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WILLIAM B. FISCH

Hate Speech in the Constitutional Law of the United States

INTRODUCTION

Our general reporter, Professor Pizzorusso, has given us “incitement to hatred” – primarily against a group of persons defined in terms of race, ethnicity, national origin, gender, religion, sexual orientation, and the like — as the working definition of “hate speech”, and asks to what extent such speech is constitutionally protected in the reporting countries. The United States of America are known at least in recent times for providing exceptionally broad protection for otherwise objectionable speech and expression, and hate speech is understood to be one of the areas in which they have positioned themselves further out on the speech-protective end of the legal spectrum than perhaps most other countries have been willing to venture.¹

Two instructive examples of U.S. resistance to proscriptions against such speech are found at the international level, relating to two U.N.-sponsored treaties both promulgated in 1966. Article 20(2) of the International Covenant on Civil and Political Rights requires Parties to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”, and article 4 of the Convention on Elimination of All Forms of Racial Discrimination condemns propaganda and organizations “which attempt to justify or promote racial hatred and discrimination” and requires Parties to punish all “dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimina-

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1. While awareness of contrary positions taken in other countries is not a noticeable feature of American judicial treatment of our topic, a number of rich comparative accounts can be found in the scholarly literature, and increasingly so. A few of the best examples are: Reisman, “Democracy and Defamation: Control of Group Libel,” 42 *Col. L. Rev.* 727 (1942); Stefancic & Delgado, “A Shifting Balance: Freedom of Expression and Hate-Speech Restriction,” 78 *Iowa L. Rev.* 737 (1993); Tushnet, “The Possibilities of Comparative Constitutional Law,” 108 *Yale L. J.* 1225, 1269-85 (1999); Whitman, “Enforcing Civility and Respect: Three Societies,” 109 *Yale L. J.* 1279 (2000); Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis,” Cardozo Law School Working Paper Series no. 41 (2001), accessed at <http://papers.ssrn.com>, SSRN_ID265939.

tion". The United States consistently objected to such provisions on free speech grounds in the negotiating process of both treaties, and, when it finally got around to ratifying them (in 1992 and 1994, respectively), attached reservations and understandings rejecting them insofar as they are inconsistent with U.S. constitutional protections.²

Without challenging the essence of this perception, this paper will try to give a more nuanced account of the limits on constitutional protection of "hate speech" recognized by American courts. In particular, it will be noted that the U.S. position itself, as a matter of domestic law, is of relatively recent origin, preceded by periods of intolerance toward certain kinds of speech on matters of public concern; and that the current protection of such speech is narrower in scope than might be supposed, allowing for the suppression of, or legal sanctions against, a great deal of conduct motivated by and expressing hostility toward particular social groups.

The U.S. federal constitution, in the First Amendment,³ offers no definition of "the freedom of speech" which it forbids government⁴ to abridge. As a result, like so much of U.S. constitutional law, judicial interpretation has supplied most of the detail on this subject; the opinions of the U.S. Supreme Court are the primary source of law. The paper begins with a detailed discussion of the Court's leading contemporary pronouncements on the subject, in two cases which, taken together, nicely illustrate the subtlety and perhaps also the contestability of the Court's analysis of hate speech protection. It then proceeds to a review of the broader framework of limitations on freedom of speech constructed by the Court in recent decades, into which regulations of hate speech must fit if they are to survive constitutional attack; and concludes with some tentatively evaluative remarks.

I. THE LEADING CASES

A. *R.A.V. v. City of St. Paul, Minnesota*

In 1992 the Supreme Court handed down its most direct judgment to date on the subject, in *R.A.V. v. City of St. Paul, Minnesota*.⁵ A group of white teenagers gathered at the home of two of them in a predominantly white neighborhood and, after a conversation laced with racial animosity toward African-Americans generally and to-

2. See, e.g., United States, Initial Report to the United Nations Committee on the Convention on Elimination of All Forms of Racial Discrimination, Part II.B.1 (ref. University of Minnesota Human Rights Library, <http://www1.umn.edu/humanrts/usdocs/cerdinitial.html#speech> (visited 8/10/01)).

3. "Congress shall make no law . . . abridging the freedom of speech. . ."

4. The First Amendment itself addresses only the federal Congress, but its provisions were made applicable to the states by the Due Process clause of the Fourteenth Amendment, see *Gitlow v. New York*, 268 U.S. 652 (1925).

5. 505 U.S. 377 (1992).

ward a black family specifically who had recently moved into the house across the street, made a crude cross and set it afire in the middle of the night on the lawn of the black family's home. A little while later they burned another cross on a street corner clearly visible from that home. Such cross-burning had been for many decades (and still is) a trade-mark of historically perhaps the best-known hate group in America, the Ku Klux Klan, a white supremacist, anti-Semitic, anti-Catholic, xenophobic organization which terrorized many communities in the South and elsewhere in the late 19th and much of the 20th centuries by lynchings, murders and other acts of violence, largely in the service of racial segregation.⁶ While the organization itself has faded somewhat in recent years, acts of violence have continued to occur in conjunction with cross-burnings often enough to keep the connection alive among the targeted groups. Fearing that they were being attacked, the black family in this case called the police after each burning, and the teenagers were eventually arrested and charged with crimes under Minnesota state and local laws. Some of them, including R.A.V., were charged as juveniles because they were under 18 years old. The evidence showed that they specifically intended to intimidate the black family and make them feel unwelcome in the neighborhood, and that the black family got precisely that message from the defendants' conduct.

R.A.V. himself was charged under two Minnesota laws: (1) a state law which prohibited assaulting another "because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability. . . , age, or national origin"; and (2) a St. Paul city ordinance which classified as "disorderly conduct" (a misdemeanor or minor crime):

" . . . plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . ."

He preliminarily objected to the second charge – but not to the first — on the ground that it would violate his constitutionally protected freedom of speech. The trial court sustained this objection and dismissed the charge, but the state supreme court reversed on appeal and reinstated the charge. The latter court held that the ordinance had been interpreted as applying only to "conduct that itself inflicts injury or tends to incite immediate violence", which the U.S. Supreme Court had characterized in earlier cases as unprotected by the First

6. See, e.g., William P. Randel, *The Ku Klux Klan* (1965).

Amendment's free speech clause even when it is expressive in character (the so-called "fighting words" exception).⁷

On further review by the U.S. Supreme Court of this judgment for its consistency with the federal constitution, that body unanimously reversed the state supreme court, holding that the St. Paul ordinance was an impermissible restriction on freedom of speech and could not be applied to R.A.V.'s conduct. The Court was sharply divided, however, over *why* the ordinance was unconstitutional. A narrow majority (five of nine Justices) concluded that the city could not properly choose among "fighting words" based on the content of the particular message, punishing racial epithets but not those disparaging other characteristics of the addressee such as his prejudices or his illegitimacy or his sexual orientation – at least not without a credible determination that the forbidden messages were more likely to provoke a violent response, or likely to provoke a more violent or dangerous response, than those not forbidden. "Fighting words" are unprotected because they are likely to provoke violence, not because they express prejudice or bias on the part of the speaker; this latter dimension lies in the realm of ideas, which cannot be suppressed simply because they are wrong or unpopular.⁸

The minority of four Justices, on the other hand, were not persuaded by the state court's assertion that the ordinance would only be applied to "fighting words", but took the language of the ordinance at face value, as purporting to prohibit the communication of ideas about race, religion, gender, etc., with which others would strongly disagree. Since the First Amendment does not permit suppression of ideas simply because others disagree with them, the ordinance was (in the minority view) substantially "overbroad" – it prohibited a substantial range of constitutionally protected speech as well as activity which is not protected – and was invalid "on its face" – and therefore subject to challenge even by persons whose own conduct is not protected in order to avoid the "chilling effect" which the ordinance would have on law-abiding persons who would otherwise wish to engage in protected expression.⁹

That the issue concerning R.A.V.'s own conduct was not whether it was punishable, but what *reasons* for punishment were constitutionally acceptable, is made clear in the Supreme Court's majority opinion by Justice Scalia, who pointed out that he might have been

7. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). This exception is discussed further below, part. II.B.2.

8. Indeed the majority cited, for this general proposition, the "flag-burning" case, *Texas v. Johnson*, 491 U.S. 397 (1989), a decision from which one of the R.A.V. majority, Chief Justice Rehnquist, had dissented. The case is discussed in part II(A) below.

9. On the "overbreadth doctrine," essentially giving *locus standi* to challenge an unconstitutional law to persons other than those whom the constitutional protection is intended to benefit, see, e.g., John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 1065f. (6th ed. 2000).

charged with violating several state laws “carrying significant penalties”.¹⁰ It is reflected in the fact that his lawyers did not even bother to challenge the charge of assault – even though the particular statute under which he was charged purported to prohibit only assaults motivated by the victim’s race, sex, religion, etc. Moreover, after the U.S. Supreme Court struck down the St. Paul hate speech ordinance, *federal* authorities charged R.A.V. and two of his friends in *federal* court with violation of *federal* civil rights laws by those same cross burnings: one law prohibits conspiracies to threaten or intimidate any person in the exercise of his federally protected rights [which include the right to own and occupy a home], and another prohibits intimidation of any person because of his race, color, religion, sex, handicap, family status or national origin.¹¹ The defendants challenged these statutes as infringing on their freedom of speech, the lower federal courts rejected the challenge, and the U.S. Supreme Court was not even asked to review their decisions.¹²

B. *Wisconsin v. Mitchell*

After R.A.V. and his friends were tried and convicted in federal court on these charges, but before their appeal was decided, the U.S. Supreme Court handed down a second decision on the subject of punishing hate, *Wisconsin v. Mitchell*.¹³ In that case a group of black men and boys attacked a white boy as he passed on the street, beating him severely and stealing his shoes. The group had been stirred to anger while discussing a movie about white racist violence and, at the urging of one of their number (Mitchell), had gone outside and attacked apparently the first white person they saw. Mitchell was charged under state law with the ordinary crime of aggravated battery (defined by the severe beating), which normally carries a maximum sentence of two years in prison. However, a new state law provided for enhanced punishment for virtually all crimes against person or property, if the defendant intentionally selected his victim because of that person’s race, religion, color, disability, sexual orientation, national origin or ancestry (or, in the case of property crimes, those characteristics of the owner or occupant of the property). On the basis of this statute, Mitchell was sentenced instead to four years imprisonment. He challenged the statute (and his conviction under it) as a violation of his freedom of speech, and the Wisconsin state

10. See *supra* n. 1 and accompanying text, 505 U.S. at 379-380.

11. 18 U.S.C. §241 and 42 U.S.C. §3631, respectively.

12. *U.S. v. J.H.H., et al.*, 22 F.3d 821 (8th Cir. 1994). For other cases sustaining the punishment of cross-burning under these statutes, see, e.g., *U.S. v. Magleby*, 241 F.3d 1306 (10th Cir. 2001); *U.S. v. Pospisil*, 186 F.3d 1023 (8th Cir. 1999); *U.S. v. Stewart*, 65 F.3d 918 (11th Cir. 1995); *Singer v. U.S.*, 38 F.3d 1216 (6th Cir. 1994)(unpublished opinion).

13. 508 U.S. 476 (1993).

supreme court sustained his objection on the basis of the U.S. Supreme Court's decision in *R.A.V.* Specifically, the state court reasoned that the statute in effect punished bigoted thought, on the sole ground that the state disagreed with that thought.

On further review the U.S. Supreme Court unanimously reversed the state court and held the Wisconsin statute to be valid. The Court distinguished punishment of the defendant's abstract beliefs as such from consideration of his prejudice as a *motive* for otherwise wholly unprotected conduct. The Wisconsin statute, said Chief Justice Rehnquist, is of the latter character, and as such falls well within a long-standing practice — never successfully challenged on free speech grounds — of treating motive either as an essential element of a crime or as an aggravating factor in determining punishment.¹⁴ The statute is “aimed at conduct”, and reflects a judgment that bias-motivated crimes “inflict greater individual and societal harm” than the same crimes committed without such motive.¹⁵

To bring out the jurisprudential background against which these path-breaking hate cases were decided, and perhaps better understand the difficulty many scholars have had with the distinction between the two, the paper will undertake a more extensive review of the grounds on which such expressive activity has been found by the courts to be subject to government regulation or suppression.

II. JURISPRUDENTIAL BACKGROUND: SOME LIMITS ON THE PROTECTION OF SPEECH UNDER AMERICAN LAW

A. *The “Speech-Conduct” Distinction and Analogous Concepts*

Much ink has been spilled — sometimes stimulated by language in Supreme Court opinions like *Wisconsin v. Mitchell* — over the distinction between “speech” and “conduct”. It is clear, of course, that there must be some minimum level of expressive character to an activity for the actor to have a plausible claim that it is protected by the Free Speech clause of the First Amendment. Within the very broad category of activity which has some expressive dimension, however, discussion often proceeds as if being able abstractly to characterize any particular activity as one or the other were crucial to determining whether or not it is protected against government regulation by the Free Speech clause of the First Amendment. Some have argued that the government can regulate an activity without concern for the Free Speech clause if it is predominantly “action” and only incidentally “expression”.¹⁶ Others have argued that all communicative activity is also conduct with dimensions distinct from the message

14. 508 U.S. at 487, specifically citing federal and state anti-discrimination laws.

15. 508 U.S. at 487-88.

16. See, e.g., Thomas I. Emerson, *The System of Free Speech* 18 (1970).

being communicated, and that therefore the distinction cannot be sustained as a basis for evaluating the constitutionality of the regulation.¹⁷

A more helpful approach to understanding the Supreme Court's interpretation of the Free Speech clause is signaled by Justice Scalia's opinion in *R.A.V.* It lies not in abstract characterization of the activity being regulated as being within or outside the scope of the clause, but in the means-ends analysis which the Court has used throughout its history to test the constitutional limits of governmental acts. That analysis focuses on the government's purposes for acting, and on the relationship or "fit" between the particular act and the purposes it is intended to achieve. The act is invalid if the government's purposes are illegitimate or forbidden by the constitution, or if its purposes are legitimate but not important enough to justify the particular restriction on individual freedom, or if the purposes are important enough but the act doesn't fit such purposes closely enough to allay suspicion that other, forbidden or insufficient purposes are at work.¹⁸

The Supreme Court has been perhaps at its clearest on the application of this analysis to First Amendment issues in the so-called "symbolic speech" cases, especially those involving demonstrative burning or destruction of a draft card or a flag in order to express a political viewpoint. In *U.S. v. O'Brien*¹⁹ it held that the federal government could properly punish the demonstrative destruction of a draft card, because it had a legitimate purpose for doing so independent of the message being conveyed by the destruction, namely the preservation of the function which the card itself played in the draft system. In doing so it announced the following standard for government regulation of an activity which combines both "speech" and "nonspeech" elements:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged

17. See, e.g., Frederick M. Lawrence, *Punishing Hate* 89-92 (1999).

18. For an argument that the Court itself – not least in the various opinions in *R.A.V.* – has yet to shed the old way of thinking in categories of speech, some of which are "outside the scope of the First Amendment," and that it should finally abandon such thinking in favor of the means-ends analysis just outlined, see Freedman, "A Lot More Comes Into Focus When You Remove The Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent For The Supreme Court to Abandon Its Inside-out Approach to Freedom of Speech And Bring Obscenity, Fighting Words, And Group Libel Within The First Amendment," 81 *Iowa L.Rev.* 883 (1996).

19. 391 U.S. 367 (1968). The draft card documented the holder's registration for the military conscription program.

First Amendment freedom is no greater than is essential to the furtherance of that interest."²⁰

In *Texas v. Johnson*²¹ and *U.S. v. Eichman*²² the Court held that neither the states nor the federal government could properly prohibit the destruction or defacing of a flag as such (in each case, a privately owned flag), where the purpose of the regulation was not to protect the owner's property interest in the physical object but to protect the symbolic meaning of the flag (representing nationhood and national unity) from disrespect. Here under the *O'Brien* test the government's interest was not unrelated to the suppression of free expression, and it was unable to present a compelling case for suppression.

B. Speech or Expressive Conduct Punishable Because of the Message it Conveys ("Content-based Restrictions")

Nonetheless, it is clear that not all regulation which is aimed at the message being conveyed by speech or other expressive conduct is forbidden by the First Amendment. Sometimes regulation is upheld because of the importance of the government's interest in regulating or suppressing the speech, and sometimes because of the relatively low value of the speech being suppressed. For the most part the Supreme Court's opinions have concerned themselves with the identification of certain characteristics (or, more often, consequences) of speech which justify restriction, on the basis of which it has often proceeded categorically in more or less traditional common-law fashion. The principal categories are reviewed below.

1. Speech that incites others to violence or other unlawful conduct

Since the early part of the 20th century²³ the Supreme Court has struggled with the scope of First Amendment protection for speech which is alleged to be subversive of public order by inciting or inducing unlawful conduct. The leading cases appear in several contexts: war and military conscription, ideological conflict, and racial/ethnic/religious conflict, but ultimately show an evolution of constitutional standards for "subversive speech" generally. The common issue has been whether or not the state must show not only that the defendant purposefully advocated unlawful action, but also that under the cir-

20. 391 U.S. at 377.

21. 491 U.S. 397 (1989)

22. 496 U.S. 310 (1990)

23. For highly praised scholarship on American free speech issues during the nation's first 150 years – in which the U.S. Supreme Court as interpreter of the federal constitution played a minor role distinctly unsympathetic to freedom of speech – see Michael K. Curtis, *Free Speech, 'The People's Darling Privilege'* (2000) (focusing on the period before the Civil War of 1861-65) and David M. Rabban, *Free Speech in its Forgotten Years* (1998) (focusing on the post-Civil War period).

cumstances there was some degree of likelihood that the unlawful action would actually occur as a result of the speech.

(A) **The World War I cases.** The first group of cases, all decided in the same year, came out of the First World War. Three involved advocacy of resistance to military conscription during the war, prosecuted as “willfully obstruct[ing] the recruiting or enlisting service of the United States” in violation of the federal Espionage Act of 1917.²⁴ The Court sustained all three convictions in opinions written within a week of each other by Justice Holmes, who announced what has become known as the “clear and present danger test”:

“The question in every case is 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.”²⁵

Holmes concluded in all three cases that the standard was met, noting that in wartime many things that may hinder government effort are less tolerable than in peacetime, and that it was not necessary to show that an actual obstruction occurred, so long as “the act. . ., its tendency and the intent with which it is done are the same” (*i.e.*, to obstruct the draft).

The fourth case involved another provision of the Espionage Act specifically directed at speech, making it a crime, *inter alia*, to incite resistance to the U.S. or to urge curtailment of war production.²⁶ Here the defendants had distributed circulars denouncing the U.S. intervention into Russia’s revolutionary war on the anti-Bolshevik side, and advocating a general strike by workers to force the U.S. to keep its armies out of Russia. The Court sustained the convictions, treating the issue of the constitutionality of the Espionage Act as settled by *Schenck* and concerning itself only with whether or not the defendants intended to incite resistance and/or a curtailment of production. This time Holmes dissented, on two distinct grounds. First, the requisite specific intent to impede the war effort against Germany was not shown, since the clear purpose of the writings was to stop the anti-Bolshevik intervention, which could be accomplished without impeding the war against Germany, and it was not enough that some indirect hindrance might occur if it was not intended.²⁷ Second, even assuming the requisite intent, “these poor and puny anonymities” presented no actual danger to the war effort against Ger-

24. *Schenck v. U.S.*, 249 U.S. 47 (1919) (distribution of leaflets to known conscriptees); *Frohwerk v. U.S.*, 249 U.S. 204 (1919) (publication of German-language newspaper articles); *Debs v. U. S.*, 249 U.S. 211 (1919) (part of a public speech)

25. *Schenck*, 249 U.S. at 52.

26. *Abrams v. U.S.*, 250 U.S. 616 (1919).

27. The majority saw the AEF as “a strategic operation against the Germans” and therefore not distinguishable from the overall war effort.

many and therefore only a minimal punishment could be justified, and the severe punishment imposed on them could only be based on their opinions. He went on to restate the "clear and present danger" test:

"It is only the present danger of *immediate evil or the intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."²⁸

While there has been much debate over whether Holmes' dissent in *Abrams* represented a conversion to a more speech-protective position than he had taken earlier that year in the draft-resistance cases,²⁹ the new formulation of the clear-and-present-danger test in the *Abrams* dissent added or at least greatly clarified three elements not obvious in the *Schenck* formula: (1) that *specific intent* to bring about the forbidden result is a prerequisite for suppression of the speech by the criminal law; (2) that the intent must be to bring about the forbidden result *immediately*; and (3) that *substantial punishment* for such intent requires an *objective likelihood of success* under the circumstances. At a purely factual level, Holmes obviously believed that the cases were quite different, in that the anti-draft protesters were much more likely to produce some resistance by draftees (by definition harmful to the war effort) than the anti-AEF protesters were to produce a noticeable impact on U.S. policy in the conduct of the war.

(B) **The "red scare" cases.** A second group of cases arose out of the "Red Scare" following the Russian revolution, and involved the constitutionality of prosecutions under state laws prohibiting advocacy of violent overthrow of the government or of the use of unlawful means to achieve industrial or political change. *Gitlow v. New York*³⁰ involved publication and distribution of a "Left Wing Manifesto" which advocated mass strikes and other mass action to bring about Communist revolution, and *Whitney v. California*³¹ grew out of a Communist Party rally resulting in similar calls for action. The Court sustained the convictions, deferring to the states' judgment that such "direct advocacy" involved "such a danger of substantive evil" that it may be penalized and noting that such statements do so "by their very nature". Here there was no war to shift the presumption in favor of the government, but the speakers' purpose and the utterances' tendency were held sufficient. The Court distinguished

28. 250 U.S. at 628.

29. See, e.g., Gerald Gunther, *Learned Hand: The Man and the Judge* 161 ff. (1994), who argues for conversion; Novick, "The Unrevised Holmes and Freedom of Expression," 1991 *S. Ct. Rev.* 303, esp. 340 ff., who argues for consistency.

30. 268 U.S. 652 (1925).

31. 274 U.S. 357 (1927).

these cases from *Schenck*, in so far as that case involved a statute which prohibited conduct (obstruction of the draft) and the *courts* had to determine whether Schenck's speech constituted such obstruction, whereas these cases involved statutes directly prohibiting speech (advocacy of violent overthrow) which the *legislature* had presumably determined to present the requisite danger.³² This analysis, which declines not only to make an independent judicial determination of "clear and present danger" but also to insist that the legislature make such a determination (presuming the latter from the mere enactment of the statute), has been characterized as the "reasonableness" approach.³³

Holmes dissented in *Gitlow*, joined as in *Abrams* by Justice Brandeis, on the ground that no "clear and present danger" of an attempt at such overthrow was presented. He rejected the distinction between theory and incitement: "The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."³⁴ In *Whitney* Brandeis and Holmes again criticized the majority's unwillingness to make an independent assessment of the likelihood of substantive harm, but did not dissent because the defendant had not objected to the conviction on that ground.

(C) **The Cold War cases.** A third group of cases arose during the Cold War under the Smith Act (1940), a federal version of the state "criminal syndicalism" statutes. Under it, several prosecutions were undertaken against officials of the American Communist Party. National leaders were convicted and their convictions sustained against First Amendment challenge in *Dennis v. United States*³⁵, on the basis of findings that the defendants advocated violent overthrow of the government, used language ordinarily calculated to incite persons to action, and intended that their goal be achieved "as speedily as circumstances would permit". There was no majority opinion, but a 4-Justice plurality concluded that since *Gitlow* the Court's decisions have favored the Holmes-Brandeis approach at least to the extent of requiring the courts to make some independent evaluation of whether a clear and present danger of substantive evil is presented on the particular facts of the case. Chief Justice Vinson's opinion, however, adopted a different formula which had been articulated by Judge Learned Hand in the court below:

32. 268 U.S. at 668-9.

33. Erwin Chemerinsky, *Constitutional Law* 806 f. (1997).

34. 268 U.S. at 671.

35. 341 U.S. 494 (1951).

"In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justified such invasion of free speech as is necessary to avoid the danger."³⁶

He then concluded that the threat of Communism had grown so much on a global scale that the government was not required to wait domestically until the evil-doers are poised to act, and that in any event attempts to incite unlawful action are punishable without regard to their likelihood of success. Justices Black and Douglas dissented essentially on the ground that teaching of doctrine, in and of itself, does not present sufficient danger.

*Yates v. U.S.*³⁷ was a prosecution under the same statute of lower-level Party officials on facts essentially similar to those of *Dennis*, but under a charge to the jury which appeared to allow for conviction on the basis of advocacy and teaching of abstract doctrine if done with the intent of eventually accomplishing violent overthrow. The Court held that the convictions could not stand without a showing that the defendants had undertaken direct *incitement* in the form of advocacy and teaching of specific unlawful acts in furtherance of the ultimate goal. While these cases — *Yates* more strongly than *Dennis* — can be seen as reinstating a "clear and present danger" standard to displace the far more deferential "reasonableness" test endorsed by the *Gitlow* majority, this version still lacked a clear insistence on both likelihood and immediacy of the intended unlawful result.

(D) **The most recent final word.** The Court's most recent pronouncement on the subject came in *Brandenburg v. Ohio*,³⁸ involving application of the state's "criminal syndicalism" law to a leader of the Ku Klux Klan who spoke at an organizing rally and suggested that "if our [government] continues to suppress the white, Caucasian race, it's possible that there might be some revengeance taken". Neither the state statute nor the charge against the defendant required any incitement to action, and the Court unanimously overturned the conviction for that reason. Most interesting, and since then most often cited, is the Court's formulation of the constitutional standard for suppressing advocacy of unlawful action:

"[Cases since *Whitney*] 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."³⁹

36. *Dennis v. U.S.*, 183 F.2d 200, 212 (2d Cir. 1950), as quoted in *Dennis v. U.S.*, 341 U.S. at 510 (Vinson, C.J.).

37. 354 U.S. 298 (1957). The implications of this case for the kinds of advocacy which can be prohibited are further spelled out in *Scales v. U.S.*, 367 U.S. 203 (1961).

38. 395 U.S. 444 (1969).

39. 395 U.S. at 447, citing *Dennis* and *Yates*.

The formula not only requires an *intention* to incite and a *likelihood* that the advocacy *will* incite unlawful action, which had been the primary focus of criticism of the “reasonableness” test, but also that the likely unlawful action be *imminent*, a requirement of immediacy that is emphasized in the Holmes-Brandeis dissents in earlier cases *but not readily found in the majority opinions*. Missing from this formula, on the other hand, is consideration of the *gravity of the threatened harm*, which was so prominent in the majority opinions in *Schenck, Abrams* and *Dennis*.

The *Brandenburg* formula thus imposes a stringent standard for suppression of hate speech as advocacy of unlawful action, at least in the ordinary situation which involves a relatively localized and individualized threat. It was handed down in a time of considerable internal unrest surrounding both race relations and the increasingly unpopular Vietnam war, and appears to have survived to the present day intact.⁴⁰ Nonetheless, one may wonder whether, in time of war or other external threat perhaps like that being faced at the moment of this writing, the *Brandenburg* formula might again yield to that of Learned Hand in *Dennis*: there might still be room, in short, for equating a lesser probability of greater harm with a greater probability of lesser harm.⁴¹

Although the Supreme Court has not yet decided such a case, the *Brandenburg* incitement formula would seem to allow for punishment of speech which purposefully incites others to commit unlawful discrimination based on race, national origin, religion, gender, etc. This may be a limited possibility, however, because private discrimination on such grounds is unlawful only to the extent that legislation makes it so: only such discrimination by public agencies is presumptively unconstitutional. Federal and state legislation prohibiting private discrimination is important, but is largely limited to public accommodations, housing, employment, and the provision of professional services. Moreover, such legislation for the most part carries only civil and not criminal penalties, which would make extension of *Brandenburg* to incitement of such conduct problematical.

2. Speech that provokes violent reaction against the speaker (“fighting words”)

As we noted above, the concept of “fighting words” was prominent in the *R.A.V.* decision, though ultimately found not to justify the

40. One leading scholar recently stated: “Nowhere on the scholarly horizon or among the federal judiciary do we see an effort to reopen this issue, though we are not lacking for extremist groups with violent potential.” Daniel A. Farber, *The First Amendment* 284 (1998).

41. See, e.g., Bollinger, “Rethinking Group Libel,” in Monroe H. Freedman & Eric M. Freedman, (eds.), *Group Defamation and Freedom of Speech* 243 f. (1995), who notes that *Dennis* has not been overruled.

particular hate speech regulation at issue there. Recognition by the Supreme Court of this limitation on the freedom of speech came in two cases from the early 1940's involving Jehovah's Witnesses in their proselytizing activities which included broad-based attacks on organized religion. In *Cantwell v. Connecticut*,⁴² the defendant was walking on the street in a predominantly Catholic neighborhood, asking passersby if they would be willing to listen to a recording. Two men who happened to be Catholic agreed, and the recording was played, including a particularly virulent attack on Roman Catholicism. The men were angry and felt like assaulting Cantwell, and told him he had better get off the street before something happened to him, whereupon Cantwell picked up his record player and materials and left. Cantwell was charged with and convicted of a breach of the peace, a very broadly defined common-law crime. The U.S. Supreme Court held that this conduct could not be suppressed under these circumstances. The majority opinion acknowledged that statements which were "likely to provoke violence or disturbance of good order" could be sanctioned, but noted that such cases almost always involved "profane, indecent, or abusive remarks directed to the person of the hearer."⁴³ It found no such conduct in this case.

Two years later the Court decided *Chaplinsky v. New Hampshire*,⁴⁴ in which a Jehovah's Witness had created a disturbance on the streets of the city with diatribes against organized religion, had been led away from the scene by a policeman, and in the process encountered the City Marshal [police chief]. He got into an argument with the Marshal and called the latter a "God damned racketeer" and "a damned Fascist". He was charged and convicted of violating a state law prohibiting him to "address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, [or] call him any offensive or derisive name". The state courts had interpreted the statute as applying only to "words likely to cause an average addressee to fight", "face-to-face words plainly likely to cause a breach of the peace by the addressee". The Supreme Court held the statute constitutional as so interpreted, because the words in question are of "slight social value" which is "clearly outweighed by the social interest in order and morality". The Court relied on the dictum in *Cantwell* that "resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded"⁴⁵ by the Constitution.

Each subsequent attempt to get the Supreme Court to approve application of the "fighting words" exception to a particular case has

42. 310 U.S. 296 (1940).

43. 310 U.S. at 309.

44. 315 U.S. 568 (1942).

45. 310 U.S. at 309-10.

failed. In *Terminiello v. Chicago*,⁴⁶ defendant gave an abusive harangue to a crowd, criticizing government officials and certain racial groups and calling the crowd “snakes” and “slimy scum” when they showed hostility toward his message. He was charged with violating a city “breach of the peace” ordinance which was interpreted by the state trial court, in its instruction to the jury, as prohibiting speech which “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance”. The Court held that this standard was too broad, that “inviting dispute” is the whole purpose of freedom of speech, and that there was no reason even to discuss whether the language used by the defendant constituted “fighting words” because the charge and conviction were not limited to that, even though the state appellate courts, in affirming the conviction, described the ordinance as limited to fighting words. *Cohen v. California*⁴⁷ reversed the conviction of a man who had worn a jacket bearing the words “Fuck the Draft” in a public place, the Court noting that the offensive words were not a “direct personal insult” aimed at the viewer, and therefore not within the “fighting words” exception. In *Gooding v. Wilson*⁴⁸ the defendant shouted racial and other epithets at a policeman who was trying to remove him from a demonstration which hindered draftees from entering an Army building; his conviction was reversed because the statute forbade “use of opprobrious or abusive language, tending to cause a breach of the peace” and had not been interpreted narrowly enough to limit it to “fighting words”. Specifically, the Court defined the exception as limited to words that “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed”.⁴⁹

In short, the Court has rejected any implication that might have been drawn from the majority opinion in *Chaplinsky* — and indeed was drawn by the Minnesota Supreme Court in *R.A.V.* — that direct injury to the hearer by the words (presumably in the form of humiliation, a sense of exclusion or inferiority, and other very real emotional distress⁵⁰) could be an alternative basis for allowing suppression, and has limited the exception to the risk of violence on the part of the hearer. Moreover, *Gooding* suggests that certain addressees, such as police officers, should be less likely to fight than others, and that this

46. 337 U.S. 1 (1949).

47. 403 U.S. 15 (1971).

48. 405 U.S. 518 (1972).

49. 405 U.S. at 524.

50. The harm to victims caused by hate speech, especially to racial or ethnic minorities, has been well documented and articulated by writers such as Mari Matsuda: see, e.g., Matsuda, “Public Reponse to Racist Speech: Considering the Victim’s Story,” in Mari J. Matsuda, Charles R. Lawrence, Richard Delgado & Kimberle Williams Crenshaw, (eds.), *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* 17 ff. (1993).

should be taken into account in determining whether the exception applies.⁵¹

The “fighting words” exception, then – even apart from *R.A.V.*’s prohibition against limiting its application to certain designated categories of words “likely to cause the average addressee to fight” – is a narrowly circumscribed weapon which cannot generally be applied against “speech that incites to hatred” because it must be addressed to the hated person individually, and must be such as to invite a *violent response from that person*.

3. Speech that defames or damages another’s reputation (“group libel”)

If hurt feelings as such have not been recognized as a ground for suppressing hate speech, there might still be room for suppression based on potential injury to reputation, a long-recognized civil and criminal wrong. In particular, the argument has been made that “hate speech” which denigrates a group of persons defined by their ethnicity, religion, race, etc., defames that group and should be suppressible on the same ground as defamation of an individual.⁵² This argument was encouraged by the Court’s inclusion of libel in the list of categories of speech which are outside the scope of the First Amendment’s protection, in *Chaplinsky* and other cases, but it has a long history of sporadic (if only rarely successful) use in the U.S.⁵³ Indeed it appears to have been urged by Southern slaveholders as a ground for suppression of pamphlets and circulars advocating abolition of slavery during the first half of the 19th century, although without apparent success⁵⁴ even in the South, where suppression was founded primarily on theories of sedition or incitement to insurrection.⁵⁵

The U.S. Supreme Court addressed the issue directly for the first and only time in *Beauharnais v. Illinois*,⁵⁶ a hate speech case which amply illustrates the difficulties which the group libel theory has encountered over its history as well as under present law. *Beauharnais* distributed a leaflet on behalf of the “White Circle League of

51. See also *Lewis v. New Orleans*, 408 U.S. 913 (1972), summarily vacating a conviction for cursing police officers who were arresting the defendant’s son, and remanding for reconsideration in light of *Gooding*.

52. See, e.g., Lasson, “To Stimulate, Provoke, or Incite?: Hate Speech and the First Amendment,” in Freedman & Freedman, *supra* n. 41, at 267f.

53. For extended analysis of the English and American precedents, both judicial and legislative, for punishment of group libel, see Riesman, “Democracy and Defamation: Control of Group Libel,” 42 *Col. L. Rev.* 727, esp. 745-50 (1942); Tanenhaus, “Group Libel,” 35 *Cornell L.Q.* 261 (1950); Schultz, “Group Rights, American Jews, and the Failure of Group Libel Laws 1913-1952,” 66 *Brook. L. Rev.* 71 (2000).

54. Curtis, *supra* n. 23, at 199-200.

55. *Id.* at 136f.

56. 343 U.S. 250 (1952).

America”, calling for white unity and accusing Negroes collectively of “aggressions, rapes, robberies, knives, guns and marijuana”. He was charged and convicted not under general libel law but under a special hate speech law which had been adopted in 1917 in the wake of severe race riots.⁵⁷ The statute made it a crime to produce or distribute any publication or exhibition “which . . . portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.” The Illinois Supreme Court interpreted the law as a form of criminal libel law, subject to the defense of truth published with good motives guaranteed by the state’s constitution for all trials of libel.⁵⁸ More importantly, the state court interpreted the statute as applying only to words which are “liable to cause violence and disorder”, thereby reflecting the dominant American view that criminal responsibility for libel – as distinguished from civil liability to the victim – was founded not on injury to the victim’s reputation but on the tendency of libel to cause a breach of the peace.⁵⁹

The U.S. Supreme Court sustained the conviction and rejected the defendant’s constitutional attack on the Illinois statute. Noting first that *Chaplinsky* had included libel in the list of types of speech unprotected by the First Amendment, and second that the gravamen of criminal punishment for libel is its tendency to cause breaches of the peace, Justice Frankfurter’s majority opinion proceeded to put the question directly: whether freedom of speech “prevents a State from punishing such libels . . . directed at designated collectives and flagrantly disseminated”.⁶⁰ It proceeded to answer by noting the background of race riots and of massive recent immigration of as yet unassimilated ethnic groups, on the basis of which it was rational for the legislature to enact such laws, and inappropriate for the courts to second-guess their likelihood of success. Frankfurter acknowledged that precedent for this extension was “dubious” and inconclusive under American law (essentially all of which is state law), but saw no constitutional impediment to a state’s choosing to extend it.

The decision was a narrow one, with four Justices dissenting; but only one of the four, Justice Black, argued against the permissibility of group libel laws generally. In his view, the only libel laws which had withstood constitutional examination had been those protecting

57. Other efforts to promote state and municipal legislation forbidding group libels were mounted in the immediate post-World War I period and again in the 1930’s, to little avail; the few laws that were passed were either unused or struck down as violations of free speech. See Schultz, “Group Rights, American Jews, and the Failure of Group Libel Laws,” 66 *Brooklyn L. Rev.* 71, 104f. and 121f. (2000).

58. 343 U.S. at 254-5.

59. See, e.g., Tanenhaus, *supra* n. 53, at 261, 270 ff.

60. 343 U.S. at 258.

individuals, involving “private feuds”; *Beauharnais* was addressing a matter of public concern,⁶¹ indeed was petitioning his elected representatives for redress of grievances.⁶² Justice Reed, on the other hand, objected to the vagueness of the terms used by the statute (“virtue”, “derision”, “obloquy”), denying due process by making it impossible for a citizen to know what is prohibited; Justice Jackson objected to the absence of proper safeguards in the law, specifically the defense of truth and the submission of all questions of fact and law to the jury, which he insisted were “the common sense of American criminal libel law”;⁶³ and Justice Douglas (who also concurred with Justice Black) insisted that the “clear and present danger” test should be applied to group libel prosecutions, allowing conviction only if necessary “in order to prevent disaster”.⁶⁴

Despite the size of the majority in *Beauharnais* conceding at least the theoretical permissibility of a properly drafted group libel law, and despite the fact that *Beauharnais* has never been overruled, most scholars and judges believe that it is no longer good law.⁶⁵

Two parallel developments in the law since 1952 support this view. First, as outlined above, *Brandenburg* has greatly strengthened the “clear and present danger” test for suppressing speech likely to cause a breach of the peace. Second, and perhaps more importantly for the stated assumptions of Justice Frankfurter’s opinion in *Beauharnais*, the Court has abandoned the notion that libel as such is wholly outside the protection of the First Amendment. Even before the decision in *Brandenburg*, the Court announced in *New York Times v. Sullivan*⁶⁶ that a civil action for libel, where the plaintiff is a public official, requires a showing that the plaintiff was specifically mentioned, that factual statements made about him were false (thus reversing the traditional burden of proof as to truth), and that they were made with knowledge that they were false or with reckless disregard of whether they were true or not. Subsequent cases have made clear that the latter element, known as *scienter*, requires awareness of probable falsity or of serious doubts about the truth of the published statements;⁶⁷ and that the plaintiff must make his case

61. 343 U.S. at 272. .

62. *Id.* at 267-68.

63. *Id.* at 297.

64. *Id.* at 284-85.

65. See, e.g., Nowak & Rotunda, *Constitutional Law* §16.32 (6th ed. 2000); Chemerinsky, *supra* n. 33, at 825; James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* 56ff. (1999); Freedman, “A Lot More Comes Into Focus When You Remove The Lens Cap,” 81 *Iowa L. Rev.* 883, 950f. (1996); Bollinger, “Rethinking Group Libel,” in Freedman & Freedman, *supra* n. 41, at 243.

66. 376 U.S. 254 (1964).

67. *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). See generally Nowak & Rotunda, *supra* n. 9, at 1174f.

by “clear and convincing evidence”, stronger than the normal civil burden of persuasion.⁶⁸ Moreover, this standard has been extended to plaintiffs who are “public figures” by reason of their intimate involvement in the resolution of important public questions, or have special influence by reason of their fame;⁶⁹ and even to plaintiffs who, while not public figures generally, have participated prominently in the particular public controversy out of which the claim arises.⁷⁰ If the plaintiff is not a public figure in either sense, but the libel concerns a matter of public concern, he must prove not only falsity of the statements but also at least negligence on the part of the defendant.⁷¹ The overriding value to be protected here is famously defined by Justice Brennan for the majority in *New York Times v. Sullivan*:

“ . . . [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . .⁷²

These trends came together in one of the most notorious hate speech cases of recent decades, the Nazi Party of America’s planned march in the Chicago suburb of Skokie in the 1970’s. When the Party’s plans became known, the predominantly Jewish community⁷³ which included many Holocaust survivors sought to prevent the march by several means. First, they sought and obtained an injunction against the march in state court, forbidding the Party from marching in the NSPA uniform, from wearing or displaying the swastika, and from distributing or displaying materials that “incite or promote hatred against persons . . . of any faith or ancestry, race or religion”. On first appeal the injunction was narrowed to a prohibition against wearing or displaying the swastika, but the state supreme court invalidated even that on free speech grounds. The city offered two related rationales for the injunction: (1) that the swastika constitutes “fighting words” within the meaning of *Chaplinsky*, and (2) that it was likely to cause a violent reaction among the Jewish residents of the city. Both were rejected by the state court on the basis of U.S. Supreme Court decisions like *Cohen* and *Terminiello*:

68. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

69. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

70. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

71. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). The Court left open the possibility that the common law burden of proving truth might remain on the defendant in a suit by a private figure suing for libel on a matter of private concern, 475 U.S. at 775; an earlier case dealing with such a situation, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), dispensed with the plaintiff’s duty to prove fault in order to obtain punitive damages, but lacked a majority opinion and in any event was not required to address the issue of burden of proof.

72. 376 U.S. at 270.

73. Jewish residents constituted the largest religious/ethnic affiliation in the city, and were alleged to make up more than half of the total population. See Philippa Strum, *When the Nazis Came to Skokie* 7 (1999).

the symbol does not constitute “fighting words”, and anticipated hostile audience reaction is insufficient justification for an injunction against the expressive activity. After the injunction was narrowed but before it was invalidated altogether, the city adopted ordinances effectively prohibiting demonstrations or distribution of materials which “portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group . . . by reason of . . . religious, racial, ethnic, national or regional affiliation”. These ordinances were challenged in federal court as a violation of freedom of speech; the trial and intermediate appellate courts held the ordinances invalid, and the Supreme Court refused to review these decisions. Specifically, the intermediate Court of Appeals rejected the group libel theory, both because the ordinances were not limited to statements of fact, which is the essence of libel, and because *Beauharnais* – to the extent that it has any continuing validity – rested on the likelihood of violence, while the ordinances were not so limited.⁷⁴

Group libel thus appears no longer to be a viable theory for legal action against hate speech in the U.S. The Supreme Court has effectively reduced it as a basis for criminal punishment to a variant on fighting words, which in turn is a variant on “subversive speech”: only the speech’s capacity to cause imminent violence or other unlawful acts will justify its suppression. On the civil side, only its harm to the reputation of individuals will justify the imposition of liability on the speaker. In any event, it can only function as a distinct theory for suppression of false statements of fact, for the falsity of which the complaining party bears the burden of persuasion.⁷⁵

4. Speech that directly threatens unlawful harm to others

As noted above, R.A.V. and his friends were punished for their cross-burning, pursuant to federal civil rights laws prohibiting threats and intimidation. Moreover, a Minnesota state law still in force – which the authorities chose not to invoke against them – prohibits (*inter alia*) threatening a crime of violence for the purpose of terrorizing another.⁷⁶ The concept of an unlawful threat is an element in several ordinary crimes such as assault and extortion.

74. *Collin v. Smith*, 578 F.2d 1197, 1203 ff. (7th Cir. 1978).

75. On the inadequacy of such a theory to reach the real harms of hate speech, indeed its capacity to exacerbate the problem, see, e.g., Kent Greenawalt, *Fighting Words* 63 (1995).

76. Minn. Stat. Ann. §609.713 (2000). Several other states have similar laws, derived from National Conference of Commissioners on Uniform State Laws, *Model Penal Code* 211.3. (1972); Code of Georgia §16-11-37 (1998); Neb.Rev.St. § 28-311.01 (2000); N.J.S.A. 2C:12-3 (1995); 18 Pa.C.S.A. § 2706 (2000); Wyoming Statutes 1977 § 6-2-505 (1982).

The U.S. Supreme Court has taken the occasion twice to address the relationship between such threats and the freedom of speech, making clear that such threats are not protected by the First Amendment but failing to provide a fully satisfactory definition of the unprotected threat.

*United States v. Watts*⁷⁷ was a prosecution for threatening the life of the President of the U.S. in violation of a specific federal statute defining that crime.⁷⁸ Defendant spoke to a small informal group at a war protest in Washington, D.C., saying that he had received his draft notice and stating: "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. [then President Lyndon Johnson];" the response of his audience to this was laughter. Watts was convicted by a jury, but on appeal the Supreme Court summarily reversed the conviction. The statute must be interpreted so as to avoid conflict with the freedom of speech, and thus requires a "true 'threat'", whereas the defendant's statements in context were nothing more than "political hyperbole", protected by the First Amendment.

"We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."⁷⁹

*NAACP v. Claiborne Hardware*⁸⁰ was a civil action under Mississippi state law for damages brought by a group of local merchants against a black civil rights organization and many of its local members, arising out of a boycott (concerted refusal to patronize the targeted businesses) organized by the defendants to protest the plaintiffs' failure, individually and through the local government which they controlled, to take appropriate steps to eliminate segregation and employment discrimination in their businesses. The state courts took the position that because acts of violence and coercion occurred during the boycott, directed primarily at black customers who wished to continue patronizing the white-owned businesses, the entire boycott was unlawful and the plaintiff businesses could recover damages for all losses suffered by reason of it. The U.S. Supreme Court unanimously reversed, holding first that the boycott was primarily for the purpose of vindicating rights of equality and freedom, and to bring about political, social and economic change, and was therefore protected by the First Amendment. While the state could impose civil

77. 394 U.S. 705 (1969).

78. 18 U.S.C. §871(a) (2000).

79. 394 U.S. at 708.

80. 458 U.S. 886 (1982).

liability for specific wrongful acts committed in the course of the boycott, it could not treat the entire movement as wrongful because of those acts; the record showed that the great majority of black citizens participated in the boycott voluntarily and not as a result of coercion by the organizers. The Court then addressed the conduct of one of the individual defendants, Charles Evers, who was the primary instigator and leader of the boycott. In the course of speeches to black citizens which were primarily devoted to stating the group's grievances and the promises of the boycott, as well as insistence that the boycott was a way of avoiding the kind of violence against the business owners and politicians which they had condoned against black people, he used strong language about the discipline that would be imposed on the black community as boycotters, allegedly saying once that boycott-breakers would "have their necks broken" by their own people. The Court held that Evers' speeches taken as a whole "did not exceed the bounds of protected speech", at least where the record (which in any event was contested as to what exactly was said) showed no actual violence following the speeches which could be attributed to them in a causal sense – as the Court put it, Evers' appeals "[did] not incite lawless action". He therefore could not be held liable to the merchants on the basis of those speeches alone.

These two decisions have left lower courts and scholars in some doubt as to how to define "true threats" as a categorical exception to the freedom of speech.⁸¹ For the most part the lower courts have applied a "reasonable listener" or "reasonable speaker" test, which asks whether the speaker "could reasonably have foreseen that the statement he uttered would be taken as a threat by those to whom it is made".⁸² This test does not ask whether the speaker *intended* his statement to be a threat, nor does it appear to ask whether the addressee of the threat, under the circumstances, was likely to receive the message. There is some isolated authority for requiring consideration of the speaker's intent to threaten,⁸³ for requiring that the listener reasonably believe that the threat will be carried out immediately,⁸⁴ and for requiring, as in the traditional crime of extortion, that the threat be directed at the achievement of some goal beyond merely frightening the victim.⁸⁵

81. For perhaps the most thorough and up-to-date analysis of the cases and literature on this subject, see Rothman, "Freedom of Speech and True Threats," 25 *Harv. J. L. & Pub. Pol.* 25 (2001). Hereinafter cited as "Rothman, 'True Threats'".

82. *U.S. v. Fulmer*, 108 F.3d 1486, 1491-2 (1st Cir. 1997).

83. See, e.g., *U.S. v. Twine*, 853 F.2d 676 (9th Cir. 1988). This position appears not to be followed by other panels in the same circuit, see Rothman, "True Threats," 308-09. She proposes, however, that the intent to threaten be part of the test for identifying true threats, *id.* pp. 333f.

84. *U.S. v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976).

85. *U.S. v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

A current case wending its way through the lower federal courts may provide the Supreme Court an opportunity to clarify the test for "true threat". In *Planned Parenthood of the Columbia-Willamette, Inc. v. American Coalition of Life Activists*,⁸⁶ defendant anti-abortion groups published posters and maintained a web site identifying abortion providers and clinic employees, often with their photographs and home addresses as well as professional addresses, generally accusing them of "crimes against humanity". In several instances providers were murdered after posters of them were published; in some of the defendants' protest actions, they carried placards reminding targeted providers of the murders; the defendants frequently praised those accused of murdering abortion providers and supported their legal defenses; and the web site (the so-called "Nuremberg Files") listed providers who had been murdered or wounded along with those currently practicing, with lines through the names of the murdered and shading on the names of the wounded. Federal law enforcement authorities notified providers and employees who were listed on posters or the web site and advised them to take precautions against violence. On this basis a jury found that the defendants' publications and associated activities constituted threats of violence against the person and/or property of the plaintiffs with intent to intimidate, in violation of a specific federal law protecting medical clinics, and awarded monetary relief (compensatory and punitive damages); the trial judge, on the basis of these findings, also issued injunctions against future publications of the same character. On appeal, a panel of the 9th Circuit Court of Appeals reversed on the ground that the defendants' conduct did not constitute "true threats", namely threats that the defendants themselves or their agents would physically harm the named providers.⁸⁷ The appellate panel rejected the inference that approval of past violence constitutes a threat of future violence against named providers, found that there was no advocacy of or incitement to such violence expressed in the publications, and emphasized that the alleged threats were carried out in public discourse rather than direct personal communications.⁸⁸ The 9th Circuit Court of Appeals, reconsidering the panel's decision en banc, has now reversed it and reinstated the trial jury's verdict, finding specifically that the jury could properly find the posters and the website to be

86. 41 F.Supp. 2d 1130 (D.C.D. Ore. 1999).

87. 244 F.3d 1007 (9th Cir. 2000). This appears to be the first time that a lower court has explicitly required that a [punishable] "true threat" be one which the issuer of the threat would personally carry out, as distinguished from a "warning threat" in which the issuer informs the target that a third person not controlled by the issuer intends to commit acts of violence against him. See Rothman, "True Threats," p. 311. That was a factor noted by the Supreme Court in *Claiborne Hardware* but not clearly said to be decisive. Rothman proposes that it be an explicit part of the definition of true threats, id. p. 334.

88. 244 F.3d at 1018-1019.

true threats, defined as a statement which, under all the circumstances, the reasonable speaker could foresee would be interpreted by its addressee(s) as a serious expression of intent to inflict bodily harm on them and made with intent to intimidate them.⁸⁹

5. Speech that constitutes unlawful discrimination ("hostile environment" in the workplace)

Federal law forbids private discrimination in employment (hiring, firing, terms and working conditions) on the basis of race, color, religion, sex or national origin.⁹⁰ One form of such discrimination which has been recognized by the courts is the so-called "hostile [or abusive] work environment" created by conduct of employers or co-workers so pervasively harassing to an employee on one of the prohibited grounds that it makes it more difficult for that employee to do her or his job.⁹¹ Very often such conduct is expressive, consisting of "intimidation, insult and ridicule",⁹² and it need not be such as to cause actual psychological harm to the victim, so long as a reasonable person in the victim's position would perceive the environment as hostile or abusive and the actual victim does so perceive it.⁹³ Although the offending conduct is expressive, the Supreme Court in its decisions recognizing the "hostile environment" form of workplace discrimination did not even acknowledge a potential Free Speech issue. In the majority opinion in *R.A.V.*, this form of employment discrimination is simply listed among the limited number of exceptions to the Free Speech principle.⁹⁴

Scholarly debate has arisen over whether this line of cases fails to provide appropriate protection for speech which would be protected in the public forum – in particular, expressions of opinion about races, genders nationalities or religions which are merely offensive.⁹⁵ One important difficulty is that the "hostile environment" is deter-

89. 2002 WL 992667 (9th Cir. Ore.).

90. Civil Rights Act of 1964, §703(a)(1), 42 U.S.C. §2000e-2(a)(1). Most states have similar laws, which vary inter alia in their lists of forbidden bases of discrimination.

91. *Meritor Savings Bank, SFB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

92. *Meritor Savings Bank*, 477 U.S. at 65.

93. *Harris*, 510 U.S. at 22.

94. 505 U.S. at 389.

95. See, e.g., Browne, "Title VII as Censorship: Hostile-Environment Harassment and the First Amendment," 52 *Ohio St. L.J.* 481 (1991) (arguing that the entire category is inconsistent with freedom of speech); Volokh, "Freedom of Speech and Workplace Harassment," 39 *U.C.L.A. L. Rev.* 1791 (1992) (arguing for a more limited protection of workplace hate speech); Sangree, "Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight," 47 *Rutgers L. Rev.* 461 (1995) (arguing that "hostile environment" harassment law targets discrimination rather than speech, and therefore does not violate the First Amendment); Balkin, "Free Speech and Hostile Environments," 99 *Col. L. Rev.* 2295 (1999) (arguing that such restrictions on free speech in the workplace are justified

mined, according to the Court, by the totality of the circumstances,⁹⁶ which can give otherwise protected speech a role in producing the cumulative effect of discrimination, even if not so intended. It is argued that the standard of severity or pervasiveness is so vague that it will have a chilling effect on expression, because claims can be asserted on the basis of expressions of opinion and not all be screened out by the courts.⁹⁷

It does not appear that the courts are much interested in pursuing these unintended consequences, which are after all by hypothesis the result of defensive overregulation by private employers who are not themselves bound by the Free Speech clause. The standard announced by the Court for “hostile environment” liability is demanding enough that only patterns of conduct which have a significant impact on a co-worker’s conditions of employment should be actionable, and the possibility that employers will enforce unreasonably strict anti-harassment standards against their employees in order to avoid lawsuits does not justify restricting the prohibition against discrimination.⁹⁸

C. *Viewpoint Neutrality in the Suppression of “Unprotected” Speech*

For many scholars, as well as for the *R.A.V.* minority, perhaps the most puzzling dimension of the Supreme Court’s treatment of hate speech is the insistence of the *R.A.V.* majority opinion that *selective* suppression of speech that is unprotected because of a broader characteristic – in that case “fighting words” – can still violate the freedom of speech if the selection is made on the basis of the particular message conveyed, unless the particular message lies at the heart of what makes it suppressible. Two state cross-burning cases nicely illustrate the difficulty judges may have in applying this reasoning.

*State v. Talley*⁹⁹ was decided by the Washington state supreme court shortly after *Mitchell* but briefed and argued by counsel before that opinion was published. There a state statute defined the crime of “malicious harassment” as placing another in reasonable fear of harm to his person or property, with intent to intimidate or harass that person on the basis of race, color, religion, ancestry, etc. The law went on to provide that cross-burning was a *per se* violation, meaning

because co-workers and employees are a “captive audience” who have no opportunity to avoid the unwanted messages).

96. Harris, 510 U.S. at 23.

97. See Volokh, “How Harassment Law Restricts Free Speech,” 47 *Rutgers L. Rev.* 563, 564f. (1995).

98. For an extended and balanced discussion of the relevant considerations, arguing that a “hostile environment” claim ought not to be founded entirely on otherwise protected speech but that in the typical case this is highly unlikely, see Greenawalt, *supra* n. 75, at 77-96.

99. 858 P.2d 217 (Wash. 1993).

that the intent of the perpetrator to intimidate and the perception of fear in the victim were conclusively presumed to exist. Two cases were decided together: one defendant who had burned a cross on his own lawn in the presence of a mixed race couple with intent to discourage them from buying the house next door, and two defendants who had burned a cross on the lawn of an African-American family. Both cases had been dismissed by the trial courts on the ground that the statute as a whole was inconsistent with *R.A.V.* The state supreme court, however, distinguished the general "hate crime" of malicious harassment from the provision making cross-burning a *per se* violation, holding that only the latter was a content-based restriction on speech foreclosed by *R.A.V.* – a singling out of a particular intimidating message for automatic suppression. Moreover, the defendant who burned the cross on his own lawn did not put the targets in reasonable fear of harm, and therefore did not violate the valid portion of the statute. Nonetheless, the *R.A.V.* minority's overbreadth rationale would have been equally applicable, since the cross-burning provision of the statute did not require proof of the otherwise essential elements of intent to intimidate and fear of harm.

*Black v. Commonwealth*¹⁰⁰ involved a Virginia statute which specifically prohibited the burning of a cross on the property of another or in a public place "with the intent of intimidating any person or group of person", and which placed the burden of proving the *absence* of intimidating intent on the defendant. Again, two prosecutions were consolidated: one for burning a cross at a Ku Klux Klan rally, and one for burning a cross on the lawn of an African-American neighbor of the defendants who were conscious of and hostile to the victim's race and chose the particular symbol for that reason. In this case the court struck down the entire statute on the ground that by singling out cross-burning for special suppression it engaged in the kind of content-based suppression of ideas condemned by *R.A.V.* Unlike the Washington court in *Talley*, but like the Supreme Court in *R.A.V.*, the Virginia court was sharply divided, 4-3, on the application of this principle. On the other hand requiring the cross-burning defendant to prove the absence of the other elements of the crime meant that some non-intimidating acts could be punished, making the statute unconstitutionally overbroad. In short, the *Black* majority relied on both the majority and concurring rationales of *R.A.V.* The dissenting justices, on the other hand, found that in fact the jury was instructed in this case that the state had to prove intent to intimidate, and that the defendant did not contest the sufficiency of the evidence to prove such intent; and they argued that *R.A.V.*'s majority rationale did not apply, because this statute did not forbid all cross-burnings, only those with intent to intimidate.

100. 553 S.E.2d 738, (Va. 2001).

III. CONDUCT ALREADY CRIMINAL WHICH IS MOTIVATED BY HATRED OR BIAS ("HATE CRIMES")

As described above, the Supreme Court in *Wisconsin v. Mitchell*¹⁰¹ sustained state hate crimes legislation against First Amendment challenge, finding a sharp distinction between punishing the expression of a bigoted idea as such and punishing an act because of its motivation in bigotry. Despite the unanimity of the Court in *Mitchell*, the distinction remains controversial among scholars, and the view of the Wisconsin court in that case – that enhancing punishment for bias motivation is equivalent to punishing the bigoted belief itself – still finds supporters.¹⁰² Nonetheless virtually all states now have hate crime laws of one sort or another and the federal government, in addition to the civil rights laws applied to *R.A.V.*, has enacted a Hate Crimes Statistics Act¹⁰³ designed to establish a national database for the incidence of such crimes.

State hate crimes laws are quite varied, but the variations occur along three matrices.¹⁰⁴ *First*, they may purport only to regulate punishment for crimes which are themselves defined in other laws (like the statute in *Wisconsin v. Mitchell*), or they may be self-contained definitions of crimes (like the Minnesota assault statute under which *R.A.V.* was charged). The difference between these two types is purely formal, however, because the free-standing crime definition always addresses conduct which is already an offense under general criminal law.¹⁰⁵

Second, they may define the required state of mind of the perpetrator in terms of an intentional selection of his victim on account of race, etc. (as did the Wisconsin statute in *Mitchell*), or in terms of bias or hatred motivating the act (as does a Florida sentence-enhancement statute¹⁰⁶ addressed to crimes the commission of which "evidences prejudice" on the prohibited grounds), or more generally in terms of motivation (as do the Minnesota assault statute and the federal civil rights statutes under which *R.A.V.* was charged, which refer to an act done "because of" the disfavored criteria,¹⁰⁷ or the Missouri sentence-enhancement statute¹⁰⁸ which refers to acts "knowingly motivated because of" the disfavored criteria). The discriminatory victim-selection model, adopted in only a few states, appears to have been intended to emphasize conduct rather than state of mind, in or-

101. 508 U.S. 476 (1993).

102. See, e.g., James B. Jacobs & Kimberly Potter, *Hate Crimes* 121-29 (1998).

103. Hate Crimes Statistics Act of 1990, as amended, 28 U.S.C. §534 note

104. This section draws substantially on the survey in Lawrence, *supra* n. 17, at 178f.

105. *Id.* at 93f.

106. Fla. Stat. Ann. §775.085 (1999).

107. 18 U.S.C. §241 and 42 U.S.C. §3631.

108. Rev. Stat. Mo. §557.035 (1999).

der to avoid what appeared after *R.A.V.* to be the free-speech pitfall of punishing ideas rather than actions. The "racial animus" model,¹⁰⁹ also adopted in only a few states, appears to be a narrower conception that focuses on the most reprehensible dimension of the hate crime. The decision in *Mitchell*, however, by endorsing the concept of punishing motivation as an integral part of conduct, has robbed the distinction between the two models of its constitutional significance. The most common model therefore remains the simple "because of" criterion, which is ambiguous on the conduct/expression distinction and is susceptible to broader or narrower interpretation by the courts. It does not appear that courts in the various states have attempted to address these differences in statutory language as yet with any great analytical subtlety.¹¹⁰

Third, the list of prohibited or disfavored criteria varies considerably from state to state. The most common are race, color, national origin, religion, and gender; but age, disability, and sexual orientation are increasingly added to the list. These are difficult political decisions for which there is only very limited guidance to be found in constitutional principle. For the most part one can see these lists as attempts on the part of legislatures to identify groups that have been especially susceptible to invidious discrimination in, or criteria for discrimination which are perceived to be especially harmful to, the society for which the particular legislature speaks. The effort to single out specific bases of discrimination for enhanced condemnation in the criminal law generates criticism and debate not only over which bases to choose, but also over the entire project of providing special legal protection for group identities, which some see as perpetuating rather than discouraging an "identity politics" which is itself at the root of the problem of hate.¹¹¹ From the constitutional perspective, the U.S. Supreme Court *has* recognized the political nature of the process whereby groups gain special legal protections and benefits, by holding in *Romer v. Evans*¹¹² that a state violates equal protection by providing in its own constitution that lawmaking agencies are *forbidden* to provide such protections or benefits to a *specific group of citizens* (in this case homosexuals), thereby in effect denying them equal access to the normal political process. Simple failure to grant such legislative protection to a particular group is unlikely to present significant equal protection problems, unless the omission were purposeful and the omitted group were defined in terms of one of the Court's "suspect classifications" (race, national origin, nationality, re-

109. See Lawrence at p. 34.

110. See Lawrence at 38. He favors the narrower "racial animus" model (at pp. 73 ff.), on the ground that it more faithfully renders what is most reprehensible and harmful about hate crimes.

111. See, e.g., Jacobs & Potter, *Hate Crimes* esp. chs. 9 and 10 (1998).

112. 517 U.S. 620 (1996).

ligion, or (to a lesser extent) gender or legitimacy), for the intentional use of which the Court has imposed a heightened burden of justification on the state.¹¹³

CONCLUSION

Expression of hatred toward any group, and therefore speech or expression which incites others to such hatred, is protected in U.S. law by the freedom of speech despite the psychological and social harm such expression is widely believed to cause when directed toward minorities otherwise subjected to patterns of discrimination in the society. Only when hatred is actualized by violence or other unlawful action or an immediate threat thereof, directed toward others or reflexively from the victim toward the hater, does the latter encounter the limits of free speech. Even then, according to the *R.A.V.* majority, the suppression must be aimed at the violence and not at the particular viewpoint of the speaker. On the other hand when that limit is reached, the special harms of expressed hatred may be and are given special recognition in the form of more severe penalties for the wrongful acts resulting from such hatred.

This protection of bigoted beliefs from government suppression may be seen as a flaw in the system, but the difficulty has always been finding a principled way to limit the suppression to those beliefs and ideas which threaten the most vulnerable groups in our society. An "even-handed" suppression of beliefs and ideas considered by a legislative majority to be false or irrational seems more likely to hinder the self-expression of disadvantaged minorities than to protect them from prejudice; yet the *R.A.V.* majority goes to some length to insist on the formal "even-handedness" of viewpoint-neutrality. Even-handed suppression of speech causing or threatening violence or other independently unlawful action, on the other hand, can operate at a greater level of consensus in society across most group boundaries.

The Court's opinions do not consistently articulate an overarching theory connecting the various categories of cases in which content-based restrictions on expressive activity are permitted, but a widely held view among scholars is that the decisions as a whole are best explained in terms of the value of individual autonomy.¹¹⁴ While some view the Court's decisions as committed to an entirely self-regarding, individualistic autonomy in the free speech field, for

113. On the "strict scrutiny" test for classifications based on race, national origin, and probably religion, and the "intermediate scrutiny" test for classifications based on sex or legitimacy, see John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §14.3 (6th ed. 2000).

114. For a review of the autonomy literature, see Wells, "Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence," 32 *Harv. Civ.Rts.-Civ.Lib. L. Rev.* 159 (1997).

the present writer the most persuasive version of the autonomy theory is Kantian, which adds a duty to respect the autonomy of others and sees that duty breached by private speakers whose expression goes beyond persuasion to invade or coerce the thought processes of others.¹¹⁵

115. See Wells, *supra*, especially at 187ff. (finding this theory implicit in the hate speech cases and notably in the majority opinion in *R.A.V.*).