

HOW FREE IS SPEECH? HATE SPEECH AND THE FIRST AMENDMENT IN POST-ORLANDO, POST-ELECTION AMERICA

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America isn't easy. America is advanced citizenship. You've gotta want it bad, 'cause it's gonna put up a fight. It's gonna say, "You want free speech? Let's see you acknowledge a man whose words make your blood boil, who's standing center stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours."¹

This paper outlines the historical origins and modern trend that has been at the forefront of resolving tensions between liberty from restraint no matter the content of the speech and a governmental interest in ensuring and preserving the peace. The cited cases highlight the advance of meaningful protection of individual rights, including freedom of expression, protection that has really only emerged jurisprudentially in the past century.²

The paper concludes with a series of hot topics concerning speech in the United States, including religious freedom, online speech, on-campus speech and recent events from the terrorist attack at the Orlando night club through the early days of the Trump administration. The authors do not seek to draw conclusions but, rather, to open the dialogue where the battle for free speech is raging across the United States.

I. COLONIAL VIEWS ON SPEECH AND THE FIRST AMENDMENT

The First Amendment to the United States Constitution provides that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This Amendment arose as a reaction to numerous English suppressive techniques against speech and the press, including an elaborate system prohibiting publication prior to licensure and restrictive seditious libel laws criminalizing criticism against the government.³

¹ THE AMERICAN PRESIDENT (Colombia Pictures 1995).

² Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, IND. L.J. 963, 968 (2009).

³ CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW 895 (2001).

a. *England Adapts to Printing*

Printing and the distribution of printed materials began in England in 1476⁴. Editorial and content based control increased under the reign of Henry VIII and continued through orders and direction of the Privy Council.⁵

b. *The Trial of the Seven Bishops*

After opposing the second Declaration of Indulgence issued by James II, seven bishops of the Church of England were imprisoned and tried for seditious libel.⁶ The *Seven Bishops* trial occurred at the Court of King’s Bench and the following day, the jury found the bishops not guilty.⁷ At the time, the bishops applied the right to petition found in the Magna Carta. One year after the trial, Parliament preserved the right to petition in the Bill of Rights of 1689 and later in the Act of Settlement of 1701.⁸ This right to petition one’s monarch was later reflected in the drafting of the First Amendment.

c. *The Trial of John Peter Zenger for Seditious Libel*

John Peter Zenger was a German immigrant who became a publisher in New York in the early 1700’s.⁹ Zenger published an article written by James Alexander, a New York lawyer, which was highly critical of the colonial governor. Upon the publication, the governor ordered Zenger to be arrested. The grand jury failed to indict him, but the attorney general charged him with libel in August 1735.

The position adopted by the attorney general, as stated by Zenger’s counsel, was that “whether the libel is true or false, or if the party against who it is made is of good or evil fame, it is nevertheless a libel.”¹⁰ Applying the same doctrine used in the *Seven Bishops’* case, Zenger’s lawyers successfully asserted that truth was a defense as he argued, “to determine both law and fact, and to understand the petition of the bishops to be no libel, that is, to contain no falsehood nor sedition, and therefore found them not guilty.”¹¹

Although it is more likely that Zenger was found not guilty due to a strong dislike for the royal governor, the court established a starting point for the freedom of the press.

II. EARLY DEVELOPMENTS IN HATE SPEECH JURISPRUDENCE: THE FIGHT TO LIMIT HATE SPEECH

⁴ Fredrick Seaton Siebert, *Freedom of the Press in England 1476-1776*, at 45 (1952).

⁵ *Id.*

⁶ Lady Trevelyan, Ed. II THE WORKS OF LORD MACAULAY, 39-41 (1866)

⁷ *Id.* at 182-84.

⁸ Stephen B. Presser, Jamil S. Zainaldin, LAW AND JURISPRUDENCE IN AMERICAN HISTORY, 7th Ed. Thomson Reuters (2009).

⁹ Presser and Zainaldin (citing S. Katz, ed., A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER PRINTER OF THE NEW YORK WEEKLY JOURNAL by James Alexander (1963).

¹⁰ *Id.* at 45.

¹¹ *Id.* at 55.

Following years of royal decrees and intrusion on the content allowed in the press and those engaged in speech activities, the right to petition was established, in part, through the *Seven Bishops* case. The application of this case in colonial America led to the use of truth as a defense to libel in the *Zenger Trial*. Both of these cases played a significant role in the content of the First Amendment. Despite the protections afforded, speech and libel cases continued during the early days of the republic and included the trials for seditious libel.¹² Free speech cases emerged again in the early twentieth century and included *Patterson v. Colorado*,¹³ *Schenck v. U.S.*,¹⁴ and *Debs v. U.S.*¹⁵

a. *Whitney v. California*¹⁶

In *Whitney*, the Supreme Court upheld a criminal syndicalism law. “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”

b. *Bryant v. Zimmerman*¹⁷

Although not directly a hate speech case, *Bryant* addressed issues surrounding the disclosure of names of individuals affiliated with hate groups. The Court upheld a law that required such groups, including the Ku Klux Klan, to register in the state and provide the Secretary of State its membership lists. The Court determined, “[t]here can be no doubt that under that power the state may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare.”¹⁸

c. *Chaplinsky v. New Hampshire*¹⁹

In *Chaplinsky*, a member of the Jehovah’s Witnesses was convicted of violating a state law prohibiting a person from “offensive, divisive or annoying” language used to “deride, offend or annoy” a person or to “prevent him from pursuing his lawful business or occupation.”²⁰ While distributing materials on a busy weekend afternoon, Chaplinsky called the City Marshall a “damned Fascist” and a “God damned racketeer.”²¹

¹² *United States v. Matthew Lyon*, 15 Fed. Cas. 1183 (D. Vt. 1798) (finding the defendant guilty under the Act for the Punishment of Certain Crimes of July 14, 1798 for publishing commentary about the President who had “an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.”); *United States v. Thomas Cooper*, 25 Fed. Cas. 631 (D. Penn. 1800) (addressing a charge of publishing “a false, scandalous and malicious libel against the President of the United States, in his official character as President.”) and *United States v. James Thompson Callender*, 25 Fed. Cas. 239 (D. Va. 1800) (accusations of libel addressing “[t]he reign of Mr. Adams [that] has been one continued tempest of malignant passion.”)

¹³ 205 U.S. 454 (1907).

¹⁴ 249 U.S. 47 (1919).

¹⁵ 249 U.S. 211 (1919).

¹⁶ 274 U.S. 357 (1927).

¹⁷ 278 U.S. 63 (1928).

¹⁸ *Id.* at 72.

¹⁹ 315 U.S. 568 (1942).

²⁰ *Id.* at 569 (citing to Chapter 378, Section 2, of the Public Laws of New Hampshire).

²¹ *Id.*

The Court determined that these offensive words were a test of “what men of common intelligence would understand would be words likely to cause an average addressee to fight”²² and thereby creating the new classification of “fighting words.” As such, the terms “damn racketeer” and “damn Fascist” would likely “provoke the average person to retaliation, and thereby cause a breach of the peace” that could be restricted and did not warrant constitutional protection.

d. *Beauharnais v. Illinois*²³

In *Beauharnais*, the president of the White Circle League of America, was convicted for publishing lithographs that portrayed “depravity, criminality, unchastity, or lack of virtue” of non-whites seeking integration in residential housing. Under Illinois state law, it was a criminal act to manufacture or publish such works.

The Court noted the tensions existing at the time between racial and religious groups, particularly as embodied by the Whig (Know-Nothing) Party. “Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion.”²⁴

In assessing the speech at issue, the Court turned to defamation law.²⁵ It held that “[i]belous utterances not being within the area of constitutionally protected speech, it is unnecessary either for us or for the State courts to consider the issues behind the phrase ‘clear and present danger.’”²⁶ In the end, the Court found “no warrant in the Constitution for denying Illinois the power to pass the law here under attack.”²⁷

III. POPPING THE CORK ON HATE SPEECH: UWINDING *BEAUHARNAIS*

Beauharnais lowered the bar on the amount of protected speech. By its adoption of the libel approach, the Court found state legislatures fully able to shutter content considered unsavory without having to take into consideration speech that created a “clear and present danger.” But as is common, the pendulum was about to swing in the other direction.

a. *New York Times v. Sullivan*²⁸

Known as the landmark case that established the actual malice standard in the realm of defamation, *Times v. Sullivan* stressed the breadth of protections under the First Amendment. In 1960, the newspaper carried a full-page ad titled “Heed Their Rising Voices” that sought to raise funds to defend Martin Luther King, Jr. against a perjury indictment in Alabama. The advertisement stated that the Alabama State Police had arrested King on seven occasions, while the facts showed he

²² *Id.* at 573.

²³ 343 U.S. 250 (1952).

²⁴ *Id.* at 262.

²⁵ In its defamation assessment, *Beauharnais* is seen to be no longer valid law. See *New York Times Co. v. Sullivan* (1964); *Philadelphia Newspapers, Inc. v. Hepps* (1986); *R.A.V. v. City of St. Paul* (1992); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 672 (7th Cir. 2008); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1200 (9th Cir. 1989).

²⁶ *Id.* at 266.

²⁷ *Id.*

²⁸ 376 U.S. 254 (1964).

had only been arrested four times. The Court was “required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.”²⁹

At the same time, *Times* may have undermined the principles that established the precedent in *Beauharnais*.³⁰ The Court based its decision on the fact that defamatory content is “unprotected” under the First Amendment, regardless of falsity³¹. Later decisions, including the Skokie march case, would clarify the role of *Times* in “discrediting” *Beauharnais*.³²

b. *Brandenburg v. Ohio*³³

In *Brandenburg*, the leader of a Ku Klux Klan group was convicted for advocating “crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and assembling with “any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism” in violation with Ohio law.³⁴

The Court determined that speech acts should be tested in accordance with a two pronged test. Speech could be regulated and prohibited if it was “directed at inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁵

IV. INTERLUDE: THE LAUNCH OF THE POST-BEAUHARNAIS ERA

Where *Times* served to erode, *Brandenburg* was the death knell for the doctrine established in *Beauharnais*. In *Brandenburg*'s wake, speech by Nazi sympathizers and racists would push the level of acceptance of speech that might make “blood boil.”³⁶

a. *Collin v. Smith*³⁷

Collin arose when the named plaintiff and the National Socialist Party of America, one of the American Nazi parties known for marching in uniforms and carrying flags bearing swastikas, announced plans to march in front of the Village Hall in Skokie.

The Village responded by obtaining a preliminary injunction against the march. The Supreme Court ordered a stay in *Vill. of Skokie v. Nat'l Socialist Party of Am.*³⁸ The injunction was reversed in part and finally in its entirety.³⁹ A day after the initial injunction, the Village passed three

²⁹ *Id.* at 265.

³⁰ Geoffrey R. Stone, *Focus: Hate Speech Jurisprudence in the United States and Hungary*, 3 E. EUR. CONST. REV. 78, 79 (1994).

³¹ *Id.*

³² *Id.* at 80.

³³ 395 U.S. 444 (1969).

³⁴ *Id.* at 444-45 (citing to Ohio Rev. Code Ann. 2923.13).

³⁵ *Id.* at 447.

³⁶ THE AMERICAN PRESIDENT (Colombia Pictures 1995).

³⁷ 578 F.2d 1197 (7th Cir. 1978).

³⁸ 373 N.E.2d 21 (Ill. 1978).

³⁹ *Village of Skokie v. National Socialist Party of America*, 51 Ill.App.3d 279, 366 N.E.2d 347 (1977); *Id.*, 69 Ill.2d 605, 14 Ill.Dec. 890, 373 N.E.2d 21 (1978).

ordinances to prohibit demonstrations by requiring a permit and insurance coverage. The ordinances further required demonstrations will not contain “criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation.”⁴⁰ This included a prohibition on the dissemination of materials that “promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so.”⁴¹

The court determined that these “activities involve the ‘cognate rights’ of free speech and free assembly.”⁴² Although the demonstration could be held to reasonable time, place, and manner restrictions, the ordinances targeted the content which “launches the government on a slippery and precarious path.”⁴³ Such content based restriction was not “per se invalid,” but must be analyzed in the “established exceptions to such a rule, namely obscenity, fighting words, and, as limited by constitutional requirements, libel.”⁴⁴

The court turned to *Gertz v. Robert Welch, Inc.* to support the conclusion that even speech that people disdain is to be protected when mere content is in question. “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”⁴⁵ To that end, the court found the restrictions on the dissemination of materials, the denial of a permit based on the promotion of hatred, and the ban on assembling in military style uniforms to be unconstitutional.

The opinion concludes with the emotional struggle that the court found between openly endorsing broad tenants of free speech and perceived repugnant content:

The preparation and issuance of this opinion has not been an easy task, or one which we have relished. Recognizing the implication that often seems to follow over-protestation, we nevertheless feel compelled once again to express our repugnance at the doctrines which the appellees desire to profess publicly. Indeed, it is a source of extreme regret that after several thousand years of attempting to strengthen the often thin coating of civilization with which humankind has attempted to hide brutal animal-like instincts, there would still be those who would resort to hatred and vilification of fellow human beings because of their racial background or their religious beliefs, or for that matter, because of any reason at all.

Retaining meaning in civil rights, particularly those many of the founding fathers believed sufficiently important as to delay the approval of the Constitution until they could be included in the Bill of Rights, seldom seems to be accomplished by the easy cases, however, and it was not so here.

⁴⁰ *Collin v. Smith*, 578 F.2d 1197, 1199 (7th Cir. 1978).

⁴¹ Village Ordinance No. 77-5-N-995.

⁴² *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978).

⁴³ *Id.* at 1202.

⁴⁴ *Id.*

⁴⁵ *Id.* citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40, 94 S. Ct. 2997, 3007, 41 L. Ed. 2d 789 (1974).

Although we would have thought it unnecessary to say so, it apparently deserves emphasis in the light of the dissent's reference to this court apologizing as to the result, that our Regret at the use appellees plan to make of their rights is not in any sense an Apology for upholding the First Amendment. The result we have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.⁴⁶

b. *Doe v. University of Michigan*⁴⁷

“It is an unfortunate fact of our constitutional system that the ideals of freedom and equality are often in conflict.”⁴⁸

The University’s policy, an effort to lower the levels of racial intolerance and harassment on campus, enacted a policy that prohibited individuals from “stigmatizing or victimizing” others based on race, ethnicity, religion, gender, sexual orientation, and other various status markers.⁴⁹ An anonymous graduate student in biopsychology challenged the rule, even though he had never been subject to discipline or sanction under the policy. Doe argued that the policy had a chilling effect on speech and classroom discussion. Specifically, he argued that controversial theories surrounding differences among races and genders could be potentially seen as a violation of the policy.

The policy was found to be both vague and overbroad. The court recognized the limitations on speech in terms of the “certain categories [that] can generally be described as unprotected by the First Amendment.”⁵⁰ The categories enumerated by the court included fighting words, the lewd and obscene, credible threats of violence or property damage, and speech inviting imminent lawless action.⁵¹ These items of speech could be regulated. The University of Michigan could not, however, “establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed” or “because it was found to be offensive, even gravely so, by large numbers of people.”⁵²

V. RECENT TRENDS

a. *R.A.V. v. City of St. Paul*⁵³

R.A.V. addressed the St. Paul, Minnesota Bias-Motivated Crime Ordinance that prohibited the use or display of a symbol that one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” in relation to several teenagers burning a cross inside the fenced yard of a local African American family.⁵⁴ As in *Doe v.*

⁴⁶ *Collin v. Smith*, 578 F.2d 1197, 1210 (7th Cir. 1978).

⁴⁷ 721 F. Supp. 852 (E.D. Mich. 1989).

⁴⁸ *Id.* at 853.

⁴⁹ *Id.*

⁵⁰ *Id.* at 862.

⁵¹ *Id.*

⁵² *Id.* at 863

⁵³ 505 U.S. 377 (1992).

⁵⁴ *Id.* at 379-80.

University of Michigan, R.A.V. argued that the ordinance was overbroad, in addition to arguing that the ordinance was impermissibly content-based and therefore facially invalid based on the First Amendment.⁵⁵

The Court rejected the argument that the fighting words doctrine may be used to regulate racist speech because the government cannot regulate use based on hostility, or favoritism, towards the underlying message.⁵⁶ By regulating only fighting words that dealt with race, color, creed, religion and gender, St. Paul had created an impermissible content-based regulation.⁵⁷

b. *Wisconsin v. Mitchell*⁵⁸

In *Mitchell*, the Court reviewed the propriety of a Wisconsin statute enhancing a sentence for an aggravated battery when the convicted intentionally selected his victim on the basis of race.⁵⁹ The convicted argued that because the only reason for the sentencing enhancement is his discriminatory motive in victim selection, the statute in effect impermissibly punished his bigoted beliefs.⁶⁰

The Court ruled in favor of the Wisconsin sentencing enhancement, holding that the defendant's First Amendment rights were not impugned by the application of the sentencing enhancement on his conviction.⁶¹ Interestingly, the Court found that nothing in *R.A.V.* compelled a different result because the St. Paul ordinance was explicitly directed at speech, while the Wisconsin statute was aimed at unprotected conduct.⁶² In addition, the Court believed that Wisconsin's desire to address the perceived harms of bias-motivated crimes (i.e., retaliation, emotional harm on the victim, and community unrest) adequately addressed the reason behind the enhancement over mere disagreement with the discriminatory animus of the assailant.⁶³

c. *Virginia v. Black*⁶⁴

In *Black*, the Court revisited *R.A.V.* when finding that bans on cross burning carried out with an intent to intimidate are consistent with the First Amendment.⁶⁵ The Court went to great lengths detailing the history of the Ku Klux Klan, demonstrating that cross burnings have long been used as a tool of intimidation and threats of violence.⁶⁶ However, the Court noted that it is not factually true that all cross burners direct their conduct solely to racial or religious minorities.⁶⁷

The Court noted that *R.A.V.* (when quoting *Chaplinsky*) clearly contemplated permissible restrictions on speech content when such speech is of "such slight social value as a step to truth

⁵⁵ *Id.* at 380.

⁵⁶ *Id.* at 386.

⁵⁷ *Id.* at 391.

⁵⁸ 508 U.S. 476 (1993).

⁵⁹ *Id.* at 479.

⁶⁰ *Id.* at 485.

⁶¹ *Id.* at 490.

⁶² *Id.* at 487.

⁶³ *Id.* at 487-88.

⁶⁴ 538 U.S. 343 (2003).

⁶⁵ *Id.* at 363. The Court did reverse the conviction, but the Court could not agree by majority on Constitutional grounds. *Virginia*, 538 U.S. at 347-48.

⁶⁶ *Id.* at 354-55.

⁶⁷ *Id.* at 362.

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality” – including speech meant to inflict injury or incite violence.⁶⁸ The difference in *R.A.V.*, the Court reiterated, was that the ordinance did not cover fighting words in connection with other ideas but was instead targeted at speakers who expressed views on specifically disfavored subjects.⁶⁹ With that clarification of *R.A.V.* as background, the Court did not view the Virginia statute as unconstitutional insofar as it banned cross burning with an intent to intimidate, because the statute was still content neutral – it did not single out speech directed toward a specified disfavored topic.⁷⁰

d. *Snyder v. Phelps*⁷¹

The Court in *Phelps* addressed whether the First Amendment serves as shield from tort liability for the speech of members of the Westboro Baptist Church.⁷² The church members picketed the funeral of a Marine killed in the line of duty, and in doing so carried numerous anti-homosexual signs.⁷³ The church members challenged a jury award on several claims (including intentional infliction of emotional distress) stemming from the picketing, on the grounds that that First Amendment provided protection for the statements.⁷⁴

The Court initially found that the content of the church members’ signs related to broad issues of interest to society at large, rather than matters of purely private concern.⁷⁵ The Court noted that while the messages in the signs fell “short of refined social or political commentary”, the broader issues (including the political and moral conduct of the United States and its citizens) were matters of public import.⁷⁶ The Court further found that while the choice of picketing the funeral was particularly hurtful, the picketing occurred peacefully at a public place on a public street – space which occupies a special position in First Amendment protection.⁷⁷

VI. HATE CRIMES VERSUS HATE SPEECH: EVOLUTION TOWARDS A CONDUCT BASED DISTINCTION

a. *Hate Crimes Generally*

Crimes arising out of hatred based on race, national origin, gender, religion, sexual orientation, or gender expression are not a new part of the American experience. Hate crimes occurred in the context of lynchings, which were prevalent during the nineteenth and twentieth centuries and

⁶⁸ *Id.* at 358-59.

⁶⁹ *Id.* at 361.

⁷⁰ *Id.* at 362.

⁷¹ 562 U.S. 443 (2011).

⁷² *Id.* at 447.

⁷³ *Id.* at 448.

⁷⁴ *Id.* at 450-451.

⁷⁵ *Id.* at 454, *relying on Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).

⁷⁶ *Snyder*, 562 U.S. at 454.

⁷⁷ *Id.* at 456, *relying on United States v. Grace*, 461 U.S. 171, 180 (1983) and *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (“[W]e have repeatedly referred to public streets as the archetype of a traditional public forum,” noting that “[t]ime out of mind’ public streets and sidewalks have been used for public assembly and debate.”)

became a “more prominent and settled form of unofficial justice after the civil war.”⁷⁸ Hatred of other nationalities also was common as seen in lynching of those of Hispanic decent in the west.⁷⁹

The power of hate groups persisted, despite an apparent evolution towards equality. At this time, groups like Neo-Nazis, The Christian Identity, Skinheads, and the Ku Klux Klan continue to “target an increasing number of diverse victim groups including African-Americans, Jews LGBTQ persons, and immigrants.”⁸⁰

As of October 2016, all fifty states have some form of hate crime legislation on the books in addition to the Hate Crimes Prevention Act (HCPA),⁸¹ 42 U.S.C. § 1983,⁸² and other related federal legislation. These laws include the tabulation of hate crimes and the enhancement of sentencing based on the proof of hate as a motivation for the crime.

b. LGBTQ Hate Crimes

In terms of attacks on the LGBTQ community, research shows a long history of prejudice that is typically less documented than its counterparts.⁸³ With the stigmatism of homosexuality, official policies, and public sentiment, commentators suggest “[i]t is within this historical context that homosexual persons today are subjected to the highest rate of violent victimizations.”⁸⁴

It was this level of victimization and the June 28, 1969 raid at the Stonewall Inn that “sparked the modern day Gay Liberation Movement.”⁸⁵ Following Stonewall, the community has seen some level of social and political progress through advocacy, but hate crimes still persist in significant numbers. In 2010, an analysis of FBI hate crime data compared multiple minority groups’ percentage of violent victimization against their relative percent in the population.⁸⁶ LGBT individuals were found to be victimized 8.3 times the expected rate.⁸⁷

c. Hate crime vs. Hate Speech: A Matter of Conduct

Generally, hate speech statutes focus on the speech of the individual, as distinguished from hate crime statutes that rely on an underlying crime or predicate offence. There is a risk, however, of states regulating conduct that does infringe on First Amendment freedoms.

The First Amendment “generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.”⁸⁸ At the same time, the Court has been clear that these protections are not unlimited. Defamation, fighting words, and obscenity are areas that have maintained a “limited categorical approach [that] has remained an important

⁷⁸ F.S. Pezzella, HATE CRIME STATUTES, Springer Briefs in Policing, p. 14, DOI 10.1007/978-3-319-40842-2_2 (2017).

⁷⁹ *Id.*

⁸⁰ *Id.* at 19,

⁸¹ 18 U.S.C.A. § 249.

⁸² Civil Action for the Deprivation of Rights, 42 U.S.C.A. § 1983.

⁸³ Gerstenfeld, P. B. (2013). HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES. Sage.

⁸⁴ Pezella, p. 22.

⁸⁵ *Id.*

⁸⁶ *Id.* citing Klanwatch of the SPLC (2010).

⁸⁷ *Id.*

⁸⁸ *R.A.V.*, 505 U.S. at 382.

part of our First Amendment jurisprudence.”⁸⁹ Therefore, hate speech statutes, those which ban symbols, objects, graffiti, pamphlets, or related speech because of the likelihood of arousing anger or resentment of others based on race, gender, religion, creed, etc. are facially invalid under the First Amendment when the regulation bans speech solely based on the content.⁹⁰

Under this regime, statutes have been upheld that prohibit inciting breach of the peace, disorderly conduct, or riot (i.e. “fighting words”) and related threatening of violence. One such example is the California law prohibiting people “by force or threat of force, willfully injure, intimidate or interfere with.... any other person in the free exercise or enjoyment of any right or privilege secured to him or her.... because of the other person's race, color, religion, ancestry, national origin, or sexual orientation.”⁹¹

The line is often drawn in the distinction between speech and conduct. Hate crimes embody some level of conduct or action while hate speech is merely an expression. But there is a segment of laws and cases that are accused of blurring the line between expression and conduct. Such laws and their respective cases include the placement of burning crosses on other people’s property. In *Florida v. T.B.D.*,⁹² the constitutionality of the Florida statute prohibiting the placement of crosses on property without permission was questioned. As the banned activity was seen as conduct that was seen as “threats of violence” and “fighting words,” it was more directed to forthcoming violence and was a neutral ban on expressive activity. The statute was held not to be overbroad and did not violate the First Amendment in its regulation of conduct.

Similar cases include:

- i. *State of Oregon v. Plowman*.⁹³ The Oregon Supreme Court upheld a law making it a crime for multiple persons, acting together, to cause injury to another because of race, color, religion, national origin, or sexual orientation as the law punished conduct.
- ii. *State v. Wyant*.⁹⁴ The Ohio Supreme Court overturned the state’s “ethnic intimidation” law that enhanced the criminal penalties for harassment or mischief targeting a person’s race, color, religion or national origin. In *Wyant*, the court determined that the law impermissibly penalized motives rather than intent, therefore infringing speech and thought. Ultimately, this opinion was vacated.
- iii. *Dobbins v. State*.⁹⁵ A Florida statute that states “[t]he penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidenced prejudice based on the race, color,

⁸⁹ *Id.*

⁹⁰ *See generally R.A.V.*

⁹¹ California Penal Code § 422.7.

⁹² *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995).

⁹³ *State v. Plowman*, 314 Or. 157, 838 P.2d 558, 22 A.L.R.5th 835 (1992).

⁹⁴ *State v. Wyant*, 64 Ohio St. 3d 566, 1992-Ohio-103, 597 N.E.2d 450 (1992), cert. granted, judgment vacated, 508 U.S. 969, 113 S. Ct. 2954, 125 L. Ed. 2d 656 (1993) and opinion vacated, 68 Ohio St. 3d 162, 1994-Ohio-480, 624 N.E.2d 722 (1994) (Ethnic Intimidation Act did not violate State or Federal Constitutions.).

⁹⁵ *Dobbins v. State*, 605 So. 2d 922 (Fla. 5th DCA 1992), decision approved, 631 So. 2d 303 (Fla. 1994).

ancestry, ethnicity, religion or national origin of the victim”⁹⁶ was held constitution as it did not regulate “intolerant opinions. Nor does it punish the oral or written expression of those opinions. It is only when one acts on such opinion to the injury of another that the statute permits enhancement.”⁹⁷

- iv. *Vermont v. Easton*:⁹⁸ A Vermont district court held that the state could prosecute offenders under a law banning “hate motivated crime” in the case of an attack motivated by the victim’s sexual orientation. This overturned a Vermont district court opinion, *Vermont v. LaDue*⁹⁹ holding “[a] bigoted thought or expression standing alone is certainly protected. When that thought or expression evolves into ‘motive,’ however, and that motive undergoes a metamorphosis through intent culminating in criminal conduct, a different creature emerges.”

VII. HOT TOPIC: HATE SPEECH AND RELIGIOUS FREEDOM

Where heartfelt religious beliefs clash with evolving societal norms, as in the case of growing acceptance of parts of the LGBT community,¹⁰⁰ conflict and strife is easy to anticipate.

a. *Religion and the Freedom to Espouse “Hate Speech”*

It is beyond question that the First Amendment extends protection to religion and the “free exercise thereof.”¹⁰¹ It is, in fact, a fundamental right that has garnered strong protections with, much like speech, certain carve-outs. Religions, for example, may not engage in human sacrifice or certain other illegal activities, even if it is a key tenant of the creed.¹⁰² And still similar to the speech debate, cases illustrate that beliefs are more easily protected than religious practices, acts or conduct. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court addressed whether the city had impermissibly targeted a religion involved in animal sacrifices based on an ordinance that prohibited the slaughter of animals in a public or private ceremony.¹⁰³ The Court held “[t]hose in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”¹⁰⁴ Only where the restrictions were secular could protections be asserted.

With both speech and religious expression existing in a somewhat parallel analytic framework, there are times where the two collide in the expression of what could be classified by some as hate speech formed through deeply held religious perspective. The Westboro Baptist Church serves as

⁹⁶ *Id.* at 923.

⁹⁷ *Id.* at 924.

⁹⁸ *State of Vermont v. Easton*, No. 1643-11-91 (Vt. Windham Dist. 1992).

⁹⁹ *State of Vermont v. LaDue*, No. 4088-8-90 (Vt. Chit. Dist. Ct., 4/18/91). Reported at 1992 Lesbian/Gay Law Notes 78

¹⁰⁰ Based on the movement towards “bathroom bills” and the Trump administration’s rescinding of the transgender guidance, the authors cautiously qualify this statement in terms of “acceptance.”

¹⁰¹ U.S. CONST. AMEND. I.

¹⁰² *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (addressing extreme hypotheticals demonstrating the need for government regulation that may curtail certain dangerous religious practices).

¹⁰³ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

¹⁰⁴ *Id.* at 547.

a bannerman for those arguing deep tenants of faith that are often incongruous with contemporary societal beliefs. Known for their belief that “God hates the United States for its tolerance of homosexuality,”¹⁰⁵ the church is prolific in its demonstration and charged rhetoric.¹⁰⁶ In this position, the Church, through *Phelps*, has brought the right to vocalize its beliefs to the forefront. Where the *Phelps* case addressed picketing a funeral, an act that falls well within the traditional speech analysis, other issues underlying the clash of religion and speech are more difficult to find common ground.

b. Wedding Cakes, Photography, and the Flip Side of the Coin: Compelling the “Speech I Hate”

One of the contentious issues surrounding the intersection of speech and religion is the denial of services to LGBT persons and the risk of compelled speech. The body of case law that exists today generally emerges from a merchant’s decision not to provide services to a same-sex wedding and has included flowers,¹⁰⁷ cakes,¹⁰⁸ accommodations,¹⁰⁹ and photography.¹¹⁰

Compelled speech is a doctrine that was first articulated in *West Virginia Board of Education v. Barnette*.¹¹¹ *Barnette* arose from a regulation that required school children to salute the American flag in classrooms. Suit was brought to restrain the enforcement of these laws against Jehovah’s Witnesses who will not salute the flag based on religious creed.¹¹² The Court upheld the injunction, holding, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”¹¹³

¹⁰⁵ *Snyder v. Phelps*, 562 U.S. at 443.

¹⁰⁶ The signs in question in *Phelps* included “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” *Id.* at 454.

¹⁰⁷ *State v. Arlene’s Flowers, Inc.*, 2015 WL 720213 (Wash.Super. Feb. 18, 2015), *aff’d* 2017 WL 629181 (S.Ct. Wash. Feb. 16, 2017).

¹⁰⁸ *Craig v. Masterpiece Cakeshop*, 370 P.3d 272 (Col. Ct. App. 2015), *aff’d* 2016 WL 1645027 (Apr. 25, 2016), *cert. petition docketed* Feb. 24, 2017.

¹⁰⁹ *Cervelli v. Aloha Bed & Breakfast*, Case No. 11-1-3103-12 ECN, 2013 WL 1614105 (Apr. 11, 2013). Complaint available at www.lambdalegal.org/sites/default/files/cervelli_hi_20111219_complaint.pdf

¹¹⁰ *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

¹¹¹ *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

¹¹² *Id.* at 629.

¹¹³ *Id.* at 642.

This doctrine has been applied in two ways: cases prohibiting the government from requiring that an individual speak the government's message¹¹⁴ and that the government may not compel individuals to accommodate another speaker's message.¹¹⁵

i. Elane Photography

In *Elane Photography*, the Supreme Court of New Mexico addressed a discrimination claim filed when a photographer refused to work at a same-sex wedding.¹¹⁶ Under the New Mexico Human Rights Act (NMHRA), public accommodations are prohibited from discriminating against people based on sexual orientation. The court determined that the photographer violated the act "in the same way as if it had refused to photograph a wedding between people of different races."¹¹⁷

Turning to the First Amendment, the court concluded that "the NMHRA does not violate free speech guarantees because the NMHRA does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another."¹¹⁸

The photographer relied on two lines of speech arguments: (1) the government may not require the individual to speak the government's message and (2) the government cannot require a private actor to host or accommodate another speaker's message.¹¹⁹ In finding that the NMHRA does not compel a business to speak a government message, the court demonstrated that the act did not require the affirmation of beliefs, rather, it required that the services be offered without regard for protected classifications. This was in accord with *Rumsfeld*, where the U.S. Supreme Court held that the federal law making funding contingent on a university allowing military recruiters access to facilities did not constitute compelled speech.¹²⁰

The second line of argumentation addressed whether the NMHRA compelled the business to accommodate the same-sex message. The court in *Elane Photography* applied the Supreme Court decision in *Miami Herald Publishing Co.*, where Florida had enacted an unconstitutional statute

¹¹⁴ *Craig*, 370 P.3d at 284 ("These cases establish that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by forcing individuals to publicly disseminate its own ideological message. *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178. The government also cannot require "the dissemination of an ideological message by displaying it on [an individual's] private property in a manner and for the express purpose that it be observed and read by the public." *Wooley*, 430 U.S. at 713, 97 S.Ct. 1428; *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178 (observing that the state cannot "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").")

¹¹⁵ *Id.* ("For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the Supreme Court invalidated a Florida law which provided that, if a local newspaper criticized a candidate for public office, the candidate could demand that the newspaper publish his or her reply to the criticism free of charge. Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 4, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986), the Supreme Court struck down a California Public Utilities Commission regulation that permitted third-party intervenors in ratemaking proceedings to include messages in the utility's billing envelopes, which it distributed to customers. These cases establish that the government may not commandeer a private speaker's means of accessing its audience by requiring that the speaker disseminate a third-party's message.").

¹¹⁶ 309 P.3d 53.

¹¹⁷ *Id.* at 59.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 63.

¹²⁰ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006).

requiring newspapers to print a candidate for public office's reply to criticism at no cost if an article contained a criticism of that candidate.¹²¹ In contrast, the New Mexico government did not "commandeer" the photographer's "means of reaching its audience and require[] the speaker to disseminate an opposing point of view."¹²² The photographer was not required to print the "names and addresses of rival photographers" or "distribute a newsletter in which the government has required it to print someone else's idea."¹²³

ii. Arlene's Flowers

In *Washington v. Arlene's Flowers*, the argument on compelled speech arose again.¹²⁴ The florist contended that the anti-discrimination statute violated the First Amendment protections against compelled speech because "it forces her to endorse same-sex marriage."¹²⁵ The court held that she would only succeed if the sale of floral arrangements equated to a protected expression.¹²⁶ The court rejected that premise as the First Amendment protects speech and not conduct. To protect conduct as speech requires two conditions: "[(1)] '[a]n intent to convey a particularized message was present, and [(2)] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."¹²⁷ Recent cases have characterized this as an inquiry into whether the conduct at issue was 'inherently expressive.'¹²⁸

In its review, the court determined that floral arrangements at wedding ceremonies were not expressive. Floral arrangements did not communicate to the public at large. Nor was the conduct inherently expressive, as the florist admitted that providing "flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism."¹²⁹ The court countered by stating that the U.S. Supreme Court cases upholding speech protections to conduct are all those that are "clearly expressive" on their face and without further explanation.¹³⁰

¹²¹ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974).

¹²² *Elane Photography*, 309 P.3d at 67.

¹²³ *Id.*

¹²⁴ *Arlene's Flowers*, 2017 WL 629181, * at 8-9.

¹²⁵ *Id.* at *8.

¹²⁶ *Id.* citing to *Clark v. Cmty.for Creative Non-Violence*, 468 U.S. 288, 293 n.5, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

¹²⁷ *Id.* citing *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (per curiam).

¹²⁸ *Id.* citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* (FAIR), 547 U.S. 47, 64, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006).

¹²⁹ *Id.* at *9.

¹³⁰ *Id.* at 10. The cases enumerated are instructive. From the opinion: "*See Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 (parades); *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) (burning the American flag); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (burning the American flag); *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (distributing leaflets outside Supreme Court building in violation of federal statute); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam) ("[m]arching, walking, or parading" while wearing Nazi uniforms); *Smith v. Goguen*, 415 U.S. 566, 588, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (White, J., concurring in judgment) (treating flag " 'contemptuously' " by wearing a small American flag sewn into the seat of one's pants); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (state motto on license plates); *Spence*, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (displaying American flag upside down on private property with peace sign superimposed on it to express feelings about Cambodian invasion and Kent State University shootings); *Cohen v. California*, 403 U.S. 15, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (wearing jacket emblazoned with the words " 'F--k the Draft' ");

VIII. HOT TOPIC: ONLINE HATE SPEECH

a. *Rise of Online Hate Speech*

Today it is hard to avoid internet trolls, they are on Twitter, Facebook, Instagram, SnapChat, and YouTube. Somehow, even the most benign posting can devolve quickly into hateful comments and threats. Social media has been the platform for revolution and has been used to encourage movements in the promotion of civil liberties, but it has also allowed hate groups and terrorist organizations to communicate, harass, and recruit with ease. How has something that can be so useful and cause so much happiness (cat videos and pictures of puppies) also provide an outlet for the worst of humanity?

There have been several articles written about how people tend to change their behavior online and become more disinhibited. In an article by Suler, he identifies eight potential reasons why people behave as they do on the Internet. For example, the ability to be anonymous online and the ability to change one's identity or persona online make it easier to separate bad online behavior with one's everyday life.¹³¹

When this disinhibition is combined with the concepts of having an equal voice and allowing free speech and free exchange of ideas built into the core of the internet, add a layer of constructed social interaction and the internet becomes a place where bad behavior can go seemingly unchecked.

b. *Who Can Be Held Accountable?*

No matter what platform is in play, an individual can be held liable for the things "said." A first stop before filing suit against an individual user, should be a review of the social media platform's terms of use. Per the user agreements and other terms of use agreed to when signing up for a social platform, failure to comply with these terms of use provides grounds for the platform to potentially remove the content or block the user. Additionally, a suit can be brought against the individual user for violations of privacy, defamation, etc. However, the difficulty may be identifying that user and obtaining jurisdiction over that user.

If going after the individual user is not feasible or the user cannot be identified, some victims of online hate speech and other online abuse have attempted to hold the online platforms accountable for failing to act to curb the abuse or for facilitating third party content, with varying levels of

Schacht v. United States, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970) (wearing army uniform in short play criticizing United States involvement in Vietnam, inasmuch as it does not tend to discredit the armed forces); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505, 89 S. Ct 733, 21 L.Ed.2d 731 (1969) (wearing black armbands to protest Vietnam conflict); *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (sit-in to protest "whites only" area in public library during civil rights struggle); *Cox v. Louisiana*, 379 U.S. 536, 552, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) (giving speech and leading group of protesters in song and prayer in opposition to segregation); *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) (peaceful march on sidewalk around State House grounds in protest of discrimination); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (refusing to salute the American flag while saying pledge of allegiance); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (peaceful display of red flag as a sign of opposition to organized government)."

¹³¹ John Suler, *The Online Disinhibition Effect*, CYBERPSYCHOLOGY & BEHAVIOR, Vol. 7, No. 3, 2004)

success. This is mainly due to the Communications Decency Act §230 which provides immunity to an “interactive computer service” under certain circumstances.¹³²

Recent case examples determining accountability for online behavior include:

- i. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*:¹³³ Roomates.com was an online housing search tool, that matched users based on housing preferences. Users created profiles that also included questions regarding sexual orientation, sex, and whether there were any children. The Fair Housing Council of the San Fernando Valley and San Diego brought a lawsuit under federal and state housing discrimination laws. The 9th Circuit, on appeal, found that Roomates.com was an “interactive computer service” but failed to grant immunity for the claims arising from the questions asked to solicit information from users. As a result, an “interactive computer service” could lose immunity if they “develop” third party content, including editing in a way that contributes to the illegality or soliciting particular information from users.
- ii. *Jones v. Dirty World Entertainment Recordings LLC*:¹³⁴ TheDirty.com was a gossip website that encouraged users to submit who, what, when, where, why, all as anonymous submissions. After the website published compromising photographs of the Plaintiff and added commentary, the Plaintiff sued for defamation. The 6th Circuit held that TheDirty.com was entitled to immunity under §230 because the request for content was neutral, and that in order to bar immunity there must be some “material contribution” above and beyond displaying third party content.
- iii. *J.S. v. Village Voice Media Holdings*:¹³⁵ Plaintiffs brought suit against Backpage.com, a site that allows users to post advertisements for sexual services. Plaintiffs were minors who alleged that they were victims of sex trafficking on the website. The Washington Supreme Court found that Backpage.com was not entitled to immunity and found that Backpage contributed to the “development” of the content on the website.
- iv. *Jane Doe No. 1 v. Backpage.com*:¹³⁶ Similar to the J.S. case, three women claimed that they were victims of sex trafficking through the Backpage website. The 1st Circuit dismissed the claims finding that Backpage was entitled to immunity on §230 grounds, upholding the principle that, “a website operator’s decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection.”

IX. HOT TOPIC: HATE SPEECH ON THE COLLEGE CAMPUS

¹³² 47 U.S. Code § 230.

¹³³ *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

¹³⁴ *Jones v. Dirty World Entm't Recordings LLC*, 755 F. 3d 398 (6th Cir. 2014).

¹³⁵ *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 715 (Wash. 2015).

¹³⁶ *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

Incidents involving hate speech on campus have experienced a significant rise, increasing to a point where commentators consider the hate speech debate to be “particularly virulent on the nation’s university campuses.”¹³⁷ These issues range from policies proscribing hate speech, limitations on where speech can occur and violent demonstrations in response to unpopular messages.

a. *Watch What You Say: Campus Speech Policies, Codes and Regulations*

i. *Doe v. University of Michigan*¹³⁸

In the *University of Michigan* case, the district court struck down the speech regulations holding that the university could not:

establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people These principles acquire a special significance in the University setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission.¹³⁹

In assessing the ability to ensure a safe and secure experience, the court balanced and noted the importance of the interest in open discourse. “While the Court is sympathetic to the University’s obligation to ensure equal educational opportunities for all of its students, such efforts must not be at the expense of free speech.”¹⁴⁰

ii. *Iota XI Chapter of Sigma Chi Fraternity v. George Mason University*¹⁴¹

Much like the University of Michigan opinion, the district court found that a policy that led to disciplining students for the sponsorship of an event where fraternity members dressed as caricatures unconstitutionally punished expression under the First Amendment.

iii. *DeJohn v. Temple University*¹⁴²

In *DeJohn*, Temple University’s racial harassment policy was struck down as the “[h]arassing’ or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections”¹⁴³ and were thereby unconstitutional. The policy prohibited “an unwelcome sexual advance, request for sexual favors, or other expressive, visual or physical conduct of a sexual or gender-motivated nature when ... (c) such

¹³⁷ § 17:18.Hate speech regulation on campuses, 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 17:18.

¹³⁸ *Doe v. University of Michigan*, 721 F.Supp. at 863.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 868.

¹⁴¹ *Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F. Supp. 792 (E.D. Va. 1991), *aff’d*, 993 F.2d 386 (4th Cir. 1993).

¹⁴² *DeJohn v. Temple University*, 537 F.3d 301, 235 Ed. Law Rep. 745, 91 Empl. Prac. Dec. (CCH) P 43277 (3d Cir. 2008).

¹⁴³ *Id.* at 315.

conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.”¹⁴⁴

The court noted that

It is well recognized that “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas [.]’ ” *Healy*, 408 U.S. at 180, 92 S.Ct. 2338, and “[t]he First Amendment guarantees wide freedom in matters of adult public discourse [.]” *Fraser*, 478 U.S. at 682, 106 S.Ct. 3159. Discussion by adult students in a college classroom should not be restricted. Certain speech, however, which cannot be prohibited to adults may be prohibited to public elementary and high school students. *See Fraser*, 478 U.S. at 682, 106 S.Ct. 3159 (“It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.”). This is particularly true when considering that public elementary and high school administrators have the unique responsibility to act in loco parentis. *See id.* at 684, 106 S.Ct. 3159.¹⁴⁵

Noting that there is no “harassment exception” to the First Amendment, the court analyzed the speech and found that the policy included gender-motivated expressive conduct while prohibiting a substantial amount of non-vulgar, non-sponsored student speech.¹⁴⁶ As it did not show severity or pervasiveness, the policy did not sufficiently protect speech and was held unconstitutional.

iv. *McCauley v. University of the Virgin Islands*¹⁴⁷

In *McCauley*, the Third Circuit held that a student code prohibiting hate speech and offensive signs was facially overbroad. Although the provisions regarding lewd conduct were upheld, the code could possibly be

used to punish any protected speech, without forewarning, based on the subjective reaction of the listener, we conclude that its overbreadth is substantial in an absolute sense and relative to its plainly legitimate sweep. In doing so, we do not deny that there are instances where Paragraph H may be invoked and the First Amendment is not implicated: for example, where a student engages in “non-expressive, physically harassing conduct,” *Saxe*, 240 F.3d at 206, that causes emotional distress, or where a student engages in obscene speech that causes emotional distress, see generally *Miller*, 413 U.S. 15, 93 S.Ct. 2607; *Roth*, 354 U.S. 476, 77 S.Ct. 1304. But the blanket chilling of all protected speech is still substantial in relation to these other types of conduct that may be prohibited under the paragraph. Every word spoken by a student on campus is subject to Paragraph H. Every time

¹⁴⁴ *Id.* at 316.

¹⁴⁵ *Id.* at 315.

¹⁴⁶ *Id.* at 319.

¹⁴⁷ *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 260 Ed. Law Rep. 551 (3d Cir. 2010).

a student speaks, she risks causing another student emotional distress and receiving punishment under Paragraph H. This is a heavy weight for students to bear.¹⁴⁸

b. Watch Where You Talk: Free Speech Zones

Falling in line with the right to create time, place, and manner restrictions, colleges are creating “free speech zones,” that limit either the period of time or physical space that a student may engage in expression.

As an example, a restricted free speech zone policy was implemented by Grand Valley State University (GVSU) in Michigan.¹⁴⁹ Along with GVSU’s policy limiting expressive rights to two areas on campus that comprise 0.02 percent of the campus area, students are required to seek permission prior to entering into speech or expressive conduct in the zones.¹⁵⁰

Policies like this at Georgetown, Stanford and the University of Iowa have come under scrutiny in recent years. Cases include:

- i. *Smith v. Tarrant County College District*:¹⁵¹ Students demonstrated likelihood of success on a claim that the college’s permit system requiring expression to occur only in free-speech zones was likely to be an impermissible prior restraint on speech.
- ii. *Jews for Jesus, Inc. v. City College of San Francisco*:¹⁵² Rendered moot by the institution’s change of policies, the court stated that it agreed with the argument that “the requirement that an individual get permission in advance to engage in expressive activities is an unconstitutional prior restraint under the First Amendment.”¹⁵³

c. Watch How You Talk: Reaction to Unpopular Messages

The rush for colleges and universities to lock in commencement speakers has become known as the “disinvitation season” due to an increase in protests and complaints about the partisan nature of potential invited guests.¹⁵⁴ These protests are no longer reserved for commencement speakers, but are now prevalent for any speaker with a message that may be offensive to listeners.¹⁵⁵

¹⁴⁸ *Id.* at 252.

¹⁴⁹ George Leef, *College Officials Tell Students: You May Speak Freely As Long As It’s Within Our (Tiny) Speech Zone*, FORBES, Dec. 15, 2016. Available at <https://www.forbes.com/sites/georgeleef/2016/12/15/college-officials-tell-students-you-may-speak-freely-as-long-as-its-within-our-tiny-speech-zone/#5dd720f275cd>

¹⁵⁰ *Id.*

¹⁵¹ *Smith v. Tarrant County College District*, 670 F.Supp.2d 534 (N.D. Tx. 2009).

¹⁵² *Jews for Jesus, Inc. v. City College of San Francisco*, 2009 WL 86703 (N.D. Cal. Jan. 12, 2009).

¹⁵³ *Id.* at *4.

¹⁵⁴ See generally Colleen Flaherty, *Disinvitation Season Begins*, INSIDE HIGHER ED, Feb. 14, 2017. Available at <https://www.insidehighered.com/news/2017/02/14/juan-williams-out-commencement-speaker-ursinus>

¹⁵⁵ Other events include protests at New York University. Ray Villeda, *Conservative Speaker’s Appearance Ignites Protests at NYU*, NBC CHANNEL 4, NEW YORK, Feb. 2, 2017. Available at <http://www.nbcnewyork.com/news/local/NYU-Protests-Fights-Arrests-Conservative-Speaker-Gavin-McInnes-412635693.html>

In one such event, protests and violence occurred in Berkeley, California in advance of a scheduled appearance by the conservative commentator, Milo Yiannopolous,¹⁵⁶ which resulted in over \$100,000 in damage to the campus.¹⁵⁷ Such activities have led the President to tweet a threat, cutting off funding for institutions in wake of the University of California-Berkeley protests against Yiannopolous.¹⁵⁸ Trump’s tweet stated, “If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view – NO FEDERAL FUNDS?”¹⁵⁹

The protest against speakers has ignited significant debate as campuses and students wrestle with providing diverse viewpoints in a safe manner. The considerations for those addressing this hot topic include addressing non-student involvement (as Berkeley allegedly involved 150 non-students), sharing opinions others may find offensive, and protecting peaceful protesters while not trampling the First Amendment.

X. HOT TOPIC: CURRENT EVENTS - ORLANDO AND THE TRUMP ADMINISTRATION

In the wake of the Orlando shooting and the policies of the Trump administration, uncertainty in the protections of speech have been coupled with an apparent increase in incidences of hate speech and hate crime.

a. *The Orlando Nightclub Shooting*

On June 12, 2016, Omar Mateen, a 29 year old from Fort Pierce, Florida, entered The Pulse nightclub in Orlando, killing 49 people and wounding at least 53 others.¹⁶⁰ In the wake of the shooting, there were messages of unity. President Barack Obama, in his address to the nation, stated that “[w]e know enough to say this was an act of terror and act of hate.”¹⁶¹ Presidential candidate Hillary Clinton also condemned the attacks in a Facebook post:

This was an act of terror. Law enforcement and intelligence agencies are hard at work, and we will learn more in the hours and days ahead. For now, we can say for certain that we need to redouble our efforts to defend our country from threats at home and abroad. That means defeating international terror groups, working with allies and partners to go after them wherever they are, countering their attempts to recruit people here and everywhere, and hardening our defenses at home. It also means refusing to be intimidated and staying true to our values.

¹⁵⁶ Yiannopolous formerly served as an editor at Breitbart and was permanently banned from Twitter after engaging in racist and sexist harassment of Leslie Jones, a Saturday Night Live cast member and co-star of the 2016 Ghostbusters film.

¹⁵⁷ Madison Park and Kyung Lah, *Berkeley protests of Yiannopolous caused \$100,000 in damage*, CNN, Feb. 2, 2017. Available at <http://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/>

¹⁵⁸ Osita Nwannevu, *Trump Threatens to Pull Federal Funding From Berkley Because of Protest Against the Alt-Right*, SLATE, Feb. 2, 2017. Available at

http://www.slate.com/blogs/the_slatest/2017/02/02/trump_threatens_to_pull_federal_funding_from_berkeley_after_milo_yiannopoulos.html

¹⁵⁹ *Id.*

¹⁶⁰ Ralph Ellis, Ashley Fantz, Faith Karimi and Elliot C. McLaughlin, *Orlando shooting: 49 killed, shooter pledged ISIS allegiance*, CNN, June 13, 2016. Available at <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/>

¹⁶¹ *Id.*

This was also an act of hate. The gunman attacked an LGBT nightclub during Pride Month. To the LGBT community: please know that you have millions of allies across our country. I am one of them. We will keep fighting for your right to live freely, openly and without fear. Hate has absolutely no place in America.¹⁶²

Presidential Candidate Donald Trump also turned to social media to respond, causing backlash in the process when he posted, “Appreciate the congrats for being right on radical Islamic terrorism, I don't want congrats, I want toughness & vigilance. We must be smart!”¹⁶³

Among the other messages expressed in response was a strong messages of hate. One such message came from California Pastor Roger Jimenez from Verity Baptist Church in Sacramento.¹⁶⁴ He instructed his flock that Christians “shouldn't be mourning the death of 50 sodomites.”¹⁶⁵ His message continued:

People say, like: ‘Well, aren't you sad that 50 sodomites died?’ Here's the problem with that. It's like the equivalent of asking me — what if you asked me: ‘Hey, are you sad that 50 pedophiles were killed today?’ . . . Um, no, I think that's great. I think that helps society. You know, I think Orlando, Fla., is a little safer tonight . . . The tragedy is that more of them didn't die. The tragedy is — I'm kind of upset that he didn't finish the job!¹⁶⁶

Many commentators attribute the hostilities to hate speech, taking the strong stance that “the shooting in Orlando which targeted the LGBT community was the end result of decades of anti-gay hate speech and gay bashing.”¹⁶⁷ This viewpoint suggests that “[e]very time a politician or community leader has advocated second-class citizenship for gay Americans, it has given permission to the haters to strike out – in this case in a mass slaughter.”¹⁶⁸

b. Election 2016: Opening the Floodgates?

Following The Pulse nightclub shooting, Trump pledged to protect the LGBT community. He stated “[a]s president, I will do everything in my power to protect LGBT citizens from the violence and oppression of a hateful foreign ideology.”¹⁶⁹ Despite Trump's pledge, actions against the

¹⁶² Hillary Clinton, June 12, 2016. Available at <https://www.facebook.com/hillaryclinton/posts/1165058356884025>

¹⁶³ Sam Frizell, *Donald Trump Faces Backlash for Tweets About Orlando Shootings*, TIME, June 12, 2016. Available at <http://time.com/4365411/orlando-shooting-donald-trump-tweet-congrats/?xid=homepage>

¹⁶⁴ Lindsey Bever, *Pastor refuses to mourn Orlando victims: ‘The tragedy is that more of them didn't die,’* THE WASHINGTON POST, June 15, 2016. Available at https://www.washingtonpost.com/news/acts-of-faith/wp/2016/06/14/pastor-refuses-to-mourn-orlando-victims-the-tragedy-is-that-more-of-them-didnt-die/?utm_term=.cd3bf7f08d68

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Hank Plante, *Orlando shooting: Hate speech lit the fuse*, DETROIT FREE PRESS, June 12, 2016. Available at <http://www.freep.com/story/opinion/columnists/2016/06/12/orlando-shooting-end-homophobia/85807596/>

¹⁶⁸ *Id.*

¹⁶⁹ Nico Lang, *This is Trump's America: LGBT community fears surge in hate crimes following reports of homophobic attacks*, Salon, Nov. 13, 2016. Available at <http://www.salon.com/2016/11/13/this-is-trumps-america-lgbt-community-fears-surge-in-hate-crimes-following-reports-of-homophobic-attacks/>

LGBT community and incidence of hate speech in general appeared to escalate during the campaign and has continued in an apparently unabated fashion.

One group that experienced significant direct animosity is the Muslim community. Compiled data demonstrated that “crimes against Muslims rose 86 percent.”¹⁷⁰ During the election cycle, the civil rights advocacy group CAIR (the Council on American-Islamic Relations’ communication director, Ibrahim Hooper, proposed that Trump

mainstreamed Islamophobia in our nation. . . He’s given permission to all those who held anti-Muslim views, or who might have formed anti-Muslim views recently, to go public with them quite proudly . . . Whereas before maybe they would have been reluctant to be so open about their bigotry, now you have a major American public figure saying that’s perfectly OK. In fact it’s somehow patriotic.¹⁷¹

Even reporters covering the election found themselves victims, as “[a] report . . . from The Anti-Defamation League documented the rise in anti-Semitic tweets targeting journalists who cover the Republican presidential candidate. From August 2015 to July 2016, the ADL found 2.6 million tweets with anti-Semitic language. Of those, nearly 20,000 tweets were directed at 50,000 journalists in the U.S., with more than two-thirds of the tweets sent by 1,600 Twitter accounts.”¹⁷² Other examples of hate speech include activities targeting the LGBT community. In North Carolina, a person left a note on a gay couple’s car stating “Can’t wait until your ‘marriage’ is overturned by a real president.”¹⁷³

c. The Trump Administration

After the inauguration, hate speech and hate crimes continued to rise. The Southern Poverty Law Center reported “that there were four hundred and thirty-seven incidents of intimidation between the election, on November 8th, and November 14th, targeting blacks and other people of color, Muslims, immigrants, the L.G.B.T. community, and women.”¹⁷⁴

Many commentators attribute this increase to a “normalization of exceedingly reactionary sentiments that run counter to the founding principles of America” and campaign rhetoric that “was definitionally hateful, misogynistic, xenophobic, and racist.”¹⁷⁵ Even attorneys within the

¹⁷⁰ Peter Eisler, *Hate speech seeps into U.S. mainstream amid bitter campaign*, REUTERS, November 7, 2016. Available at <http://www.reuters.com/article/us-usa-election-hatespeech-insight-idUSKBN13225X>

¹⁷¹ Jessica Guynn, *‘Massive rise’ in hate speech on Twitter during the presidential election*, USA TODAY, October 21, 2016. Available at <http://www.usatoday.com/story/tech/news/2016/10/21/massive-rise-in-hate-speech-twitter-during-presidential-election-donald-trump/92486210/>

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Alexis Okeowo, *Hate on the rise after Trump’s election*, THE NEW YORKER, Nov. 17, 2017. Available at <http://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election>

¹⁷⁵ Akash Goel and Andrew Goldstein, *Donald Trump and the Epidemiology of Hate*, TIME, November 22, 2016. Available at <http://time.com/4578814/donald-trump-spread-of-hate/>

Department of Justice's Civil Rights Division expressed initial concern regarding their role in the nascent administration.¹⁷⁶

Further, policy decisions have led to questions about Trump's support for the community. On February 22, 2017, the President rescinded protections for transgender students that were implemented during the Obama administration.¹⁷⁷ The administration adopted a federalist viewpoint suggesting that bathroom access was a matter best left to the states.¹⁷⁸

In response to the general outcry, the Gay and Lesbian Alliance Against Defamation (GLAAD) has launched the Trump Accountability Project targeting "hateful rhetoric, discriminatory actions, and exclusionary worldviews."¹⁷⁹

With respect to hate crimes, however, the administration has adopted several strong stances. On February 28, 2017, the Federal Bureau of Investigation initiated an investigation into the Kansas shooting that killed an Indian man while wounding another.¹⁸⁰ The assailant allegedly told the two men to "get out of my country" before he shot them.¹⁸¹ In response, the White House called the attack "an act of racially motivated hatred."¹⁸² A spokesperson for the FBI announced "the FBI, in conjunction with the U.S. Attorney's Office and the Department of Justice Civil Rights Division, is investigating this incident as a hate crime."¹⁸³ Later that night, in his first address to Congress, Trump spoke to other examples of hatred and division. "Recent threats targeting Jewish Community Centers and vandalism of Jewish cemeteries, as well as last week's shooting in Kansas City, remind us that while we may be a nation divided on policies, we are a country that stands united in condemning hate and evil in all of its very ugly forms."¹⁸⁴ This statement followed criticism from the Jewish community after Trump was slow to respond to anti-Semitic attacks and has been perceived as a "slight shift" in his tone.¹⁸⁵

Despite this fear, it is important to note that views on the administration's position on the LGBT community differ. Trump received approximately 14% of the LGBT vote.¹⁸⁶ Records reflect that

¹⁷⁶ Ryan J. Reilly, *DOJ Civil Rights Lawyers Ponder Future Under Potentially 'Terrifying' Trump Presidency*, HUFFINGTON POST, November 11, 2016. Available at http://www.huffingtonpost.com/entry/trump-doj-civil-rights_us_582a189be4b060adb56fb8c7?section=us_politics

¹⁷⁷ Jeremy W. Peters, Jo Becker, and Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, THE NEW YORK TIMES, Feb. 22, 2017. Available at

<https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>

¹⁷⁸ *Id.*

¹⁷⁹ Krystin Arneson, *GLAAD Will Be Tracking the Trump Administration's Hate Speech*, GLAMOUR, Dec. 3, 2016. Available at <http://www.glamour.com/story/glaad-will-be-tracking-the-trump-administrations-hate-speech>

¹⁸⁰ Mark Berman, *FBI investigates shooting of two Indian men in Kansas as a hate crime*, THE WASHINGTON POST, Feb. 28, 2017. Available at https://www.washingtonpost.com/news/post-nation/wp/2017/02/28/fbi-investigating-shooting-of-two-indian-men-in-kansas-as-a-hate-crime/?utm_term=.cae68234745c

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Katie Reilly, *President Trump Began His Address to Congress by Condemning Hate Crimes*, TIME, Mar. 1, 2017. Available at <http://time.com/4686336/trump-congress-address-condemn-hate-crimes/>

¹⁸⁵ *Id.*

¹⁸⁶ Joseph R. Murray II, *Memo to the LGBT community: Donald Trump is not your enemy*, THE HILL, Nov. 17, 2016. Available at <http://thehill.com/blogs/pundits-blog/civil-rights/306657-memo-to-the-lgbt-community-donald-trump-is-not-your-enemy>

he donated significant amounts of money to charities during the AIDS outbreak on the 1980s and 1990s.¹⁸⁷ His LGBT supporters and pundits point to the fact Trump “forcefully condemned” the Pulse shooting while asking Peter Thiel to address the GOP convention.¹⁸⁸ Even with respect to the transgender bathroom protections, Education Secretary Betsy DeVos noted that it was a “moral obligation” to protect students from bullying, including those who “are most vulnerable in our schools.”¹⁸⁹

The actions of the Trump administration may appear to be inconsistent or significantly nuanced. It is possible that the increase in hate speech and crimes is a direct result of the interpretation of these views by those who independently seek to amplify hostility. Causation and correlation aside, it appears that the current administration will continue to provide discussion points for the ongoing debate on addressing hate speech.

XI. CHALLENGING ASSUMPTIONS: THE LASTING QUESTIONS SURROUNDING HATE SPEECH JURISPRUDENCE

In applying hate speech jurisprudence to the hot topics above and those that have yet to be contemplated, a few threshold questions are evident. As the Court has moved to protect more hate speech, including both direct speech and expressive conduct, should it continue down that path? Is hate speech indeed something that should be protected?

a. Does hate speech have high intrinsic worth?

On its face, it appears that the Court has determined in its recent decisions that hate speech has value. “Our system of free expression serves a number of societal and individual goals. Included are the personal fulfillment of the speaker; ascertainment of the truth; participation in democratic decisionmaking; and achieving a balance between social stability and change.”¹⁹⁰

Even in a divided political universe, hatred has been held out to have value. On the opening day of the 2017 Conservative Political Action Conference (CPAC), NPR host, Rachel Martin, interviewed Matt Schlapp, the Chairman of the American Conservative Union. When asked about hate speech and, in particular, about the cancellation of Milo Yiannopolous as a speaker, Schlapp supported the ability to air controversial views:

Unlike what the reputation might be for conservatives, we take what people watch on television, hear on the radio, read in newspapers, and we put it on our stage. We put it within a conservative context. And we think what's happening with shutting down speech on campus is un-American. And I think the voices from the right should be here on campus. I think the boundary for us was we're OK with controversy, but we're not OK with criminal . . . They [inflammatory statements made by Yiannopolous] are red lines in the sense that they're offensive. And we don't agree with him. And we certainly don't agree with the alt-right. And we don't

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Peters, Becker and Hirschfeld Davis.

¹⁹⁰ Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 378–79 (1991)

think racism has a role in the conservative movement. That doesn't mean that through the first amendment that our attendees shouldn't get the ability to hear a vigorous debate that's raging across the country. And we want to put that before them. Look. We believe that it is better when we air our political differences, left to right. And even within the conservative movement, give our attendees a chance to hear it. We think that helps us find the truth.¹⁹¹

However, later in the same day, CPAC kicked Richard Spencer, a white nationalist, out of the conference and the hotel where the conference was being held.¹⁹² It appeared that “CPAC is trying to send a message that it wants nothing to do with the so-called alt-right, a white nationalist movement that latched on to Donald Trump's rise.”¹⁹³ This act leads to the question of how value such speech actually contains.

b. Does hate speech have an intent to cause harm?

Any prohibition or direction to curb hate speech would likely need to be founded in an intent to create a cognizable harm.¹⁹⁴ In the context of racial hate messages, victims have experienced “physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.”¹⁹⁵

Such harm could cause long term effects, even in those who are exposed to hate speech as the

research in psychosocial and psycholinguistic analysis of racism suggests a related effect of racist hate propaganda: at some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth. The idea is improbable and abhorrent, but it is there before us, because it is presented repeatedly. “Those people” are lazy, dirty, sexualized, money-grubbing, dishonest, inscrutable, we are told. We reject the idea, but the next time we sit next to one of “those people” the dirt message, the sex message, is triggered. We stifle it, reject it as wrong, but it is there, interfering with our perception and interaction with the person next to us. For the victim, similarly, the angry rejection of the message of inferiority is coupled with absorption of the message. When a dominant-group member responds favorably, there is a moment of relief — the victims of hate messages do not always believe in their insides that they deserve decent treatment. This obsequious moment is degrading and dispiriting when the self-aware victim acknowledges it.¹⁹⁶

¹⁹¹ Interview by Rachel Martin with Matt Schlapp, Chairman, American Conservative Union, on National Public Radio (Feb. 23, 2017). Available at <http://www.npr.org/2017/02/23/516787809/cpac-in-the-trump-era>

¹⁹² Domenico Montanaro, *White Nationalist Richard Spencer Kicked Out Of CPAC*, NPR, Feb. 23, 2017.

¹⁹³ *Id.*

¹⁹⁴ See generally Anuj C. Desai, *Attacking Brandenburg with History: Does the Long-Term Harm of Biased Speech Justify A Criminal Statute Suppressing It?* 55 FED. COMM. L.J. 353, 361 (2003) (addressing the connection between “hate speech” and harm).

¹⁹⁵ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2336 (1989).

¹⁹⁶ *Id.* at 2339–40.

If this is true, the question remains whether this harm is sufficient to justify intervention. Opinion writers suggest considering the distinction between hateful intent and hateful effect.¹⁹⁷ “Not all speech that offends or degrades is *willful* hate speech. It may be insensitive, ill-thought out and even incendiary to certain people, but it may mean something quite different to its author or its intended audience, particularly in a world where images transverse borders and cultural contexts.”¹⁹⁸

These questions lead to the need to address the balance of protecting people from physical and psychological harm while not leading to a chilling effect on the expression of unpopular, controversial, and hostile viewpoints.

¹⁹⁷ Suzanne Nossel, *To fight ‘hate speech,’ stop talking about it*, THE WASHINGTON POST, June 3, 2016. Available at https://www.washingtonpost.com/posteverything/wp/2016/06/03/we-dont-need-laws-banning-hate-speech-because-it-doesnt-exist/?utm_term=.7918c4d46db5

¹⁹⁸ *Id.*