuals should not be compelled to subsidize private groups or private speech—should prevail."[153] "To respect the limits of the First Amendment, the union should have . . . allow[ed] nonmembers to opt in to the special fee rather than requiring them to opt out."[154] This

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compelled to join the union. Employees who choose not to become union members are required, as a condition of employment, to pay an annual fee for the cost of chargeable expenses related to collective bargaining. Chargeable expenses do no not include, and nonunion employees cannot be required to pay for, the union's political and ideological projects. *See* CAL. GOVT. CODE ANN. § 3502.5(a) (2012).

147. *Knox*, 132 S. Ct. at 2289 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 455 (1984)).

148. *Id.* (citing Davenport v. Washington Ed. Assn., 551 U.S. 177, 181 (2007)).

149. *Id.* at 2290 (citing Teachers v. Hudson, 475 U.S. 292, 303 (1986)).

150. *Id.* at 2289.

151. *Id.* at 2291.

152. *Id.* at 2292.

153. *Id.* at 2295.

154. *Id.* at 2293.

new rule,[155] mandating as a matter of constitutional law an opt-in regime for special assessments, was justified by a perceived need to protect nonunion employees from what the Court considered to be a problematic expansion of the agency shop anomaly and the risks attendant to compelling the speech and association of nonunion employees asked to pay a special assessment to the union.[156]

In another recent case, *United States v. Alvarez*,[157] the Court reviewed the constitutionality of the Stolen Valor Act of 2005[158] as applied to Xavier Alvarez.[159]

> Lying was his habit. . . . [He] lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing that he held the Congressional Medal of Honor, [he] ventured onto new ground; for that lie violates a federal criminal statute.[160]

In his plurality opinion, Justice Kennedy—joined by Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor—concluded that the statute violated the First Amendment.[161] Citing *United States v. Stevens*,[162] he declared that permissible content-based restrictions on speech have been limited to "'historic and traditional categories'" such as "incite[ment] to imminent lawless action," "obscenity," "defamation," "speech integral to criminal conduct," "fighting words," "child pornography," "fraud," "true

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155. *See id.* at 2289 (Sotomayor, J., concurring in the judgment) (complaining that the Court "announces its novel rule without any analysis of potential countervailing arguments and without any reflection on the reliance interests our old rules have engendered").

156. *See also* Harris v. Quinn, ___ U.S. ___, 134 S. Ct. 2618 (2014) (holding that Illinois agency-fee provision requiring nonunion home care personal assistants to pay fees to union representing assistants violated the First Amendment).

157. ___ U.S. ___, 132 S. Ct. 2537 (2012) (plurality opinion).

158. *See* 18 U.S.C. § 704 (2012). The statute provided that "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both." 18 U.S.C. § 704(b) (2012). If the false representation involved the awarding of the Congressional Medal of Honor, the offender was subject to an enhanced penalty of a fine and "imprisonment of not more than one year, or both." 18 U.S.C. § 704(c)(1) (2012).

159. *Alvarez*, 132 S. Ct. at 2537.

160. *Id.* at 2542.

161. *Id.* at 2540.

162. 559 U. S. 460 (2010), discussed *supra* notes 135–43 and accompanying text.

threats," and speech involving "grave and imminent threats" the government is empowered to prevent.[163] A First Amendment exception for false statements is not such an historic and traditional category of unprotected speech.[164] Nor, as the United States argued, did the Court's precedents support the government's position "that false statements have no value and hence no First Amendment protection."[165] Justice Kennedy wrote:

> These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation . . . In those decisions the falsity of the speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.[166]

As written, the Stolen Valor Act applied to false statements made at any time; thus, Justice Kennedy stated, "[i]t can be assumed that it would apply to, say, a theatrical performance" and "to personal, whispered conversations within a home . . . without regard to whether the lie was made for the purpose of material gain."[167] Subjecting the statute to strict scrutiny review, he

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163. *Alvarez*, 132 S. Ct. at 2544.

164. *Id.*

165. *Id.* at 2544; *see id.* at 2544–45 and cases cited therein.

166. *Id.* at 2545 (internal citations omitted). Justice Kennedy also rejected the government's argument that courts have found permissible regulations of false speech in the criminal prohibition of false statements to a government official, laws punishing perjury, and prohibitions of false representations that a person is speaking as a government official or on behalf of the government. Federal law banning false statements to government officials "does not lead to the broader proposition that any false statements are unprotected when made to any person, at any time, in any context." *Id.* at 2546. Anti-perjury laws address the harms of perjured testimony and remind witnesses that their "statements will be the basis for official government action, action that often affects the rights and liberties of others. Sworn testimony is quite distinct from lies not spoken under oath and simply intended to puff up oneself." *Id.* And laws prohibiting the false representation that a person is speaking on behalf of the government and prohibiting the impersonation of a government officer "protect[s] the integrity of Government processes, quite apart from merely restricting false speech." *Id.* "These restrictions . . . do not establish a principle that all proscriptions of false statements are exempt from rigorous First Amendment scrutiny." *Id.*

167. *Id.* at 2547. Responding to this aspect of Justice Kennedy's opinion,

acknowledged the government's compelling interest in preserving the integrity of the military honors system and recognized that a pretender's lie about having received the Medal of Honor "might harm the Government by demeaning the high purposes of the award" and could offend those who truly held the medal.[168] But those interests did not satisfy the government's burden of showing a "direct causal link between the speech restrictions and the injury to be prevented," the Justice concluded.[169] The claim that the public's perception of military awards was diluted by false claims like that made by Alvarez was not supported by evidence, Justice Kennedy opined, and the government did not show that counterspeech or refutation of the false statement would not achieve its interests.[170] "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[171]

Justice Breyer, joined by Justice Kagan, agreed with Justice Kennedy that the statute violated the First Amendment, but did not base his conclusion on Kennedy's categorical analysis. Justice Breyer argued that in answering the question whether a statute violates the First Amendment,

> [T]he Court has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately, the Court has had to determine whether the

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Congress passed the Stolen Valor Act of 2013, Pub. L. No. 113-12, and made clear that the statutory prohibition covers "[w]hoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds one-self out to be a recipient of a decoration or medal . . . shall be fined under this title, imprisoned not more than one year, or both." Stolen Valor Act of 2013, Pub. L. No. 113-12, § 2, 127 Stat. 448 (2013).

168. *Alvarez*, 132 S. Ct. at 2549.

169. *Id.* at 2548–49.

170. *Id.* at 2549–50.

171. *Id.* at 2550; *see also id.* at 2551 (positing that the government could likely protect the "integrity of military awards" by the "less speech-restrictive means" of a "government-created database" listing the winners of the Congressional Medal of Honor).

> statute works speech-related harm that is out of proportion to its justifications.[172]

Applying intermediate scrutiny,[173] Justice Breyer determined that the Stolen Valor Act "has substantial justification" as the law sought "to protect the interest of those who have sacrificed their health and life for their country" and also sought to "preserve intact the country's recognition of that sacrifice in the form of military honors" while preventing the dilution of the awards' value.[174] "Thus, the statute risks harming protected interests but only in order to achieve a substantial countervailing objective."[175] That governmental objective could be achieved "in less burdensome ways," he stated, namely, "by enacting a similar but more finely tailored statute" providing that some awards required "greater protection than others," or that a false statement caused a particular or material harm, or focused "on lies most likely to be harmful or on contexts where such lies are most likely to cause harm."[176] Concluding that the statute as written "works disproportionate constitutional harm" and "fail[ed] intermediate scrutiny," Justice Breyer "concur[red] in the Court's judgment."[177]

In his harm-assessment dissent, Justice Alito, joined by Justice Scalia and Justice Thomas, argued that "the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."[178] The Stolen Valor Act was a Congressional response to a proliferation of false claims made about the receipt of military awards, lies which "inflict substantial harm" as false claimants obtained financial or material rewards while "debas[ing] the distinctive honor of military awards."[179] "[T]he proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common

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172. *Id.* at 2551 (Breyer, J., concurring in the judgment).

173. "Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like" present concerns that governmental regulation of supposedly false speech would suppress truthful speech and call for strict scrutiny review. *Id.* at 2552. Strict scrutiny was not required in the case before the Court, Justice Breyer reasoned, as it involved the regulation of "easily verifiable" false statements, which "are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas." *Id.*

174. *Id.* at 2555.

175. *Id.*

176. *Id.* at 2555, 2556. For the post-*Alvarez* response of Congress, see *supra* note 167.

177. *Alvarez*, 132 S. Ct. at 2556 (Breyer, J., concurring in the judgment).

178. *Id.* at 2557 (Alito, J., dissenting).

179. *Id.* at 2558–59.

than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps."[180] Thus, Justice Alito urged, "it was reasonable for Congress to conclude that the goal of preserving the integrity of our country's top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags."[181]

Whether a California law placing restrictions on "violent video games" violated the First Amendment was the query answered in the affirmative by the Court in *Brown v. Entertainment Merchants Association*.[182] The challenged law prohibited the sale or rental of such games to minors and required the labeling of "18" on the packaging.[183] Justice Scalia's opinion for the Court initially noted, and the state conceded, that video games qualify for the protection of the First Amendment.[184]

> Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.[185]

Deeming the case controlled by *United States v. Stevens*,[186] Justice Scalia opined that California attempted "to shoehorn speech about violence" into the historically recognized obscenity exception to the First Amendment.[187] "That does not suffice. Our cases have been clear that the obscenity exception . . . does not cover whatever a

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180. *Id.* at 2559.

181. *Id.*

182. ___ U.S. —, 131 S. Ct. 2729 (2011).

183. *Id.* at 2732. The statute "cover[ed] games 'in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being'" and acts depicted in a way that a "'reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,'" and that "'causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.'" *Id.* at 2732–33 (quoting CAL. CIV. CODE ANN. § 1746(d)(1)(A)). Violations of the law were punishable by a civil fine of up to $1,000. *Id.* at 2733 (citing CAL. CIV. CODE ANN. § 1746.3).

184. *Id.*

185. *Id.*

186. *Id.* at 2734 (citing United States v. Stevens, 559 U.S. 460 (2010)), discussed *supra* notes 135–43 and accompanying text.

187. *Id.*

legislature finds shocking, but only depictions of 'sexual conduct.'"[188] In his view, speech concerning violence "is not obscene" and "it is of no consequence that California's statute mimics the New York statue regulating obscenity-for-minors that we upheld in *Ginsberg v. New York* . . . ."[189]

California, "acknowledg[ing] that it [could not] show a "direct causal link between violent video games and harm to minors," relied on studies by research psychologists "show[ing] a connection between exposure to violent video games and harmful effects on children."[190] Applying strict scrutiny,[191] Justice Scalia rejected the studies:

> They do not prove that violent video games *cause* minors to *act* aggressively (which would at least be a beginning). . . . They show at best some correlation between exposure to violent entertainment and miniscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent video game than after playing a nonviolent game.[192]

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188. *Id.* (quoting Miller v. California, 413 U.S. 15, 24 (1973)). In *Miller*, the Court held that obscene material, defined as "disgusting to the senses" and "grossly repugnant to the generally accepted notions of what is appropriate," is not protected by the First Amendment. *Miller*, 413 U.S. at 18–19 n.2, 36. The Court set out the following questions to be answered by the trier of fact: (1) "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest'"; (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)). As then-Professor Elena Kagan noted, the Court's "standard for identifying obscenity was justified in part by reference to real-world harms." Elena Kagan, *Regulation of Hate Speech and Pornography after* R.A.V., 60 U. CHI. L. REV. 873, 893 (1993).

189. *Brown*, 131 S. Ct. at 2735; *see* Ginsberg v. New York, 390 U.S. 629 (1968), discussed *supra* notes 46–50 and accompanying text.

190. *Brown*, 131 S. Ct at 2738–39.

191. The state had to demonstrate that its law was "justified by a compelling government interest and is narrowly drawn to serve that interest." *Id.* at 2738 (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992)). "The State must specifically identify an 'actual problem' in need of solving . . . and the curtailment of free speech must be actually necessary to that solution." *Id.* (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 822–23 (2000)).

192. *Id.* at 2739.

Not persuaded by "some of the evidence brought forward to support the harmfulness of video games,"[193] and noting that he was not passing judgment on the state legislature's view that violent video games "corrupt the young or harm their moral development,"[194] Justice Scalia concluded that violent video games did not constitute a well-defined and narrowly limited category of speech "'prevention and punishment of which have never been thought to raise any Constitutional problem.'"[195]

Concurring in the judgment, Justice Alito, joined by Chief Justice Roberts, concluded that the "well intentioned" California statute was "not framed with the precision that the Constitution demands."[196] He did not agree, however, with what he viewed as the Court's hasty dismissal of the state legislature's judgment. "There are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show."[197] "Any assessment of the experience of playing video games must take into account certain characteristics of the video games that are now on the market and those that are likely to be available in the near future."[198] Video games "create realistic alternative worlds in which millions of players immerse themselves for hours on end";[199] the violence of video games is "astounding" as victims are "dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces" and "killed with every imaginable implement";[200] "there is no antisocial theme too base for some in the video-game industry to exploit," including the Columbine High School and Virginia Tech murders;[201] and games exist in which rape, ethnic cleansing, and shooting a rifle at the head of President John F. Kennedy are the objectives.[202] Given the technological characteristics of violent video games allowing "troubled teens to experience in an extraordinarily

193. *Id.* at 2741.

194. *Id.*

195. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).

196. *Id.* at 2742 (Alito, J., concurring in the judgment).

197. *Id.* at 2742 (Alito, J., concurring in the judgment); *see also id.* at 2750 ("[O]nly an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game.") (Alito, J., concurring in the judgment).

198. *Id.* at 2748 (Alito, J., concurring in the judgment).

199. *Id.* (Alito, J., concurring in the judgment).

200. *Id.* at 2749 (Alito, J., concurring in the judgment).

201. *Id.* (Alito, J., concurring in the judgment).

202. *See id.* at 2749–50 (Alito, J., concurring in the judgment).

personal and vivid way what it would be like to carry out unspeakable acts of violence,"[203]

> [T]here is certainly a reasonable basis for thinking that the experience of playing a video game may be quite different from the experience of reading a book, listening to a radio broadcast, or viewing a movie. And if this is so, then at least for some minors, the effects of playing violent video games may also be quite different. The Court acts prematurely in dismissing this possibility out of hand.[204]

Justice Breyer's harm-assessing dissent suggested that a state could legitimately "advance its interests in protecting children against the special harms present in an interactive video game medium through a default rule that still allows parents to provide their children with what their parents wish."[205] He pointed out that studies by social scientists "have found *causal* evidence that playing these games result in harm," and that experimental studies, surveys of eighth and ninth grade students, neuroscience and meta-analyses show the ways in which those who play violent video games display aggressive characteristics.[206] Some of the studies "say that the closer a child's behavior comes, not to watching, but to *acting* out horrific violence, the greater the potential psychological harm."[207] Noting that the studies he cited had critics who produced their own studies and came to different conclusions,[208] Justice Breyer stated:

> I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm.[209]

Thus, he concluded, the Court should have deferred to the California legislature's determination that violent video games are likely to harm children. "The majority, in reaching its own

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203. *Id.* at 2750 (Alito, J., concurring in the judgment).

204. *Id.* at 2751 (Alito, J., concurring in the judgment).

205. *Id.* at 2767 (Breyer, J., dissenting).

206. *Id.* at 2768 (Breyer, J., dissenting).

207. *Id.*

208. *See id.* at 2771–70 (Breyer, J., dissenting) (appendixes to Justice Breyer's opinion listing peer-reviewed academic journal articles supporting and not supporting the hypothesis that violent video games are harmful).

209. *Id.* at 2769 (Breyer, J., dissenting).

conclusion about the validity of the relevant studies, grants the legislature no deference at all."[210]

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The cases discussed in this part provide examples of the ways in which the Court has struck down governmental prohibitions of certain speech in decisions in which speech-related harms and negative consequences were referenced but were not found to be sufficient to place the at-issue speech outside the First Amendment's protective umbrella. Of particular interest is *Entertainment Merchants Association* and its approach to the harm issue. Justice Scalia's majority opinion did not declare that the speech-related harm of violent video games was of no relevance or significance; he was not persuaded that California's evidence supporting the challenged regulation proved that such games cause minors to act aggressively.[211] The Court thus concluded, not that the issue of harm was immaterial, but that the state's proof of harm in the case before it was deficient.

III. HARMFUL AND HATEFUL SPEECH

As demonstrated in the preceding parts of this article, harm assessment has long been an aspect of the Supreme Court's First Amendment jurisprudence. This part focuses on the harms of hate speech, and asks whether, as a descriptive matter, the harm-assessment analytic can also be found in Court decisions addressing the constitutionality of governmental regulation and prohibition of hate speech, and whether, as a normative matter and proposition, the Court should adopt and employ an explicit harm-assessment analysis in hate speech cases.

A. Hate Speech and the Harms Thereof

As previously noted, speech and expression can cause harm and will often be protected "not because it is harmless, but despite the harm it may cause."[212] As Frederick Schauer noted:

> To put it more precisely, existing understandings of the First Amendment presuppose that legal toleration of speech-related harm is the currency with which we as a society pay

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210. *Id.* at 2770 (Breyer, J., dissenting).
211. *Id.*
212. Schauer, *supra* note 26, at 1321.

> for First Amendment protection. Paying a higher price by legally tolerating more harm is thus taken to be necessary in order to get more First Amendment protection. Conversely, it appears equally well accepted that being more concerned about speech-related harm by tolerating less of it requires accepting a commensurately weaker First Amendment.[213]

Who pays this higher price for harm-tolerating free speech? Schauer observed that:

> [E]xisting understandings of the First Amendment are based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay it. This assumption, however, seems curious. It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries. And when in some situations those who bear the cost are those who are least able to afford it, there is even greater cause for concern. If free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech.[214]

Can hate speech cause harm? An "advocate of almost absolute protection of free speech," C. Edwin Baker, expressed his "awareness of the fact that hate speech causes many real harms, many real injuries" and noted the position (one that he rejected) that "these injuries could plausibly justify suppression of hate speech even if suppression was not a wise way to respond [to] the most dramatic evils of racism."[215]

What are the speech-related harms of hate speech?[216] It has been recognized that "[h]ate speech based on race or ethnicity or gender is

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213. *Id.* at 1322.

214. *Id.*

215. C. Edwin Baker, *Hate Speech*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH 57, 79 (Michael Herz & Peter Molnar eds., 2012). Baker argued that "even though the arguments that racist speech causes real harms is surely right, that point is hardly unique to racist speech. Real harm is caused by most speech that judges or legislatures consider as possible bases for legal liability or punishment." *Id.* at 79. He favored a "speech-protective stance despite the harm speech can and does cause. This is especially true given the inevitable errors of identifying what speech causes greater harm than benefits and given the inevitable chilling effect of speech regulation on valuable speech." *Id.*; *see also* C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 981 (1997) (setting forth and discussing the thesis "that the harmfulness of a person's speech itself never justifies a legal limitation on the person's freedom of speech").

216. On definitions of hate speech, see *supra* note 29 and accompanying text.

typically more hurtful and painful to the listener than are other types of generic insults. The literature describing the experience of being victimized by this kind of speech is extensive and convincing."[217] "[B]eing called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face."[218] Persons targeted by hate-speakers can experience "an instinctive, defensive psychological reaction, as well as fear, rage, shock, and flight"[219] and "spirit murder."[220] Mari Matsuda has noted that the targets of racist hate speech experience "physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."[221]

Hate speech can lead to violence directed against the targets of such speech and result in harm and injuries in the form of the loss of reputation, humiliation, and emotional torment.[222] Targets "quit jobs, forego education, leave their homes, avoid certain public places . . . and . . . modify their behavior."[223] Members of targeted groups can be silenced and effectively excluded from participation in public

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217. Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes that Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 204 (1994).

218. Lawrence, *supra* note 6, at 452 (bracketed material added); *see also* Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1823 (1994) ("The fact is that terms like 'nigger,' 'spick,' 'faggot,' and 'kike' evoke and reinforce cultural histories of oppression and subordination. They remind the target that his or her group has always been and remains unequal in status to the majority group.").

219. Turner, *supra* note 11, at 294.

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

221. Matsuda, *supra* note 29, at 2336; *see also Interview with Nadine Strossen, in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 215, at 384 ("There definitely is a cost to allowing hate speech. Particularly if the expression is directly targeted at an individual, it causes hurt feelings and psychological and emotional harm."); Bell, *supra* note 29, at 966 (noting national study in which individuals targeted by the prejudice of others manifested physical or psychological harms); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143 (1982) ("mental or emotional distress is the most obvious direct harm caused by a racial insult," and "mere words, whether racial or otherwise, can cause mental, emotional, or even physical harm to their target, especially if delivered in front of others or by a person in a position of authority").

222. *See* Massey, *supra* note 29, at 158.

223. *Id.* at 2337.

discourse.[224] An affront to the dignity and reputation of individuals,[225] and a "verbal tag" treating all targeted persons as sharing posited negative attributes imputed to their group membership,[226] the harms of hate speech include deontic harm, harm to the marketplace of ideas, and harm to educational environments.[227]

The "likely long-term consequences" of hate speech include the encouragement "of a climate in which, over time, some groups come to be demonized and their discriminatory treatment becomes accepted as normal."[228] Societal condemnation of and response to such consequences and harms via hate speech laws can "mitigate the negative impacts" of hate speech and provide a "normative statement . . . that the society that has adopted them considers expressions of racial hatred to be an attack on equality, which undermines the ability of the target group to attain full equality, and which will not, therefore, be tolerated."[229]

B. Exemplars

1. United States Supreme Court Decisions

In *Terminiello v. City of Chicago*,[230] the Court addressed a First Amendment challenge to the conviction of Arthur Terminiello. Terminiello was found guilty of the offense of disorderly conduct in

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224. *See* Bikhu Parekh, *Is There a Case for Banning Hate Speech?*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 215 at 44 ("Because hate speech intimidates and displays contempt and ridicule for the target group, group members find it difficult not only to participate in the collective life, but also to lead autonomous and fulfilling personal lives."). *But see* BOONIN, *supra* note 29, at 241–45 (discussing and finding deficient the argument that the silencing effect of hate speech justifies restricting such speech). For more on silencing as a consequence of another's speech, see Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635, 648 n.24 (1993).

225. *See* WALDRON, *supra* note 16, at 165 ("[H]ate speech damages the dignity and reputation of individuals in vulnerable groups . . . undermines the public good of socially furnished assurance with which the dignity of ordinary people is supported . . . and defaces and pollutes the environment on which members of vulnerable groups, like the rest of us, have to live their lives and bring up their children.").

226. Delgado, *supra* note 221, at 144.

227. *See* Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 272–77 (1994).

228. Parekh, *supra* note 224, at 45.

229. Toby Mendel, *Does International Law Provide for Consistent Rules on Hate Speech?*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 215, at 426.

230. 337 U.S. 1 (1949).

violation of a city ordinance after a meeting in a Chicago auditorium held under the auspices of the Christian Veterans of America. During that meeting Terminiello said, among other things:

> I am going to talk about some Jews. . . . Now this danger which we face—let us call them Zionist Jews if you will, let's call them atheistic, communistic Jews or Zionist Jews, then let us not fear to condemn them. . . . We must not lock ourselves up in an upper room for fear of the Jews. I speak of the Communistic Zionist Jew, and those are not American Jews. We don't want them here; we want them to go back to where they came from. We are going to stand one and all together and form a solid phalanx of courage and loyalty and strength, and oppose every attempt to breach freedom of speech in America, every attempt to dilute Christianity in America, every attempt to undermine the morality of America, every attempt to shed American blood to promote Zionism in America.[231]

The Court, in an opinion by Justice Douglas, held that Terminiello's conviction violated the First Amendment. Justice Douglas stated that while the freedom of speech is not absolute it "is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view."[232] Terminiello was convicted because his "speech stirred people to anger, invited public dispute, or brought about a condition of unrest," grounds which did not support the conviction in the absence of a clear and present danger.[233]

Beauharnais v. Illinois[234] considered the constitutionality of an Illinois statute criminalizing group libel and the public display of any publication that "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion" and "exposes" them "to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[235] Joseph Beauharnais passed out leaflets in downtown Chicago, Illinois "calling on the Mayor and City Council . . . 'to halt the further

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231. City of Chicago v. Terminiello, 79, N.E.2d 39, 42 (Ill. 1948), *rev'd*, 337 U.S. 1 (1949).

232. *Terminiello*, 337 U.S. at 4.

233. *Id.* at 5.

234. 343 U.S. 250 (1952).

235. *Id.* at 251 (quoting statute).

encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro."[236]

Holding that Beauharnais' conviction and fine for passing out the leaflet did not violate the First Amendment, Justice Felix Frankfurter's opinion for the Court stated that:

> Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan polyglot community.[237]

The state had been the scene of "exacerbated tension between races, often flaring into violence and destruction."[238] In light of this history and the "frequent obligato of extreme racial and religious propaganda," Justice Frankfurter opined that the Court "would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial or religious groups made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented."[239]

Justice Frankfurter then made clear the Court's view that it would be "arrant dogmatism" to deny that the state "may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious groups to which he willy-nilly belongs, as on his own merits."[240] Thus, he concluded, "we are precluded from saying that speech cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved."[241] As can be seen, real and conceivable harms of group libel were factors in the Court's decisional calculus.[242]

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236. *Id.* at 252 (quoting leaflet).

237. *Id.* at 258–59.

238. *Id.* at 259; *see also id.* at 260–61 (referring to race riots in Springfield, East St. Louis, and Chicago, Illinois).

239. *Id.* at 261.

240. *Id.* at 263.

241. *Id.*

242. It has been argued that *Beauharnais* is no longer good law in light of *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See* ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE 159 (2007) (arguing that *Beauharnais* is no longer good law post-*Sullivan*); *see also* Nuxoll v. Indian Prairie School District #204, 523 F.3d 668, 672 (7th Cir. 2008) (although *Beauharnais* "has never been overruled, no

The Court's 1969 *Brandenburg v. Ohio* decision involved a Ku Klux Klan member's First Amendment challenge to his conviction under an Ohio criminal syndicalism law.[243] Clarence Brandenburg, leader of a KKK group, invited a television reporter to attend and film a Klan rally held on a farm; the rally was attended by Klansmen, the reporter, and a cameraman. During the rally Brandenburg gave a speech in which he said that the Klan was not "a revengeant organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might be some revengeance taken."[244] In another speech Brandenburg stated: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."[245] The Court's *per curiam* ruling, overturning Brandenburg's conviction, noted that:

> [The Court's] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[246]

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one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited"). In *Sullivan* the Court held that libel damages cannot be recovered by public officials absent proof of actual malice, *i.e.*, proof that the challenged speech was made with knowledge of its falsity or with reckless disregard of whether the statement was or was not false. Disagreeing that *Sullivan* interred *Beauharnais*, Jeremy Waldron notes that the "African Americans libeled as a group in Beauharnais' obnoxious leaflet were not public officials who had taken on the burden of office." WALDRON, *supra* note 16, at 62 (quotation marks and footnote omitted). Waldron argues that "there is carelessness about the consensus of modern First Amendment jurists that *Sullivan* implicitly overturns *Beauharnais*, a carelessness that I suspect is really the product of nothing more scholarly than wishful thinking." *Id.* at 63; see also Tsesis, *supra* note 28, at 1179–87 (discussing and critiquing the views of scholars who believe that *Beauharnais* is no longer good law); Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 637–40 (2010) (same).

243. 395 U.S. 444 (1969) (per curiam). The state law prohibited the advocacy of "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 445 (quoting statute) (internal quotations omitted).

244. *Id.* at 446.

245. *Id.* at 447.

246. *Id.*

The Ohio law's "bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action" violated the First Amendment.[247] Brandenburg's subversive advocacy could not be punished in the absence of the harm of an incitement to imminent lawless action, with the imminence requirement serving as "a mechanism for weeding out uncertain and low-probability consequences and for heightening the probabilistic and causal connection between speech and harm that must exist before the government may curtail advocacy."[248]

Do the speech-related harms of certain cross burnings justify governmental regulation and prohibition of such expression? In *R.A.V. v. City of St. Paul*,[249] a white teenager was charged with violating the city's bias-motivated crime ordinance after he and several other teenagers allegedly burned a cross inside the fenced yard of an African-American family. Justice Scalia's opinion for five-Justice majority of the Court accepted the Minnesota Supreme Court's determination that the ordinance reached only expressions constituting fighting words within the meaning of *Chaplinsky v. New Hampshire*.[250] However, the Justice reasoned, government may not regulate fighting words on the basis of hostility or favoritism towards the message conveyed.[251] The Minnesota ordinance "applies only to fighting words that insult, or provoke violence, on the basis of race, color, creed, religion or gender."[252] As provided therein:

> Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But

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247. *Id.* at 448–49.

248. Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1308 (2007); *see also* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 523 (2004) (the *Brandenburg* Court's "approach would seem to permit the punishment of subversive advocacy *only* if three conditions are satisfied: there must be *express* advocacy of law violation; the advocacy must call for *immediate* law violation; and the immediate law violation must be *likely* to occur"; *Brandenburg* "effectively overruled in one fell swoop . . . Espionage Act cases decided in and following the World War I era"); *see also supra* note 11 and accompanying text (discussing the World War I era cases affected by *Brandenburg*).

249. 505 U.S. 377 (1992).

250. 315 U.S. 568 (1942), discussed in *supra* notes 119, 139, 195 and accompanying text; *see also* 505 U.S. at 386 ([T]he exclusion of fighting words from the protective scope of the First Amendment "simply means that . . . the unprotected features of the words are, despite their verbal character, essentially a 'non-speech' element of communication.").

251. *R.A.V.*, 505 U.S. at 391.

252. *Id.* (internal quotation marks omitted).

> "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion." St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.[253]

On that view, "what is wrong with the St. Paul ordinance is not that it bans too much speech but that it bans too little."[254]

While Justice Scalia made clear his view that "burning a cross in someone's yard is reprehensible,"[255] he did not "deliberate on the violent racist history associated with burning crosses or about the psychological effect on the immediate victims and other black families living nearby. His holding focuse[d] on the value of speech while giving short shrift to the social harms associated with hate speech."[256]

The absence of any consideration of the harms of cross burning in Justice Scalia's opinion is particularly telling given the recognition and discussion of such harms in the *R.A.V.* concurring opinions. Justice White, joined by Justices Blackmun, O'Connor and

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253. *Id.* at 391–92; *see also id.* at 396 ("In fact, the only interest distinctly served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.").

254. Julie C. Suk, *Denying Experience: Holocaust Denial and the Free-Speech Theory of the State*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 215, at 146.

> Under this analysis, a blanket ban on all fighting words would be constitutionally permissible, because nobody has a First Amendment right to express fighting words, but a narrower ban on racist fighting words is unconstitutional because it reflects state favoritism toward antiracist or antisexist points of view. What renders the law illegitimate is the state's hostility to a particular viewpoint, not the burdens on the individual autonomy interests in speaking.

Id. at 146–47.

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

256. TSESIS, *supra* note 29, at 143.

Stevens,[257] wrote that the St. Paul ordinance "reflects the city's judgment that harms based on race, color, creed, religion, or gender are more pressing public concerns than the harms caused by other fighting words. In light of our Nation's long and painful experience with discrimination, this determination is plainly reasonable."[258] Justice Blackmun's separate concurrence argued that by deciding that government "cannot regulate speech that causes great harm unless it also regulates speech that does not (setting law and logic on their heads), the Court seems to abandon the categorical approach, and inevitably to relax the level of scrutiny applicable to content-based laws."[259] Seeing no First Amendment values compromised by prohibiting "hoodlums from driving minorities out of their homes by burning crosses on their lawns," Justice Blackmun saw "great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community."[260] And Justice Stevens opined that "[c]onduct that creates special risks or causes special harms may be prohibited by special rules."[261] Race- or religious-based threats, which "may cause particularly severe trauma or touch off a riot" may be subjected to more severe punishments "than threats against someone based on, say, his support of a particular athletic team" as "[t]here are legitimate, reasonable, and neutral justifications for such special rules."[262] Just as Congress can constitutionally criminalize threats against the President, thereby choosing a subset of threats "from the set of unprotected speech (all threats),"[263] the city council of St. Paul:

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257. Justice White agreed with the majority that the St. Paul ordinance did not pass constitutional muster: the law "is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment." *R.A.V.*, 505 U.S. at 397 (White, J., concurring in the judgment). He complained, however, that the Court's holding was based on a ground that was not presented to the Minnesota Supreme Court, was not briefed by the parties, and constituted an abandonment of Court precedent. *See id.* at 398.

258. *Id.* at 407.

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

260. *Id.* at 416.

261. *Id.* at 416 (Stevens, J., concurring in the judgment).

262. *Id.*

263. *Id.* at 424. In referring to the President, Justice Stevens responded to Justice Scalia's statement that Congressional criminalization of only threats against the President is constitutional because "the reasons why threats of violence are outside the First Amendment (protecting individuals from fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the . . . President." *Id.* at 388, 423–24.

> [M]ay determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic.[264]

The harms of cross burning were front and center in the Court's 2003 *Virginia v. Black* decision.[265] There, the Court held that a Virginia statute banning cross burning "with the intent to intimidate any person or group of persons" did not violate the First Amendment.[266] Justice O'Connor's opinion for the Court examined the history of cross burning and the Ku Klux Klan's association with and use of the burning cross "as a tool of intimidation and a threat of impending violence."[267]

> To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." And while cross

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

265. 538 U.S. 343 (2003).

266. VA, CODE ANN. § 18.2-423 (1996). The Court disagreed with the Virginia Supreme Court's ruling that in light of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), Virginia's cross-burning statute unconstitutionally discriminated on the basis of content and viewpoint. "We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech." *Black*, 538 U.S. at 361.

> Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics'. . . . It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality.

Id. at 362. Indeed, the Court stated, it was not clear whether two of the individuals charged with violating the cross burning statute did so because of racial animus. *See id.* at 363; *see also id.* at 368 (Scalia, J., concurring in the judgment in part, and dissenting in part) (agreeing with the Court that under *R.A.V.*, a state may prohibit cross burning with the intent to intimidate without violating the First Amendment).

267. *Black*, 538 U.S. at 354; *see also* State v. Zimmerman, 278 U.S. 63, 76 (1928) (upholding state law requiring the Ku Klux Klan to register with the state and disclose its membership list, and noting that the Klan "exacted of its members an oath to shield and preserve 'white supremacy'" and "was conducting a crusade against Catholics, Jews, and negroes, and stimulating hurtful religious and race prejudices").

> burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, . . . person[s] sometimes use cross burning because of this association between a burning cross and violence.
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> In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.[268]

Having set out this account of the history and intimidating purpose and impact of cross burning, Justice O'Connor noted that a state can constitutionally prohibit "[t]rue threats"—"statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" even though the speaker does not intend to carry out the threat.[269] It was not contested that "some cross burnings fit within this meaning of intimidating speech, and rightly so."[270]

In an interesting and notable dissenting opinion, Justice Thomas[271] observed that Justice O'Connor's "brief history of the Ku

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268. *Black*, 538 U.S. at 357 (internal citation omitted).

269. *Id.* at 359–60; *see also* Watts v. United States, 394 U.S. 705 (1969) (per curiam) (holding that the defendant's alleged statement that he would refuse induction into the armed forces and "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was political hyperbole distinguishable from a true threat against the President).

270. *Black*, 538 U.S. at 360.

271. During the December 2002 oral argument of the case before the Supreme Court, Justice Thomas addressed Deputy Solicitor General Michael Dreeben, arguing on behalf of the *amici* United States in support of Virginia, whether Dreeben understood the effects of cross burning. Transcript of Oral Argument at 22–24, Virginia v. Black, 538 U.S. 34.3 (2003) S. Ct. (No. 01-1107). Justice Thomas noted the "almost 100 years of lynching and activity in the South by the Knights of Camellia" and the Ku Klux Klan and the "reign of terror" with the cross as "a symbol of that

Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods," including cross burnings, beatings, and murder.[272] A burning cross is "a threat and a precursor of worse things to come" and "has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence."[273] Noting that at the time of the enactment of the anti-cross-burning law the Virginia legislature (then engaged in a massive resistance campaign in response to *Brown v. Board of Education*)[274] sought to criminalize

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reign of terror." *Id.* When Dreeben responded "I think they're coextensive," Justice Thomas stated:

> Well, my fear is, Mr. Dreeben, that you're actually understating the symbolism . . . of and the effect of the cross, the burning. . . . [T]he cross was not a religious symbol . . . it was intended to have a virulent effect. And I—I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society.

Id. In the Justice's view, "there was no other purpose to the cross. There was no communication of a particular message. It was intended to cause fear . . . and to terrorize a population." *Id.*

In a *Washington Post* article journalist Charles Lane wrote that these statements by Justice Thomas provided an "emotional high point" as the Justice "broke his customary silence during oral argument to drive home the point that the history of cross burning . . . makes it uniquely threatening not only to minorities, but to others as well." Charles Lane, *High Court Hears Thomas on KKK Rite*, WASH. POST, Dec. 12, 2002, at A1. Rodney Smolla, counsel for the challengers to the Virginia law, observed that "[t]he impact of Justice Thomas's remarks was palpable and physical" and that he had "never seen the mood in a courtroom change so suddenly and dramatically." Rodney Smolla, *Cross Burning:* Virginia v. Black, *in* A YEAR AT THE SUPREME COURT 164 (Neal Devins & Davison M. Douglas eds., 2004); *see also* Angela Onwuachi-Willig, *Using the Master's "Tool" to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 148 (2005) ("Clearly, Justice Thomas and his unique perspective impacted the way the other Justices approached the case [in *Black*], forcing them to view the cause of action from a different angle, even if they ultimately rejected his analysis.").

272. *Black*, 538 U.S. at 389 (Thomas, J., dissenting); *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) ("There is little doubt that the Klan's main objective is to establish a racist white government in the United States. In Klan ceremony, the cross is a symbol of white supremacy and a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan.").

273. *Black*, 538 U.S. at 391 (Thomas, J., dissenting).

274. 347 U.S. 483 (1954).

terrorizing conduct, Justice Thomas reasoned that it "strains credulity to suggest that a state legislature that adopted a litany of segregationists laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable."[275] Accordingly, he concluded, the Virginia law prohibited only conduct and not expression, and "there is no need to analyze it under any of our First Amendment tests."[276]

The question before the Court in *Snyder v. Phelps*[277] was whether the First Amendment shielded members of the Westboro Baptist Church[278] from tort liability for their speech while picketing near the funeral of Marine Corporal Matthew Snyder, who was killed in the line of duty in Iraq. Picketing on public land next to a public street approximately one thousand feet from the funeral, church founder Fred Phelps and other church members carried signs displaying the following language: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."[279] The picketers displayed their signs for approximately thirty minutes before the funeral and did not enter church property, did not go to the cemetery where Matthew Snyder was buried, did not shout or use profanity, and did not engage in violence.[280] Albert Snyder, Matthew's father, did not see the top of the signs as the funeral procession passed within two to three hundred feet of the picketing; he only saw what was written on the signs when he watched a television broadcast later that evening.[281]

Albert Snyder filed a diversity action against the church and the picketers, alleging, among other causes of action, an intentional

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

276. *Id.* at 395.

277. 562 U.S. 443,131 S. Ct. 1207 (2011).

278. "The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing, often at military funerals." *Id.* at 1213.

279. *Id.*

280. *Id.*

281. *Id.* at 1213–14. A few weeks after the funeral one of the picketers posted on the church's website an "Epic" "discussing the picketing and containing religiously oriented denunciations of the Snyders, interspersed among lengthy Bible quotations." *Id.* at 1214 n.1. Albert Snyder discovered the Epic as he searched his son's name on the Internet. The Court did not consider or analyze the Epic. *Id.*

infliction of emotional distress tort claim.[282] A jury found for Snyder and held the church liable for $2.9 million in compensatory damages and $8 million in punitive damages, and the district court reduced the damages award to $2.1 million. The United States Court of Appeals for the Fourth Circuit reversed, holding that the church's statements addressed matters of public concern and were protected by the First Amendment.[283]

The Supreme Court, in an opinion by Chief Justice Roberts, affirmed the Fourth Circuit. Instructing that the question whether the First Amendment shielded the church from liability "turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case," the Chief Justice determined that the content of the church's picket signs "plainly relates to broad issues of interest to society at large, rather than matters of purely private concern."[284] The church's messages highlighted "matters of public import"; that is, "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy."[285] That a few picket signs related specifically to Matthew Snyder and his family did not change the thrust and theme of the picketing, Chief Justice Roberts concluded.[286]

Regarding the harms of the at-issue speech, Chief Justice Roberts acknowledged that the church's decision to convey its views at Matthew Snyder's funeral "made the expression of those views

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282. *Id.* at 1214. Under Maryland law a plaintiff had to demonstrate that a defendant engaged in extreme and outrageous conduct that caused the plaintiff to suffer emotional distress. Courts have held that the First Amendment provides a defense to that claim. *See id.* at 1215; *see also* 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, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.' But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment."); Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978) (holding that the plaintiffs could not rely on the intentional infliction of emotional distress tort to bar public speech by Nazis because the "problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that 'invites disputes . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger'").

283. *See* Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009), *aff'd*, ___ U.S. ___ 131 S. Ct. 1207 (2011).

284. *Snyder*, 131 S. Ct. at 1215 (internal quotation marks and citation omitted).

285. *Id.* at 1217.

286. *Id.*

particularly hurtful to many, especially to Matthew's father."[287] But the peaceful picketing was conducted on a public street, a space "occup[ying] a special position in terms of First Amendment protection."[288] Any distress caused by the picketing was caused by the content and viewpoint of the messages, and Chief Justice Roberts was concerned about the risk and danger that a jury, which would be asked to consider imposing liability under a "highly malleable" and inherently subjective outrageousness standard, would become "'an instrument for the suppression of . . . vehement, caustic, and sometime unpleasant expression.'"[289] The Court elaborated:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[290]

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287. *Id.*; *see also id.* at 1220 ("Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible.").

288. *Id.* at 1218 (bracketed material added); *see also id.* at 1220 ("Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of a local official."). Chief Justice Roberts noted that the church's choice of picketing places and times was subject to reasonable time, place, and manner restrictions. *Id.* at 1218. The Maryland law regulating and restricting funeral picketing, *see* MD. CRIM. LAW CODE ANN. § 10-205 (2010), was not in effect at the time of the picketing of the Snyder funeral, and the Court did not address that statute's legality. *See Snyder*, 131 S. Ct. at 1218. A dissenting Justice Alito was not persuaded that laws like the Maryland funeral picketing statute provides an adequate substitute for the protection from the intentional infliction of emotional distress tort. Those laws "dramatically illustrate[] the fundamental point that funerals are unique events at which special protection against emotional assaults is in order." *Id.* at 1227 (Alito, J., dissenting).

289. *Id.* at 1219 (quoting Bose Corp. v. Consumer Union of United States, Inc., 466 U.S. 485, 510 (1984)).

290. *Id.* at 1220. Chief Justice Roberts also rejected Snyder's argument that the church could be held liable for intrusion upon seclusion because Snyder was a member of a captive audience at his son's funeral. The captive audience doctrine "protect[s] unwilling listeners from protected speech." *Id.* The picketers

> stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral. And there is no indication that the picketing in any way interfered with the funeral itself. We decline

Would the Court have reached the same conclusion if the facts were different, for example, if the "signs [had] been waved in the Snyder family's faces,"[291] or if Albert Snyder could see the signs as the funeral procession passed the picketers, or if the picketers went to the cemetery where Matthew Snyder was buried? Would the harm assessment be the same?

Justice Alito, the sole dissenter in *Snyder*, began his opinion with this sentence: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[292] Albert Snyder sought to "bury his son in peace," and the Westboro picketers "deprived him of that elementary right" when they "brutally attacked Matthew Snyder."[293] In the Justice's view, a reasonable person seeing the picket signs would have assumed a connection between the displayed messages and Matthew Snyder, and other signs would have been understood as falsely suggesting that Matthew Snyder was gay.[294] The church's signs and the post-funeral Epic[295] "specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military."[296] That "attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not."[297]

> Allowing family members to have a few hours of peace without harassment does not undermine . . . public debate. I

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to expand the captive audience doctrine to the circumstances presented here.

Id.

291. Schauer, *supra* note 1, at 107.

292. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

293. *Id.* at 1222, 1223. Objecting to the majority's position that it was significant that the protest occurred on a public street, Justice Alito saw no reason why a public street close to a funeral should be viewed as a "free-fire zone in which otherwise actionable verbal attacks are shielded from liability. If the First Amendment permits the States to protect their residents from the harm inflicted by such attacks—and the Court does not hold otherwise—then the location of the tort should not be dispositive." *Id.* at 1227.

294. *See id.* at 1225 ("God Hates Fags," "Semper Fi Fags," "Fags Doom Nations," and "Fag Troops"); *see also id.* ("Another placard depicted two men engaging in anal intercourse.")

295. *See supra* note 281.

296. *Snyder*, 131 S. Ct. at 1226 (Alito, J., dissenting).

297. *Id.*

> would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.[298]

He closed his opinion with the following observation: "In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims . . . ."[299]

2. Canada Supreme Court Decisions

In thinking about the harm-assessment approach discussed in this article, it may be useful to consider the Supreme Court of Canada's treatment of the hate speech issue.[300] In its 1990 decision in *Regina v. Keegstra*,[301] the Canadian high court reviewed the conviction of a high school teacher charged with unlawfully promoting hatred by communicating anti-Semitic statements to his students.[302] The court concluded that the provision the teacher was charged with violating, § 319(2) of the Criminal Code of Canada,[303] constituted an infringement of the freedom of expression protected by § 2(b) of the Canadian Charter of Rights and Freedoms.[304] In so

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298. *Id.* at 1228.

299. *Id.* at 1229; *see* MARK TUSHNET, IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT 224 (2013) ("Justice Alito's point . . . seems exactly right.").

300. *See generally* Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321 (2009); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003).

301. [1990] S.C.R. 697 (Can.).

302. The teacher described Jewish persons as "treacherous," "subversive," "sadistic," "money-loving," "power hungry," and "child killers," and told students that Jews "created the Holocaust to gain sympathy." *Id.* at 714. Students were expected to reproduce his teachings in class and on examinations and their grades were lowered if they failed to do so. *See id.*

303. "Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction." Criminal Code, R.S.C. 1985, c. C-46, § 319(2).

304. Section 2(b) of the Charter provides that everyone has "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being*, Schedule B to the Canada Act, 1982, c. 11 (U.K.) at § 2(b) [hereinafter *Charter*].

concluding, the court reasoned that: (1) communications which willfully promote hatred against an identifiable group convey a meaning and are intended to do so, and (2) the purpose of § 319(2) was to restrict the content of expression by singling out particular meanings that are not to be conveyed.[305]

The *Keegstra* court then asked whether the infringement of the freedom of expression was a reasonable limit in a free and democratic society under § 1 of the Charter.[306] Focusing on the harms of hate propaganda, the court concluded that in the case before it

> there is harm done to members of the target group. It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence. . . . Words and writings that willfully promote hatred can constitute a serious attack on persons belonging to a racial or religious group.[307]

"It is . . . not inconceivable that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between various cultural groups in society."[308] And the dignity of targeted group members can be threatened given the "possibility that prejudiced messages will gain some credence, with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society."[309] Parliament enacted § 319(2) to prevent the substantial harms caused by hate-promoting speech, the court stated. "[I]n trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada," Parliament "has decided to suppress the willful promotion of hatred against identifiable groups."[310]

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305. [1990] S.C.R. at 730 (Can.).

306. Charter § 1 provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Charter*, *supra* note 304, at § 1.

Noting that there is no equivalent to Charter § 1 in the United States Constitution, the court stated that "American experience should never be rejected simply because the *Charter* contains a balancing provision, for it is well known that American courts have fashioned compromises between conflicting interests despite what appears to be an absolute guarantee of constitutional rights." [1990] S.C.R. at 743.

307. *Id.* at 746.

308. *Id.* at 747.

309. *Id.* at 748.

310. *Id.* at 758 (bracketed material added).

More recently, in its 2013 *Saskatchewan Human Rights Tribunal v. Whatcott* decision,[311] the Canada Supreme Court asked whether a section of the Saskatchewan Human Rights Code violated the Charter. At issue in that case were flyers, published and distributed by William Whatcott on behalf of the Christian Truth Activists, which were challenged by complainants who contended that the flyers promoted hatred against individuals because of their sexual orientation.[312] Section 14(1)(b) of the Saskatchewan code provides that "[n]o person shall publish or display . . . any representation . . . that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground."[313]

Upholding a civil fine imposed on Whatcott for distributing the anti-gay flyers, the court held that the limitations on the freedom of expression imposed by § 14(1)(b) was demonstrably justified in a free and democratic society.[314] The court reasoned that the "preventive measures" of hate speech prohibitions "should only prohibit the type of expression expected to cause the harm targeted."[315] Emphasizing that harm "is more than hurt feelings, humiliation or offensiveness,"[316] the court focused on the effects and not the content of the speech.

> A . . . conceptual challenge that impedes the proper application of hate speech prohibitions is a mistaken propensity to focus on the nature of the ideas expressed, rather than on the likely effects of the expression. The repugnant content of expression may sidetrack litigants from the proper focus of the analysis.[317]

Distinguishing between the expression of repugnant ideas and the effects thereof, the court explained:

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311. [2013] S.C.R. 467 (Can.).

312. The flyers were entitled "Keep Homosexuality out of Saskatoon's Public Schools!" and "Sodomites in our Public Schools." *Whatcott*, [2013] S.C.R. at para. 8. The complainants filed complaints against Whatcott after they received the flyers at their homes. *Id.* at para. 9.

313. The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1. The court determined that the words "ridicules, belittles, or otherwise affront the dignity of" in § 14(1)(b) were "not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups" and were therefore constitutionally invalid. *Whatcott*, [2013] S.C.R. at para. 92.

314. *See id.* at para. 151.

315. *Id.* at para. 47.

316. *Id.* at para. 47.

317. *Id.* at para. 49.

> Hate speech legislation is not aimed at discouraging repugnant or offensive ideas. It does not, for example, prohibit expression which debates the merits of reducing the rights of vulnerable groups in society. It only restricts the use of expression exposing them to hatred as a part of that debate. It does not target the idea, but their mode of expression in public and the effect that this mode of expression may have.[318]

Taking note of the Charter's objective of eliminating discrimination and substantive inequality,[319] the *Whatcott* court expressed its concern that hate speech "will perpetuate historical prejudice, disadvantage and stereotyping and result in social disharmony as well as harm to the rights of the vulnerable group."[320] Because the public communication of hate speech[321] seeks to marginalize individuals on the basis of their group membership, hate speech restrictions must be rationally connected to the legislature's objective of reducing discrimination, the court stated. That connection will only be made where hate speech "rise[s] to the level beyond merely impugning individuals; it must seek to marginalize the group by affecting its social status and acceptance in the eyes of the majority."[322] Proof of harm is to be discerned by way of a reasonable apprehension of harm test applicable where "'it has been suggested, though not proven, that the very nature of the expression undermines the position of groups or individuals as equal participants in society.'"[323]

This reference to the Canada Supreme Court's approach to the constitutionality of hate speech restrictions, interpreted and developed by that court under a constitutional regime dissimilar in important respects to the United States Constitution, is not intended

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318. *Id.* at para. 51.

319. Section 15(1) of the Canadian Charter of Rights and Freedom provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability." *Charter*, *supra* note 304, at § 15.

320. *Whatcott*, [2013] S.C.R. at para. 79.

321. Section 14(1)(b) "only limits the publication of representations, such as through newspapers or other printed matter, or through television or radio broadcasting. In other words, it only prohibits *public* communications of hate speech" and "does not restrict hateful expression in private communications between individuals." *Id.* at para. 83.

322. *Id.* at para. 80.

323. *Id.* at para. 133 (quoting Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877 at para. 115).

to and does not argue for importing that court's analysis and doctrine. What is worthy of consideration is the Canadian high court's recognition of the harms of hate speech and the distinction between (1) the content of and ideas expressed in such speech, and (2) the existence and effects of speech-related harms on the targets of such expression. Conceptualizing the constitutionality of hate speech restrictions in this way better captures the dynamics of hate speech in terms of the rights and interests of both the speaker/writer targeting and the hearer/reader targeted by hate speech, and provides and makes more likely the consideration of a harm-assessment analytic employed in hate speech cases as it is utilized in other areas of First Amendment law and jurisprudence.

C. Regulable Hate Speech?

As previously discussed, the issue of speech-related harm, negative consequences, and costs has been considered by the Court and/or individual Justices as a ground for recognizing an exception to the speech-protective coverage of the First Amendment. Should certain instances of hate speech be one of these exceptions? Are there circumstances in which hate speech and an assessment of its related harms call for the placement of that speech on the constitutionally prohibited[324] and not the unconstitutionally abridged[325] side of the First Amendment line?

Consideration of the foregoing question raises other queries. If a harm-assessment analysis is applied to a constitutional challenge to a hate-speech prohibition, what type and what magnitude of harm must be shown? What context, content, and mode of delivery of hate speech warrants a harm-based justification for regulation and/or prohibition? Is a harm-assessment approach workable and consistent with the Supreme Court's First Amendment jurisprudence? Can that approach provide a useful mechanism for the evaluation of the constitutionality of particular expressions?

The argument for consideration of an explicit harm-assessment analysis of hate speech may understandably be met with a high degree of skepticism and opposition. At first glance, the notion that hate speech should ever be subjected to regulation and proscription runs head-long into the free-speech principle, viewed generally and broadly, and into free-speechers' understanding that "the proper

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324. *See supra* Part I.
325. *See supra* Part II.

response is not the regulation of speech but the production of *more* speech to counteract the speech that may have wounded you."[326]

We must look past and move beyond that initial reaction and undertake a more refined and nuanced analysis. The freedom of speech is one but only one of this nation's fundamental constitutional rights, values, mandates, and commitments; because individuals have "equally important rights" in addition to First Amendment protections, courts may be faced with the task of "reconcil[ing] competing rights and interests in a workable way."[327] Thus, while the hate speaker contends that he or she has a First Amendment right to express, say, racist views and positions free from the fear or reality of government prohibition and punishment, the target of that speech can assert his or her right to a norm of equality created by and flowing from the antidiscrimination mandate of the Fourteenth Amendment to the Constitution.[328] Is the issue of the regulation of hate speech only or primarily a free speech question, or should the issue be approached and conceptualized as one placing equality at the center of the debate?[329] Should the free-speech right always or presumptively trump the equality right? If the answer to that query is "no" or "not always," then in what circumstances, and on what grounds, should equality concerns provide a constitutional basis for restricting and punishing hate speech?

One subject to be considered in answering the question posed is the type of legally cognizable harm caused by hate speech. This requires identification of, and consideration of what constitutes, assessable harm properly subject to governmental concern and regulation. Consider the harms of hate speech previously discussed.[330] Consider, in addition, an ascriptive notion of what constitutes such a harm in which "a range of bad feelings . . . or distresses" must first be identified followed by the decision as to which of the identified harms "ought to be controllable or remediable . . . ."[331] That there will be debate and disagreement over what falls within and outside of the regulable category is expected and required

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326. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING, TOO 122 (1994).

327. BREYER, *supra* note 95, at 160.

328. *See* U.S. CONST. amend. XIV, § 1.

329. *See* Richard Delgado & Jean Stefancic, *Essay I: Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851, 851–53, 864 (1994)

330. *See supra* Part III-A.

331. Schauer, *supra* note 224, at 652.

in any regime in which the harms of hate speech are assessed as part of the constitutional calculus.

Content and context are critical. Certain hate speech delivered directly from the face of the speaker to the face of the target "is the most immediately problematic, especially if the target is not in a position to leave and the one delivering it possesses the power to harm."[332] In that scenario the target may experience psychosocial harms and other demonstrable injuries.[333] In addition, hate speech communicated more generally in flyers, in speeches, and on signs—not face-to-face—may cause diffuse yet cognizable harms.[334] Whether the diffuse harms of generally communicated hate speech can provide a justification for regulation is a harder question, for the diffuse harms can be qualitatively different from the harms of face-to-face hate speech.[335] How can a court determine that the adverse effects and negative consequences of generally communicated hate speech do or do not rise to the level of a legally and constitutionally cognizable harm?

Readers seeking further discussion of the harm-assessment analytic and hate speech will be interested in Jeremy Waldron's recent and excellent book *The Harm in Hate Speech*.[336] Hoping that readers of his book "will at least understand—rather than impatiently dismiss—the more thoughtful arguments that can be mustered in favor of" hate speech laws,[337] Waldron argues, among other things, that hate speech undermines the public good "by intimating discrimination and violence" and "by reawakening living nightmares of what this society was like—and what other societies have been like—in the past."[338] Hate speech "creates something like

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332. Delgado & Stefancic, *supra* note 24, at 362.

333. *See id.*

334. *See id.* at 363.

335. The court explained:

> By diffuse, we mean harms that afflict a substantial group, not just a single individual. . . . [T]hese harms are qualitatively different from the ones (elevated blood pressure, internalized anger, and depression) associated with face-to-face insults. For example, their onset is delayed and mediated by other factors, such as the extent to which the demonized group is able to flee.

Id. at 363 n.74.

336. *See* WALDRON, *supra* note 16.

337. *Id.* at 12.

338. *Id.* at 4. Waldron notes that "racial segregation, second-class citizenship, racist terrorism (lynchings, cross-burnings, fire-bombings of churches) are living memories in the United States—they are no less vivid than the memories of

an environmental threat to social peace."[339] The publication of hate speech[340] also undermines the dignity of the targets of such speech, he contends, and "besmirch[es] the basics of their reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing."[341] For Waldron, assaults on a person's dignity[342] can be distressing and can create "grave fear and apprehensions about what may be done to them, what is to become of them, and how they and their family members are to navigate life in society under the conditions that the hate-speakers are striving to bring about."[343] Waldron maintains that "laws restricting hate speech should aim to protect people's dignity against assault," and posits that dignity "may need protection against attack, particularly against group-directed attacks which proclaim that all or most members of a given group are, by virtue of their race or some other ascriptive characteristic, not worthy of being treated as members of society in good standing."[344]

McCarthyism that haunt the defenders of the First Amendment . . . ." *Id.* at 31.

339. *Id.*

340. Waldron focuses on "attacks that are printed, published, pasted up, or posted on the Internet—expressions that become a permanent or semipermanent part of the visible environment in which our lives, and the lives of members of vulnerable minorities, have to be lived." *Id.* at 37. In his view, "it is the enduring presence of the published word or the posted image that is particularly worrying in this connection; and this is where the debate about 'hate speech' regulation should be focused." *Id.* at 37–38. Thus, while noting that "[s]peech, in the sense of the spoken word, can certainly be wounding," Waldron makes clear that he is avoiding the "misleading impression" that he views "*what people say out loud* as a problem that calls for legislation." *Id.* at 37; *see also id.* at 72 ("an emphasis on speech is an emphasis on the ephemeral" and contrasting "the occasional angry or politically incorrect use of one or another racial epithet . . . with the relatively enduring expression of visible signage or the published word").

341. *Id.* at 5 (bracketed material added).

342.

> A person's dignity is not just some Kantian aura. It is their social standing, the fundamentals of basic reputation that entitle them to be treated as equals in the ordinary operations of society. Their dignity is something they can rely on—in the best case implicitly and without fuss, as they live their lives, go about their business, and raise their families.

Id. at 5.

343. *Id.* at 111–12.

344. *Id.* at 105, 106.

For a contrasting view, consider David Boonin's opposition to hate-speech restrictions. In his view, "it's morally objectionable to prohibit people from saying certain sorts of things unless there's a sufficiently good reason for the prohibition."[345] Boonin recognizes that

> [t]here are, of course, a number of restrictions on freedom of expression that are by and large accepted as morally unobjectionable. . . . But none of these seem relevantly similar to restrictions on hate speech, and so none of them seem capable of providing a plausible basis for justifying the claims that such restrictions are morally unobjectionable either.[346]

Focusing on the moral rather than the constitutional dimensions of the issue, Boonin writes that a "simple two-step argument" can be made for a harm-based justification for hate speech restrictions: first, the identification of a category of speech and the claim that it is morally unobjectionable to regulate speech falling into that category and, second, the claim that "hate speech falls into this category."[347] This argument is problematic, he states, because the "introduction of an unprotected category of words that wound . . . would leave unprotected too many forms of expression that virtually everyone on both sides of the hate speech debate believes should remain protected."[348] He further explains:

> [M]ost people on both sides of the hate speech debate agree that anti-abortion protesters should be allowed to yell "baby killer" at women and workers entering an abortion clinic, and that pro- and anti-war protesters should be permitted to use such words as "traitor" or "murderer" when they engage each other at rallies. They agree, moreover, that it would be morally objectionable to restrict the people in question from using such words at protest rallies regardless of whether they take place in public parks or on college campuses. But these, too, are hurtful words, and it's hard to deny that they, too, have the ability to cause pain to those they are aimed at,

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345. BOONIN, *supra* note 29, at 209.

346. *Id.* at 229; *see also id.* (noting "laws prohibiting the publication of works that would violate copyrights, academic rules against plagiarism, restrictions on the dissemination of military secrets, ordinances governing the place, time and volume at which people are permitted to make noise, and so on").

347. BOONIN, *supra* note 29, at 231.

348. *Id.*

> to be experienced as a sharp slap in the face, just as hateful epithets do.[349]

In addition, Boonin notes and responds to the concern that his "objection to the harm-based argument has an unacceptable implication" by maintaining "that no matter how severe the resulting mental suffering is, it's always morally objectionable to intervene on the sufferer's behalf."[350] Referring to the tort of intentional infliction of emotional distress, Boonin imagines some cases "in which the speech is so horrific and the grief that follows so devastating that many people, including many who value freedom of expression, would approve of something being done in response, even by the government."[351] Intentional infliction of emotional distress tort plaintiffs can sue and collect damages when they are the victims of "extreme and outrageous conduct" that intentionally or recklessly causes "severe emotional distress."[352] Those who call for government intervention where hate speech causes severe emotional distress "can't take this as grounds for concluding that the state should adopt hate speech restrictions" and can claim, instead, that the tort should apply to hate speech cases.[353] "Rather than helping to reinforce the case for hate speech restrictions, then, such extreme cases demonstrate that hate speech restrictions are unnecessary even if one believes that the state should intervene in such cases."[354] On this view, a speech-related harm caused by hate speech is not to be viewed as qualitatively different from other harms even though the hate speech is grounded in and is motivated by the intent to target a person on the basis of a racial, ethnic, gender, religious or other characteristic or group membership. Only that harm-causing conduct which can be challenged by all, such as an intentional infliction of emotional distress claim, can be the subject of a claim not subject to a First Amendment defense.

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349. *Id.* at 232 (bracketed material added).

350. *Id.* at 235.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.* Boonin anticipates the harm-based argument that all instances of hate speech involve extreme and outrageous conduct intentionally or recklessly causing severe emotional distress. That argument is problematic, in his view, as "it's simply implausible to insist that every instance of hate speech rises to this level of outrage and severity." *Id.* at 235–36. And if some or all instances of hate speech do result in the aforementioned level, "then every victim of hate speech should already be able to collect damages under the already existing tort . . . [I]n the end they provide no reason to accept the harm-based argument for hate speech restrictions." *Id.* at 236 (bracketed material added).

Whether and how courts can determine that particular hate speech does or does not rise to the level of a constitutionally cognizable harm are interesting, difficult, and debatable questions that must be considered and answered if harm is to be assessed in deciding that certain speech can or cannot be regulated consistent with the First Amendment. While the harms of hate speech in the form of physiological symptoms and manifestations may be demonstrable and provable in a given case,[355] "the costs of legal protection from psychological harm are high" as persons cannot be insulated "from the negative psychological effects of the speech of others except at the cost of severely limiting speech altogether."[356] As Kwame Anthony Appiah has remarked, a

> world in which we were constantly trying to predict and avoid upset would be a world with much less communication, and many of the desirable consequences of a world rich in communications would have to be foregone. . . . And making any upset caused by speech or writing a legally cognizable harm incentivizes people to pretend to be upset to shut others up.[357]

One must grapple with Appiah's concerns, for it is true that regulating hate speech can impose its own costs on those who wish to say or write or hear or read such speech. But the costs of legal protection from harm have been imposed on speakers, writers, hearers, and readers in other areas of speech in which the Court has recognized exceptions to the First Amendment on harm and other justificatory grounds. Thus, "[i]f speech is not a seamless web, the issue is whether the case for prohibiting hate speech is as compelling as that underlying existing exceptions."[358] If one concludes that it is not, why not? What is it about certain hate speech that calls for a blanket ban on the regulation thereof, and not a casuistic approach in which questions of harm assessment and line drawing in specific contexts involving particular speech and expression can be presented to the courts for analysis?

Whether a harm-assessment analysis should be an explicit methodology employed in determining the constitutionality of hate

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355. *See supra* note 228 and accompanying text.

356. Kwame Anthony Appiah, *What's Wrong with Defamation of Religion?*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH, *supra* note 215, at 171; *see also id.* ("Identifying actual psychological harms is . . . a difficult exercise, one that we would be wise to avoid imposing on our courts.").

357. *Id.* at 171–72.

358. Delgado & Stefancic, *supra* note 24, at 367 (bracketed material added).

speech laws and regulations is a crucial and fertile area of inquiry for judges, commentators, and others interested in First Amendment law and jurisprudence. For those who believe that the application of a harm-assessment analytic should be considered in First Amendment cases involving hate speech, as I do, a clear articulation of the specific grounds for the acceptance or rejection of this view will join and frame the ongoing debate. While a definitive resolution of that debate awaits further analysis and commentary, a scenario for examination and future discussion is proposed: the constitutionality of a hate speech law protecting persons directly targeted by others using certain slurs and epithets,[359] the mechanics of harm assessment in such scenarios, and the contexts in which hate speech regulations will or will not be held to be constitutional.

CONCLUSION

This article has made a descriptive claim—supported by a survey and discussion of Supreme Court decisions and the opinions of individual Justices spanning a number of decades—that harm assessment has long been an aspect of the Court's First Amendment jurisprudence and its recognition of exceptions to the coverage and protection of that amendment's free-speech command. In addition, the normative question of whether the Court should similarly employ a harm-assessment analysis in hate speech cases is posed and arguments for and against such an approach are presented. The reality and impact of speech-associated harms of hate speech warrant focused consideration of the harm-assessment approach and analytic and a fresh and hard look at the issue of the constitutionality of hate-speech regulation. My hope is that this discussion will provoke rumination and will prompt readers to "reflect more broadly on the role that genuine harm can and might play in understanding free speech theory and fashioning First Amendment doctrine"[360] in general and as applied to hate speech in particular.

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359. *See supra* notes 219–27 and accompanying text.

360. Schauer, *supra* note 1, at 96.