



Winter 1-1-1990

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Rodney A. Smolla

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Recommended Citation

Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist And Sexist Speech*, 47 Wash. & Lee L. Rev. 171 (1990).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol47/iss1/7>

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RETHINKING FIRST AMENDMENT ASSUMPTIONS ABOUT RACIST AND SEXIST SPEECH

RODNEY A. SMOLLA*

I. INTRODUCTION.

An increase around the nation in incidents of racial and sexual harassment,¹ particularly on university campuses, has led to calls for penalties on racist and sexist speech.² This article is organized around a series of first

* James G. Cutler Professor of Law and Director, Institute of Bill of Rights Law, The College of William and Mary, Marshall-Wythe School of Law. Portions of this article will appear in a somewhat different form in a forthcoming book by the author on the future of free speech.

1. See *infra* text accompanying notes 16-26. The incidents include attacks based upon race, ethnicity, religion, sex, and sexual preference. I recognize that the balance of interests implicated by these attacks may not always be the same. The anatomy of racism, for example, may not resemble the anatomy of sexism in all respects. Similarly, speech attacking religion may trigger the special constitutional concerns of the Religion Clauses over and above whatever protection is provided by the Speech Clause. Compare *Burstyn v. Wilson*, 343 U.S. 459 (1952) (striking down New York law prohibiting "sacrilegious" material) with *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding Illinois group libel statute in context of racist attacks) (*Beauharnais* is discussed *infra* text accompanying notes 83-91). Nevertheless, for the purposes of this article, I mean by the phrase "racist and sexist speech" all speech attacks based on race, ethnicity, religion, sex, and sexual preference. I use the phrase as a shorthand for all such attacks and further assume that the constitutional analysis presented here would not be altered appreciably as the nature of the victimization changes.

2. See, e.g., Au, *Freedom from Fear*, 15 LINCOLN L. REV. 45 (1984); Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

This article had its genesis in the gracious invitation by students at the Washington and Lee University School of Law to comment on their proposal for a communicative torts statute that includes a section that would create tort liability for racial, sexual, or religious harassment. The proposal reads, in pertinent part:

(a) A person who intentionally engages in a course of conduct that is addressed to an individual, that is specifically intended and reasonably likely to harass or intimidate the individual because of the individual's race, sex, [ethnic origin], or religion, and that directly causes serious emotional distress, is subject to liability to the individual:

(i) for damages. . . ; and

(ii) in an action for injunctive relief. . . .

(b) For the purposes of this Section, course of conduct means a pattern of communication evincing a continuity of purpose.

THE MODEL COMMUNICATIVE TORTS ACT § 6-103 (1989).

The comment to § 6-103 indicates that the drafters of the proposed communicative torts act were in significant disagreement over whether to include a section grounding liability in racial, sexual, ethnic, or religious harassment. *Id.* The comment further states that the phrase "ethnic origin" was bracketed to reflect the view of "approximately one half of the drafters" that "ethnic origin should not be included because its inclusion would create too much confusion over the scope of the term." *Id.*

amendment themes, each presenting critical choices in free speech jurisprudence. For each choice, one can identify with relative ease the current prevailing first amendment orthodoxy. When one moves from the descriptive to the normative, however, asking not what the first amendment presently is, but what its future ought to be, the choices become excruciatingly close.³

II. THE COMPETING COMMUNITARIAN AND LIBERTARIAN VISIONS OF LAW.

A. *The Vision of Law as the Tie that Binds.*

The debate over controls on racist and sexist speech implicates a broader philosophical split in thinking over the purpose of the law. American intellectual history reflects this split in any number of ways, including the division between classic liberalism and civic republicanism that was visible

3. Prevailing first amendment dogma maintains that speech may not be penalized merely because its content is racist or sexist. Indeed, under conventional modern free speech jurisprudence, racist speech qualifies for the very highest levels of first amendment shelter, perhaps even absolute protection, because it is thought of as "opinion." See *infra* text accompanying notes 38-44. Even if racist speech communicates little in the way of intellectual argument but is rather an invocation of raw hatred, prevailing first amendment principles protect the speech because the prevailing dogma refuses to countenance any distinction between the cognitive and the emotive elements of speech. The communicative thought and feeling equally are protected. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Cohen v. California*, 403 U.S. 15 (1970); *infra* text accompanying notes 45-51. Thus, membership in groups that advocate racist positions may not be made illegal; advocacy of ideas such as racial or religious genocide may not be outlawed. Only if such speech is on the very verge of ripening into immediate violence may the speech be penalized. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *infra* text accompanying notes 79-82. Furthermore, if that violence comes from the reactions of others to the hate-filled speech, our current orthodoxy normally is that the hecklers must be arrested, not the speakers. See *Terminiello v. Chicago*, 337 U.S. 1 (1949). But see *Feiner v. New York*, 340 U.S. 315 (1950). The capacity of racist attacks to cause deeply scarring psychic wounds or to undermine the values of racial equality and harmony that make meaningful community possible are discounted as harms too ephemeral to justify content-based speech restrictions.

Despite these formidable constitutional barriers, the rise in racist incidents has led to a proliferation of new regulations aimed at restricting racist speech. The proposal by the students at Washington and Lee is a particularly thoughtful effort. This article does not attempt to construct a comprehensive model for resolving the conflicts posed by controls on racist and sexist speech because such an effort is beyond the scope of the pieces contemplated for this Symposium. For this Symposium, the *Washington and Lee Law Review* asked for relatively short, lightly footnoted essays commenting on the various provisions of the proposed act. In light of those highly sensible instructions, this article seeks only to raise the themes implicated by the Washington and Lee proposal.

This article, however, does attempt to jar libertarian defenders of the first amendment from the doldrums of certitude, canvassing a number of strategies, old and new, through which defenders of controls on racist and sexist speech might seek to win over their libertarian colleagues. I include myself among those libertarian defenders. This article is an act of self-examination in which I openly question many of my own past assumptions. Some of the suggestions in this piece, for example, are not reconciled easily with my prior writings. See, e.g., R. SMOLLA, *JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL* (1988) [hereinafter R. SMOLLA, *JERRY FALWELL V. LARRY FLYNT*].

early on in our intellectual history.⁴ For the purposes of this essay, precision in intellectual history is less important than simply evoking two quite different impulses concerning the nature of law and the role of the state that continue to vie energetically for control of our legal culture.

The first impulse, traceable as far back as Aristotle, is that law exists to make men good by binding men together in a cohesive and just community. Aristotle wrote: "It is evident that the state is a creation of nature, and that man is by nature a political animal."⁵ Aristotle did not mean this in the way the statement is sometimes used today—as a cynical "it's a jungle out there and law is all raw politics and power" indictment of the mean ego of humanity. Rather, this statement is optimistic, part of Aristotle's road to virtue. For Aristotle, it is politics in the highest and best sense—the practical art of organizing a community around principles of justice, equality, and virtue—that distinguishes man from the animals. According to Aristotle, man is a creature of the state because without the state man truly cannot be man. Law and justice are affirmations of the highest potential of the human condition. Only through communal living and through the state may men achieve virtue; only through the state may they find true peace, happiness, and fulfillment. Aristotle argues that "the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of the good life."⁶ Aristotle thus celebrated the potential for genuine human community:

Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.⁷

Aristotle's vision resonates throughout western political thought. When this Aristotelian impulse becomes the dominant mode of thinking in a society, there will be an inexorable tendency for the state to think that it is reasonable to exercise control over speech. Speech that promotes the good life and that affirms values of community, justice, and the rule of law will be fostered and nurtured by the state; speech destructive of those ends will be condemned. The philosopher, Thomas Hobbes, whose social contract

4. See generally G. WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35* (1988); Seigel, *The Marshall Court and Republicanism*, 67 *TEX. L. REV.* 903 (1989). This split in thinking continues to have great vibrancy. For an example of civic republicanism as the principal organizing theme in the work of a major American constitutional theorist, see M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

5. ARISTOTLE, *THE POLITICS*, Book I, Ch. 1, reprinted in G. CHRISTIE, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 13 (1973).

6. *Id.*

7. *Id.* at 12.

theory envisioned the state as a benign, friendly giant, a leviathan with a smile, thought it axiomatic that the state would exercise censorship over opinions:

[I]t is annexed to the Sovereignty, to be Judge of what Opinions and Doctrines are averse, and what conducing to Peace; and consequently, on what occasions, how farre, and what, men are to be trusted withall, in speaking to Multitudes of people; and who shall examine the Doctrines of all bookes before they be published. For the Actions of men proceed from their Opinions; and in the well governing of Opinions, consisteth the well governing of mens Actions, in order to their Peace, and Concord.⁸

B. *The Counter Vision of Individual Autonomy.*

Because Aristotle is alive and well in American thought, legislatures often are motivated, rightly or wrongly, by an Aristotelian vision of law as making men good.⁹ Aristotle's vision competes in America, however, with a far brasher, more youthful, more daring, and disorderly philosophy, a libertarian streak that insists that Aristotle got it all wrong. Law does not exist to make men good; that is none of law's business. Law exists to keep minimal order, to provide for the common defense, to insure domestic tranquility. The John Stuart Mill in us instructs that the legitimate jurisdiction of government extends only so far as is necessary to keep one citizen from harming another.¹⁰ Raising the level of public discourse or improving sensitivity to communal values is beyond the ken of the state.

C. *The Emotional Demographics of Controls on Racist and Sexist Speech.*

Proponents of controls on racist and sexist speech can draw impressive philosophical sustenance from the likes of Aristotle and Hobbes. Racial and sexual equality and tolerance are not just good ideas but the law of the land,¹¹ the declared public policies of the United States.¹² Hobbes was right: the actions of men proceed from their opinions, and racist and sexist opinions lead to an atmosphere of race-hate, an insensitivity that fosters acts of palpable violence and discrimination.

Supporters of controls on racist and sexist speech, however, face a difficult decision over which they are likely to feel both philosophically

8. T. HOBBS, *LEVIATHAN*, Part II, Ch. 18, reprinted in G. CHRISTIE, *supra* note 5, at 327.

9. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

10. See J. MILL, *ON LIBERTY* (1859) (S. Collini ed. 1989).

11. Professor Charles Lawrence of Stanford has been articulate in advancing this view. See Lawrence, *The Debates Over Placing Limits on Racist Speech Must Not Ignore the Damage It Does to Its Victims*, *CHRON. OF HIGHER EDUC.*, October 25, 1989. See *infra* text accompanying notes 105-111.

12. See *infra* text accompanying notes 105-111.

conflicted and strategically unsure. For on this issue they find themselves Aristotelian thinkers seeking to influence a predominately libertarian club. Thus, the supporters of controls on racist and sexist speech must choose whether to fight this battle purely in Aristotelian terms or whether to meet the libertarians half-way by trying to convince the libertarians that the communal goals of tolerance and equality can be accommodated within the libertarian framework of free expression and an open marketplace.

A personal dimension to this conflict exists. Many of the more eloquent exponents of controls on racist and sexist speech are persons who often have thought of themselves as libertarians or at least as part of a coalition in which libertarians have been their allies. It is not easy to be portrayed as against free speech and civil liberties by the same persons with whom you have fought so many battles for civil rights.

The civil libertarians also have conflicts. Racist and sexist speech is hard to defend. Unlike the speech of socialists, labor unions, Darwinists, communists, or persecuted religions—the kinds of unpopular groups over which free speech battles were fought in the easy old days—the civil libertarian cannot in his or her heart truly imagine that the speech of the Ku Klux Klan or the Nazis can have any redeeming social value. Thus, the libertarian is forced to defend racists and sexists on the pure market principle that the lack of any discernable redeeming value does not matter.

The libertarian, moreover, is pressed to define the contours of the harm principle. Even John Stuart Mill permits the state to intrude on individual liberty when its exercise will injure another. But what should count as injury? Moral indignation at the conduct of another is not enough in classic libertarian terms. Thus, laws against sodomy may not be justified by collective repugnance for gay lifestyles. The legislature may not criminalize sexual activity between two persons of the same sex merely because of majoritarian squeamishness. Some injury more palpable than moral outrage is required. When the legislature bans racist or sexist speech, is it acting in the same manner as when it discriminates against gay relationships? The libertarian may insist that the answer is yes and, therefore, both exercises of state power are illegitimate.

If the proponents of controls on racist and sexist speech feel saddened by having their libertarian colleagues as opponents, they also may feel awkward about the identity of some of their strongest allies. Some conservative voices will argue that the libertarians are exactly right: there *are no* differences in the thought patterns that permit the majority to enact its morality into law against gays, racists, and sexists. For these conservatives *both* types of laws are perfectly permissible because all law is a distillation of public morality.

As a result, proponents of controls on racist and sexist speech who do not wish to sanction discrimination against gays and lesbians must devise a theory to explain why the libertarians are right in one case and wrong in the other. Two basic options are available. The first is to draw a distinction between a moral consensus based on prejudice, exclusion, and intolerance, and a moral consensus based on eliminating prejudice, fostering inclusion,

and promoting tolerance. The law may be the "witness and external deposit of our moral life,"¹³ but not any old morality will do. The moral judgments of the community that condemn racists and sexists are different in kind from the moral judgments that condemn lesbians and gays.

The libertarian, however, will tend to blanch at this and reject the argument because it is too Aristotelian to swallow. Legislatures that pass laws that repress gays *claim* that they are "building community." The legislatures claim that they are rescuing society from mindless relativism and restoring moral fabric. The libertarian will insist that the legislature may not punish racists or gays in the pursuit of the good life for the community because in either case the legislature is exempting itself from the harm principle.

The second and more promising line of argument for proponents of controls on racist and sexist speech concedes the legitimacy of the harm principle to libertarians but then takes issue with libertarians over what will qualify as harm. This line of argument requires an examination of the harm through the eyes of the victim.

III. THE ANATOMY OF HATE; LAW THROUGH THE EYES OF VICTIMS.

Patterns of thought often are forged by the hydraulic pressure of events.¹⁴ The debate over liability for racial, sexual, or religious harassment has occupied center-stage at American universities in recent months as incidents of harassment have increased on campuses. If law should not be written solely from the perspective of victims, law, nonetheless, should be written only after the lawmaker has attempted to see the world through a victim's eyes.¹⁵

The Community Relations Service for the United States Department of Justice reported a steep increase in cases relating to racial tensions at institutions of higher learning during fiscal year 1988.¹⁶ A recent study by

13. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

14. See R. CRAGG, PURITANISM TO THE AGE OF REASON 190 (1966). I prefer this formulation to the cynical conclusory cliché that "hard cases make bad law." See *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law."). Hard cases do not necessarily make bad law even though they may force new law. Hard cases commandeer the imagination and challenge us to reconsider old laws, possibly to refit the old laws to new and harder circumstances.

15. A rich new jurisprudence of "empathy" is now prominent in feminist, critical legal studies and "law and literature" scholarship. See, e.g., Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Yudof, *"Tea at the Palace of Hoon": The Human Voice in Legal Rules*, 66 TEXAS L. REV. 589 (1988). Professor Toni Massaro has written cogently that we should avoid both "foolish formalism" and "unguided emotion" in our legal reasoning. See Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2126 (1989) (stating that we should "revisit our experience and feelings along with other guides to reasoned judgments," and that we should "guard against empathic or intellectual blind spots when we construct and critique legal institutions and standards that govern us.").

16. See *Campus Anti-Bias Codes: A New Form of Censorship?*, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH CIVIL RIGHTS DIVISION POLICY BACKGROUND REPORT 1 (1989) (copy on file with author) [hereinafter ANTI-DEFAMATION LEAGUE REPORT].

the National Institute Against Prejudice and Violence documents racist incidents at 250 colleges and universities since the fall of 1986.¹⁷

Anti-semitic violence is also on the increase on American campuses. According to an October 1989 report of the Civil Rights Division of the Anti-Defamation League of B'nai B'rith, thirty-eight incidents of anti-semitic harassment occurred in 1988, the highest ever recorded by the Anti-Defamation League. The upward trend appears to be continuing in 1989.¹⁸

The incidents are an insult to tolerance and human dignity and an embarrassment to American universities. Incidents range from the random anonymities of hate graffiti to the mob desecration of anti-apartheid shantytowns to ugly student newspaper slurs on the intellectual capacities of black faculty and students to the barbarous physical assault of white male students pouring human urine on a black female student passing beneath their dormitory window. These slurs rape the soul.

The individual stories convey a dehumanizing pattern more distressing than the actual statistics. For example, at a University of Alabama football game, Alabama Governor Guy Hunt was crowning Kimberly Ashley, a black woman, homecoming queen when spectators' boos came from the stands and a few unfurled a Confederate flag. The University of Alabama President, Roger Sayers, issued a statement stating that the University "neither endorses nor tolerates statements, behavior, tokens, or insignias which deride or disparage any individual or group." The steering committee of the Alabama Faculty Senate condemned "racism in all its forms," and the student government unanimously passed a resolution denouncing the racist behavior.¹⁹ At the University of Virginia a Phi Gamma Delta fraternity flyer warned: "No short wops and no nega babes."²⁰ At the University of Wisconsin at Madison, the Zeta Beta Tau fraternity held a fundraising "slave auction" in which fraternity members were auctioned off to perform services for bidders. Some of the fraternity members appeared in blackface and performed skits offensive to black students.²¹ At Northwest Missouri State leaflets were distributed warning: "The Knights of the Ku Klux Klan are watching you."²² At the University of Michigan white students painted themselves black and placed rings in their noses for a "jungle party."²³

Furthermore, a black woman walking past a residence hall at the University of Pennsylvania was taunted by two white men who poured urine on her as they leaned out a dormitory window.²⁴ At the University of

17. *Lessons from Bigotry 101*, NEWSWEEK, September 25, 1989, at 48.

18. ANTI-DEFAMATION LEAGUE REPORT, *supra* note 16, at 1.

19. *Crowd at Homecoming Boos Black Queen*, CHRON. OF HIGHER EDUC., November 4, 1989.

20. See Matsuda, *supra* note 2, at 2333 n.71 (citing Harris, *Hindman's "Nega" Example Reveals Problem*, Cavalier Daily (University of Virginia), Nov. 10, 1988, at 2, col. 2).

21. Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues*, CHRON. OF HIGHER EDUC., October 4, 1989, at A38.

22. Matsuda, *supra* note 2, at 2333 n.71.

23. *Id.*

24. Wilson, *supra* note 21, at A38.

Connecticut two Asian students were subjected to slurs and spit by a group of white students.²⁵ At Dartmouth a professor was called “a cross between a welfare queen and a bathroom attendant,” and the *Dartmouth Review* purported to quote a black student as saying: “Dese boys be sayin’ that we be comin’ here to Dartmut an’ not takin’ the classics.”²⁶

If there is “no negligence in the air,”²⁷ perhaps also there is no legal injury in the air. The conceptual mind of the lawyer finds it difficult to measure the metes and bounds of legally cognizable harm without thinking immediately of the adjacent conceptual property out of which the boundaries of harm will be carved. If the emotional harm caused by racist speech is understood as outrage at the message of the speech, libertarians are unlikely to treat the harm as sufficient to overcome first amendment protections because of the bedrock principle that controls on speech never should be permitted merely because of disagreement with the message.

Perhaps, however, we incorrectly characterize the harm by conceptualizing it in terms of outrage at the message. Perhaps the emotional wound is not the stuff of “agreement” or “disagreement” because there is nothing to agree or disagree with in the speech. Perhaps outrage at the “message” gives the speech more credit than it deserves because there is no message, at least no intellectual message, to be outraged against. If we are to pursue this tack, however, and use the harm as a foil to reveal the lack of intellectual content in the “speech,” we will need first to uncoil and then rebraid the strands from which contemporary first amendment doctrines are woven.

IV. UNRAVELING THE MULTIPLE FUNCTIONAL STRANDS OF SPEECH.

A. *The First Amendment and Bipolar Thought.*

Free speech jurisprudence often seems a collage of confusing bipolar choices: Is it speech or conduct? Does it communicate thought or emotion? Does the regulation state facts or opinion? Is the regulation content-based or content-neutral? Is the government property a forum or a nonforum? Is the speech political or nonpolitical? Commercial or noncommercial? For adults or children?

Controls on racist and sexist speech implicate many of these classic dichotomies. Rather than attempt to canvass them all, I will emphasize those that comprise the crucial pressure points in the debate.

B. *Fact v. Opinion*

To unravel the rope we must first loosen a strand, and the dichotomy between fact and opinion is a convenient place to start. The law of

25. *Id.*

26. Matsuda, *supra* note 2, at 2333 n. 71.

27. See *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

defamation traditionally has divided the universe of speech into two categories: fact and opinion. The division began in the common law and now has been absorbed into first amendment jurisprudence. The current doctrine is neat and simple: a factual statement is actionable and an expression of opinion is not.²⁸ The only task for modern defamation law is classification, and tests proliferate articulating the appropriate analytic devices for performing the operation. The consequence of thinking of speech in the bipolar terms of fact and opinion for the purposes of the problem of racist and sexist attacks is that the attacks will be classified as opinion, and thus deemed absolutely protected under the first amendment.

The universe of speech, however, does not need to be divided according to the orthodoxy of defamation law. We could divide speech into three, four, five, or six categories depending on the breadth of our imagination and intellectual ingenuity. Imagine, for example, a taxonomy of speech recognizing as many as six "functional genres": 1) statements of fact, 2) statements of opinion, 3) statements of transaction, 4) statements of incitement, 5) statements of emotion, and 6) statements of art and entertainment, with different levels of first amendment protection for each. Human beings do not speak in airtight categories, of course, and any given statement may be an admixture of two or more of the types of statements identified above. That, however, does not disable us from identifying the principal defining characteristics of each category.

C. *Six Functional Genres of Speech.*

1. Statements of Fact and the Epistemological Skepticism of Free Speech Jurisprudence.

A statement of fact tends to be capable of objective verification. It purports to express the truth about some aspect of reality that may be measured and calibrated in time and space and that can be proved or disproved with evidence. While even the most simple declaratory sentence cannot escape the judgments and conventions attendant to any use of language, in the common sense of everyday usage a statement such as "John Smith is black" is normally thought of as a statement of fact.²⁹

Intuitively, one might think that statements of fact deserve the highest level of first amendment protection. But this is not the case. The permissible range of governmental regulation of statements of fact is far broader than

28. See generally R. SMOLLA, LAW OF DEFAMATION §§ 6.01-6.12 (1986) [hereinafter R. SMOLLA].

29. Even a statement with such a straightforward syntax as "John Smith is black" in context may be a statement of opinion. The negation of the statement may be even more likely to express opinion. To say "John Smith is not black" or "John Smith is not a Native American," for example, may be a statement laden heavily with ideological perspectives on the nature of ethnic or racial identity. In context, for example, such statements may be "code" for "John Smith is an uncle tom."

the permissible range of regulation of opinion. By definition statements of fact are statements in which it is possible to verify objectively their truth or falsity with relative confidence. Prevailing doctrine posits that "there is no constitutional value in false statements of fact."³⁰ Thus, statements of fact may be subject to regulation for their truth or falsity.

The point that there is no first amendment value in factual falsehood, however, threatens at times to degenerate into a tired and misleading cliché. One must be careful about what is meant by the proposition. Prevailing free speech jurisprudence is adamant in its insistence that the proposition does not mean that there is no first amendment *protection* for false statements of fact. We provide false statements of fact with a degree of protection that they do not intrinsically deserve because of the abiding skepticism of contemporary first amendment epistemology.

The epistemological skepticism of modern first amendment thought has two components. Current first amendment thought is doubtful about the ability of institutional decisionmakers, such as juries, judges, law enforcement officials, or university faculties, to separate true facts from false facts and is even more suspicious of the spurious surgical precision with which such institutional decisionmakers often purport to distinguish fact from opinion. Clearly, there is at least *some* first amendment value (we may argue over how much) even in the misguided opinion. It may or may not be that good opinions will prosper in the market and drive out bad ones, but it is certainly true that on at least *some* occasions good opinion is illuminated through its collision with error.³¹ It is healthy to be exposed to positions that proceed from basic premises and even norms of argument different from one's own.

We do not wish to penalize factual truth. Because truth and falsity are often difficult to distinguish, courts have devised constitutional doctrines, such as the rules governing burdens of proof on the issue of falsity in defamation cases,³² that deliberately "overprotect" false facts to provide a buffer zone of safety for true facts. Similarly, we do not wish to penalize expressions of opinion. Because statements of fact and statements of opinion are often difficult to distinguish, courts have devised constitutional doctrines that instruct the decisionmaker to err on the side of classifying speech as opinion. Once again, this results in a penumbra of constitutional immunization for false fact to protect the expression of opinion at the constitutional core.³³

30. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

31. When attempts are made to ground the first amendment in utilitarian thinking, it is necessary to confront the question of how often good speech will drive out bad speech and how this net calculation compares with the long-term benefits of freedom of speech *other* than its actual performance in ferreting out truth reduced by the short-term costs in tolerating speech that causes discernable harms. This calculation is too difficult for the primitive legal physics of today, and thus, we usually substitute leaps of faith one way or another.

32. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

33. *See, e.g., Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc).

2. Statements of Opinion and the Creeping Nihilism of First Amendment Theory.

A statement of opinion will tend to elude objective verification. The most easily identifiable opinion is value-laden, expressing preferences of personal taste, aesthetics, literary criticism, religious beliefs, moral convictions, political views, and social theories. Thus, the statement "John Smith is an uncle tom" is different from the statement "John Smith is black," because to call Smith an uncle tom is to invoke the language of conviction and belief, expressing the viewpoint that Smith is a traitor to the interests of his race.

Many statements combine elements of fact and opinion. A statement may be cast in the ostensible language of fact though in context it is primarily or exclusively a statement of opinion. The statement "John Smith is a murderer" is a statement of opinion when it appears on a placard as part of a right to life protest against the performance of abortions by Doctor John Smith. The translated subtext is: "Abortion is murder; John Smith performs abortions; John Smith is a murderer."

Conversely, statements couched in the form of opinion may be statements of fact masquerading as statements of opinion. The statement "In my opinion, John Smith is a murderer" takes on a factual cast if it is a statement made by an eyewitness to a shooting incident between Smith and White in which White was killed and the question being investigated is who fired first and who merely fired back in self-defense. Against that contextual backdrop, the statement is laden with the factual subtext: "Smith fired first upon White, murdering him."

Statements of opinion also may be intertwined with other categories of speech. Opinions are often used as vehicles for incitement³⁴ and often convey emotion.³⁵ Both the persuasion and emotion may be related to a proposal to enter into a transaction.³⁶ In determining whether a statement is one of opinion or fact, courts have employed a variety of tests, including the degree of verifiability, the common usage or meaning of the language, the use of cautionary or qualifying terms, the genre of the speech, and the broader social context in which the statement is made.³⁷

Statements of opinion, in prevailing first amendment doctrine, receive the highest order of protection. Statements of opinion, indeed, may be afforded absolute protection at least when they concern issues of public concern. At one time the common-law protection for "opinion" or "fair comment" in defamation actions extended only to "fair" or "reasonable" opinions.³⁸ The "fairness" or "reasonableness" of the comment usually was left to the jury's relatively unguided judgment.³⁹ This practice permitted

34. See *infra* text accompanying notes 58-70, 79-82.

35. See *infra* text accompanying notes 45-51.

36. See *infra* text accompanying notes 52-55.

37. See R. SMOLLA, *supra* note 28, at §§ 6.06-6.08.

38. *Id.* § 6.02[3].

39. *Id.*

juries to judge the "worth" of the speaker's viewpoint, and thus carried the potential for persecution of unpopular opinion. The common law of defamation, therefore, often permitted the prosecution of "outrageous" opinion.⁴⁰

When the Supreme Court stated in *Gertz v. Robert Welch, Inc.*⁴¹ that "[u]nder the First Amendment there is no such thing as a false idea,"⁴² the Court emancipated the outrageous opinion from legal censure. "However pernicious an opinion may seem," the Court stated, "we depend for its correction *not on the conscience of judges and juries* but on the competition of other ideas."⁴³ This statement in *Gertz* is almost nihilistic in its denial of any constitutional authority for the state to absorb community values and enact them into law. It is a flat ban on the use of the Aristotelian and Hobbesian impulse that the law exists to make men good and the wise governing of men proceeds from the wise governing of their opinions.⁴⁴

However, a potential chink exists in the libertarian armor. Is every racist or sexist statement necessarily a statement of opinion?

3. Statements of Emotion.

A statement of emotion in its pure form has no cognitive message at all, but rather conveys raw, unvarnished feeling. One promising analytic solution to the problem of racist speech is to reject the prevailing first amendment orthodoxy refusing to recognize any distinction between the emotional and cognitive side of speech. This would not require stripping emotional speech of all protection—indeed, in the context of artistic and entertaining speech, the emotional component might enjoy enhanced protection—but it would require recognition that the degree to which emotion is part of the "mix" of the speech may affect the level of protection the speech enjoys when considered in light of the presence or absence of other redeeming elements.

Some libertarians will be repelled instantly by any suggestion that the emotional side of speech may be separated from the intellectual side. It may be possible to satisfy those concerns, however, by employing the same sort of "breathing space" methodology that informed our rules governing protection of true facts and expression of opinions. The epistemological skepticism of libertarian first amendment jurisprudence does not insist that government never may classify speech according to its function, but only that government must build into its classification system devices that are overprotective. The task of devising a principled basis for separating the emotive from the cognitive elements of speech is so difficult that it may

40. *Id.*

41. 418 U.S. 323 (1974).

42. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

43. *Id.* at 339-40.

44. *See supra* text accompanying note 8.

require even more overprotection than in other contexts. The following rule, however, arguably would do the job:

When statements of emotion are intertwined with statements of opinion in general public discourse settings, the absolute protection for statements of opinion controls, and the emotional components of the speech are absolutely protected. In certain “restricted zones” outside the realm of general public discourse, however, the absolute protection for statements of opinion does not apply. In such contexts the government may proscribe the speech if it can demonstrate compelling state interests and if the regulation is narrowly tailored to achieve those interests. Controls on racist and sexist speech communicating racial superiority, advocating violence, or expressing nothing other than hate—with no ideological position expressed or implied—will satisfy the compelling state interest requirement, and if narrowly drafted, be constitutional.

This rule is obviously in tension with the *Gertz* proclamation that under the first amendment there is no such thing as a false idea if we understand that proclamation as contemplating that the statement will contain a discernable “idea.” But as developed more fully in the concluding section of this article, government may carve out of the general marketplace of discourse certain restricted zones in which the *Gertz* rule does not apply.

But does it even make sense to talk of statements of emotion? It might be maintained that when conceptualized in these terms the phrase “statement of emotion” is an oxymoron because for the use of language to make a *statement* of emotion by definition will implicate more than the emotion alone. Language is an intellectual enterprise. The moment we graduate from grunts and groans to words, sentences, and paragraphs, we leave behind the inarticulate speech of the heart and set in motion the waves of the brain.

None of our categories, however, need be pure to be recognized. A statement of emotion might be defined as a statement conveying no cognitive message other than the static level of cognition required to use language. What I mean by “language of emotion” is language that requires no more thought than the ability to spell; language that states no fact, offers no opinion, proposes no transaction, attempts no persuasion; language that contains no humorous punch-line, no melodic rhythm, no color or shape or texture that might pass as art or entertainment; language that embodies emotion with no elaborative gloss other than feeble minimum intellectual current necessary to power the use of words.

Take a vulgar or racist word etched on the door of the bathroom stall. Imagine it is only one word and that the word stands alone. For the moment, do not imagine any *particular* word, but think, for the sake of argument, only of the function of this generic vulgarity. It is not part of any larger joke, political commentary, philosophical nugget, or personal libel. While it would not be fair to say that this word contains no intellectual component because the reader will recognize the word, “process” it men-

tally, and perhaps for a fleeting moment conjure up the physical imagery that it conveys, it would be fair to say that what the word *primarily* communicates is not properly thought of as intellectual.

Speech uttered to another human being, particularly in the physical presence of the listener, is even more susceptible of being a blend that approaches a ratio of emotional to cognitive nearly ninety-nine to one. Imagine that John Smith, a black person, is walking down the street, when a stranger snarls "Nigger!" to his face. Speech in this instance seems to communicate only the uncut emotions of hate and insult. The best we might do to give the speech a patina of intellectual content is to treat the speech as containing the subtext: "John Smith, you nigger, I hate you," or perhaps adding: "I hate you all." Even this, however, may be too generous.

Justice Frankfurter stated in *Niemotko v. Maryland*:⁴⁵ "A man who is calling names or using the kind of language which would reasonably stir another to violence does not have the same claim to protection as one whose speech is an appeal to reason."⁴⁶ In the obscenity context the Supreme Court has distinguished control of obscene speech from "control of reason and intellect."⁴⁷ We might articulate one of the preeminent goals of free speech as the triumph of intellect over passion and reason over prejudice. In 1941 the Court stated: "[In] back of the guaranty of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind."⁴⁸

One might think that the Supreme Court's holding in cases such as *Texas v. Johnson*,⁴⁹ *Hustler Magazine v. Falwell*,⁵⁰ or *Cohen*

45. 340 U.S. 268 (1951).

46. *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

47. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973).

48. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941).

49. 109 S.Ct. 2533 (1989). In *Johnson* the Supreme Court held unconstitutional a conviction under a Texas statute for flag desecration, which was defined under the law as defacing, damaging, or physically mistreating a "venerated object in a way that the actor knows will offend seriously one or more persons likely to observe or discover his action." *Id.* at 2541.

50. 485 U.S. 46 (1988). The *Hustler* case arose from a crude parody run by *Hustler Magazine* depicting Reverend Falwell as an incestuous drunk. *Id.* at 48. The Supreme Court ruled without dissent that the parody was protected under the first amendment. *Id.* at 53. Chief Justice Rehnquist conceded that the *Hustler* parody was at best a distant cousin of the conventional political cartoon "and a rather poor relation at that." In what may have been the single most important analytic step in his opinion, however, Rehnquist argued that there was simply no way to draw a principled distinction between the *Hustler* parody and other satiric efforts. *Id.* "If it were possible," stated Rehnquist, "by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm." *Id.* But the Supreme Court was doubtful, Rehnquist explained, that any reasonably concrete standard could ever be articulated. *Id.* One thing was certainly clear: the amorphous pejorative "outrageous" was too subjective to withstand first amendment requirements. *Id.* To permit a jury to impose liability for mere "outrageousness" would invite jurors to base liability on the basis of their tastes and prejudices. *Id.*

Chief Justice Rehnquist then made it clear that the mere capacity of speech to embarrass

v. California,⁵¹ forbid recognition of any dichotomy between the emotional and cognitive sides of speech. Those three decisions (I would defend all three), however, do not necessarily stand for the proposition that no division between the emotional and intellectual attributes of speech is defensible. In all three cases the speech was uttered in the general marketplace of public discourse, and there *was an intellectual subtext to the emotionally graphic speech*.

While it is tempting to explain the Supreme Court's decisions on the grounds that the Supreme Court refuses to recognize any distinction between the emotional and intellectual content of speech, the cases are explained more properly in terms of a narrower proposition: Intellectual speech does

or offend did not strip speech of its protected character. *Id.* In citing the holdings in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the George Carlin "fighting words" case (discussed *infra* at text accompanying notes 114-19), and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (the "fighting words" case discussed *infra* at text accompanying notes 103-04), Rehnquist emphasized that those holdings represented narrow exceptions to the general first amendment rule that the government must remain neutral in the marketplace of ideas. *Id.* at 55-56. While the Court recognized that all speech is not of equal first amendment importance, Rehnquist explained that the speech in this case simply did not fit into the precisely drawn categories in which lower levels of protection have been permitted. *Id.* at 56. Rehnquist wrote:

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether it was true.

Id. Here, the jury had found that the statement was not factual. *Id.* at 57. In the absence of a misstatement of fact, Chief Justice Rehnquist explained that Falwell could not recover for the mere intentional infliction of emotional distress. *Id.* See generally R. SMOLLA, JERRY FALWELL V. LARRY FLYNT, *supra* note 3.

51. 403 U.S. 15 (1970). In *Cohen*, where the defendant wore the words "fuck the draft" on his jacket, the Court emphasized that the state was not exercising its police power "to prevent a speaker from intentionally provoking a given group to a hostile reaction." *Id.* at 20. Rather, the state was attempting to penalize *only* the fact of communication. *Id.* The Court held that the state could not do this:

How is one to distinguish this from any other offensive word? Surely the state has no legal right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is never the less often true that one man's vulgarity is another's lyric.

Id. at 25.

Similarly, in *Street v. New York*, 394 U.S. 576, 592 (1969), a flag desecration case, the Court wrote:

[A]ny shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers.

As emphasized in the text, these cases are all distinguishable from the expression of pure hate characteristic of many racist insults. In *Johnson*, *Hustler*, *Cohen*, and *Street*, there were redeeming undercurrents of protest. To have censored the mode would have been to have censored the message. In utterances of raw, emotive race-hate, however, there is no message to censor.

not forfeit its first amendment protection merely because it is intertwined with emotional speech. Thus, an intellectual component may immunize emotional speech from legal regulation in somewhat the same way that "redeeming social value" operates to rescue sexual speech from classification as obscenity. When emotional speech stands naked and alone, however, with no plausible cognitive content to clothe it, the first amendment values requiring a "free trade in *ideas*" do not apply.

4. Statements of Transaction.

Some controls on racist and sexist speech are merely extensions of civil rights acts and labor laws in which racist and sexist language is used to identify racist and sexist behavior. When the National Labor Relations Board sets aside an election because it is tainted with racial propaganda⁵² or when a suit is brought to enforce the Civil Rights Act of 1964⁵³ or the Fair Housing Act of 1968⁵⁴ and the "smoking gun" is a racist or sexist remark, the level of first amendment scrutiny may be reduced. This reduction is justified if one recognizes a functional genre of speech constituting "statements of transaction."

A statement of transaction does not state a fact in the conventional sense. It is not a description of reality subject to verification nor does it express an opinion as that term is normally used; rather, a statement of transaction is the use of language to propose or conclude some form of transaction. A simple example: "John Smith, I will rent to you this apartment if you will pay me \$300 per month." While the term "transaction" has commercial overtones, statements of transaction need not be limited to commercial speech. The statement "I will meet you at the gym to play basketball" is a statement of transaction.

Statements of transaction also are not limited to the cold, sterile forms of offer and acceptance. Thus, statements of transaction may be appended to statements of fact, opinion, emotion, or persuasion. Statements of transaction may be imbued more directly with elements of these categories. The statement "Will you marry me?" may, in context, convey elements of

52. See *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962). In *Sewell* the NLRB held that "prejudice based on color is a powerful emotional force" and "a deliberate appeal to such prejudice is not intended or calculated to encourage the reasoning faculty" and, therefore, "[t]he Board does not intend to tolerate as 'electoral propaganda' appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election." The NLRB's analysis here is fascinating. It appears to argue much the same point that I stressed earlier: that it is possible to sever the purely emotional content of speech from any bona fide opinion. Because the racial appeals at issue also might have been intertwined with protected speech ("labor propaganda"), the safer argument might be that the normal first amendment rules do not apply in the unique context of "labor speech," for labor speech will always contain a "transactional" quality that permits greater governmental regulation. The government here is not regulating speech about race so much as race relations between management and labor as manifest in the propaganda surrounding Board-certified elections.

53. 42 U.S.C. §§ 2000(a)-2000(h)(6) (1982).

54. 42 U.S.C. §§ 3601-3619 (1982).

(1) fact (subtext: "My current state of heart and mind is that I want to marry you."); (2) opinion (subtext: "We will be happy."); (3) transaction (subtext: "I propose a marital contract."); (4) emotion (subtext: "I love you."); and (5) persuasion (subtext: "Just say yes.")

Statements of transaction deserve only a relatively low order of first amendment protection.⁵⁵ A statement that is nothing other than transactional may receive no first amendment protection at all. Laws governing commercial transactions, for example, such as the laws governing the language that must appear on a negotiable instrument, never have been thought to implicate freedom of speech. To regulate the language is to regulate the transaction. We do not think of laws governing the language on promissory notes as laws governing speech about promissory notes but rather as laws governing promissory notes.

Because virtually all transactions are effectuated through language, freedom of speech never has been thought to encompass all use of language. To qualify as freedom of speech language must be more than merely transactional. Advertising is an example of speech that is more than *merely* transactional. Advertising often contains statements of fact, opinion, emotion, persuasion, art, or entertainment. Thus, laws governing advertising are analyzed today under a four-prong constitutional test that provides at least a modicum of first amendment protection.⁵⁶ Because advertising is a form of commercial speech that is primarily transactional, however, the level of protection is low, certainly much lower than the protection for most forms of speech with little or no transactional elements.

When the speech is an element of some other oppressive, coercive, or harassing activity, might it not create in combination with that other activity a cause of action that would raise less serious first amendment objections? Infliction of emotional distress by an oppressive bill collector or through sexual harassment on the job may be effectuated by "speech." The gravamen of the tortious activity in such cases, however, is arguably the proscription of underlying nonspeech conduct such as an oppressive commercial tactic or anti-social behavior in the workplace. The penalty exacted on speech in such cases appears incidental to the governmental purpose of regulating the purely expressive component of the conduct.

Because much of our concern about racist and sexist speech does in fact arise in such transactional settings, controls that are conscientiously aimed at eliminating racism and sexism in those transactional relationships should be constitutional if properly tailored.

55. Current first amendment doctrine does not recognize a category for statements of transaction. It does recognize a lower level of first amendment protection for "private speech." See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Connick v. Myers*, 461 U.S. 138 (1983). It also recognizes a special category for commercial speech. See *infra* note 122 and accompanying text.

56. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

5. Statements of Art and Entertainment.

Statements of art and entertainment are easy to describe and hard to define. They include such genres as fiction, music, visual and performing arts, and humor. They may combine some or all of the other categories discussed here, conveying facts, opinions, transactions, emotions, and persuasion. Defining art and entertainment, however, is difficult. How does one define art in a matter that is not elitist or pompous but also not so democratic and standardless as to be vacuous? Humor is no easier. In Woody Allen's movie, *Crimes and Misdemeanors*, Alan Alda plays a character who pontificates on the definition of comedy as "tragedy plus time."

If we required perfect definitional perfection, artistic and entertaining speech would confound us. We would be tempted to surrender to definitions grounded in empty tautology and self-proclamation ("Art is speech presented as art by an artist as art.") or in the purely descriptive actions of markets ("Art is whatever sells as art"; "Art is what critics accept as art"; "Art is whatever a culture accepts as art.").

A fair working definition might begin, like a sculptor creating shape from a mass of stone, by cutting away what we know art is not. Art is not pure fact, opinion, or emotion. It does not offer itself as fact but as a play on reality, a rendering, an interpretation. Art does not offer itself as plain opinion but as opinion filtered through imagination. It does not speak to the emotion alone but to emotion tempered by relations of substance and form.⁵⁷

There should be no liability for racist and sexist speech that is part of artistic or entertaining expression. We might think of speech in this context as inherently incapable of ever satisfying any of the demands of modern first amendment epistemological skepticism. The law has no centrifuge sufficiently powerful to separate the strands of fact, opinion, and emotion that comprise the peculiar alchemy of imaginative speech.

6. Statements of Incitement.

Modern free speech jurisprudence first began to crystalize around the problem of incitement,⁵⁸ and it is one of the most familiar components in the debate over controls on racist and sexist speech. Statements of incitement are statements made with the intent and form of inducing action. There are

57. Satire, for example, is often effective precisely because it is shocking to mainstream cultural sensibilities. The satirist's very purpose is often to be "outrageous" and "indecent," and to incite anger, revulsion, and controversy. The "bite" of satire is often its potency. One unavoidable consequence of satire's emotive power is its greater capacity to inflict pain than that of other genres of speech. It is a fact of American life that an attack on a public figure in a context such as *Doonesbury* may have more impact than scores of detached analytic essays by commentators on op-ed pages.

58. See generally Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

two types. First, the speaker may seek to incite allies to help effectuate the speaker's purposes. Second, the speaker may seek to incite enemies to react against him.

Statements of incitement always will be composites of other types of statements to the point where statements of incitement arguably do not deserve classification as a separate category at all but rather should be seen as statements of opinion, transaction, or emotion in which swaying others is the overriding purpose. All transactional speech, it might be argued, includes inducement as an implicit motive. All opinions, it might be maintained, are expressed for the motive of suasion. As Holmes put it: "Every idea is an incitement."⁵⁹

In common-sense usage, however, while statements of incitement always may be composites of other types of statements, they cross a threshold of immediacy analogous to the concept of proximate cause in tort that legitimates their treatment as a unique category. Holmes was wrong. Not every idea is an incitement. Opinions may express general preferences on matters of taste, aesthetics, or morals in which the speaker is merely engaging in self-expressive interpretations of reality largely indifferent to whether others accept the opinion or act upon it. Alternatively, opinions may be part and parcel with exhortation, graduating from mere interpretations of reality to concrete persuasive efforts to convince others to modify reality. Justice Harlan acknowledged this dichotomy in *Yates v. United States*,⁶⁰ proclaiming that the "essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."⁶¹ An example of a statement that in a proper context would be more than mere opinion and legitimately classifiable as incitement is: "John Smith deserves to die; let us storm his home, take him out to the woods, and kill him."

The incitement category tends to be confusing in debates over racist and sexist speech because libertarians do not deny that incitement may be penalized. Libertarians, rather, cling to the modern rules requiring the government to demonstrate a tight nexus between the inciting language and the illegal conduct on a case-by-case basis. Proponents of controls on racist and sexist speech, on the other hand, would relax this modern rule, permitting a return to what might be called "generic clear and present danger."

There was a time in our first amendment jurisprudence where it was taken for granted that a legislature could effectively "precertify" certain identified classes of speech as satisfying the requirement of proximity to a substantive issue the government has a right to prevent. This was one of the principal themes in *Gitlow v. New York*,⁶² where the Court approved

59. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

60. 354 U.S. 298 (1957).

61. *Yates v. United States*, 354 U.S. 298, 325 (1957).

62. 268 U.S. 652 (1925).

proscription of utterances that "by their very nature, involve danger to the public peace and to the security of the State."⁶³ You cannot start a fire without a spark,⁶⁴ and the Court was convinced that a "single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."⁶⁵

The Court in *Gitlow* did not require that foreseeable harm be demonstrated in each individual prosecution.⁶⁶ Rather, the legislature could make a generic determination applicable to a broad class of speech and thereby estop individuals from claiming that their particular speech posed no serious threats. Thus, the Court admonished:

When the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil is not open to consideration.⁶⁷

This device of deference to generic legislative determinations has been abandoned in contemporary first amendment doctrine. In *Landmark Communications, Inc. v. Virginia*,⁶⁸ for example, the Court stated flatly that "[d]eference to a legislative finding cannot limit judicial inquiry when first amendment rights are at stake."⁶⁹ Furthermore, in *Cohen v. California*⁷⁰ the Court rejected the view that the state could specify in advance language that is inherently likely to cause violent reaction.⁷¹

Acceptance of the generic clear and present danger test would require a retreat that libertarians are unwilling to make. That unwillingness places American libertarians at odds with American proponents of controls on racist or sexist speech, and even more strikingly, at odds with the rest of the world. While we are in the midst of a national debate concerning the conflicts between free speech and racial, religious, or sexual harassment, most other nations do not see the problem because for them it seems obvious that free speech does not include the right to engage in racist or sexist attacks.

We need not look to cultures markedly different from our own to see how far out of step our views of protections for racist speech are from prevailing world opinion. The Public Order Act⁷² in Great Britain, for

63. *Gitlow v. New York*, 268 U.S. 652, 669 (1925).

64. See Bruce Springsteen, "Dancing in the Dark," in *Born in the U.S.A.*, ASCAP (1984).

65. *Gitlow*, 268 U.S. at 669.

66. *Id.* at 669-70.

67. *Id.* at 670.

68. 435 U.S. 829 (1978).

69. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

70. 403 U.S. 15 (1970).

71. *Cohen v. California*, 403 U.S. 15, 20-24 (1970).

72. 1986, ch. 64, § 18.

example, forbids incitement to racial hatred, including the use of "threatening, abusive, or insulting" language. The Swedish Penal Code states:

If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for an ethnic group or other such group of persons with allusion to race, skin colour, national or ethnic origin or religious creed, he shall be sentenced for agitation against ethnic group. . . .⁷³

European nations enforce these laws. In 1980 eleven youths attending a basketball game between an Israeli and Italian team carried wooden crosses and shouted the slogans "Jews to the ovens" and "Hitler taught us it's no crime to kill the Jews!" The youths were arrested and convicted in an Italian court of exalting genocide and sentenced to three years and four months imprisonment.⁷⁴ West Germany criminalizes the writing, printing, or distributing of material glorifying acts of violence against human beings or incitement to hatred. Nazi signs, symbols, labels, and uniforms are illegal. The Nazi greeting "Heil Hitler!" is outlawed. These German laws have been used to penalize the spray-painting of swastikas and the slogan "Die Jew" on an unmarked police car.⁷⁵

International law norms on hate speech began to crystalize in 1959 and grew out of a growing number of anti-Semitic incidents around the world, including outbursts of swastika painting in many nations.⁷⁶ With the memory of Hitler's hate propaganda and the holocaust seared in the consciousness of the international community, efforts began in the United Nations to draft a treaty aimed at the elimination of all forms of racial discrimination.

From the beginning, the problem of how to reconcile freedom of speech with the goal of eliminating hate propaganda was a centerpoint of debate. There was no disagreement on the urgency of combating discrimination.⁷⁷ Consensus began to unravel, however, on how to treat racist speech. By 1964, in the United Nations, the Subcommittee on the Prevention of Discrimination and Protection of Minorities had before it a draft submitted by Poland and the Soviet Union that banned all propaganda containing a message of racial superiority and that made it illegal to be a member of any organization that engaged in or advocated discrimination. It should be remembered that this was the same year that the United States passed what may have been the most important piece of social legislation in American history, the Civil Rights Act of 1964. Yet, in its draft submission to the international Subcommittee, the United States would have banned only government involvement, chartering, or support of racial supremacy organ-

73. SWED. PENAL CODE ch. 16, § 8 (1986), *reprinted in* Matsuda, *supra* note 2, at 3248 n.147.

74. L. BOLLINGER, *THE TOLERANT SOCIETY* 255 n.66 (1986).

75. *Id.* at 256 n.66.

76. R. LILICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS* 130 (1979).

77. *See generally* N. LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 1-10 (2d ed. 1980).

izations and would have criminalized only speech that amounted to a direct and immediate incitement to acts of racist violence.⁷⁸

In short, the American draft was wedded to American constitutional principles. In American constitutional law, the Constitution generally proscribes only discrimination by the government. Our Constitution does not reach acts of discrimination by private parties. By the late 1960s, our first amendment jurisprudence already had begun to evolve to a stringent reformulation of the clear and present danger test, requiring a tight causal connection between speech and illegal action before the government would criminalize the speech.

Indeed, at roughly the same historical moment in which world opinion was mobilizing in favor of direct criminal sanctions against racist organizations and racist speech, American law was moving in exactly the opposite direction. The Polish and Soviet draft, as I will return to discuss later, ultimately would find its way into the final treaty banning all forms of race discrimination in 1969. It turns out that 1969 was also the key year in American first amendment law as a result of a case called *Brandenburg v. Ohio*.⁷⁹

Brandenburg involved a Ku Klux Klan rally conducted on a farm in Hamilton County, Ohio, outside Cincinnati. A local Cincinnati television station reporter had been invited to witness the rally, and he and a cameraman filmed the event. Portions of the rally were later broadcast on the Cincinnati station and a national network. The film footage is filled with vile, incendiary, racist bile. Klan members pronounced that "the nigger should be returned to Africa, the Jew returned to Israel,"⁸⁰ and "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken."⁸¹

The state of Ohio prosecuted *Brandenburg*, the leader of the Klan group, under an Ohio "criminal syndicalism" law that made it illegal to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," or to assemble "with any group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Brandenburg* was convicted, fined \$1,000, and sentenced to one to ten years imprisonment.

The Ohio law had not been passed with groups like the Ku Klux Klan in mind but was rather a capitalist response to labor and socialist movements from an earlier time. Ohio had pressed this old law to new use, however, and it certainly fit. The Klan quite clearly did advocate and teach the propriety of "crime, sabotage, violence, or unlawful methods" to accom-

78. See Matsuda, *supra* note 2, at 2343.

79. 395 U.S. 444 (1969).

80. *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969).

81. *Id.* at 447.

plish its own perverse image of "political reform." Ohio in 1969, in short, seemed to be in perfect harmony with developing world opinion because if you simply substitute the silly stilted phrase "criminal syndicalism" with the phrase "racial discrimination," the Ohio law becomes almost verbatim the draft of Poland and the Soviet Union in the United Nations Subcommittee. Ohio, like Poland and the Soviet Union, proposed to criminalize the use of racist propaganda and membership in racist groups.

The United States Supreme Court in *Brandenburg* instructed Ohio, however, that its law was unconstitutional. No one was present at the Klan rally except the Klan members themselves, the television reporter, and his cameraman. Nothing in the record indicated that the orgy of race hate posed any immediate physical threat to anyone. In these circumstances, the Court held that the Klan was guilty only of the "abstract teaching" of the "moral propriety" of racist violence. The Supreme Court stated:

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁸²

To underscore how much of a divergence *Brandenburg* was from the gaining international momentum against racist speech from prior American jurisprudence on the matter, compare *Brandenburg* with a Supreme Court case the decade before, *Beauharnais v. Illinois*,⁸³ decided in 1952. *Beauharnais* was a criminal libel case involving an Illinois statute that criminalized any publication that portrayed "depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed or religion" that exposes the class "to contempt, derision, or obloquy or which is productive of breach of the peace or riots."⁸⁴ A racist Chicago organization known as the White Circle League of America distributed leaflets calling on the Mayor and City Council of Chicago to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro." The leaflet called on "[o]ne million self respecting white people in Chicago to unite," and proclaimed that "[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions, . . . rapes, robbers, knives, guns and marijuana of the negro surely will."⁸⁵

The defendant, *Beauharnais*, was president of the White Circle League, and in his defense to the Illinois criminal prosecution, he asked that the jury be instructed that he could not be found guilty unless the leaflets were

82. *Id.*

83. 343 U.S. 250 (1952).

84. *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952) (quoting ILL. REV. STAT. ch. 38, div. 1, § 471 (1949)).

85. *Id.* at 252.

“likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.”⁸⁶ The Illinois court refused to use this instruction, and Beauharnais was convicted. The United States Supreme Court affirmed in an opinion by Justice Felix Frankfurter.

Justice Frankfurter’s opinion is instructive in its preoccupation with two of the crucial “pressure points” in modern first amendment jurisprudence. Frankfurter’s opinion does not contain any of the epistemological skepticism of modern first amendment thought. Rather, it is an exercise in certitude in which he appears to have no doubt that it is possible to distinguish speech that contributes to the intellectual marketplace from speech that merely communicates hate. Frankfurter similarly accepted with almost cavalier insouciance the proposition that it is within the legitimate province of the state legislature to make generic determinations concerning individual harm and communal danger.

Frankfurter observed that, if a libelous utterance directed at an individual may be punished, “we cannot deny to a State power to punish the same utterance directed at a *defined group*, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State.” Frankfurter observed that Illinois did not have to look beyond its own borders “or await the tragic experience of the last three decades” (a reference to Nazi Germany) to conclude that purveyors of racial and religious hate “promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community.” Recalling the murder in 1837 of the abolitionist Lovejoy to riots in Cicero in 1951, Frankfurter concluded that Illinois might deduce that racial tensions are exacerbated and more likely to flare into violence when racial messages are tolerated.⁸⁷

Frankfurter also argued that Illinois was entitled to conclude that the dignity of the individual might be intertwined inextricably with protection for the reputation of his racial or religious group. Frankfurter stated that it was not for the Supreme Court to deny that the “Illinois legislature may warrantably believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.”⁸⁸

In addition, Justice Frankfurter’s opinion contained a short but interesting discussion of freedom of speech. The argument against the Illinois law was that prohibiting libel of a creed or a racial group is “but a step from prohibiting libel of a political party.” Frankfurter, however, clearly thought that a sharp first amendment distinction existed between restrictions on political speech and restrictions relating to “race, color, creed or relig-

86. *Id.* at 253.

87. *Id.* at 258-59.

88. *Id.* at 263.

ion." These terms, he insisted, had "attained too fixed a meaning to permit political groups to be brought within" their rubric, and for Frankfurter, that rubric was apparently outside the protections of the first amendment. Frankfurter noted: "Of course, discussion cannot be denied and the right, as well as the duty of criticism must not be stifled."⁸⁹ But for Frankfurter there was nothing "political" about this speech. "If a statute sought to outlaw libels of political parties," he conceded, "quite different problems not now before us would be raised."⁹⁰ But that problem could be dealt with if it were ever presented. Frankfurter was confident that "'[w]hile this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel."⁹¹

Viewed against the backdrop of *Beauharnais*, *Brandenburg* was a radical change in first amendment thinking. And viewed against the backdrop of developments in the United Nations, *Brandenburg* was a radical departure from international thinking. In 1965 first the Commission on Human Rights and then the Third Committee of the General Assembly voted overwhelmingly to adopt the Polish and Soviet positions criminalizing racist propaganda and participation in racist organizations.⁹² As it finally emerged, Article Four of the International Convention on the Elimination of All Forms of Racial Discrimination contained sweeping language. The Article begins with a general condemnation of racist speech:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination. . . .⁹³

Article Four then requires nations that are parties to the Convention to criminalize the *dissemination of ideas* based on racism, directing the nations to:

declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;⁹⁴

89. *Id.* at 264.

90. *Id.* at 263 n.18.

91. *Id.* at 263-64.

92. See Matsuda, *supra* note 2, at 2343-44.

93. International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), reprinted in R. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 160.1 (1983).

94. *Id.*

Article Four forbids "public authorities or public institutions, national or local, to promote or incite racial discrimination,"⁹⁵ and requires nations to:

declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.⁹⁶

The only concession to freedom of speech in Article Four is the *pro forma* conclusion that the requirements of the Article were drafted with "due regard" for the free expression principles recognized in international law, such as those embodied in the Universal Declaration of Human Rights. This, however, was an essentially empty reservation because the specific prohibitions of Article Four delineate the contours of whatever "regard" those free expression values are "due" in the context of the Universal Declaration on Human Rights.

Many other international documents embody the concept of freedom of expression. These documents also embody the values of racial and religious tolerance and are all sufficiently malleable to permit the restrictions in Article Four. While the European Convention for the Protection of Human Rights and Fundamental Freedoms, for example, declares that "[e]veryone has the right to freedom of expression" and that this right "shall include freedom to hold opinions,"⁹⁷ those guarantees are subject to the clause of exceptions:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁹⁸

Thus, the racial supremacy ideas condemned in Article Four could be defended as required by "public safety," the "prevention of disorder or crime," the protection of "health or morals," or the protection of "the reputation of others"—hardly a restrictive list.

The Convention Against All Forms of Racial Discrimination, including Article Four, was approved unanimously by the General Assembly of the United Nations in 1965, and the United States was one of the first of the

95. *Id.*

96. *Id.*

97. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), reprinted in R. LILLICH, *supra* note 93, at 500.1, 500.4 (1983).

98. *Id.* art. 10, cl. (2), reprinted in R. LILLICH, *supra* note 93, at 500.4.

many nations to sign it. It was not submitted to the Senate for ratification, however, until 1978, and the Senate has never ratified it. In fact, the Senate has undertaken no meaningful steps toward ratification. The reason for the Senate's recalcitrance is the First Amendment.⁹⁹

The Senate in 1986 did ratify another problematic international treaty, the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁰⁰ which contains the requirement that member nations criminalize the "[d]irect and public incitement to commit genocide."¹⁰¹ The Senate's ratification, however, came with the reservation that the United States Constitution would override the treaty with regard to the country's obligations under the Convention.¹⁰² The treaty's phrase "direct and public incitement to commit genocide" is, of course, much narrower than the broad condemnation on dissemination of ideas contained in Article Four of the Convention on the Elimination of Racial Discrimination. The words "direct" and "incitement" in the genocide convention would appear to make it compatible with existing first amendment law.

Is there any possibility for common ground among libertarians and proponents of controls on racist and sexist speech on the incitement issue? In my view, common ground does exist, though we are still a long way from agreement on how large the common ground might be. In the final section of this article, I outline some of the points that should be considered at the negotiation table.

V. THE SEARCH FOR COMMON GROUND.

A. *Defining Levels of Protection.*

The analysis in the section above already contains a number of propositions defining the contours of racist and sexist speech. These might be organized around different levels of protection.

1. Low Level Protection in Transactional Settings.

When racist and sexist speech is part of a transactional setting, such as harassment in the workplace, it may be regulated. The only first amendment inquiry is into the bona fides of the purported transactional rationale. As long as we are satisfied that the rule is indeed genuinely transactional, it normally will be upheld.

99. See Matsuda, *supra* note 2, at 2345.

100. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), *reprinted in* R. LILICH, *supra* note 93, at 130.1.

101. *Id.* art. 3, *reprinted in* R. LILICH, *supra* note 93, at 130.1.

102. 132 CONG. REC. § 1377-78 (daily ed. Feb. 19, 1986).

2. Absolute Protection for Opinion, Art, and Entertainment.

When racist and sexist speech is the expression of opinion, it is absolutely protected. When it is a mixture of opinion and emotion, it is absolutely protected. When it is part of art or entertainment, it is absolutely protected.

3. Qualified Protection.

A communication that expresses hatred and does not contain any discernable opinion forfeits the absolute first amendment shelter for opinion. Such a communication, however, is still speech entitled to qualified first amendment shelter. The government should be permitted to penalize such speech only when it can articulate compelling reasons for classifying such speech as harmful and demonstrate a tight nexus between the speech and the harm. In the context of the incitement cases, this problem may be distilled into three questions:

(1) Does the government have a compelling interest in reducing the emotional stigma caused by racist and sexist attacks, or is the government's compelling interest limited to preventing physical violence?

(2) Are there certain forums and settings that justify greater latitude in governmental rules attempting to police racist and sexist speech, either by broadening the interests deemed to qualify as "compelling" in those settings or by loosening the causal nexus normally required between speech and harm?

(3) To what degree should the answers to the two questions above be influenced by whether the attack is particularized toward an individual or is a generalized group attack?

B. Prevention of Stigma as a Compelling State Interest: Cross-Indexing the First and Fourteenth Amendments.

Nearly everyone seems to concede that a verbal attack directed at a particular individual in the sort of face-to-face confrontation that presents a clear and present danger of a violent physical reaction may be penalized. This is the one kernel of *Chaplinsky v. New Hampshire*¹⁰³ that still survives.

103. 315 U.S. 568 (1942). In *Chaplinsky* the Supreme Court upheld a criminal conviction against a Jehovah's Witness for uttering "fighting words" to a city marshal in the course of an incident arising from a hostile crowd reaction to the appellant's proselytizing on the street. The Supreme Court stated that certain "well-defined and narrowly limited" classes of speech "have never been thought to raise any constitutional problem" including "the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 571-72.

Chaplinsky has good and bad components of theory but almost all bad application of theory to fact. *Chaplinsky's* intuition that speech primarily communicating something other than the exposition of ideas deserves less first amendment protection than intellectual speech is sound. To the extent that the case is based on the peculiar proximity of speech to violence characteristic of "fighting words," it is also sound and still good law. *Chaplinsky* is foolishly

A statute aimed at racist and sexist speech that *only* penalizes these “fighting words” confrontations and that requires a governmental showing of imminent danger *in every individual case* would be constitutional.¹⁰⁴ The statute or regulation also might be valuable symbolically because the statute at least makes some statement concerning human dignity and the repugnance of racist and sexist attacks.

A mere fighting words statute, however, will reach almost none of the racist and sexist speech that proponents of controls seek to proscribe. Whatever the statute’s symbolic value, in practical terms, the statute is relatively impotent. A fighting words statute, for example, would not have been sufficient to stop the speech of Nazis in Skokie, Illinois, perhaps the most graphic illustration of where modern first amendment jurisprudence has tended to leave us.¹⁰⁵

simplistic, however, in maintaining that emotive speech is *no part* of the family of protected first amendment protection. Emotional speech may be connected intimately to ideas or may, as in the case of art or entertainment, deserve a full measure of constitutional protection in its own right. *Chaplinsky’s* whole crude methodology of simply listing certain taboo categories of speech and dismissing them with the conclusory judgment that they are beneath the dignity of the first amendment has been disowned by the Supreme Court with the sole exception of obscenity.

Chaplinsky also is flawed because it is not anything like our current first amendment skepticism concerning the ability of decisionmakers to separate the various strands of speech. Mr. *Chaplinsky* *did* have an intellectual message that was aimed against the government and its officials. Police officers must endure as an occupational hazard cries of “fascist” when they arrest demonstrators for talking peacefully on the streetcorner.

104. It might be argued that, while a properly drawn general fighting words statute would be constitutional and legitimately could be applied to a racist or sexist provocation, it would be unconstitutional to draft a fighting words statute that singled out only one species of fighting words—racist and sexist attacks—for coverage. This might be seen as content-based discrimination. This analysis is flawed. A “racist and sexist speech” fighting words statute surely is not rendered constitutionally infirm merely because the statute *narrows* the range of prosecution from a larger set of proscribable speech. Under current first amendment doctrine, for example, a state may regulate obscenity if its regulation meets governing constitutional standards for defining the term. Assume that a statute, after properly defining obscenity, contained a blanket exception for all obscene books and magazines but permitted prosecution for obscene films. The constitutionality of the statute should not be diminished merely because the legislature has exercised restraint. Similarly, prosecutions under espionage statutes otherwise defensible under the first amendment never have been thought infirm merely because the prosecutions are aimed at one subject matter, speech inimical to national security.

105. Skokie, a suburb of Chicago, is one of the most unique communities in the United States because it has a special demographic link to Hitler’s holocaust. In 1977 the village had about 70,000 residents, 40,000 of whom were Jewish. In the 1930s the village had a substantial German population that had supported a German Nazi organization but died out when the United States entered World War II. After World War II, Skokie’s Jewish population mushroomed. Approximately 5,000 village residents were members of families that had suffered direct persecution at the hands of Nazis, and as many as 1,200 were actual survivors of Nazi concentration camps. These holocaust survivors were closely knit and well organized with a distinct identity as a subcommunity within Skokie. See D. DOWNS, *NAZIS IN SKOKIE* 21 (1985).

The antagonist of the Jewish survivors in Skokie was Frank Collin, the leader of a Nazi organization called the National Socialist Party of America. Collin came from Marquette Park, which in 1977 was a white, ethnic enclave on the south side of Chicago plagued by a racially

May incitement statutes go beyond a clear and present danger of producing violence and reach out to encompass clear and present dangers

incendiary siege mentality. Collin's message was one of white supremacy and hatred of blacks and Jews. In March 1977 Collin told officials in Skokie that he wished to stage a peaceful rally in front of the village hall to protest a village ordinance requiring the posting of a \$350,000 bond as a condition on using the village parks for assemblies. Collin informed the village that the protest would consist of 30 to 50 demonstrators and that the demonstrators would wear facsimiles of German Nazi party uniforms during Hitler's reign and swastika emblems and armbands. Moreover, the demonstrators would carry their party banner containing the swastika and would carry signs with the messages "White Free Speech" and "Free Speech for the White Man."

The village of Skokie promptly filed suit to enjoin the marchers from displaying any materials "which incite or promote hatred against persons of Jewish faith or ancestry," including the wearing of Nazi uniforms or brandishing the swastika.

The village's argument was based on two related but distinct themes, one based on the inevitability of reactive violence against the Nazis, the other on empathy for the excruciating emotional distress that the Nazi symbols would cause the survivors of German persecution. The village argued that the march was nothing less than a "symbolic assault against large numbers of the residents" and an "incitation to violence and retaliation." An Illinois state trial court conducted a hearing on the village's injunction request and heard evidence that some 15 to 18 Jewish organizations along with other anti-Nazi groups planned to stage a counter-demonstration if the Nazis were allowed to march. The village stated that the Nazi march and the ensuing counter-demonstrations would generate "an uncontrollably violent situation" and that "bloodshed would occur." One concentration camp survivor testified before the trial judge that the swastika is a symbol that his closest family members were killed by the Nazis and that the lives of him and his children presently are not safe. While the witness did not intend to use violence against the Nazi marchers, he said that he did not know if he could control himself.

The trial court enjoined the Nazi march. The intermediate Illinois appellate court affirmed the injunction. The case then went to the Illinois Supreme Court which refused a request to grant expedited review of the case and which refused to grant any stay of the injunction pending appeal. This had the practical effect of denying to Collin and the marchers the opportunity to demonstrate on their appointed day because under the normal schedule of the Illinois Supreme Court the case would not be decided for at least a year and the injunction would be in force the whole time. The United States Supreme Court, in a five-to-four decision, held that the failure of the Illinois Supreme Court to provide for either immediate appellate review or a stay of the injunction pending review violated the first amendment. The Supreme Court did not say that the Nazis had a constitutional right to march in Skokie but only that the Nazis had a constitutional right to be free of prior restraints against such a march unless the prior restraints were accompanied by special procedural safeguards including swift appellate review. *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977).

The Supreme Court remanded the case to the Illinois appellate court, which this time modified the injunction to a prohibition only on displaying the swastika. *Skokie v. National Socialist Party of Am.*, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977). The Illinois Supreme Court, however, reviewed that decision and ultimately held that the entire injunction was invalid. *Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

Meanwhile, the village fought an aggressive rear-guard action, enacting a flurry of ordinances aimed at derailing Collin's planned march. One provision of the Skokie ordinances prohibited the "dissemination of any materials within the Village of Skokie that promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so." Skokie Village Ordinance No. 77-5-N-995, reprinted in L. BOLLINGER, *THE TOLERANT SOCIETY* 252 n.47 (1986). Another provision required, as a condition on the issuance of any parade or public assembly permit, that the activity "will not portray criminality,

of inducing stigma? Stigma is at the heart of modern equal protection analysis. In *Brown v. Board of Education*¹⁰⁶ the Supreme Court stated that separating black children from white children solely because of their race “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁰⁷ As Professor Charles Lawrence explains, *Brown* held that separate was inherently unequal “because of the *message* that segregation conveyed that black children were an untouchable caste unfit to go to school with white children.”¹⁰⁸

In *Anderson v. Martin*¹⁰⁹ the Supreme Court struck down a state law requiring the designation of the race of candidates on ballots. While no one doubts that voters in the privacy of the voting booth may take racial identity into account in casting their votes, the government may not encourage that accounting by placing into prominence on the ballot the race of the candidate. This was different in kind from designating the candidate as “republican” or “democrat” and placing little elephants or donkeys next to the labels. The Supreme Court held that to identify candidates by race, places “the power of the State behind a racial classification that induces racial prejudice at the polls.”¹¹⁰

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.” Skokie Village Ordinance No. 77-5-N-994, *reprinted in* L. BOLLINGER, *supra*, at 201 n.47. The ordinance further provided that “no person shall engage in any march, walk or public demonstration as a member or on behalf of any political party while wearing a military-style uniform.” Skokie Village Ordinance No. 77-5-N-996, *reprinted in* L. BOLLINGER, *supra*, at 252 n.47. The ordinance defined political party as “an organization existing primarily to influence and deal with the structure or affairs of government, politics, or the state.” *Id.*

This time the litigation battles were fought in federal court with the Nazis suing to block enforcement of the ordinances. The Nazis were successful. First, the federal district court and then the Seventh Circuit held the ordinances unconstitutional. *See Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir. 1978). The village requested the Supreme Court to stay the lower federal court injunctions but the request was denied. *Smith v. Collin*, 436 U.S. 953 (1978). Three days before the march was scheduled, Frank Collin called the march off, claiming that his purpose all along merely had been to make the first amendment point that his party had a right to demonstrate in Skokie. Collin claimed that he had made the point and that the march was moot. This sniveling retreat was, at least in part, disingenuous. Frank Collin did not merely exploit symbols in Skokie; he exploited the first amendment itself, and he did it to cause human suffering. “I used it,” Collin said. “I planned the reaction of the Jews. They are hysterical.” D. DOWNS, *supra*, at 19. *See also* D. HAMLIN, *THE NAZI/SKOKIE CONFLICT* (1980).

Later that summer, Collins and his Nazis did hold a one hour rally in Chicago. A puny band of 25 Nazi demonstrators were protected by 400 Chicago police in full riot regalia. Some rocks and bottles were thrown, but there was no serious violence. The police made 72 arrests.

106. 347 U.S. 483 (1954).

107. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

108. Lawrence, *The Debates Over Placing Limits on Racist Speech Must Not Ignore the Damage It Does to Its Victims*, *CHRON. OF HIGHER EDUC.*, October 25, 1989, at B1.

109. 375 U.S. 399 (1964).

110. *Anderson v. Martin*, 375 U.S. 399, 402 (1964).

As our equal protection theory has evolved, government is not bereft of all power to classify on the basis of race. Current doctrine does permit the use of race in affirmative action programs that meet the rigors of the "strict scrutiny" test.¹¹¹ If government is permitted to classify on the basis of race, it must be permitted to speak in terms of racial identity; racial classifications require racial speech. This affirmative action jurisprudence, however, does not undercut the lesson of *Brown* and its progeny outlawing governmental actions and words that stigmatize; rather, affirmative action reinforces *Brown*. Justice Brennan in *Regents of the University of California v. Bakke*¹¹² pronounced as a "cardinal principle" the proposition that "racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more."¹¹³

Thus, we may extrapolate two rules from contemporary equal protection theory relevant to racist speech. First, not only is the government *permitted* to eliminate all racist messages from the realm of governmental speech, it is under a constitutional *duty* to cleanse its own speech of racism. Second, government is not stripped of the power to invoke racial identity in passing laws; race may be referred to and used as the basis for legal classifications but only if the use of race meets the tough requirements of recent affirmative action decisions and it does not stigmatize.

C. *Racist Speech in Government Forums.*

The next step is much harder. May we build from these two rules a third rule that would permit the government to go beyond cleansing its own speech and permit the government to penalize the racist speech of private citizens at least when they speak in governmentally created forums such as university campuses? If our modern fourteenth amendment is understood to contain restrictions on governmental *speech* as well as action, to what extent should the *speech principles* of the fourteenth amendment be interpreted to modify the speech principles of the first amendment?

On the equal protection side are the familiar tools of the state action doctrine. Ostensibly, private conduct may at times bear a sufficiently close nexus to the state that we are willing to characterize the private activity as governmental and subject it to the requirements of the equal protection clause. Modern state action doctrine is sufficiently latitudinarian, for example, to bring within its compass the speech of state university professors in classrooms or the speech of officially sanctioned student organizations on a state campus.¹¹⁴

111. See *Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989).

112. 438 U.S. 265 (1978).

113. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357-58 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

114. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking*

We also can build from the first amendment side. There is first amendment authority for the proposition that when government creates a forum for private speech the government enjoys a broader power to regulate the content of the speech than it would otherwise possess. The federal government, having created the forum for speech on the electronic broadcast spectrum, has a greater power to regulate speech on that spectrum than speech in the ambient atmosphere. For a time, many scholars thought that this exception to the general first amendment presumption against content-based regulation was tied to the peculiarities of spectrum scarcity.

In *FCC v. Pacifica Foundation*,¹¹⁵ however, the Supreme Court permitted the regulation of indecent speech on the airwaves on a rationale that went well beyond scarcity. When we are dealing with racist speech on governmental forums, including university campuses, *Pacifica* may be the single most important existing first amendment precedent. The Court in *Pacifica* upheld the authority of the FCC to sanction a radio station for broadcasting George Carlin's "seven dirty words" comedy routine. Carlin's routine was not legally obscene but merely "indecent."¹¹⁶

Pacifica is not "just a broadcasting" case because its analysis is not tied to the physical characteristic that sets broadcasting apart from other forms of speech regulation, spectrum scarcity. Scarcity legitimately may be invoked to justify such devices as "equal time" or "fairness doctrine" regulations because those doctrines are linked logically to scarcity. If there is only limited time and space on the governmentally owned broadcast spectrum, the government may condition the grant of licenses to use the spectrum on the requirement that the licensees permit multiple voices to be heard.

Pacifica, however, was not an equal time case. The offended listener was not seeking an opportunity to come on the air and rail against George Carlin's brand of humor. The argument, rather, was that Carlin's language *should not be heard at all* on the radio. For the Supreme Court to accept this proposition, as it did, necessitated resort to a rationale broader than spectrum scarcity because scarcity at most requires that the soapbox be shared. Scarcity cannot be used to set limits on what is said while a speaker has the soapbox.

Thus, the Court rested its analysis on other grounds. By emphasizing two attributes of broadcasting, its "pervasive" influence on our lives and its peculiar accessibility to children, the Court was willing to approve of

Auth., 365 U.S. 715 (1961); *Marsh v. Alabama*, 326 U.S. 501 (1946). While the Court has taken a decided turn toward narrowing the scope of the state action doctrine, see, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), most of the activities of officially sanctioned and supported organizations on state university campuses still would seem to be within the contours of the doctrine.

115. 438 U.S. 726 (1978).

116. The Carlin routine is quite funny, and while never to be heard again on the American airwaves, it is available on tape and compact disk.

the use of a dichotomy that it had held was impermissible elsewhere: the distinction between the intellectual message of speech and the manner in which it is spoken. Thus, Justice Stevens' opinion in *Pacifica* dismissed any concerns about the censorial implications of his decision because of what he perceived as the low social value of the speech at issue: "At most, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities."¹¹⁷ Justice Stevens found these references to be "at the periphery of the First Amendment."¹¹⁸ Justice Stevens then adopted for purposes of broadcast regulation the dichotomy between the message and the mode that cases such as *Cohen* and *Hustler* reject, the dictum that if you can't say something *nicely*, don't say it at all. Justice Stevens claimed: "A requirement that indecent language be avoided will have its primary effect on the form rather than the content of serious communication."¹¹⁹ Justice Stevens stated further that "[t]here are few, if any thoughts that cannot be expressed by the use of less offensive language."¹²⁰

D. *Individual v. Group Attacks.*

I have saved discussion of the distinction between individual and group attacks for last, not because it is unimportant, but because it is tempting to grab onto this simple dichotomy as the dominant test for measuring the constitutionality of controls. While the distinction is probative of the underlying balance of interests, it ought not be regarded as dispositive because the distinction may be underinclusive and overinclusive. Not all proscribable racist and sexist speech is individually directed, and not all individually directed racist and sexist speech is proscribable.

The types of statements identified in this essay as deserving absolute protection, such as statements of opinion or statements made in the context of art or entertainment do not lose their protection merely because they are directed at an individual.¹²¹ Conversely, transactional racist and sexist statements do not gain immunity merely because they are cast in generalized group terms. There may be mass violations of civil rights acts, fair housing laws, or labor laws as easily as individual violations.¹²²

The intuition that individual attacks are proscribable more easily than group attacks is informed by three judgments. First, it might be thought that as an attack becomes more directed toward an individual, it becomes more likely that the attack communicates emotion and not opinion. Group

117. Federal Communications Comm'n v. *Pacifica Found.*, 438 U.S. 726, 743 (1976).

118. *Id.*

119. *Id.* at 743 n.18.

120. *Id.*

121. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

122. Racist statements directed at large racial groups are included within the prohibition of the National Labor Relations Board rules against racist exhortations in labor elections. I defend these rules under transactional speech principles. See *supra* text accompanying note 123; *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962).

slurs, on the other hand, might be thought to contain ugly cognitive assertions, but cognitive assertions, nonetheless, that members of the group possess certain characteristics. Second, it might be thought that the stigma caused by group attacks lacks the palpable intensity of the individual insult. The government's interest in sheltering citizens from racist and sexist injuries arguably diminishes as the harm is diffused. Third, when the penalty is fashioned in terms of tort recovery, the law may balk at what are really "proximate cause" concerns. To treat group insults as a form of mass tort in which there can be class recovery runs counter to the traditional suspicion of tort claims grounded in nonphysical injury in which the class of plaintiffs is large and indeterminate.¹²³

While these intuitions do tend to make responsibility for group insults more problematic than individuated attacks, we should be wary about adopting a per se rule prohibiting penalties for racist and sexist speech aimed at groups. In at least some contexts, such as special governmental forums, it is possible to imagine group insults lacking any discernable "idea" and in the aggregate generating stigma far greater in magnitude than an individual attack.

VI. CONCLUSION.

The purpose of this essay was not to construct the ideal statute for controlling racist and sexist speech but rather to encourage free thinking about free speech that might be useful in putting together a defensible model. As a starting point for devising a statutory scheme, I propose the following set of rules:

1. *Individualized Attacks in Face-to-Face Confrontations.* In face-to-face confrontations in which the racist speech is directed to individuals, the speaker may be penalized either through criminal prosecution or through a private tort action for damages for uttering "fighting words," provided that the state can demonstrate a clear and present danger of physical confrontation (The key here is not that the attack is directed to only one person—for the attack may well be directed to a group of people—but rather that the person or persons to whom the attack is directed are in an immediate "face-to-face" situation that creates a clear and present danger of precipitating violence.).

2. *Group Attacks in Certain Settings Outside the General Marketplace of Discourse.* Group racist attacks should be subject to penalties in specified settings outside the general marketplace of

123. See Khalid Abdullah Tariq Al Mansour Faissal Fahd Al Talal v. Fanning, 506 F. Supp. 186 (N.D. Cal. 1980) (refusing to recognize defamation action for derogatory reference to 600 million Muslims); Puerto Rican Legal Defense Fund, Inc. v. Grace, 9 Media L. Rep. (BNA) 1514 (N.Y. Sup. Ct. 1983) (refusing to recognize defamation action for group reference to 900,000 Puerto Ricans).

discourse, provided that the definitions of the types of speech that qualify as "racist attacks" are drawn with sufficient precision to meet generally applicable first amendment standards.

Thus, this rule has two components, one involving the *setting* of the speech and the other involving the definition of the type of speech covered. In certain specified settings, general first amendment rules regarding the nature and proximity of the harm required to justify controls on speech should not apply. A lower threshold of harm and a looser nexus of proof linking the speech to the harm should be permitted. Specifically, the government should be required to demonstrate that physical injury or some other palpable harm (such as loss of employment) is at stake, but also may justify the controls on the basis of the emotional distress felt by members of the group that is subject to the attack and the injury to community values of tolerance caused by the attack.

With regard to the second component of the rule, however, normal first amendment doctrines *should* apply. The controls should be upheld only if the controls are drawn very precisely so that the speaker is able to discern with reasonable clarity what speech is or is not covered. The special settings include:

(1) speech by the government as an institution or by government employees speaking on issues related to the business of government;

(2) speech by actors in economic transactional settings, such as management and employees in the public and private sector on issues related to terms or conditions of employment, or speech by real estate agents in the sale or rental of housing;

(3) speech by school children, teachers, and administrators at the elementary and secondary levels on school grounds whether or not part of classroom instruction;

(4) speech by public university professors, students, and administrators during classroom instruction, or in other settings directly involving the university's instructional mission but *not* in university settings that are part of the "general marketplace" of university discourse; and

(5) mass-media speech directed to children where there is no technologically feasible method of preventing children from viewing the material.

In these limited settings, it should be permissible to penalize racist attacks on groups even though the attacks would not meet the requirements of the clear and present danger test for face-to-face individual confrontations. In each of these special settings, one or more factors are present justifying lowered first amendment protection. The Constitution itself imposes an affirmative obligation on government to cleanse its own speech of racial stigma. For example, when government is acting as an educator of children, the government's role as an inculcator of civic values should permit it to teach children to be tolerant and to punish children for engaging in racist attacks while on school grounds. Similarly, in the context of mass media speech aimed at children, special considerations relevant to the transmission of public values should permit greater regulation of speech than otherwise would be acceptable.

A state university is different from a public elementary or high school because by tradition a university is a place of uninhibited public discourse and should remain so. A university, however, is also a unique *community* in which the state should be permitted to require of its members higher levels of rationality and civility than the state may impose on the general population. It should be permissible for the state to require that members refrain from racist attacks *at certain places and times* as a condition for entry into this special community.

Many parts of a state university must be open forums for discourse, and it would be unconstitutional to apply special, group racist attack rules to them. These open forum areas should include the open areas of the campus including malls, greens, squares, plazas, streets, sidewalks, meeting rooms, auditoriums, and other spaces traditionally open to all comers (including bulletin boards in such spaces). Publications such as the campus newspaper or professional journals published by the university and displays for all forms of creative and artistic expression such as art galleries or stage productions also should be open forums. Other parts of the university, however, traditionally are not open free speech forums but rather are dedicated directly to the university's academic function. These include classrooms during class times, libraries, laboratories, and recreation and research centers. The university should be permitted under the first amendment to treat these areas as "restricted zones" where members of the university community can be assured that they will not be subjected to racist attacks.

Finally, the government may treat speech involving economic transactions, for example, in both the public and private sector employment context, as outside the general marketplace of discourse and subject to special restrictions regarding racist attacks. The government is entitled to enact legislation for the purpose of encouraging a "racism-free workplace" because racism in the workplace is uniquely "transactional" and, therefore, deserving of lower first amendment scrutiny. In regulating the speech government simultaneously regulates the transaction. This form of government regulation of racist speech in economic transactions already is quite common. Civil rights laws governing employment, rulings of the National Labor Relations Board governing labor elections, and rules governing advertising and the conduct of real estate agents under Fair Housing laws all attempt to eliminate racially discriminatory transactions in part by limiting racist speech.

Even in these special restricted zones, however, government should not be relieved of the general first amendment requirement of defining with precision the type of speech that is covered by the restrictions. Precision in definition should be regarded as a first amendment "universal" applicable in all regulation of speech.

Is it possible to define "racist attacks" with enough clarity to meet generally applicable first amendment standards? In a recent test case, *Doe*

v. University of Michigan,¹²⁴ a federal district court struck down as unconstitutional efforts by the University of Michigan to control racist attacks. The decision in *University of Michigan* was correct because the University, despite a valiant effort, failed to confine sufficiently its definition of covered speech. The *Michigan* case raises the question of whether it is possible to draw a narrower regulation that would meet first amendment precision requirements.

Defining terms for controls on racist and sexist speech is extremely difficult and highlights one of the recurring problems endemic to controlling speech: defining classes of speech in generic terms on the basis of *content* always will be a more problematic form of regulation than controlling speech on the basis of its nexus to concrete social harm (such as physical violence). Whenever generic definitions are employed, there is an automatic tension. Because our general first amendment jurisprudence requires that we err on the side of allowing "bad" speech to go free rather than risk penalizing the "good" speech with the bad, all attempts at simple, elegant definitions may be vulnerable because such definitions sweep too broadly. On the other hand, if we treat the precision requirement conscientiously, trying scrupulously to avoid bringing into the net any protected first amendment expression, we are in danger of precision-tooling the definition to a point so narrow that the definition becomes meaningless.

There are many different strategies available to solve the definition problem, from mechanical approaches such as listing specific taboo words to more ambitious efforts to define speech in terms of its functions, purposes, or effects. In the context of racist speech, for example, the following characteristics, alone or in combination, are nominees for inclusion:

(1) speech that "stigmatizes" or "victimizes" on the basis of race, ethnicity, or religion;

(2) speech that "threatens" the security of members of a group, either in their physical safety or in the maintenance of their institutional positions, such as their jobs or their seats at a university;

(3) speech that advocates physical violence against racial groups even in the abstract;

(4) speech that espouses views of racial superiority or inferiority, such as by using stereotypes to ascribe negative characteristics to members of certain groups;

(5) speech that is "defamatory" in the traditional legal sense for libel and slander by tending to subject members of the group to ridicule, obloquy, or diminished esteem;

(6) speech that commonly is understood to convey in a direct and visceral way hatred or contempt, such as speech that employs words that are understood as vulgar or derogatory terms of hatred or contempt to identify groups;

124. 721 F. Supp. 852 (E.D. Mich. 1989).

(7) speech that intentionally is calculated to generate severe emotional distress in members of the group;

(8) speech that bears some specified likelihood (such as "posing a reasonable likelihood" or "posing a clear and present danger") of generating severe emotional distress in members of the group;

(9) speech that would be deemed to have some highly onerous quality (such as being "outrageous" or "highly offensive") to the ordinary reasonable person in the community;

(10) speech that communicates only hatred and is otherwise devoid of any intellectual content;

(11) speech that is devoid of some specified level of redeeming social value (such as "serious political, artistic, religious, or scientific value");

(12) speech that does not contain any expression of opinion.

A critic might think that none of these nominees are very good and that certainly the author is secretly attempting to sabotage the whole effort. Almost all attempts to control group racist attacks, however, have in fact involved one or more of these ingredients, and if the definitions seem at first unsatisfying, that is only because the speech-defining business inherently is so ethereal.

The list, however, poses some clear choices. Controls on racist and sexist speech will not withstand constitutional scrutiny if the definitions are cast in terms of speech that "stigmatize" or "victimize" or "threaten" the "security" or "position" of members of a racial group. The court struck down the University of Michigan's attempt because terms such as "stigma," "victim," and "threat" are too general and too susceptible to subjective interpretation to satisfy first amendment norms. While words like "threaten" may be too indefinite, the phrase "advocates physical violence against racial groups," even in the abstract, is different. This phrase has a precise meaning and involves a substantive evil that the state has a right to prevent—physical violence. Its only failing under general first amendment standards is that it fails the proximity requirement. Mere "abstract advocacy" is not the sort of direct incitement contemplated by the clear and present danger test. Because proximity rules should not apply in the special "restricted zone" settings, however, this nominee has promise because it does seem to address our precision concerns. If this nominee causes problems, it is not in the proximity or precision category but rather in the fact/opinion dichotomy. Many international documents are cast in terms of speech that espouse doctrines of racial superiority. Once again, this is not a particularly difficult nominee from the precision perspective, but it presents serious "expression of opinion" problems.

If we think that opinion, even racist opinion, always must be protected under the first amendment, some device for separating racist speech that is devoid of opinion must be employed. Thus, we might require that the racist attack be devoid of "intellectual content," or of "redeeming social value," or simply insist that it not contain any "expression of opinion." In addressing this difficulty, we will be forced to confront the first amendment orthodoxy that forbids any cleavage between the treatment of the intellectual

and emotional components of speech. As previously argued, however, that principle, while absolutely sound in the arena of general public discourse, should not be binding in "restricted zones" where greater regulation of speech is permitted.

Finally, a whole basket of choices exists with regard to the purpose and effect of the speech. Some device must be employed to separate the serious affront to human dignity and norms of community civility from the more trivial insults that are endemic to social life. Inevitably, we will be tempted to penalize only the intentional infliction of distress (as opposed to the accidental insult) and, further, to try our hand at defining the level of distress or incivility required to trigger a violation. While it is tempting to resort to the word "defamatory," and hitch our definition to that traditional legal term of art, many racist attacks do not fit neatly into the conventional definitions of libel and slander because the attacks do not lower the reputations of the victims in the eyes of others in the community. The victim of a racist attack is not always in the same position as the victim of a defamatory attack. Others do not necessarily think less of the victim but rather may be moved to sympathy at the outrageous victimization. Thus, racist group defamation may be one useable ingredient in the definition, but it may not be enough to get at what we are after.

Once we move away from the safe traditions of defamation, however, definitions again become difficult. In the *Hustler* decision the Supreme Court held that the term "outrageous" was too imprecise to satisfy first amendment standards in a suit for intentional infliction of emotional distress. Even though *Hustler* was a "general marketplace" and not a "restricted zone" case, first amendment precision rules still should apply. In *Hustler*, however, Virginia had attempted to use phrases such as "highly offensive," "outrageous," and "severe distress" coupled with intent to create that distress as the *only* gatekeepers to liability. Anything might be offensive under the Virginia law, including a parody heavily laden with opinion (albeit crude) about Reverend Falwell, a public figure. A racist speech statute, however, could include the requirements of severe distress and outrageousness over and above other defining elements that already had narrowed the field.

Putting it all together, what follows is a proposal that, if limited to "restricted zones," should pass first amendment requirements:

I. Racist Group Attack Defined.

The phrase "racist group attacks" as used in this law is defined as speech:

- (1) that is intended to inflict severe emotional distress in members of a racial, ethnic, or religious group; and
- (2) creates a clear and present danger of inflicting such distress in an ordinary reasonable person who is a member of the group; and
- (3) is defamatory or would be highly offensive to an ordinary person in the community; and
- (4) is not, when considered in the context in which it was uttered

or published, part of any serious political, artistic, religious, or scientific debate or discussion.

II. *Highly Offensive to an Ordinary Reasonable Person Defined.*

As used in this regulation, speech shall be deemed capable of satisfying the requirement of being highly offensive to an ordinary reasonable person in the community only if:

- (1) it advocates physical violence against members of the group, even in the abstract; or
- (2) it espouses views of racial superiority or inferiority by using stereotypes to ascribe negative characteristics to members of certain groups; or
- (3) employs words that are commonly understood as vulgar or derogatory terms of hatred or contempt to identify groups.

It should be emphasized that the group racist attack proposal set forth in this article would not be constitutional when applied to the general marketplace of discourse. In the context of university campuses, the proposal would not apply to areas that are open forums for discourse.

The very fact that the drafting process becomes so extraordinarily difficult once one moves away from the simple face-to-face "fighting words" model is a strong argument for not attempting to police group attacks at all. The overwhelming international consensus on the evil of such attacks and the unique historical experience with racism in the United States, however, provide a compelling reason for permitting narrowly drafted controls on racist speech. Narrow drafting almost always is missing in other attempts to control speech on the basis of its content. In this respect racist attacks are entirely different from flag-burning. Forced patriotism is *never* a compelling state interest. But racial tolerance, at least in those "restricted zones" outside the general marketplace of discourse, is one of the few constitutional values as compelling as free speech itself. Properly focused within narrow confines, restrictions on speech enforcing racial tolerance should be permitted.

If the modest outlines of permissible controls suggested in this article seem to upset the certainty with which we have fixed the stars in our constitutional constellation,¹²⁵ perhaps that is healthy. "For certainty is generally illusion, and repose is not the destiny of man."¹²⁶

125. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

126. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

