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Burning Crosses on Campus: University Hate Speech Codes

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Debates about the value and constitutionality of hate speech regulations on college campuses have deeply divided academics for over a decade. The Supreme Court's recent decision in Virginia v. Black, recognizing a state's power to criminalize intentionally intimidating cross burning at long last provides the key to resolving this heated dispute. The opponents of hate speech codes argue that such regulation guts our concept of free speech. One prominent scholar claims that this censorship would nullify the First Amendment and have "totalitarian implications." Another constitutional expert, Erwin Chemerinsky, asserts that the "public university simply cannot prohibit the expression of hate, including antisemitism, without running afoul of [established First Amendment principles]."

On the other end of the spectrum are authors who argue that hate speech attacks individuals' Fourteenth Amendment right to equality, which outweighs any cathartic desire to degrade people because of their race, ethnicity, sexual orientation, and religion. This line of thinking recognizes the fundamental right to free speech but argues that it can be restrained when used to intrude on others' dignity rights. The advocates of campus hate speech codes claim that a college's mission to further intellectual freedom is not undermined by restricting intimidating speech on campus; consequently, some scholars argue that curbing racist and xenophobic speech would not undermine the core purpose of higher education—the acquisition of truth.

Both factions have relied on the Supreme Court's First Amendment precedents to bolster their claims. This Article adds a fresh perspective to this decades-old academic tempest of intellectual disagreement about First Amendment theory. It first discusses the current problem of hate speech on college campuses. It then turns to a survey of First Amendment jurisprudence that is relevant to the regulation of hate speech on campus. Then it compares and contrasts international approaches to that of the United States. The final portion of the Article analyzes the narrow and broad implications of the Supreme Court's rationale in Virginia v. Black to develop two forms of college hate speech regulations that are likely to withstand First Amendment challenges.

ARTICLE CONTENTS

I. INTRODUCTION.....	
II. HATE SPEECH ON AMERICAN CAMPUSES	
III. U.S. JURISPRUDENCE	
A. FOUNDATIONS OF FIRST AMENDMENT LAW	
B. THE EXPRESSION OF HATE	
IV. INTERNATIONAL POLICY	
V. FORMULATING CONSTITUTIONAL COLLEGE SPEECH CODES	
VI. CONCLUSION	



Burning Crosses on Campus: University Hate Speech Codes

ALEXANDER TSESIS*

I. INTRODUCTION

One of the most divisive First Amendment debates of the late twentieth and early twenty-first centuries has been about the constitutionality of university hate speech regulations. The Supreme Court's recent decision in *Virginia v. Black*,¹ recognizing a state's power to criminalize intentionally intimidating cross burning,² provides the key to resolving this heated dispute. The opponents of hate speech codes argue that their enforcement contravenes the American commitment to the preservation of free speech.³ One prominent scholar claims that this censorship would nullify the First Amendment and have "totalitarian implications."⁴ Another constitutional expert, Erwin Chemerinsky, asserts that the "public university simply cannot prohibit the expression of hate, including antisemitism, without running afoul of [established First Amendment principles]."⁵

On the other end of the spectrum are authors who argue that hate speech attacks individuals' Fourteenth Amendment right to equality, which outweighs any cathartic desire to degrade people because of their race, ethnicity, sexual orientation, or nationality.⁶ This line of thinking recognizes the fundamental right to free speech but argues that it can be

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¹ 538 U.S. 343 (2003).

² *Id.* at 363.

³ Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENT. 71, 73 (1996).

⁴ David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223, 240–41 (2003).

⁵ Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL RTS. J. 765, 770 (2009) [hereinafter Chemerinsky, *Unpleasant Speech*].

⁶ See Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. COMP. & INT'L L. 1, 18 (2008) ("[T]he state . . . has a responsibility to diminish the conditions that create inequality. . . . The protection of hate speech hence might at times conflict with the right to equality . . ."); Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587, 2613 (2007) (noting that the meaning of particular speech has mattered in debate over speech regulations); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 383–87 (1991) (discussing the harmful effects of racist speech).

restrained when used to intrude on others' dignity rights.⁷ The advocates of campus hate speech codes claim that their aims are not novel. They are construed as a balancing of interests that is already commonplace with other limitations on speech, such as those enforced through copyright, libel, conspiracy, and fighting words statutes.⁸ A college's mission to further intellectual freedom is unimpaired by limitations on intimidating campus expression; consequently, some scholars argue that curbing racist and xenophobic speech would not undermine the core purpose of higher education, the acquisition of truth.⁹ This school of thought holds either that hate speech is outside the scope of the First Amendment or counterbalanced by weightier social considerations.¹⁰

Both factions have relied on the Supreme Court's free speech jurisprudence to bolster their claims. Opponents of university hate speech regulations have often relied on *R.A.V. v. St. Paul*,¹¹ in which the majority found a municipal ordinance against cross burning to be unconstitutional.¹² Following the rationale of that case, libertarians and several lower federal courts have asserted that university administrators lack the authority to prevent the spread of vitriol, no matter how racist, xenophobic, or sexist.¹³ Eleven years after deciding *R.A.V.*, in a quiet coup, the Court upheld a more rigorously drafted cross burning statute than the one struck down in *R.A.V.* The later decision, *Virginia v. Black*,¹⁴ defined the scope of legitimate limitations on destructive messages. Given its substantial

⁷ Steven J. Heyman, *Hate Speech, Public Discourse, and the First Amendment*, in *EXTREME SPEECH AND DEMOCRACY* 158, 160, 163 (Ivan Hare & James Weinstein eds., 2009).

⁸ Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CALIF. L. REV. 871, 883, 892 (1994).

⁹ Richard A. Glenn & Otis H. Stephens, *Campus Hate Speech and Equal Protection: Competing Constitutional Values*, 6 WIDENER J. PUB. L. 349, 363 (1997).

¹⁰ See *id.* at 362–63 (“This type of speech feeds prejudice and may be undeserving of First Amendment protection. Hate speech is subject to limitation if the intent of the speaker is not to advance or acquire knowledge, but rather to injure and destroy the victim.”).

¹¹ 505 U.S. 377 (1992).

¹² *Id.* at 391.

¹³ This Article proposes a more narrowly constructed hate speech code than the ones struck in lower court decisions. Those district and circuit court cases were issued long before *Virginia v. Black*, which is the Supreme Court decision I primarily rely on to develop a campus incitement plan. The most commonly cited of these earlier cases, *Doe v. University of Michigan*, was decided at the district court level. 721 F. Supp. 852 (E.D. Mich. 1989). The case involved a University of Michigan code prohibiting “individuals, under the penalty of sanctions, from ‘stigmatizing or victimizing’ individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status.” *Id.* at 853. Michigan had instituted the anti-harassment policy as part of its effort to deal with the increased frequency of racist incidents on campus. *Id.* at 854–55. The court held that enforcement of such a “vague” policy would violate the Due Process Clause. *Id.* at 867. Another much discussed federal district court case held that the University of Wisconsin’s hate speech code was likewise unconstitutionally overbroad and vague. *UMW Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1178–79 (E.D. Wis. 1991). Because these decisions were not binding precedents, many colleges outside the courts’ jurisdictions retained their codes. JON B. GOULD, *SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION* 159 (2005).

¹⁴ 538 U.S. 343 (2003).

impact on First Amendment jurisprudence, it has received surprisingly inadequate treatment in the academic literature. I extend the Supreme Court's rationale to hate speech that can intimidate minority groups as well as individuals—a controversial point, to say the least, since so many specialists erroneously believe group defamation is no longer actionable. My point, however, is that college hate speech codes serve a public good by preventing the dissemination of menacing stereotypes, symbols, and statements that deter people from enjoying the intellectual life of a university. Universities can limit hate speech that aims to stifle conversation by putting members of the campus community in fear for their well-being.

This Article adds a fresh perspective to this decades-old academic tempest of intellectual disagreement about First Amendment theory. It first discusses the current problem of hate speech on college campuses. It then turns to a survey of First Amendment jurisprudence that is relevant to the regulation of hate speech on campus. Then it provides a comparative analysis of international and European regulations of hate speech, comparing and contrasting international approaches to that of the United States. That analysis lays the groundwork for developing hate speech codes that are informed by international norms without violating the First Amendment's guarantee of free speech. The final portion of the Article analyzes the narrow and broad implications of the Supreme Court's rationale in *Black* to develop two forms of college hate speech regulations that are likely to withstand First Amendment challenges.

II. HATE SPEECH ON AMERICAN CAMPUSES

Numerous incidents of hate speech have occurred on American college campuses. Their increased frequency speaks to the need to develop constitutionally sound campus hate speech codes designed to prevent the alienation and intimidation of targeted students. Before delving into what forms of speech colleges can constitutionally restrict, this section provides sociological background indicating the extent of the problem.

There are strong differences of opinion as to what constitutes hate speech. For example, when Columbia University invited Iranian President Mahmoud Ahmadinejad to speak on campus, many elected and private individuals decried the decision to provide a forum for a well-known denier of the Holocaust and supporter of terror.¹⁵ Others, to the contrary,

¹⁵ See Amotz Asa-El, Editorial, *Value of Free Speech Twisted at Columbia*, SEATTLE POST-INTELLIGENCER, Oct. 3, 2007, at B6 (stating that Ahmadinejad is a "narrow-minded populist" who is "tactless" and "intellectual[ly] limit[ed]"); Barbara Banaian, Op-Ed., *President's Speech Had No Purpose*, ST. CLOUD TIMES (Minn.), Oct. 5, 2007, at 4B (arguing that Ahmadinejad's speech served no educational purpose); Irwin Cotler, Op-Ed., *Ahmadinejad and International Law*, JERUSALEM POST, Oct. 3, 2007, at 15 (arguing that Ahmadinejad should not have been given a forum to speak because of

regarded his appearance there to be a legitimate part of the university's educational mission because it provided an opportunity to voice differences of opinion.¹⁶

Hate speech that is overtly derogatory toward vulnerable groups persistently occurs on college campuses. Jewish students at several U.S. universities have recently been the targets of a growing number of antisemitic incidents.¹⁷ An Anti-Defamation League audit found there were ninety-four antisemitic incidents on U.S. campuses in 2007, representing about six percent of total anti-Jewish harassment and vandalism that year.¹⁸ This frequency speaks to the need to develop constitutionally sound campus hate speech codes designed to prevent the alienation and intimidation of targeted students.

Jewish students at the University of California, Irvine ("UC-Irvine") report that antagonism has grown to such an extent that they travel the outskirts of campus to avoid conflict, are reluctant to engage in activities sponsored by Jewish organizations, and have trouble focusing on their studies.¹⁹ Imam Mohammad Al-Asi and Amir Abdel Malik Ali made speeches at a week-long event at UC-Irvine that wedded traditional stereotypes with modern events, claiming that Jews are in control of U.S. media and responsible for the terror on September 11, 2001. In one speech Al-Asi asserted, "[w]e have a psychosis in the Jewish community that is unable to co-exist equally and brotherly with other human beings."²⁰ In 2010, the Muslim Student Union at UC-Irvine, which the University subsequently banned, brought in a speaker who "compared Jews to Nazis" and "expressed support for Hamas, Hizbullah and Islamic Jihad."²¹

his alleged incitement to genocide); *Mahmoud Ahmadinejad at Columbia*, CHRON. HIGHER EDUC. (D.C.), Oct. 5, 2007, at 4 (surveying a variety of views on Ahmadinejad's invitation to Columbia University and Columbia President Lee Bollinger's criticism of the Iranian president); *Rep. Calvert Denounces President Ahmadinejad's Visit to U.S.*, U.S. FED. NEWS, Sept. 28, 2007 ("There is great irony that Ahmadinejad, who has openly called America '[t]he Great Satan' and threatened to wipe one of our allies 'off the map,' is allowed to speak freely without fear of repercussion.").

¹⁶ See, e.g., Sheryl McCarthy, Editorial, "*Madman*" Tag Is Counterproductive, AUGUSTA CHRON. (Ga.), Oct. 4, 2007, at A05 (criticizing the actions of Columbia's president for being "counterproductive" and "insult[ing]" to Ahmadinejad); Zohreh Rastegar, *The Belligerent Lee Bollinger*, NEWSRELEASEWIRE.COM, Oct. 1, 2007, available at <http://expertclick.com/NewsReleaseWire/ReleaseDetails.aspx?ID=18157&CFID=154679&CFTOKEN=81626502> (arguing it was not the Iranian President's but President Bollinger's speech that was offensive); Jonathan Zimmerman, *Hate Acts, Hate Words Bear Great Distinction*, DESERET MORNING NEWS (Salt Lake City), Sept. 30, 2007, at G04 (stating that the best way to disseminate knowledge is through different points of view).

¹⁷ Susan B. Tuchman, *Jewish Students of America, Know Your Legal Rights*, JERUSALEM POST, (Dec. 11, 2005), <http://www.jpost.com/Home/Article.aspx?id=7091>.

¹⁸ Sonia Scherr, *Anti-Semitism Goes to School*, INTELLIGENCE REP., Fall 2008, at 19, 19, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2008/fall/anti-semitism-goes-to-school>.

¹⁹ Tuchman, *supra* note 17.

²⁰ Scherr, *supra* note 18, at 20.

²¹ E.B. Solomont, *Irvine Muslim Student Union Suspended*, JERUSALEM POST, (June 15, 2010), <http://www.jpost.com/International/Article.aspx?id=178434>.

In two separate incidents at the University of California, Berkeley (“UC-Berkeley”), swastikas were scrawled on a Jewish student organization’s pamphlet and an anti-Palestinian message appeared scrawled on a campus building.²² At the California Polytechnic University, students reporting seeing a Confederate flag and a noose hanging in a residence hall, as well as a sign featuring racist and homophobic statements.²³ University attorneys and law enforcement officials presumed, incorrectly as I will demonstrate later, that the First Amendment protects such speech.²⁴ In light of their advice, the president of the university issued a written reprimand but refused to punish the perpetrators.²⁵ In Eugene, Oregon, several “hate speech-related crime[s]” followed the appearances of Holocaust denier David Irving and Ku Klux Klan supporter Tomislav Sunic at group-sponsored forums held on the University of Oregon campus.²⁶

Universities and policymakers have drafted, or have considered drafting, a variety of responses to these types of incidents. The University of Nevada, Las Vegas (“UNLV”) is considering instituting a campus hate crime policy that would include a prohibition against expressions

²² *Hate Speech Roils UC Berkeley Campus*, N.Y. JEWISH WEEK, Sept. 26, 2008, at 50; see also Rebecca Wallace, *UC-Berkeley: U California Berkeley Groups React to Recent Acts of “Hate Speech” Vandalism*, DAILY CALIFORNIAN, Sept. 24, 2008, available at http://www.dailycal.org/article/102745/campus_groups_react_to_recent_acts_of_hate_speech (reporting incidents of antisemitic and retaliatory vandalism on UC-Berkeley’s campus).

²³ Nick Wilson, *Confronting Signs of Hate*, TRIBUNE (San Luis Obispo, Cal.), Nov. 7, 2008, at A1; see also Johnna Pinholster, *Community Discussion Tackles Southern Heritage, Symbolism*, VALDOSTA DAILY TIMES (Ga.), Sept. 28, 2009, available at http://www.valdostadailytimes.com/archivesearch/local_story_271232024.html (relating a public discussion at Valdosta State University about polarizing symbols like Confederate flags on campus); Alex Vaughn, *Professors Give Historic Perspective*, TECHNICIAN (N.C. State Univ.) (Dec. 2, 2008), <http://www.technicianonline.com/news/professors-give-historic-perspective-1.1042145> (reporting on a prospective teach-in about hate images, such as the Confederate flag, lynching, and the Ku Klux Klan, scrawled in the school’s “Free Expression Tunnel”).

²⁴ Nick Wilson, *Incident at Cal Poly: Hundreds Urge Tolerance over Display of Hate Signs*, TRIBUNE (San Luis Obispo, Cal.), Nov. 13, 2008, at A1. See *infra* Part II.B for a discussion of why the First Amendment does not protect hate speech.

²⁵ Press Release, Cal. Polytechnic State Univ., Cal Poly President Issues Second Letter to Campus Supporting Diversity, Announcing University Meetings, Nov. 4, 2008, available at http://calpolynews.calpoly.edu/news_releases/2008/November/Baker-message.html.

²⁶ Jack Moran, *Hate-Filled Graffiti Spurs Vigil, Concerns*, REG.-GUARD (Eugene, Or.), June 24, 2008, at A. Concerning David Irving’s Holocaust denial, see ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* 188 (2002) [hereinafter TESIS, *DESTRUCTIVE MESSAGES*]. The best full-length account of the David Irving trial in Germany is RICHARD J. EVANS, *LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL* 185–266 (2001). Irving sued Penguin Books and Professor Deborah Lipstadt for allegedly libeling him as a Nazi apologist and Holocaust denier. The High Court held that Irving was both a Holocaust denier and antisemitic. *Irving v. Penguin Books Ltd.*, [2000] EWHC (Civ) 115, 13.91–13.108 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/QB/2000/115.html>. A Vienna Court later sentenced Irving to three years in jail. Anne Applebaum, *Tolerating the Intolerable*, BUFFALO NEWS, Mar. 2, 2006, at A7. Irving, though, only served one year of the sentence behind bars. Luke Salkeld, *Riot Fear After Oxford Invites BNP to Debate*, DAILY MAIL (London), Nov. 26, 2007, at 20.

motivated by racial, religious, gender, and political bias.²⁷ In the spring of 2009, the Michigan Civil Rights Commission held an open public forum for better understanding the testimonies of student victims of hate speech and balancing them against others' free speech concerns.²⁸ At the University of Rhode Island, the provost, Donald H. DeHayes, supported a university police investigation of hateful, racist epithets made against then presidential candidate Barack Obama.²⁹ And at Auburn University, the multicultural center suggested sponsoring an event on hate speech after a professor received a racist note.³⁰

Other universities have instituted aspirational civility statements for preventing the use of prejudicial slurs.³¹ The University of Chicago, for instance, requests that its community foster the marketplace of ideas by preserving the diversity, civility, and equality of its campus.³² St. Scholastica College in Duluth, Minnesota, issued a similar statement to students after hate symbols appeared on its campus, as did two other colleges in the state.³³

Some of these incidents of hate speech have been isolated events. Others appeared to be part of a concerted effort to make certain groups feel uncomfortable, threatened, or isolated. The location of these events, often occurring hundreds or even thousands of miles from each other, suggests that the expression of intimidating bigotry is not a localized problem. But can anything be done to combat this trend? Are all or any of the recent expressions of hate on campus protected by the First Amendment? Indeed, only constitutional solutions are warranted. Mere discomfort or disdain is no justification for diminishing an individual's right of self-expression, no matter how morally reprehensible the message might be. Free speech jurisprudence shows that universities do not have a free hand when it comes to regulating hate speech, but they are not without recourse when destructive messages intentionally incite criminal behavior against identifiable groups.

²⁷ *Controlling Speech UNLV Policy Goes Too Far in Trying To Stop Harassment, Treads on the First Amendment*, LAS VEGAS SUN, Apr. 28, 2009, at 4. The most recently reported UNLV draft policy on hate crimes contains a provision against intimidation and harassment. Richard Lake, *UNLV Rewrites Policy on Hate Crimes*, LAS VEGAS REV.-J., June 3, 2009, at 2B.

²⁸ Press Release, Mich. Dep't of Civil Rights, Michigan Civil Rights Commission Seeks Student Victims of Campus Hate for Testimony (Mar. 27, 2008), http://michigan.gov/mdcr/0,1607,7-138-4952_4995-188497--,00.html. A similar public forum was held in Chapel Hill, North Carolina, to discuss the issue of hate crimes and hate speech policy for public universities. Eric Ferreri, *UNC Commission Hears Pleas To Create Hate-Crimes Policy*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 16, 2009, at B2.

²⁹ Kate Bramson, *URI Probes Hate Speech Messages*, PROVIDENCE J., Oct. 24, 2008, at 2.

³⁰ Hannah Wolfson, *Auburn Professor Reports Racist Note*, BIRMINGHAM NEWS, Oct. 22, 2008, at 6B.

³¹ Marilyn Gilroy, *Colleges Grappling with Incivility*, 18 HISP. OUTLOOK IN HIGHER ED. 8 (2008), reprinted in 74 EDUC. DIG. 36, 37 (2008).

³² *Id.*

³³ *Duluth College Reaffirms Hate Crime Policy*, ST. PAUL PIONEER PRESS, Feb. 28, 2008, at B2.

III. U.S. JURISPRUDENCE

College administrators have taken several approaches in response to recent expressions of hatred at American universities.³⁴ Inevitably, each university is a self-governing body that sets its own policies. In developing approaches uniquely designed to combat hate speech at their separate universities, all administrators must be conscious not to infringe on individuals' First Amendment rights.

A. *Foundations of First Amendment Law*

Supreme Court jurisprudence establishes the extent to which the state can impose limitations on expression. While speech is among the foremost of individual rights, states can prohibit a limited class of expressions that are harmful to individuals' reputational, property, and dignitary interests.³⁵

Contemporary First Amendment jurisprudence developed in the early twentieth century.³⁶ Three of the most prominent cases arose with the prosecution of defendants under the Espionage Act of 1917.³⁷ The most often cited of the three, *Schenck v. United States*, affirmed the conviction of a socialist who conspired to distribute leaflets against forced military conscription during World War I.³⁸ Writing for the majority, Justice Oliver Wendell Holmes recognized that the government suppression of statements against the war involved more than ordinary criminal issues.³⁹ The Court upheld prosecution under the law but developed a test to prevent government overreaching to suppress protected speech. Federal and state statutes could only prevent the freedom of expression when the message posed "a clear and present danger" of achieving some "substantive evil[]" that the government "has a right to prevent."⁴⁰ This test allowed for the proscription of speech when it was likely to soon cause criminal conduct,

³⁴ See *supra* text accompanying notes 27–33.

³⁵ See Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389, 394–95 (2004) (noting that "[c]ontemporary jurisprudence recognizes the constitutionality of laws" restricting speech that is harmful to these interests).

³⁶ For a history of free speech in the United States in the late nineteenth and early twentieth centuries, see generally DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS, 1870–1920* (1997). Stephen M. Feldman has also published a detail-rich historical narrative on this subject, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* (2008).

³⁷ See Act of June 15, 1917, Pub L. No. 65-24, ch. 30, § 3, 40 Stat. 217, 219 (amended 1997) (punishing the expression of sentiments that undermine war efforts). The three cases are: *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); and *Schenck v. United States*, 249 U.S. 47 (1919). For early criticism of the Espionage Act, see Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 973 (1919). A significantly more deferential contemporary approach to the restrictions on wartime speech is found in Edward S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resumé*, 30 YALE L.J. 48, 55 (1920).

³⁸ *Schenck*, 249 U.S. at 49–50, 53.

³⁹ *Id.* at 52.

⁴⁰ *Id.*

such as violence, but not when the message itself was obnoxious.⁴¹

While *Shenck* appears to establish a “clear and present danger” rule, no one case could by itself develop the foundations of First Amendment jurisprudence. Just seven days after it decided *Schenck*, in a closely related case, *Frohwerk v. United States*, the Court upheld a ten-year prison sentence against a German-born newspaper editor for attempting to cause “disloyalty, mutiny and refusal of duty in the military” during the First World War.⁴² At his sentencing hearing, the defendant dejectedly declared his loyalty to the United States and his hatred for “kaizerism”; in turn, the trial judge expressed his respect for German culture.⁴³ Once again writing for the majority, Holmes recognized that the First Amendment “obviously was not[] intended to give immunity for every possible use of language.”⁴⁴ His rationale reflected on the particular circumstances of publication leading to the defendant’s harsh conviction, finding that the newspaper was circulated in areas “where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.”⁴⁵ While it is highly improbable that an appeal from any prosecution of criticism against the current War on Terror would find so sympathetic a Court, nothing indicates that the principle of *Frohwerk* has been overruled. The opinion established government’s ability to criminalize advocacy to commit criminal acts in circumstances that pose a clear and present danger of serious harm, but it did not grant government a license to impede criticism of the war, even during the course of belligerency. What remains is the principle that, where language instigates violence or threatens violence, it can be regulated without violating the speakers’ First

⁴¹ Judge Learned Hand further elaborated the test: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951). As with so many of Judge Learned Hand’s articulations, the significance of this one went well beyond the Second Circuit. The Supreme Court has accepted the passage several times both in its rulings and in dicta. *E.g.*, *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 562 (1976); *Brandenburg v. Ohio*, 395 U.S. 444, 453 (1969) (Douglas, J., concurring); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 64 (1961); *Dennis*, 341 U.S. at 510.

⁴² *Frohwerk*, 249 U.S. at 205–06, 210. The Missouri state case is unreported in Westlaw and Lexis, but details about it appear at 12 AMERICAN STATE TRIALS xxix-xxx (John D. Lawson ed., 1919). Jacob Frohwerk was the president of the Kansas branch of the National German-American Alliance. In his testimony before a United States Subcommittee of the Committee on the Judiciary, he stated that neither he nor the organization had any connection or received any money from the German government. *National German-American Alliance: Hearings Before the Subcomm. of the S. Comm. on the Judiciary on S. 3529*, 65th Cong. 199 (1918) (testimony of Jacob Frohwerk, President, National German-American Alliance—State Alliance of Kansas). The Senate Subcommittee grilled Frohwerk about his organization’s political activism against the export of munitions during World War I. *Id.* at 200. Frohwerk was an editor of *The Missouri Staats Zeitung*, which published editorials against performing military service. *Two Missouri Editors Held*, N.Y. TIMES, Jan. 27, 1918, at 7.

⁴³ *Frohwerk Gets Ten Years*, CHILLICOTHE CONSTITUTION (Mo.), July 1, 1918, at 3; *see also German Editors Arrested*, WASH. POST, Jan. 27, 1918, at 6.

⁴⁴ *Frohwerk*, 249 U.S. at 206.

⁴⁵ *Id.* at 209.

Amendment rights. The reason for this leeway in the regulation of dangerous speech is that it does not further the underlying rationale for free speech. Intimidation is neither a step toward truth in the marketplace of ideas nor related to democratic self-governance.

In the final case of this trilogy, *Debs v. United States*, which also upheld a conviction for seeking to incite insubordination of the military,⁴⁶ the Court inferred the speaker's advocacy from his choice of words, which tended "to obstruct the recruiting service."⁴⁷ The significance of the ruling lies in the judicial power to assess whether speech has the "natural tendency and reasonably probable effect" of convincing audiences to commit illegal acts.⁴⁸ Taken together, the doctrine announced in *Schenck*, *Frohwerk*, and *Debs* allows for the use of circumstantial evidence to prove the clear and present danger of harm from speech.

These precedents established that government can prohibit speech whose content and context tends to cause a clear and present danger that likely will trigger serious illegal acts. While Holmes later tempered this principle by making it only applicable to extreme cases, these three rulings remain pivotal to First Amendment jurisprudence. His dissent in *Abrams v. United States*⁴⁹ qualified his earlier opinions, and demonstrated a heightened sensitivity to the dangers of suppressing ideas that are unrelated to harmful incitement.⁵⁰ Most critically, Holmes's dissent in *Abrams* provided a more stringent test to prevent the judiciary's zealous over-support for executive department wartime action that had led to the arrest and conviction of men who had merely expressed opposition to World War I.

Abrams was one of five Russian-born anarchists convicted for urging munitions workers to go on strike in opposition to "barbaric intervention"

⁴⁶ 249 U.S. 211, 212, 217 (1919).

⁴⁷ *Id.* at 216. Eugene V. Debs, the subject of prosecution in this case was a socialist leader who became famous for his efforts on behalf of working people and his unsuccessful runs for the United States presidency. NICK SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST 342–45 (1984). Debs argued that the military draft was a capitalist plan to conscript working men against their class interests. ERNEST FREEBERG, DEMOCRACY'S PRISONER: EUGENE V. DEBS, THE GREAT WAR, AND THE RIGHT TO DISSENT 45, 55 (2008). He was convicted for violating the Espionage Act of 1917. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 196–97 (2004). After Debs was jailed, President Harding commuted his sentence and invited him for a private conversation at the White House. JOHN W. DEAN, WARREN G. HARDING 128 (2004).

⁴⁸ *Debs*, 249 U.S. at 216.

⁴⁹ 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

⁵⁰ *Id.* at 630–31. For a list of diverging opinions about whether Holmes's views on the First Amendment changed between *Schenck* and *Abrams*, see Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192, 194 n.7 (2008). The Holmes dissent in *Abrams* has been variously regarded as a change in his thinking, an inconsistency in his First Amendment approach, or a response to legislative developments. Thomas A. Balmer, "Present Appreciation and Future Advantage": A Note on the Influence of Hobbes and Holmes, 47 AM. J. LEGAL HIST. 412, 430 (2005).

of the United States into the Russian Civil War between the Bolsheviks and the White Armies.⁵¹ Abrams was part of a group of anarchist and socialist immigrants from Russia who wrote, printed, and distributed leaflets urging opposition to U.S. policy.⁵² The three principal organizers were sentenced to twenty years in prison, and another received a fifteen-year sentence.⁵³ The Court gave little explanation for upholding the convictions except to say that it was following *Schenck* and *Frohwerk*.⁵⁴

While the majority's analysis is not particularly memorable, Holmes's dissent has had an enormous influence on the evolution of free speech doctrine. Holmes opposed the conviction because he regarded it to be an impermissible suppression of relatively innocuous political ideas; the state, he wrote, can only legitimately restrict speech that poses "the present danger of immediate evil or an intent to bring it about."⁵⁵ Abrams posed no immediate danger since he had no specific intent to overthrow the government. The harsh prison sentence, as Holmes saw it, was imposed to prevent Abrams from expressing personal views supporting the newly installed Soviet government.⁵⁶ Of even greater consequence than his exposition of the case, was Holmes's philosophy of free speech. Known as the "marketplace of ideas" doctrine, it posits that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."⁵⁷

This doctrinal formulation raises very complex questions of construction; perhaps the most complicated ones are how a judge is to determine what the nature of "truth" is and the extent to which the First Amendment protects unenlightening expressions. Surely truth-seeking is not the entire range of constitutionally protected speech. The First

⁵¹ SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 329–30 (1989); see also Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 845 (2008) (noting that "American military intervention on behalf of the White armies fighting Russian Bolsheviks" was the target of the defendants' activities).

⁵² MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 80–81 (1991); POLITICAL TRIALS IN HISTORY: FROM ANTIQUITY TO THE PRESENT 1 (Ron Christenson ed., 1991); STONE, *supra* note 47, at 205.

⁵³ CLEMENS P. WORK, DARKEST BEFORE DAWN: SEDITION AND FREE SPEECH IN THE AMERICAN WEST 250 (2005); *Exult as Bolsheviks*, FORT WAYNE NEWS & SENTINEL (Fort Wayne, Ind.), Oct. 25, 1918, at 8.

⁵⁴ *Abrams*, 250 U.S. at 618–19.

⁵⁵ *Id.* at 628 (Holmes, J., dissenting).

⁵⁶ *Id.* at 629–30. Not only were the prison sentences of the group of pamphleteers incommensurable to their calls for a labor strike, but the police beat the defendants. ALAN M. DERSHOWITZ, AMERICA ON TRIAL: INSIDE THE LEGAL BATTLES THAT TRANSFORMED OUR NATION 230 (2004).

⁵⁷ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

Amendment, for instance, protects parody⁵⁸ and pornography,⁵⁹ even though neither mode of expression necessarily weighs the validity of ideas. A further weakness with Holmes's "market place of ideas" test is its disregard for how wealth disparities differentiate persons' abilities to have their message heard. Sometimes having more resources can make it easier to convince audiences of the validity of false ideas because the source of the correct ones lacks the means to air them on prominent outlets, like television and radio. Well-funded, but wrong-headed, organizations exploiting media contacts are sometimes more likely to influence audiences than paupers with sound theories but inadequate access to the airwaves or broadband.⁶⁰

The Holmes decisions provide university administrators with guidance for preventing dangerous speech. By themselves, however, they leave the impression that only the most immediately threatening expressions can be excluded from the marketplace of ideas. To the contrary, the Supreme Court has on numerous occasions recognized that speech is not an absolute right.⁶¹ A variety of restrictions on speech, such as copyright statutes⁶² and

⁵⁸ See *Hustler Magazine v. Falwell, Inc.*, 485 U.S. 46, 50 (1988) (holding that the First Amendment protects parody that "could not reasonably have been interpreted as stating actual facts about the public figure involved").

⁵⁹ Supreme Court jurisprudence distinguishes "pornography" and "obscenity." Unlike pornography, at least in certain forms, obscenity is an unprotected form of communication. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239–41, 258 (2002) (finding that "virtual child pornography" using computer graphics is a protected form of communication); *Miller v. California*, 413 U.S. 15, 31–32 (1973) (defining obscenity within the context of "'contemporary community standards,'" (quoting *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966))); *Roth v. United States*, 354 U.S. 476, 485 (1957) ("[O]bscenity is not within the area of constitutionally protected speech or press."). But see *Osborne v. Ohio*, 495 U.S. 103, 108, 111 (1990) (holding that a state may constitutionally proscribe the possession and viewing of child pornography); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (upholding a state statute prohibiting persons from knowingly promoting depictions of sexual performances involving children).

⁶⁰ See Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2376–77 n.105 (2007) (expressing the concern that "monetary power" not impede deliberation and political participation in a representative democracy); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1886 (2000) ("[I]n an unregulated market, wealth disparity skews public discourse in favor of speakers with the financial wherewithal to own a mass media outlet and consumers likely to buy speech and the products that advertisers want to sell."); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 589 (2004) (stating that free speech is a means to preserve social and political equality against wealth disparities, but that because profitability drives media licensing fees, it functionally limits accessibility to media outlets).

⁶¹ In *Nebraska Press Ass'n v. Stuart*, the majority explicitly stated that the "Court has frequently denied that First Amendment rights are absolute." 427 U.S. 539, 570 (1976); see also *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute."), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶² *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (identifying a "'definitional balance between the First Amendment and the Copyright Act'" that permits the freedom to communicate facts while continuing to protect authors' original expressions (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985))).

zoning ordinances,⁶³ indicate that not all manner of expressions are covered by the First Amendment.

The function of speech in a democracy helps to reconcile the seemingly absolute language of the First Amendment⁶⁴ with legitimate restraints on self-assertion. Justice Louis Brandeis's seminal concurrence to *Whitney v. California* outlined the function of the constitutional protections of free expression to include the ability to think and speak freely in order to discover and disseminate political truths.⁶⁵ Speech is not, however, only instrumental. It is also "an end in itself" that is essential for human beings to achieve their individual sense of purpose.⁶⁶ The First Amendment is not only a protection of the polity but of the human drive to demonstrate a sense of self-identity and to preserve individual dignity.⁶⁷ Free discussion, Brandeis believed, facilitates social stability by allowing persons to publically vent volatile disagreements rather than allowing them to fester into unresolved hatreds.⁶⁸ The sentiments Brandeis expressed in his concurrence have become the accepted values of protecting free speech.⁶⁹ True threats fall outside these accepted bounds of self-assertion because they are meant to menace someone with physical harm.⁷⁰ To

⁶³ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48, 54–55 (1986) (holding that an adult theater zoning ordinance was content-neutral and only subject to intermediate scrutiny because the law targeted the secondary effects of adult entertainment establishments). Justice Brennan and Justice Kennedy criticized *Renton's* "content-neutral" characterization in two separate concurrences. *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (Brennan, J., concurring in part).

⁶⁴ See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

⁶⁵ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

⁶⁶ Brandeis explained that:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

Id.

⁶⁷ In the words of Justice Marshall:

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.

Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

⁶⁸ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

⁶⁹ See Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 606 (1996) ("At least since the famed concurring opinion of Justice Brandeis in *Whitney v. California*, it has been well accepted that the answer to supposedly harmful speech is not governmental suppression, but rather more speech." (footnote omitted)); Philippa Strum, *Brandeis: The Public Activist and Freedom of Speech*, 45 BRANDEIS L.J. 659, 706 (2007) ("Brandeis's *Whitney* opinion and the doctrine embedded in it eventually became the cornerstone of American speech jurisprudence.").

⁷⁰ See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (suggesting that willfully threatening the President may amount to unprotected expression); *In re Steven S.*, 31 Cal. Rptr. 2d 644, 647 (Cal.

survive constitutional scrutiny, the regulation of cross burning, swastika displays, or other intimidating images in a university must be mindful of First Amendment values while also preserving individuals' right to live undisturbed from the threat of immediate or future harm.

B. *The Expression of Hate*

The democratic purpose of First Amendment protection, which allows for the expression of ideas to enrich dialogue, raises a challenge to the formulation of university hate speech regulations. Existing jurisprudence, nevertheless, indicates that intimidating threats do not fall under the core speech protected by the Constitution.

Several mid-twentieth century cases identified some of the harmful expressions that are unprotected by the First Amendment. In a case decided during World War II, *Chaplinsky v. New Hampshire*,⁷¹ the Court found that a Jehovah's Witness who verbally attacked a police marshal could be prosecuted pursuant to an ordinance prohibiting public incitement.⁷² The Court has long contrasted constitutional expression and violent bombast because "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."⁷³ The social interest in "order and morality" outweighs any cathartic benefit a speaker may derive.⁷⁴ Just as fighting words are unprotected by the First Amendment because they are unconnected to traditional speech values, neither should hate speech receive First Amendment protection when it aims to incite people to commit harmful acts against identifiable groups.⁷⁵ Not all hate speech seeks to incite others to act; sometimes it is simply a true threat that might constitute an assault.⁷⁶ But where hate speech threatens a protected group and seeks to incite others to act against an identifiable target, a university speech code can punish it. The free exchange of ideas is not furthered through exhortations to attack, harm, or

Ct. App. 1994) (finding that "malicious" cross burning on another person's property constitutes a form of "true threat").

⁷¹ 315 U.S. 568 (1942).

⁷² *Id.* at 569, 573–74.

⁷³ *Id.* at 571–72. Recent cases have confirmed the continued vitality of the "fighting words" doctrine. *Virginia v. Black*, 538 U.S. 343, 358–59 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992).

⁷⁴ See *Chaplinsky*, 315 U.S. at 572 (concluding that the social interest in "order and morality" outweighs the social benefits that "'fighting' words" may offer).

⁷⁵ See *R.A.V.*, 505 U.S. at 401 (White, J., concurring) ("[A] ban on all fighting words or on a subset of the fighting words category would restrict only the social evil of hate speech, without creating the danger of driving viewpoints from the marketplace.").

⁷⁶ See Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1378 (1998) (finding that the burning of a cross "in front of the home of an African-American family" is sufficient to constitute an assault "if family members observe it and suffer imminent fear for their safety").

discriminate against others.⁷⁷ A judge determining whether a verbal attack is dangerous enough to constitute an offense must consider the context in which it was uttered. Even the content-based regulation of speech that is drafted with enough generality not to discriminate against particular viewpoints can be a permissible use of government power when “the evil to be restricted so overwhelmingly outweighs the expressive interests.”⁷⁸

Fighting words are analogous to hate speech insofar as both are meant to provoke violent reaction rather than to elicit discussion. In circumstances where fighting words are meant to intimidate others by reference to historically intimidating symbols, like swastikas or burning crosses, they enter the realm of hate speech. Neither form of expression seeks to promote debate. Rather than being discursive, hate messages are meant to be threatening or damaging to targeted individuals.⁷⁹

The enormous import of free speech renders it imperative to take utmost care to prevent any regulation of hate speech to become an excuse for the repression of heterodox ideas.⁸⁰ Unconstitutional infringements

⁷⁷ See *id.* at 1318, 1378–79 (suggesting that hate speech, when directed against particular persons, lacks sufficient value to justify the injuries and rights violations it causes, and therefore does not merit First Amendment protection). But see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 90 & n.167 (1996) (arguing that, under a property-based theory of the First Amendment, many difficulties would arise in attempting to regulate hate speech).

⁷⁸ See *New York v. Ferber*, 458 U.S. 747, 763–64 (1982) (asserting that “it is not rare that a content-based classification of speech has been accepted [as constitutional] because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests”). Some opponents of hate speech codes claim that the Supreme Court has “largely abandoned” the fighting words doctrine. ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA’S CAMPUSES* 86 (1998). That claim, however, does not hold up against the fact that Supreme Court Justices have regularly relied on *Chaplinsky*. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 410–11 (2007) (Thomas, J., concurring) (arguing that, originally, the First Amendment did not protect student speech in public schools); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996) (citing *Chaplinsky* for the proposition that Congress and states can “address the most serious problems” through legislation); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (using *Chaplinsky* for precedential value, but distinguishing it from the case at bar). For Courts of Appeals citations to *Chaplinsky*, see, for example, *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 51 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009); *DeJohn v. Temple University*, 537 F.3d 301, 320 (3d Cir. 2008); *United States v. Judd*, 315 F. App’x 35, 40 (10th Cir. 2008).

⁷⁹ See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (stating that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”).

⁸⁰ By “heterodox” opinions, I mean those that are outside the mainstream and unpopular. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008) (stating that the First Amendment protects “the expression of extremely unpopular and wrong-headed views”); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting) (“I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.”). First Amendment jurisprudence has developed to prevent the abuse of neutral-sounding statutes to repress public debate. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 442 (1996) (“[T]he First Amendment bans restrictions on speech arising from hostility, sympathy, or self-interest. The fact is that courts cannot enforce this ban directly.”).

against unpopular views were common during and after the First World War and throughout the Red Scare in the mid-1950s, when political suppression of Communist or anarchist statements stifled public debate.⁸¹

Hate speakers do not merely add an unpopular perspective into the marketplace of ideas; if they did no more than that their views would be protected. Their aim is to incite illegal conduct, to intimidate, or to harm the reputation of a select group of the public.⁸² Justice Byron R. White's concurrence in *R.A.V. v. City of St. Paul* dismissed the notion that hate speech is a legitimate form of political discourse: "Instead, it permits, indeed invites, the continuation of expressive conduct that . . . is evil and worthless in First Amendment terms [C]haracterizing fighting words as a form of 'debate[]' . . . legitimates hate speech as a form of public discussion."⁸³

Not all expressions of hatred and intolerance are advocacy; therefore, some expressions of apathy, disdain, or outright malevolence do not fit the paradigm of administratively punishable hate speech. Where only the private expression of racism is involved without any provable intent to harm, it is beyond the purview of government regulation. Under these circumstances, even the depiction of symbols associated with violence cannot be prosecuted where they are displayed in some private location, like a home, or even at a private hate rally. *Brandenburg v. Ohio*⁸⁴ indicates that the First Amendment protects the liberty right of students who unobtrusively display racially or ethnically hateful emblems or insignia. That case involved the criminal conviction of a man under the Ohio Criminal Syndicalism law for leading a Ku Klux Klan rally.⁸⁵ The Klansmen and an invited journalist attended the meeting at which a cross was burned. Because the journalist was invited, he never sensed any threat

⁸¹ For a discussion of the regulation of expressive activities during this time period, see Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1520–25 (2001).

⁸² See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 402 (2008) (distinguishing "Western" regulations on incitement hate speech from U.S. laws); John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. ST. U. L. REV. 41, 46 (2008) (noting that "fighting words" and "true threats," among other forms of speech, do not receive First Amendment protection); Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 159–60 (2005) [hereinafter Tsesis, *Boundaries*] (alteration in original) (explaining that the International Covenant on Civil and Political Rights requires signatory states to prevent "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence").

⁸³ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 402 (1992) (White, J., concurring).

⁸⁴ 395 U.S. 444 (1969) (per curiam).

⁸⁵ See *id.* at 444–45 (alterations in original) (prohibiting "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism'" (quoting OHIO REV. CODE ANN. § 2923.13 (1964))). At its core, the law prohibited the use of political advocacy to instigate criminal conduct. *Id.* at 448–49.

from the burning cross. At the event, armed persons made derogatory statements about blacks and Jews.⁸⁶ The only statement entered into the record that could have been interpreted as incitement was couched in qualifications that would have made it virtually impossible to prove criminal intent: “The Klan has more members in the State of Ohio than does any other organization. We’re not a revengent organization, but 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 revengeance taken.”⁸⁷ The Court held that under the circumstances, given that the recorded speeches were abstract assertions rather than advocacy to commit imminent violence, application of the Ohio statute would intrude on First and Fourteenth Amendment freedoms of speech and assembly.⁸⁸ The statute was also unconstitutional on its face since it punished mere advocacy.⁸⁹

The case remains relevant even though more recent jurisprudence has qualified its central holding.⁹⁰ In *Brandenburg*, the Court indicated that only under imminently dangerous circumstances does advocacy warrant regulation to prevent speakers from inciting others to commit lawless actions.⁹¹ In examining the constitutionality of restrictions, the Court determined that trial courts must review the context in which a statement was made to determine whether it is likely to instigate socially or individually harmful consequences.⁹² In criminal trials, the prosecution must also prove beyond a reasonable doubt that the speaker actually intended to achieve the advocated criminal act.⁹³

The *Brandenburg* standard prevents the punishment of empty or even

⁸⁶ *Id.* at 445–46. On the film, *Brandenburg* appeared in Klan regalia speaking of vengeance and advocating sending blacks to Africa and Jews to Israel. WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 56 (2007).

⁸⁷ *Brandenburg*, 395 U.S. at 446.

⁸⁸ *Id.* at 448–49.

⁸⁹ *Id.* at 449.

⁹⁰ See *infra* text accompanying notes 98 and 130.

⁹¹ See *Brandenburg*, 395 U.S. at 447 (espousing the principle that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

⁹² See Frederick Schauer, *Is It Better To Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301, 307 (2009) (“[A]s new events cause us to revise our previous estimates, it should come as little surprise that these new events should cause us to re-examine . . . the doctrines that have emanated out of earlier and possibly outdated empirical estimates.”). In a recent dissent, Justice Breyer recognized the relevance of contextualized analysis of speech in cases involving public safety. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2851–52 (2008) (Breyer, J., dissenting).

⁹³ The plurality in *Virginia v. Black* set out the parameters of a “true threats” statute that prohibits intentional intimidation: “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). In a related subject on hate speech, Jeannine Bell has provided a discussion of state statutes prohibiting the intimidating display of nooses. Jeannine Bell, *The Hangman’s Noose and the Lynch Mob: Hate Speech and the Jena Six*, 44 HARV. C.R.-C.L. L. REV. 329, 351–52 (2009).

emotionally charged threats. It aims to prevent the government from persecuting anyone who jokingly, in the heat of the moment, or out of simmering anger, urges unlawful conduct. Professor Thomas Healy's recent claim that criminal advocacy is part of the search for truth, self-government, or self-fulfillment⁹⁴ does not get at the core of the decision's holding. In fact, criminal advocacy coupled with intent to bring about the crime is unlike the Ku Klux Klan scenario of *Brandenburg*.⁹⁵ The Klan gathering was at a private location with only one person, the invited journalist, not a participant of the rally. Unlike *Frohwerk*, *Debs*, and *Schenck*, the inflammatory language in *Brandenburg* was not directed to a public audience. As I will explain below, the Court has found that expression of hate only becomes criminal when it is advocacy calculated to achieve criminal conduct.

General racist statements at public university campuses are probably protected forms of expression, but when a person stands up in a classroom or in the college commons area and advocates the commission of specific criminal conduct, his statements are no longer immune from campus regulation and criminal prosecution.⁹⁶ No educational purpose is served by criminal incitement on campus that incorporates symbols historically linked to violence, such as swastikas and burning crosses.⁹⁷

As comprehensive as the *Brandenburg* imminence standard sounds, there are circumstances where the state can prohibit hate speech that is neither imminently harmful nor instigative. Most important, in *Beauharnais v. Illinois*,⁹⁸ the Court determined that states and cities may prohibit group defamation, even when it does not pose an imminent threat of harm.⁹⁹ Several scholars and judges have wrongly claimed that group defamation is no longer constitutional after *New York Times Co. v. Sullivan*¹⁰⁰ and *R.A.V.*,¹⁰¹ but their arguments are not only conjectural but

⁹⁴ Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 683–89 (2009).

⁹⁵ See Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1309 (2007) (stating that “like *Brandenburg*, *Schenck* demanded that courts scrutinize only the likelihood that speech would trigger some harm or danger, not the enormity or significance of the threat”).

⁹⁶ Recent circuit court decisions indicate that common areas at universities are designated public fora. *E.g.*, *Bowman v. White*, 444 F.3d 967, 978–80 (8th Cir. 2006); *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005).

⁹⁷ See *Healy v. James*, 408 U.S. 169, 180 (1972) (“[W]here state-operated educational institutions are involved, this Court has long recognized ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’” (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507 (1969))).

⁹⁸ 343 U.S. 250 (1952).

⁹⁹ See *id.* at 266 (“Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase ‘clear and present danger.’”).

¹⁰⁰ 376 U.S. 254 (1964).

dismissive of recent Supreme Court cases that make clear that *Beauharnais* remains valid precedent.

In *Beauharnais*, the Court upheld the constitutionality of a group libel statute that rendered it actionable to “portray[] depravity, criminality . . . or lack of virtue of a class of citizens, of any race, color, creed, or religion” and to expose those citizens to “contempt, derision, or obloquy.”¹⁰² The majority found that, given Illinois’s history of racial friction, its legislature could enact legislation to punish the dissemination of demeaning messages, such as those opposed to neighborhood integration, because those messages threatened “the peace and well-being of the State.”¹⁰³ The opinion conceived of government playing a role in establishing a standard of decency designed to prevent intergroup friction.

Of the four justices who dissented in *Beauharnais*, only one, Justice Hugo Black, espoused an absolutist view of the First Amendment.¹⁰⁴ While the other three dissenters agreed that the conviction should be overturned, they nonetheless agreed with the majority that, under some circumstances, group defamation could be an actionable offense.¹⁰⁵ Justice Stanley Reed claimed that group defamation statutes could only be constitutional if they required proof of criminal incitements.¹⁰⁶ Justice William O. Douglas’s dissent found the statute to be vague but recognized the potential dangers of hate speech:

Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to

¹⁰¹ See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 978 (2d ed. 2002) (concluding that the statute in *Beauharnais* “almost certainly would be declared unconstitutional today based on vagueness and overbreadth grounds”); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 185–86 (1995) (stating that commentators believe that broadly-defined bans on hate speech are no longer valid); Cedric Merlin Powell, *The Mythological Marketplace of Ideas: R.A.V., Mitchell, and Beyond*, 12 HARV. BLACKLETTER L.J. 1, 34 (1995) (arguing that, after *Sullivan*, *Beauharnais* “is no longer persuasive authority”); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 517–18 (noting that “[t]he group defamation concept . . . has been thoroughly discredited by others”); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1116–17 n.29 (2006) (observing that numerous lower courts and commentators have concluded that *Beauharnais* is no longer good law). Sunstein argues that the First Amendment protects speech because it is vital to self-governance in a “deliberative democracy,” in which “new information and perspectives influence social judgments about possible courses of action,” and believes some forms of hate speech do not contribute to “social deliberation.” SUNSTEIN, *supra*, at 18–19, 198.

¹⁰² *Beauharnais*, 343 U.S. at 251, 266–67 (quoting 38 ILL. REV. STAT. § 471 (1949)).

¹⁰³ *Id.* at 252, 258–59. This law against the dissemination of class and group prejudices had a long history before the Court’s *Beauharnais* opinion, appearing as early as 1919 in a collection of Illinois statutes. 2 ANNOTATED STATUTES OF THE STATE OF ILLINOIS 1497 (Oliver A. Harker ed., 1919).

¹⁰⁴ *Beauharnais*, 343 U.S. at 274–75 (Black, J., dissenting).

¹⁰⁵ *Id.* at 283–84 (Reed, J., dissenting); *id.* at 284–85, 287 (Douglas, J., dissenting); *id.* at 299–302 (Jackson, J., dissenting).

¹⁰⁶ See *id.* at 279, 283 (Reed, J., dissenting) (arguing that free speech rights may be abridged “when speech becomes an incitement to crime,” but that words giving rise to speech limitations “[need to] be reasonably well defined”).

contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense.¹⁰⁷

Finally, Justice Robert Jackson agreed that the state could pass group libel laws, but dissented because the trial judge did not give Defendant *Beauharnais*, the president of a racist Chicago organization, an adequate opportunity to proffer his defense.¹⁰⁸

Beauharnais might offer a model for formulating one type of campus hate speech code,¹⁰⁹ but several authors challenge its precedential value. Dean Rodney Smolla, for instance, states that “*Beauharnais* is flatly inconsistent with modern First Amendment doctrines restraining content-based and view-point based discrimination.”¹¹⁰ Smolla explains this view by analogy to other free speech jurisprudence. In this, he provides reasoning that similarly minded authors do not. For instance, Professor Eugene Volokh is content to claim that “*Beauharnais* is now widely regarded as no longer being good law,”¹¹¹ but he does not provide any argument for his opinion. Volokh further claims that any university group libel prohibition would be unconstitutional.¹¹² Smolla, on the other hand, expostulates on the doctrine from other areas of free speech jurisprudence.¹¹³ He claims that just as the Court does not countenance restrictions on lewd or profane speech, neither does it approve of criminal group libel statutes.¹¹⁴ This analogy is incongruous because lewd and

¹⁰⁷ *Id.* at 284 (Douglas, J., dissenting).

¹⁰⁸ *Id.* at 299–301 (Jackson, J., dissenting).

¹⁰⁹ See, e.g., Rhonda G. Hartman, *Revitalizing Group Defamation as a Remedy for Hate Speech on Campus*, 71 OR. L. REV. 855, 884–85 (1992) (“*Beauharnais* underscores the importance that the First Amendment value accorded defamation by the Court has to the success of university proscription of group defamatory hate speech. Because group defamation is not fully protected speech, a court would probably find a reasonable university determination of harm sufficient to justify even an absolute prohibition of hateful, vilifying expression.”); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 35 (1985) (“*Beauharnais* . . . strengthens the argument that the Court would approve a properly drawn and construed statute or judicial ruling proscribing racial defamation of a group.”); James R. Bussian, Comment, *Anatomy of the Campus Speech Code: An Examination of Prevailing Regulations*, 36 S. TEX. L. REV. 153, 179 (1995) (“If a university wants to convey its commitment to having an environment free of discrimination to its students, a speech code formulated after the language in the group defamation statute in *Beauharnais* is one possible solution whose utility has yet to be realized.” (footnote omitted)).

¹¹⁰ Rodney A. Smolla, *Words “Which by Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 351–52 (2009).

¹¹¹ Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI. L. SCH. ROUNDTABLE 223, 238 n.87 (1996). Volokh is similarly dismissive of the case in an earlier work. See Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1819–20 n.127 (1992).

¹¹² Volokh, *supra* note 111, at 420.

¹¹³ Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, 53 LAW & CONTEMP. PROBS. 195, 215–16 (1990).

¹¹⁴ *Id.* at 208.

profane language is neither related to the incitement of violence nor to group libel. Smolla also asserts that “*Beauharnais* cannot survive side by side with cases such as *Brandenburg*.”¹¹⁵ This latter statement overlooks post-*Brandenburg* jurisprudence.

A weakness in this line of counterarguments is that while proclaiming allegiance to Supreme Court jurisprudence, Smolla and Volokh avoid key cases that challenge their perspective. Particularly glaring is the reliance on a circuit court case, *Collin v. Smith*,¹¹⁶ in an effort to demonstrate that “subsequent developments in libel and political speech jurisprudence have implicitly overruled *Beauharnais*.”¹¹⁷ Relying on an appellate court case in order to demonstrate the invalidity of *Beauharnais* is analytically unsound. In *Collin*, the Seventh Circuit stated that cases like *Brandenburg* “implicitly” raised a question as to whether “*Beauharnais* would pass constitutional muster today.”¹¹⁸ But the court of appeals never assumed away the binding precedent; instead, it found that the law in question did not survive the *Beauharnais* analysis.¹¹⁹ The *Collin* court’s rhetorical statement used implicit logic, but its explicit statements about Supreme Court precedent leads to the opposite conclusion. After the Supreme Court denied certiorari to the Seventh Circuit for *Collin*, Justice Blackmun took the unusual step of publishing a statement on behalf of himself and Justice White. Blackmun did so to indicate his sense that “the Seventh Circuit’s decision is in some tension with *Beauharnais*. That case has not been overruled or formally limited in any way.”¹²⁰ While this assertion is not part of a binding opinion, it has been borne out by subsequent majority opinions, the most recent one issued in 2010, demonstrating that the holding in *Beauharnais* has neither been overturned nor even questioned.¹²¹

¹¹⁵ Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 444 (1988).

¹¹⁶ 578 F.2d 1197 (7th Cir. 1978).

¹¹⁷ Steven G. Gey, *What If Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1055 (1997); see also Lili Levi, *Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy*, 78 WASH. U. L.Q. 1005, 1084 & n.286 (2000) (referring to *Collin* as an example of the court declining to apply *Beauharnais* to a Nazi march in Skokie, Illinois); Jendi B. Reiter, *Redskins and Scarlet Letters: Why “Immoral” and “Scandalous” Trademarks Should Be Federally Registrable*, 6 FED. CIR. B.J. 191, 202–03 (1996) (describing *Collin* which “considered *Beauharnais* to be invalid, or at the least limited to situations where a breach of the peace is imminent”). Justice Richard Posner recently reaffirmed a commitment to his own vision of group defamation, ignoring the body of Supreme Court precedents that reaffirm its constitutionality. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 672 (7th Cir. 2008) (“[T]hough *Beauharnais v. Illinois* has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.” (citation omitted)).

¹¹⁸ *Collin*, 578 F.2d at 1204.

¹¹⁹ *Id.* at 1204–05.

¹²⁰ *Smith v. Collin*, 439 U.S. 916, 919 (1978) (Blackmun, J., dissenting).

¹²¹ See, e.g., *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (“‘From 1791 to the present’ . . . the First Amendment has ‘permitted restrictions upon the content of the speech in a few

Another common error in the academic literature is to rely on a second Seventh Circuit case, *American Booksellers Ass'n v. Hudnut*,¹²² to claim, in the sternly dramatic words of one author, that “[t]he doctrinal tides that have swept libel in general into the First Amendment ocean have left *Beauharnais* . . . high and dry.”¹²³ In *Hudnut*, the appellate court in fact believed it was following precedent, claiming “that cases such as *New York Times Co. v. Sullivan* [have] so washed away the foundations of *Beauharnais* that it [can no longer] be considered authoritative.”¹²⁴ The circuit court admitted that its presumption might be incorrect, but found that the case did not support the challenged ordinance irrespective of *Beauharnais*’s status.¹²⁵

The Seventh Circuit was mistaken in its understanding of the judicial trend. *Sullivan* established the requirement that any public figure suing in defamation prove that the offensive false statement was uttered with actual malice.¹²⁶ Consequently, its effect on *Beauharnais* extends only to cases where group libels are directed against public personalities, in which case the actual malice standard applies. But *Sullivan* had no effect on private group defamation cases. The Supreme Court made this point in a 1982 case, *New York v. Ferber*, stating that, except in special cases related to public officials, *Beauharnais* continues to be the controlling precedent on the publication of group libels.¹²⁷ Consequently, **misethnic group** defamation that is directed against public officials can be prohibited when stated maliciously, despite the actual knowledge of the statement’s falsehood and with the reckless disregard for its truth value.¹²⁸ Yet, staying true to *Sullivan*’s restraints, it is still constitutional for the state to place

Comment [JLS1]: Could you please clarify the intended word? Thank you.

ED: I have been using this word since my book in 2002, *Destructive Message*. I defined the word there on page 2. Please use the correct citation to it.

limited areas,’ and has never ‘include[d] a freedom to disregard these traditional limitations.’ These ‘historic and traditional categories’ . . . includ[e] obscenity [and] defamation’); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (“We have recognized that ‘the freedom of speech’ referred to by the First Amendment does not include a freedom to disregard these traditional limitations.”); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) (“[T]here are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend Libelous speech has been held to constitute one such category.”).

¹²² 771 F.2d 323 (7th Cir. 1985), *aff’d*, *Hudnut v. Am. Booksellers Ass’n*, 475 U.S. 1001 (1986).

¹²³ Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon Its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 950 (1996).

¹²⁴ *Hudnut*, 771 F.2d at 331 n.3.

¹²⁵ *Id.* at 331–32 n.3.

¹²⁶ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (“The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”).

¹²⁷ See *New York v. Ferber*, 458 U.S. 747, 763 (1982) (citing *Sullivan* and *Beauharnais* for the proposition that, “[l]eaving aside the special considerations when public officials are the target, a libelous publication is not protected by the Constitution”).

¹²⁸ See *Sullivan*, 376 U.S. at 279–80 (concluding that a prohibition on the ability of a public official to recover damages for defamation does not include instances where a speaker makes a defamatory statement falsely or “with reckless disregard of whether it was false or not”).

prohibitions on expressions which “portray[] ‘depravity, criminality . . . or lack of virtue’ of ‘a class of citizens, of any race, color, creed, or religion’” and make that group subject to “contempt, derision, or obloquy.”¹²⁹ Group defamation made against persons who are not public officials would fall under the standard set forth in *Gertz v. Robert Welch, Inc.*,¹³⁰ requiring only proof of the defamer’s negligence to prevail.¹³¹

Counter-intuitively, the most convincing indication of *Beauharnais*’s vitality comes from the very Supreme Court decision that for years had been the mainstay of opponents to university hate speech codes, *R.A.V. v. City of St. Paul*.¹³² The case explicitly enumerated several types of expressions, including group defamation, that are unprotected by the First Amendment.¹³³

For a decade, *R.A.V.* hindered universities determined to punish the expression of hatred against racial, religious, ethnic, gender, national, or sexual orientation groups. The *R.A.V.* case arose when some juveniles set fire to a cross on a black family’s lawn.¹³⁴ The youths were charged under a St. Paul ordinance which made it a misdemeanor to display, in public or private places, symbols—like Nazi swastikas and burning crosses—which are known to “arouse anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender.”¹³⁵ Writing for the majority, Justice Scalia held that the ordinance resulted in unconstitutional “content discrimination.”¹³⁶ The statute was flawed, he explained, because rather than punishing the use of all fighting words the law singled out hate speech.¹³⁷ Scalia acknowledged that St. Paul had a compelling interest in protecting the human rights of the “members of groups that have historically been subjected to discrimination.”¹³⁸ To accomplish that end, however, the city could enact a blanket prohibition on hostile expressions.¹³⁹

Justice White sharply disagreed with the majority, arguing that it deviated from precedents that had long allowed for content-based

¹²⁹ 343 U.S. at 270–71 (quoting 38 ILL. REV. STAT. § 471 (1949)).

¹³⁰ 418 U.S. 323 (1974).

¹³¹ *Id.* at 350.

¹³² 505 U.S. 377, 402 (1992).

¹³³ *Id.* at 383 (mentioning defamation as an area in which First Amendment safeguards are at a minimum). The Court explicitly stated that “[e]ven the prohibition against content discrimination . . . is not absolute.” *Id.* at 387.

¹³⁴ *Id.* at 379.

¹³⁵ *Id.* at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

¹³⁶ *Id.* at 387 (internal quotation marks omitted).

¹³⁷ See *id.* at 391 (concluding that the ordinance applied only to “‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender’”).

¹³⁸ *Id.* at 395.

¹³⁹ See *id.* at 395–96 (“The dispositive question . . . is whether content discrimination is reasonably necessary to achieve St. Paul’s compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect.”).

regulation of low-level speech.¹⁴⁰ Using language reminiscent of the rationale behind the fighting words doctrine in *Chaplinsky*, White pointed out that nothing is wrong with prohibiting the use of a subset of speech that is “by definition worthless and undeserving of constitutional protection.”¹⁴¹ In his estimation, the majority illegitimately substituted its judgment for the city’s conclusion that disparagements “based on race, color, creed, religion, [and] gender” pose “more pressing public concerns than the harms caused by other fighting words.”¹⁴² In his most poignant comments, White blamed the majority for elevating worthless fighting words to the level of “debate.”¹⁴³

White’s concurrence, therefore, recognized the constitutionality of hate speech regulations, but he joined the court’s judgment because the specific ordinance in the case covered protected forms of speech.¹⁴⁴ St. Paul had sought to prevent the use of insults to cause offense or resentment.¹⁴⁵ In a separate concurrence, Justice Blackmun agreed with Justice White that the scope of the statute was overbroad.¹⁴⁶ He further believed there to be “no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns.”¹⁴⁷

In a third concurrence, Justice Stevens poked holes in the majority’s reasoning. He pointed to several constitutional limits on utterances. For example, “a city can prohibit political advertisements in its buses while allowing other advertisements.”¹⁴⁸ Like White and Blackmun, he found the majority’s assertion that all content-based regulations are unconstitutional to be disingenuous and precedentially unsound.¹⁴⁹ Just as the state can differentiate between various forms of commercial speech, so too can it choose to prohibit some but not all types of fighting words.¹⁵⁰ In formulating legislative policy, lawmakers can evaluate the potential social harms that are likely to result from varying forms of fighting words.¹⁵¹

Any hope that *R.A.V.* was an absolute ban against any regulation of

¹⁴⁰ *Id.* at 401 (White, J., concurring).

¹⁴¹ *Id.*

¹⁴² *Id.* at 407.

¹⁴³ *Id.* at 402 (internal quotation marks omitted).

¹⁴⁴ *Id.* at 411, 413.

¹⁴⁵ *Id.* at 414.

¹⁴⁶ *Id.* at 416 (Blackmun, J., concurring).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 423 (Stevens, J., concurring).

¹⁴⁹ *Id.* at 419.

¹⁵⁰ See *id.* at 434 (“[E]ven if the St. Paul ordinance did regulate fighting words based on its subject matter, such a regulation would . . . be constitutional. . . . [S]ubject-matter-based regulations on commercial speech are widespread and largely unproblematic.”).

¹⁵¹ See Shannon Gilreath, “Tell Your Faggot Friend He Owes Me \$500 for My Broken Hand”: Thoughts on a Substantive Equality Theory of Free Speech, 44 WAKE FOREST L. REV. 557, 574 (2009) (discussing the importance of the First Amendment theory of assessing the social context of speech to determine when words become dehumanizing, degrading, and subjugating actions).

hate speech was short-lived.¹⁵² While it has not been overtly overruled, its impact has been ameliorated. *Black* is the most recent Supreme Court case to shed light on the allowable elements of college hate speech codes. The case arose from the prosecution of individuals for cross burning¹⁵³ pursuant to a more narrowly drafted statute than the one struck down in *R.A.V.* Virginia's law made it

unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.¹⁵⁴

A majority of justices agreed that the state did not violate the First Amendment by punishing intentionally intimidating displays of burning crosses.¹⁵⁵ Mimicking the language in *Chaplinsky*, the Court found that such conduct was of “such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”¹⁵⁶ The statute did not run afoul of the prohibition against content discrimination because it prohibited all manner of cross burning, irrespective of whether it sought to intimidate others on the basis of their race, religion, or other characteristics.¹⁵⁷ The Court explained that Virginia could selectively punish cross burnings, even though it did not criminalize all other forms of virulent intimidation, “in light of cross burning’s long and pernicious history as a signal of impending violence.”¹⁵⁸

An important distinction between the St. Paul ordinance and the Virginia statute was that the latter prohibited the entire category of threatening cross burnings, not just those that expressed hatred toward a particular group. The city ordinance struck down by the *R.A.V.* Court, on the other hand, only prohibited cross burnings meant to “arouse[] anger,

¹⁵² For a discussion on *R.A.V.*’s nearly absolutist perspective on speech, see Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575, 602 (2005); Edward J. Eberle, *Cross Burning, Hate Speech, and Free Speech in America*, 36 ARIZ. ST. L.J. 953, 973 (2004); Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 363–64 (1998); Hon. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1310 (1993).

¹⁵³ *Virginia v. Black*, 538 U.S. 343, 348 (2003).

¹⁵⁴ *Id.* (quoting VA. CODE ANN. § 18.2-423 (1996)).

¹⁵⁵ *Id.* at 347.

¹⁵⁶ *Id.* at 358–59 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992)).

¹⁵⁷ *Id.* at 362–63.

¹⁵⁸ *Id.* at 363.

alarm or resentment in others . . . on the basis of race, color, creed, religion or gender.”¹⁵⁹ A narrow reading of *Black* would require campus hate speech codes to be as open-ended as the Virginia statute. A broader reading of *Black*, however, is that the underlying problem of the Minnesota ordinance was that it prohibited words that merely aroused an emotive response rather than intimidated persons. The broader reading would indicate that a university could pass a speech code punishing cross burnings that intimidate others because of their racial-, social-, gender-, political-, or sexual orientation-group statuses. The *Black* decision is unclear about whether both types of regulations, or only the open-ended one, would pass constitutional muster.

What is clear is that only intentionally symbolic intimidation may be regulated, but the Court in *Black* did not agree on whether the fact-finder can infer the scienter element or if the prosecutor must prove it—only a plurality of the Court found the statute’s prima facie evidence presumption to be unconstitutional.¹⁶⁰ The group of four justices who comprised the plurality argued that without requiring prosecutors to prove a defendant’s state of mind, juries would lack context to determine “whether a particular cross burning is intended to intimidate.”¹⁶¹

Several states currently have cross burning and harassment laws.¹⁶²

¹⁵⁹ *R.A.V.*, 505 U.S. at 391 (internal quotation marks omitted).

¹⁶⁰ See *Black*, 538 U.S. at 368 (Scalia, J., concurring in part and dissenting in part) (“I write separately . . . to explain why I believe there is no justification for the plurality’s apparent decision to invalidate [the prima facie evidence] provision on its face.”).

¹⁶¹ *Id.* at 367 (plurality opinion). Chief Justice Rehnquist and Justices O’Connor, Stevens, and Breyer made up the plurality, holding that the prima facie element of the Virginia statute was unconstitutional. *Id.* Justice Scalia, who had joined those four in other parts of the opinion, argued that the prima facie presumption was a legitimate rebuttable presumption. *Id.* at 368–69 (Scalia, J., concurring in part and dissenting in part). Justice Thomas joined Scalia on this point. But Thomas also wrote a separate dissent, arguing that cross burning was by definition a violent form of intimidation. See *id.* at 388–89 (Thomas, J., dissenting) (arguing that “whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means” and that “the association between acts of intimidating cross burning and violence is well documented in recent American history”). Justice Souter, concurring in the judgment in part and joined by Justices Kennedy and Ginsburg, never reached the prima facie issue, writing instead against the constitutionality of the entire statute: “In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents’ conduct.” *Id.* at 387 (Souter, J., concurring in part and dissenting in part).

¹⁶² See, e.g., ARIZ. REV. STAT. ANN. § 13-1707 (2010) (prohibiting cross burning); IDAHO CODE ANN. § 18-7902(b) (2004) (making the “placing of any word or symbol commonly associated with racial, religious or ethnic terrorism on the property of another person [unlawful] without his or her permission”); 720 ILL. COMP. STAT. ANN. 5/12-7.6 (West 2010) (specifying the elements of cross burning); MO. ANN. STAT. § 565.095 (West 2010) (defining the crime of cross burning); MONT. CODE ANN. § 45-5-221 (2009) (establishing the crime of “malicious intimidation or harassment” relating to civil or human rights); S.D. CODIFIED LAWS § 22-19B-2 (2006) (defining one type of hate crime as defacement by burning crosses and “the placing of any word or symbol commonly associated with racial, religious, or ethnic terrorism on the property of another person without that person’s permission”); WASH. REV. CODE ANN. § 9A.36.080(2) (West 2009) (prohibiting acts like burning crosses and defacing property with a swastika), *amended on other grounds*, 2009 Wash. Sess. Laws 961–62.

The new doctrine on hate speech provides state universities clear parameters for developing hate speech policies that punish the depiction of hateful symbolic speech with a culpable frame of mind. International protocols on racist and xenophobic speech provide further reason to believe that university hate speech codes do not violate the underlying principles of democratic free speech.

IV. INTERNATIONAL POLICY

University administrators wishing to deter hate speech on their campuses will need to review Supreme Court precedents, especially *Chaplinsky v. R.A.V.*, and *Black*, to identify how to achieve the goal while respecting speakers' First Amendment rights. International norms, while not binding on American courts, provide advisory insight for colleges wishing to balance the dignity rights of those targeted by hate speech and the liberty rights of speakers.¹⁶³ There are recent signs of some Supreme Court justices' willingness to consider international legal standards. In *Lawrence v. Texas*, a case recognizing the constitutional value of consensual, adult sexual intimacy,¹⁶⁴ and *Roper v. Simmons*,¹⁶⁵ invalidating the death penalty in cases involving juvenile offenders,¹⁶⁶ the majority of the Court demonstrated an openness to international norms.¹⁶⁷

Throughout the world, democracies recognize that on campuses and at other public places hate speech can be suppressed because it poses a social threat and does not constitute a form of legitimate political debate. The general trend is to balance the rights of speakers against the interests of persons who are the targets of hateful statements.¹⁶⁸ In this area of law, countries that bar the use of racial and ethnic incitement tend to follow

¹⁶³ Chief Justice Roberts and Justices Scalia and Thomas have been the most opposed to the incorporation of international precedents into American constitutional interpretation. For example, see *Medellin v. Texas*, 552 U.S. 491, 504 (2008), in which Chief Justice Roberts, writing for the Court, asserted that "not all international law obligations automatically constitute binding federal law enforceable in United States courts"; *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting), in which Justice Scalia deemed the majority's "discussion of these foreign views" to be "meaningless dicta"; and *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring), in which Justice Thomas stated that "jurisprudence should not impose foreign moods, fads, or fashions on Americans."

¹⁶⁴ See *Lawrence*, 539 U.S. at 572–73 (referring to a decision of the European Court of Human Rights on consensual homosexual conduct).

¹⁶⁵ 543 U.S. 551 (2005).

¹⁶⁶ *Id.* at 578.

¹⁶⁷ See, e.g., *id.* at 575–78 (detailing international norms against juvenile capital punishment).

¹⁶⁸ Defamation cases clearly balance the value of speech against individuals' right to their good reputation. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (barring public officials' recovery of damages for defamatory falsehoods absent proof that the speaker made the statement with "actual malice"); cf. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (setting a balancing standard in right-to-attorney cases); William Funk, *Intimidation and the Internet*, 110 PENN ST. L. REV. 579, 593 (2006) ("First Amendment doctrine, however, generally avoids applying . . . implicit balancing to new cases.").

international standards of civility. Typically, the balance is struck more in favor of the victims' rights, in contrast to the United States' inclination towards the interests of speakers.

The international trend began in the aftermath of World War II, when the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. It obligates signatory states to punish the "[d]irect and public incitement to commit genocide."¹⁶⁹ Not satisfied with the rather limited scope of the Genocide Convention, multiple members of the United Nations broadened the coverage through the Convention on the Elimination of All Forms of Racial Discrimination. The latter convention requires signatories to punish "all dissemination of ideas based on racial superiority or hatred, [and] incitement to racial discrimination."¹⁷⁰ The International Covenant on Civil and Political Rights is yet another relevant international agreement. It requires that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" be "prohibited by law."¹⁷¹

In response to the virtual ubiquity of the Internet,¹⁷² the most recent expansion of the Universal Declaration of Human Rights has been the Council of Europe's Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Racist and Xenophobic Acts Committed Through the Operation of Computer Systems.¹⁷³ This convention requires signatory countries to pass laws prohibiting the manipulation of electronic transmission devices to intentionally threaten or insult people who "(i) . . . belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these

¹⁶⁹ Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951).

¹⁷⁰ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 220 (entered into force Jan. 4, 1969).

¹⁷¹ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, I.C.C.P.R. art. 20, ¶ 2 (entered into force Mar. 23, 1976).

¹⁷² See Alexander Tsisis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 818 (2001) [hereinafter Tsisis, *Hate in Cyberspace*] (describing the globalized reach and influence of the Internet with respect to communications, knowledge, employment opportunities, and so on).

¹⁷³ For additional details about the treaty, see Knechtle, *supra* note 82, at 48–49; Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L L. & POL'Y 253, 265–66 (2003). U. N. Secretary-General Ban Ki-moon issued a statement in 2009 asking the Internet industry to "help ensure that hate speech does not proliferate online." Press Release, U.N. Dep't of Pub. Info., Secretary-General, at Seminar on Cyberhate, Spells out Steps Taken To Protect Children from "Digital Demonization," Make Cyberspace Safer for Youth (June 16, 2009), available at <http://www.un.org/News/Press/docs/2009/sgsm12319.doc>.

characteristics.”¹⁷⁴ A glaring weakness of these four protocols is that none of them include sexual orientation as a protected class.

These international norms have been incorporated into laws and mores of numerous democratic countries. Part II of this Article described hate speech attacks recently occurring at American universities; internationally, universities face similar concerns about the dissemination of hate speech. Five Canadian university presidents and vice presidents have recently networked to develop a policy against expressing antisemitic sentiments cloaked under the guise of anti-Zionism.¹⁷⁵ During a recent meeting of the Canadian Political Science Association, some members of the audience accused a professor of using hate speech against the nation’s aboriginal tribes, raising the question of whether college administrators could resolve the dispute.¹⁷⁶

The United Kingdom has witnessed a rise in campus antisemitic speech.¹⁷⁷ British Prime Minister Tony Blair issued a directive requiring “universities to stop anti-Jewish ideology from taking root on campuses.”¹⁷⁸ So much complacency had been shown, that the English

¹⁷⁴ Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, *opened for signature* Nov. 23, 2001, C.E.T.S. No. 189.

¹⁷⁵ *Toronto Universities Confer with FSWC to Help Protect Jewish Students in Response to Hate-Filled Week*, MARKETWIRE (Mar. 3, 2009), <http://www.marketwire.com/press-release/Toronto-Universities-Confer-With-FSWC-Help-Protect-Jewish-Students-Response-Hate-Filled-956582.htm>; *see also* Frances Kraft, *Jewish Students Kept Tabs on Anti-Israel Event*, CANADIAN JEWISH NEWS, Feb. 10, 2005, at 45 (concerning a university investigation of a hate speech complaint); Fred M. Hoppe, Letter to the Editor, *No More Hate Speech*, HAMILTON SPECTATOR (Hamilton, Ont.), Mar. 15, 2008, available at <http://www.thespec.com/opinion/letters/article/168967> (stressing the need to ban hate speech from the McMaster University campus).

¹⁷⁶ Alexandra Shimo, *Tough Critique or Hate Speech?*, MACLEAN’S, Mar. 2, 2009, at 42.

¹⁷⁷ Adam Pike, *UK Jewish Students Get Some Out-of-Class Lessons*, JERUSALEM POST, Mar. 18, 2009, available at <http://www.jpost.com/Home/Article.aspx?id=136399>. One of the most prominent facets of recent British antisemitic activities has been the effort to boycott Israeli academics. The University and College Union, a trade union of universities, formally invited a person whom the South Africa Human Rights Commission had convicted for using “anti-Zionism to excuse, apologize for, and ultimately align with antisemitic agitators.” David Schraub, *South Africa Conveys a Message Back to Bongani Masuku*, MODERATE VOICE (Dec. 6, 2009), <http://themoderatevoice.com/55315/south-africa-conveys-a-message-back-to-bongani-masuku>. Umar Farouk Abdulmutallab, who attempted to detonate a bomb on an airplane headed to the United States, had been president of the University College of London’s Islamic Society. He is reported to have been deeply influenced by a radical Islamic cleric, Anwar al-Awlaki, who gave a series of speeches at British universities. Patrick Sawyer & David Barrett, *Detroit Bomber’s Mentor Continues to Influence British Mosques and Universities*, TELEGRAPH (U.K.), Jan. 2, 2010, available at <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/6924653/Detroit-bombers-mentor-continues-to-influence-British-mosques-and-universities.html>.

¹⁷⁸ Denis MacShane, *The New Anti-Semitism*, WASH. POST, Sept. 4, 2007, at A17. Prosecutors are empowered to bring causes of action “against Islamic extremists for speeches on student campuses” under British Public Order Act 1986. Colin Brown, *Warning over Islamic Extremists Operating in Universities*, INDEPENDENT (London), Mar. 28, 2007, at 6. A recent parliamentary report from the House of Commons “highlighted attacks on undergraduates, a lack of respect by lecturers and tutors for the needs of observant Jewish students and a growing tolerance of extreme language against Israel during student debates on the Middle East.” Isabel Oakeshott & Chris Gourlay, *Anti-Semitism Rules Come in at Universities*, SUNDAY TIMES (London), Mar. 25, 2007, available at <http://www.timesonline.co.uk/tol/news/uk/education/article1563917.ece>.

government decided to “warn vice-chancellors they must not ignore antiJewish [*sic*] activity on campuses and must prevent prejudiced lecturers, guest speakers and extremist political organisations [from] stirring up hatred against Israel.”¹⁷⁹ Marking a similar trend, the German government accused a group with a substantial Muslim membership in German universities of “propagating antisemitism and urging violence against Jews.”¹⁸⁰ The German government has been particularly leery of this antisocial form of student behavior because of its own perilous history with antisemitic and anti-democratic student organizations,¹⁸¹ and because Germany pursues a policy meant to prevent the acceptance of antisemitism in universities as it is ““throughout the Arab Middle East.””¹⁸²

The Canadian Ministry of the Attorney General can rely on several Canadian laws prohibiting hate speech. The Canadian Supreme Court has distinguished hate speech from protected speech. It has articulated the purpose of constitutional protections for speech to be the protection of core values of “(1) seeking the truth and the common good, (2) promoting self-fulfilment [*sic*] of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons.”¹⁸³ The Supreme Court of Canada has determined that hate speech is incompatible with these values.¹⁸⁴ While free speech is a quintessentially fundamental right, its centrality for individual self-governance is compatible with “reasonable limits prescribed by law” as long as they are necessary for maintaining “a free

¹⁷⁹ Oakeshott & Gourlay, *supra* note 178.

¹⁸⁰ Richard Bernstein, *German Police Raid an Islamic Militant Group*, N.Y. TIMES, Apr. 11, 2003, at A9; *see also* Peter Finn, *Germany Bans Islamic Group; Recruitment of Youths Worried Officials*, WASH. POST, Jan. 16, 2003, at A14 (reporting that the German government banned an Islamic group “accused of spreading violent antisemitism on [German] university campuses and establishing contacts with neo-Nazis”).

¹⁸¹ RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* 426–31 (2003) [hereinafter EVANS, *THIRD REICH*]. Antisemitism also spilled into university organizations, influencing the attitudes of future leaders. The Union of German Students enjoyed large-scale support among students and provided a forum for spreading racism to budding intellectuals and teachers. NANCY THORNDIKE GREENSPAN, *THE END OF THE CERTAIN WORLD: THE LIFE AND SCIENCE OF MAX BORN* 165 (2005); Konrad H. Jarausch, *Keynote Address: The Expulsion of Jewish Professors and Students from the University of Berlin During the Third Reich*, in *CROSSING BOUNDARIES: THE EXCLUSION AND INCLUSION OF MINORITIES IN GERMANY AND THE UNITED STATES* 9, 16 (Larry Eugene Jones ed., 2001); Herman Jacobsohn, *Effects of the War on Jews*, REFORM ADVOC., July 30, 1921, at 760, 761. One of the students’ often-repeated complaints was that Jews enrolled in secondary schools and universities at a higher rate than their proportion to the population, increasing competition in the job market. JACOB KATZ, *FROM PREJUDICE TO DESTRUCTION: ANTI-SEMITISM, 1700–1933*, 263 (1980).

¹⁸² David G. Dalin, *Hitler’s Mufti*, FIRST THINGS, Aug.–Sept. 2005, at 14, 14; *see also* Ernest Mabuza, *Malema’s Hate Speech Case Postponed*, BUS. DAY (S. Afr.), June 6, 2009 (“In a country[, South Africa,] that records some of the highest figures for sexual violence in the world, it is particularly irresponsible for a political leader to be reinforcing both silence as well as attitudes that tolerate and condone acts of sexual violence . . .”).

¹⁸³ *Sierra Club of Can. v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, para. 75 (Can.).

¹⁸⁴ *R. v. Keegstra*, [1990] 3 S.C.R. 697, 699 (Can.).

and democratic society.”¹⁸⁵

Canada’s expositive definition of “hate speech” is pertinent even though it is broader than the U.S. Supreme Court’s ruling in *Black*. Canada is openly willing to examine whether a hateful statement against an identifiable group is harmful to a pluralistic society, while the United States is only willing to place limitations on speech that intentionally incites harmful conduct.¹⁸⁶ In a case dealing with telephonically transmitted hate speech, the Canadian Supreme Court explained the importance of limiting speech that vilifies individuals.¹⁸⁷ The explanation is pertinent to universities identifying unacceptable speech in a multiethnic campus setting:

[M]essages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.¹⁸⁸

While barring verbal attacks against individual dignity will not survive the *Black* test, Canadian jurisprudence is compatible with U.S. defamation case law. A foremost purpose of group and individual defamation law is the protection of an individual’s or a group’s public reputation.¹⁸⁹ The U.S. Supreme Court considers an “individual’s right to the protection of his own good name” to be grounded in “our basic concept of the essential

¹⁸⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 1, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

¹⁸⁶ See *Virginia v. Black*, 538 U.S. 343, 362–63 (2003) (suggesting that the federal and state governments may ban “threats of violence” (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992))); *Keegstra*, 3 S.C.R. at 751 (“The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual’s sense of self-worth and acceptance. This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority. Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society.”).

¹⁸⁷ *Canada (Human Rights Comm’n) v. Taylor*, [1990] 3 S.C.R. 892 (Can.).

¹⁸⁸ *Id.* at 922.

¹⁸⁹ See RESTATEMENT (SECOND) OF TORTS § 575 cmts. a–b (1979) (differentiating the types of damage to reputation allowing the target to recover without showing any other damages from others that do not allow for recovery without additional economic or pecuniary losses on the forms of defamation that result in reputational harms); David A. Elder, *Small Town Police Forces, Other Governmental Entities and the Misapplication of the First Amendment to the Small Group Defamation Theory—A Plea for Fundamental Fairness for Mayberry*, 6 U. PA. J. CONST. L. 881, 933 (2004) (stating that the Supreme Court finds equally compelling the need to provide redress for reputational harms and the need to protect freedom of expression); Thomas David Jones, *Human Rights: Freedom of Expression and Group Defamation Under British, Canadian, Indian, Nigerian and United States Law—A Comparative Analysis*, 18 SUFFOLK TRANSNAT’L L. REV. 427, 586 (1995) (noting that when defamation harms a group’s reputation and social esteem, it often leads to aggressive conduct against that group’s members).

dignity and worth of every human being.”¹⁹⁰ College administrations can protect the higher educational experience of individuals to freely exchange ideas on campus without being harassed by racists, xenophobes, sexists, homophobes, or ethnocentrists and without running afoul of the First Amendment’s injunctions.

With the advent of the Internet, university computer equipment can also be used to spread propaganda attacking a group’s purported racial, religious, or ethnic inferiority. Canada has confronted a similar problem of hate purveyors, like Ernst Zundel and Heritage Front,¹⁹¹ who used the Internet to inflame prejudice and spread discrimination. The Canadian Human Rights Act of 2001 addresses the increasingly common transmission of information through the Internet and is applicable to threatening or defamatory student speech.¹⁹² The law contains a provision for penalizing anyone who repeatedly uses telecommunications devices, including the Internet, to expose people “to hatred or contempt” based on their “race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability [or] conviction for which a pardon has been granted.”¹⁹³ Prior to the addition of the section addressing Internet communications, the Supreme Court of Canada upheld restraints on telephonic dissemination of hate speech. The Court came to its conclusion after balancing freedom of speech with other human rights obligations.¹⁹⁴ Extrapolating the Court’s reasoning to the campus hate speech debate, regulations against hate propaganda may be adopted in Canada to better promote “equal opportunity unhindered by discriminatory practices.”¹⁹⁵

France, like the United States and Canada, intrinsically values free speech, asserting, in its declaration of rights, “[t]he free communication of ideas and opinions” to be “one of the most precious of the rights of

¹⁹⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

¹⁹¹ See Charlie Gillis, *Righteous Crusader or Civil Rights Menace?*, MACLEAN’S, Apr. 21, 2008, at 22 (writing about the Canadian Human Rights Tribunal’s hearings dealing with the Heritage Front’s hate messages); Mary Gusella, Chief Comm’r, Canadian Human Rights Comm’n, *A Serious Threat*, Opening Address: Hate on the Internet Conference (Dec. 15–16, 2005), in CANADIAN ISSUES, Spring 2006, at 5–6 (describing Zundel’s spread of group defamation on the Internet); *Jail for German Holocaust Denier*, INDEPENDENT (London), Feb. 16, 2007, at 24 (mentioning Zundel’s conviction in Germany for Holocaust denial); Warren Kinsella, *The Racist Face of SARS*, MACLEAN’S, Apr. 14, 2003, at 60 (describing how a “supporter of the pro-Nazi Heritage Front” relied on the Internet).

¹⁹² On the regulation of Internet hate speech, see Tsesis, *Hate in Cyberspace*, *supra* note 172, at 820; Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, 6 (2002).

¹⁹³ Canadian Human Rights Act, R.S.C. 1985, c. H-6, §§ 3(1), 13(1)–13(2) (Can.).

¹⁹⁴ *Canada (Human Rights Comm’n) v. Taylor*, [1990] 3 S.C.R. 892 (Can.) (“It can thus be concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multi-cultural society which is committed to the idea of equality.”).

¹⁹⁵ *Id.* at 895.

man.”¹⁹⁶ Yet a student, faculty member, or visitor to a French university who uses the Internet to send hateful messages, create discriminatory webpages, or post comments on a newsgroup can be criminally prosecuted for abusing that freedom. The threat of hate speech is taken so seriously in France that it even requires Internet service providers (“ISPs”) to “assist law enforcement officers in eliminating online material that justifies crimes against humanity, incites racial hatred or can be classified as child pornography.”¹⁹⁷ As the French government explains, the “precious” value of “free communication of thoughts and opinions” does not preclude the government from punishing the “incitement to discrimination, hatred and violence.”¹⁹⁸ This legal sensibility, which is meant to preserve democratic institutions, precludes the use of traditional free speech forums, including newspapers, parks, and universities, from being converted into podiums of defamation and incitement to harm.¹⁹⁹ It also has implications for regulating digital communication.

The Tribunal de Grande Instance de Paris has established precedent that allows for the criminal prosecution of hateful Internet content even when its source is extraterritorial.²⁰⁰ Plaintiffs, who included the union for French Jewish Students, alleged that, by allowing the posting of hyperlinks to auctions of Nazi memorabilia on its search engine, Yahoo! violated R645-1 of the French Criminal Code.²⁰¹ The French court asserted jurisdiction and rendered judgment over the corporation even though Yahoo!’s computer servers were located in California. The court found that it had the power to adjudicate the case because there was a “domestic effect[.]” in France of prohibited content that was accessible to French web

¹⁹⁶ DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 11 (Fr. 1789).

¹⁹⁷ Lyombe Eko, *New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet*, 28 LOY. L.A. INT’L & COMP. L. REV. 69, 102–03 n.208 (2006). French ISPs agreed to filter materials depicting “child pornography, terrorism, or hate speech.” Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 401 (2009). German law also allows for holding ISPs liable for allowing users access to hate sites on the Internet. Timofeeva, *supra* note 173, at 264.

¹⁹⁸ *France in the United Kingdom: Freedom of Speech in the French Media*, FRENCH EMBASSY (May 24, 2007), <http://www.ambafrance-uk.org/Freedom-of-speech-in-the-French.html>.

¹⁹⁹ Loi no. 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe [Law no. 90-615 of July 13, 1990 to suppress all racist, antisemite, or xenophobic acts], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 14, 1990, p. 8333. For an elaboration on a challenge made to the French law against Holocaust Denial, see *Faurisson v. France*, Decisions U.N. Human Rights Comm., Commc’n No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996), available at <http://www1.umn.edu/humanrts/undocs/html/VWS55058.htm>.

²⁰⁰ The Tribunal’s decision in the original French, with an English translation, can be found at Appendix to the Complaint for Declaratory Relief, *Yahoo!, Inc. v. La Ligue Contre le Racisme et l’Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev’d*, 379 F.3d 1120 (9th Cir. 2004), *vacated*, 399 F.3d 1010 (9th Cir. 2005).

²⁰¹ *Yahoo!*, 169 F. Supp. 2d at 1184.

surfers.²⁰² Another well-known French case involved the conviction of Robert Faurisson, a prominent Holocaust denier.²⁰³ In that case the Tribunal de Grande Instance de Paris found it had jurisdiction over the criminal case, even though Faurisson had published his postings on a server located in the United States.²⁰⁴ This was similar to the Canadian Human Rights Commission's order requiring white supremacist Ernst Zundel to remove antisemitic statements from his California-based website that was nevertheless accessible in Canada.²⁰⁵ These precedents allow French and Canadian courts to adjudicate cases where hateful materials that give rise to causes of action are originally posted on American college servers, far outside the countries' geographic boundaries.

German courts have likewise determined that they have the authority to render judgments against hateful messages that can be accessed in that country even though they were posted extraterritorially. Hate speech originating on U.S. campuses may therefore be subject to German criminal penalties. Germany's highest criminal and civil court, the Federal Court of Justice, recently found that Gerald Fredrick Töben, the founder of the Adelaide Institute, could be imprisoned once he arrived in Germany even though his Holocaust denial was written on and posted from a computer located outside of Germany.²⁰⁶ The court established that it had jurisdiction over the case because Töben had made his statements easily accessible to Germans through the Internet.²⁰⁷ Töben's web posting violated German criminal law because, as the court found, his distorted statements about history disturbed the peace and contaminated the political climate by making light of Nazi atrocities.²⁰⁸ The court sentenced him to ten months in prison.²⁰⁹ More recently, in July 2009, Germany's Justice

²⁰² Gregory S. Cooper, *A Tangled Web We Weave: Enforcing International Speech Restrictions in an Online World*, 8 U. PITT. J. TECH. L. & POL'Y 1, 2 & n.10 (2007).

²⁰³ Russell L. Weaver et al., *Holocaust Denial and Governmentally Declared "Truth": French and American Perspectives*, 41 TEX. TECH L. REV. 495, 499 (2009).

²⁰⁴ Maria Luisa Fernández Esteban, *The Internet: A New Horizon for Race Hatred*, in DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM 77, 103 (Sandra Fredman ed., 2001). More recently the French Interior Minister announced that government negotiators had developed a plan for French ISPs to filter sites containing racist speech. Bambauer, *supra* note 197, at 401.

²⁰⁵ Georgios I. Zekos, *State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction*, 15 INT'L J.L. & INFO. TECH. 1, 36 (2007).

²⁰⁶ Bundesgerichtshof [BGH] [Federal Court of Justice], Dec. 12, 2000, docket number 1 StR 184/00 (Ger.), available at <http://www.hrr-strafrecht.de/hrr/1/00/1-184-00.pdf>. Gerald Fredrick Töben was a South Australian who set up a Holocaust denial organization known as the Adelaide Institute. Emma Alberici, *Alleged Australian Holocaust Denier Arrested* (Austral. Broad. Corp. television broadcast Oct. 1, 2008).

²⁰⁷ Yulia A. Timofeeva, *Worldwide Prescriptive Jurisdiction in Internet Content Controversies: A Comparative Analysis*, 20 CONN. J. INT'L L. 199, 206-07 (2005).

²⁰⁸ *Id.* at 206.

²⁰⁹ Terri Judd, *Holocaust Revisionist Held at Heathrow*, INDEPENDENT (London), Oct. 2, 2008, at 14. In 2008, Scotland Yard's extradition unit arrested Töben in London at the Heathrow airport on a European Union arrest warrant that German authorities had issued. *Id.* A British district court judge

Minister urged foreign ISPs to enforce their policies against spreading far-right ideologies.²¹⁰

The applicability of German, Canadian, and French hate speech laws to extraterritorial defendants means that litigants in those countries can effectively sue people who post hate speech on computers housed at American universities. Even though Germany, Canada, and France will apply their own laws to those cases, enforcement of judgments against the purveyors of hate speech will prove difficult. The United States' free speech doctrine is more libertarian, placing greater emphasis on expressive autonomy than many European nations, and thus raising substantive recovery problems.²¹¹ Ordinarily, U.S. courts enforce foreign judgments, but they will not do so where the original judgment violates a party's U.S. constitutional rights.²¹² A potential international comity dispute with the French court was recently avoided when Yahoo! sought a declaratory judgment from a federal court to prevent the enforcement of the judgment of the Tribunal de Grande Instance de Paris, claiming that enforcement of its judgment would violate the company's First Amendment rights.²¹³ While the district court had entered a summary judgment for Yahoo!, the Ninth Circuit reversed en banc, ultimately dismissing the case for lack of ripeness, thereby avoiding the First Amendment and due process issues.²¹⁴

ruled the warrant to be invalid and ordered Töben's release. "*Holocaust Denier*" Wins Fight Against Extradition, DAILY MAIL (London), Oct. 30, 2008, at 43.

²¹⁰ Germany: Ban Neo-Nazi Sites from Abroad, JERUSALEM POST, June 9, 2010, available at <http://www.jpost.com/Home/Article.aspx?id=148187>. The German Multimedia Law punishes ISPs that publish their own hate speech, however, it does not hold ISPs liable for "hate speech posted by third parties unless 'they have knowledge of such content and blocking its use is both technically possible and can be reasonably expected.'" Courtney Macavinta, *U.S. Weighs German ISP Law*, CNET NEWS (July 7, 1997, 6:25 PM), http://news.cnet.com/U.S.-weighs-German-ISP-law/2100-1033_3-201212.html; see also Justus Reid Weiner, *Referral of Iranian President Mahmoud Ahmadinejad and Iran to the United Nations for Incitement to Commit Genocide and Other Charges*, 3 INT'L J. PUNISHMENT & SENT'G 1, 17–18 n.100 (2007) ("Decisions by the German courts have prompted ISPs to block access to sites containing hate speech or symbols of hate speech."). Germany's approach has not only been passive, the country's justice officials have also threatened ISP companies, like U.S.-based CompuServe or German Webcom, with prosecution for failing to self-police their services for hate speech. PETER JEPSON, TACKLING MILITANT RACISM 131 (2003); Shamoil Shipchandler, Note, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 445–46 (2000).

²¹¹ See Tsesis, *Boundaries*, *supra* note 82, at 160 ("United States free speech jurisprudence is anomalous. . . . [H]ere in the U.S. . . . intolerance and persecution can exist alongside free speech.").

²¹² See, e.g., *Telnikoff v. Matusevitch*, 702 A.2d 230, 249 (Md. 1997) (finding that enforcement of a foreign defamation judgment would have been contrary to public policy); *Abdullah v. Sheridan Square Press, Inc.*, No. 93 Civ. 2515 (LLS), 1994 WL 419847, at *1 (S.D.N.Y. May 4, 1994) (dismissing a cause of action because establishment of a claim under British defamation law would run afoul of the defendants' First Amendment rights).

²¹³ *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 433 F.3d 1199, 1201 (9th Cir. 2006) (per curiam); see also *id.* at 1220 ("[T]he harm to First Amendment interests—if such harm exists at all—may be nowhere near as great as Yahoo! would have us believe.").

²¹⁴ *Id.* at 1201; see also *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisemitisme*, 379 F.3d 1120, 1126 (9th Cir. 2004) (asserting that because it benefitted financially from its commercial dealings in France, "Yahoo! cannot expect both to benefit from the fact that its content may be viewed around

Even an unenforceable victory, however, can have communicative value, deterring further publication on the Internet of hate materials on college computers that degrade protected groups. While Yahoo! disputed the order, it independently began blocking the sale of Nazi paraphernalia to French users of its popular search engine.²¹⁵

German penal provisions are part of a democratic system of governance that provides a constitutional guarantee to enjoy “the right freely to express and disseminate” ideas.²¹⁶ To further underscore the importance of free speech, the German Constitution, known as the Basic Law, prohibits censorship.²¹⁷ On the other hand, restraints on symbols that degrade historically vulnerable groups do not constitute an intrusion on democratically protected freedoms.²¹⁸ Universities in Germany, in addition to other components of the country’s social apparatus, are responsible for preventing discourse from being used to instigate the mass violence that was part and parcel of the Nazi era.²¹⁹ While German history is unique and its legal sensibilities are particularly heightened to any racist communications that are likely to stoke popular antisemitism, the United States’ history with slavery and Jim Crow laws also points to the need for restrictions on the use of intimidating forms of hatred.²²⁰

European and Canadian speech laws emphasize the government’s role in prosecuting violations of human dignity. The first Article of the German Basic Law, for example, imposes a national obligation to “respect and protect” “[h]uman dignity.”²²¹ A scholar pointed out that Germany’s “balancing [of] human dignity and freedom of expression” is more attuned with Western democracies than “America’s robust free speech protection.”²²²

In the United States, the *Virginia v. Black* model recognizes the state’s power to enforce criminal hate speech laws that prohibit intentional

the world and to be shielded from the resulting costs—one of which is that, if Yahoo! violates the speech laws of another nation, it must wait for the foreign litigants to come to the United States to enforce the judgment before its First Amendment claim may be heard by a U.S. court”), *vacated*, 399 F.3d 1010 (9th Cir. 2005).

²¹⁵ Orin S. Kerr, *Enforcing Law Online*, 74 U. CHI. L. REV. 745, 747 (2007).

²¹⁶ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 5(1) (Ger.), *translated in* BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 14 (Christian Tomuschat & David P. Currie trans., 2008) [hereinafter BASIC LAW], *available at* <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Antonio Brown, *Academic Freedom in Western Europe: Right or Privilege?*, in *ACADEMIC FREEDOM AT THE DAWN OF A NEW CENTURY* 115, 124 (Evan Gerstmann & Matthew J. Streb eds., 2006).

²²⁰ See TESIS, *DESTRUCTIVE MESSAGES*, *supra* note 26, at 11, 25–28, 39–48 (discussing the centrality of hate speech in Nazi Germany and the antebellum American South).

²²¹ GG, BGBl. I art. 1(1), *translated in* BASIC LAW, *supra* note 216, at 13.

²²² Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 988 (2007).

intimidation; however, *R.A.V.*'s stricture against criminalizing simply offensive speech would likely render unconstitutional any dignity protection statutes.²²³ Despite the difference between the American and German doctrinal treatments—with the United States being less inclined to follow international standards for curbing genocidal and deprecatory statements—dignity is by no means incompatible with our case law. But in America dignity is protected by civil statutes, rather than by criminal laws as it is in Europe. The Supreme Court in the seminal case on private defamation explicitly stated that defamation law is meant to safeguard “our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”²²⁴

Germany recognizes that disparaging remarks based on race and ethnicity are social offenses, not merely personal affronts. To that end, a German criminal provision prohibits the distribution of any “written materials . . . which describe cruel or otherwise inhuman acts of violence against human . . . beings in a manner expressing glorification or which downplays such acts of violence or which represents the cruel or inhuman aspects of the event in a manner which violates human dignity.”²²⁵

German law has much to teach about democratic standards of governance that do not interfere with core principles of free speech. Its law prohibits: (1) incitement to hate directed at a segment of the population; (2) advocacy to take “violent or arbitrary measures against them”;²²⁶ and (3) insults maliciously exposing others to contempt.²²⁷ In finding these standards to be constitutional, the German Constitutional Court has balanced constitutional provisions against individual liberties in a way that also makes sense in university settings. The state government in Munich brought an action under the Public Assembly Act against Holocaust denier David Irving for a speech he gave before the National Democratic Party of Germany.²²⁸ The Court found the law did not violate Basic Law Article 5(1)'s protection for the open expression of public opinions.²²⁹ Its decision differentiated between opinions, which are subjective, unverifiable statements, and statements of fact. Factually false statements about the Holocaust enjoy no constitutional or statutory protections in Germany because they are “untrue and cause[] harm to the

²²³ See *supra* notes 134–39 and accompanying text.

²²⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

²²⁵ STRAFGESETZBUCH [STGB] [PENAL CODE], Dec. 2007, § 131(1) (Ger.), translated in THE GERMAN CRIMINAL CODE: A MODERN ENGLISH TRANSLATION 116 (Michael Bohlander trans., 2008).

²²⁶ *Id.* § 130(1)(1).

²²⁷ *Id.* § 130(1)(2).

²²⁸ DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 382–83 (2d ed. 1997).

²²⁹ *Id.* at 383.

reputation and dignity of Holocaust survivors and their families.”²³⁰ Holocaust denial insults Jews by disparaging their sincerity and veracity, making them the object of opprobrium.²³¹

A look at a few other cases will demonstrate how Germany differentiates a fact from an opinion. A 1994 case that was also decided by the Constitutional Court established that the right to free speech does not protect individuals propagating the claim that the Auschwitz concentration camp never existed.²³² A Berlin state court convicted a German neo-Nazi leader in 1995 for also teaching that Auschwitz was a lie because the claim spread “racial hatred and denigrat[ed] the state.”²³³ Contrast these two cases with the recitation of the opinion that Germany was not at fault for starting World War II, which is a protected form of speech.²³⁴

Like Germany, England is more in accord with international understandings about foreseeable dangers hate speech poses to pluralistic order than is the United States.²³⁵ An English statute defines the spread of racial hatred to include disparagements about a person’s color, race, nationality, and ethnicity.²³⁶ To establish a *prima facie* case, a British prosecutor must prove that the defendant either meant for the abusive, threatening, or insulting words “to stir up racial hatred” or that “having regard to all the circumstances racial hatred is likely to be stirred up thereby.”²³⁷ Violations can occur in either public or private places, but not where the statements are made in a dwelling to others assembled there.²³⁸ In 2006, an additional provision was added to the Act prohibiting the

²³⁰ RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH* 127 (2006).

²³¹ KOMMERS, *supra* note 228, at 386.

²³² James J. Black, *Free Speech & the Internet: The Inevitable Move Toward Government Regulation*, RICH. J.L. & TECH., Winter 1997, at ¶¶ 53, 56, <http://jolt.richmond.edu/v4i2/black.html>.

²³³ Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 76 (1997); see also Eric Stein, *History Against Free Speech: The New German Law Against the “Auschwitz”—and Other—“Lies,”* 85 MICH. L. REV. 277, 289–93 (1986) (discussing the German criminal code articles associated with the “Auschwitz lie,” including a synopsis of German federal supreme court case law from 1960 to 1985).

²³⁴ KOMMERS, *supra* note 228, at 387. An analysis of German constitutional law cases can be found in Rainer Hofmann, *Incitement to National and Racial Hatred: The Legal Situation in Germany*, in *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION* 159, 167–70 (Sandra Coliver ed., 1992).

²³⁵ This is not to say, however, that the United Kingdom’s hate speech standards are identical to those found in international protocols. The United Kingdom on at least two occasions asserted some reservations when it ratified the International Covenant of Civil and Political Rights and the International Covenant on the Elimination of All Forms of Racial Discrimination (“CERD”) by creating a criminal offense rather than simply prohibiting by law, as the CERD requires, and requiring a likelihood of criminal conduct rather than simply vilification of racial groups. FRANCESCA KLUG ET AL., *THE THREE PILLARS OF LIBERTY: POLITICAL RIGHTS AND FREEDOMS IN THE UNITED KINGDOM* 175–76 (1996).

²³⁶ Public Order Act, 1986, c. 64, § 17 (U.K.), available at http://opsi.gov.uk/acts/acts1986/pdf/ukpga_19860064_en.pdf.

²³⁷ *Id.* § 18(1).

²³⁸ *Id.* § 18(2).

spread of religious hatred.²³⁹ This is not to say that all religious criticism is culpable. To the contrary, the amendment explicitly protects the expression of “antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents.”²⁴⁰

ISPs are required to contact the police National Community Tension Team; failure to do so and violation of the ISPs’ own terms of operation can result in their administrative removal.²⁴¹ In another indication of progressive policymaking aimed at derogatory stereotyping, under the Criminal Justice and Immigration Act of 2008, sexual orientation is now a protected category.²⁴²

Purposeful and negligent disparagements fit the British criminal definition of hate speech. This differs from the United States, where only intentionally intimidating speech can be criminally punished.²⁴³ That is not to say that the negligent-fault conception of speech is wholly distinct from U.S. law, where civil penalties can attach for publicly spreading false defamation.²⁴⁴ In England and the United States, a university can punish

²³⁹ Racial and Religious Hatred Act, 2006, c. 1, §§ 29A–29B (U.K.), available at <http://www.legislation.gov.uk/ukpga/2006/1/enacted>. The Parliamentary committee that debated the bill determined that it was needed to end the anomaly of some religious groups—like Jews and Sikhs—being protected under the Public Order Act of 1986 while other religious groups were not. June 29, 2005, PARL. DEB., H.C. (2005), 3–4 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200506/cmstand/e/st050628/am/50628s01.htm>. The British Home Office provided the following, non-inclusive list of religions protected under the Act: Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, the Baha’i faith, Zoroastrianism, and Jainism. Home Office Circular 029/2007, Nat’l Archives (U.K), The Racial and Religious Hatred Act 2006 ¶ 9 (Sept. 5, 2007), <http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2007/029-2007/index.html>.

²⁴⁰ Racial and Religious Hatred Act, c. 1, § 29J. The Provision, as the Home Office described, was designed to prevent intrusion on free speech while targeting threatening religious words and materials intended to stir religious hatred. Home Office Circular 029/2007, *supra* note 239, at ¶¶ 2–19. The 2006 Act does not include blasphemy. Lorenzo Zucca, *The Crisis of the Secular State—A Reply to Professor Sajó*, 7 INT’L J. CONST. L. 494, 496–98 (2009). Section 29J is designed to protect statements made against a religion that are not meant to intimidate or put someone in fear of harm. Gary Slapper, *The Legality of Assaulting Ideas*, 71 J. CRIM. L. (U.K.) 279, 280–81 (2007).

²⁴¹ Home Office Circular 029/2007, *supra* note 239, at ¶ 22. Under the Public Order Act of 1986, the ISP can be held liable even if it lacked racist or religious animus intent to distribute written material, as long as “‘having regard to all the circumstances’” the publication was likely to result in legally cognizable hatred. Michael Horn, *Racism and Cyber-Law*, 153 NEW L.J. (U.K.) 777, 778 (2003). Where, however, the ISP is a “‘mere conduit,’” having no knowledge of the material’s illegal content, it will avoid liability. *Id.*; see also Julia Hörnle, *E-Collections & Legal Liability*, UNIV. OF LONDON, <http://www.jisclegal.ac.uk/Portals/12/Documents/PDFs/JHornle.pdf> (last visited Nov. 4, 2010). Once the ISP becomes aware of the material, it must expeditiously take it down from its server. Horn, *supra*, at 778; EUROPEAN COMM’N AGAINST RACISM AND INTOLERANCE, COUNCIL OF EUR., LEGAL INSTRUMENTS TO COMBAT RACISM ON THE INTERNET 46 (2000), [http://www.coe.int/t/dghl/monitoring/ecri/legal_research/combata_racism_on_internet/CRI\(2000\)27.pdf](http://www.coe.int/t/dghl/monitoring/ecri/legal_research/combata_racism_on_internet/CRI(2000)27.pdf).

²⁴² Criminal Justice and Immigration Act, 2008, c. 4, § 74, sch. 16(a) (U.K.), available at http://www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080004_en.pdf.

²⁴³ See *Virginia v. Black*, 538 U.S. 343, 362 (2003) (suggesting that a state may regulate speech that carries with it an intent to intimidate).

²⁴⁴ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (“The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . .”);

defamatory comments made in either a public dormitory meeting or on a college green. In other words, universities can impose various disciplinary penalties without involving the criminal system.

Australia is another member of the British Commonwealth with hate speech laws. Its constitution does not explicitly mention the fundamental value of free speech, but its Supreme Court has long recognized it to be an implicit constitutional right.²⁴⁵ An Australian appellate court found that expressions meant to insult, humiliate, or intimidate others convey a realistic risk of harming the democratic society that places a high value on tolerance and political pluralism.²⁴⁶ The recognition of insults as outside the sphere of free speech goes beyond the U.S. precedents on hateful incitements.²⁴⁷ While university hate speech codes that prohibit the use of insults and humiliating statements are unlikely to survive U.S. judicial scrutiny because they would likely run afoul of the holding either in *R.A.V.* or in *Black*, Australia's promotion of tolerance and pluralism is entirely compatible with American values. Universities can promote collegiality on campuses by instituting anti-intimidation and group defamation provisions without running afoul of the First Amendment.

Australia's approach to instigative speech is consistent with that of European countries that have made the legislative connection between instigative speech and the instigation of harmful conduct. They have differentiated between instigation to commit ordinary criminal violence and the expression of ideas or display of signs attacking vulnerable groups. Denmark's criminal code prohibits the intentional dissemination of statements relating information that threatens, insults, or degrades a group

Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (finding that "[l]ibelous utterances [are] not . . . within the area of constitutionally protected speech").

²⁴⁵ See *Lange v. Austl. Broad. Corp.*, 189 C.L.R. 520, 523–24 (1997) (Austl.); *Austl. Communist Party v. Commonwealth*, 83 C.L.R. 1, 262–63 (1951) (Austl.); Kathleen E. Foley, *Australian Judicial Review*, 6 WASH. U. GLOB. STUD. L. REV. 281, 313 (2007) (noting that the implied freedom of speech "is now an established part of Australia's constitutional doctrine").

²⁴⁶ *Bropho v. Human Rights & Equal Opportunity Comm'n*, 204 A.L.R. 761, ¶ 65 (2004). Anti-vilification laws in Australia were passed at differing times in various states. For instance, in 1991, Queensland passed an anti-discrimination law against the advocacy of racial and religious hatred and, in 2001, Victoria passed a racial and religious tolerance law. Mandy Tibbey, *Developments in Anti-Vilification Law*, 21 AUSTL. B. REV. 204, 204 (2001). The Victoria Act requires that the speaker intend for the vilification to be heard by a third party, not only by the individual at whom it is directed. Anna Chapman & Kathleen Kelly, *Australian Anti-Vilification Law: A Discussion of the Public/Private Divide and the Work Relations Context*, 27 SYDNEY L. REV. 203, 204 (2005). Vilification is understood to include "hate-speech, racist gestures or graffiti, racist material posted on Internet sites, or through workplace intranet or email messaging systems, the distribution of pamphlets or stickers and the wearing of clothing, insignia or badges with racist or derogatory religious meaning." Anna Chapman, *New Vilification Laws and Victorian and Queensland Work Relationships*, 15 AUSTL. J. LABOUR L. 277, 278 (2002).

²⁴⁷ The Australian balance between protecting free speech and prohibiting "racial vilification and hatred" is directly linked to international obligations under the Universal Declaration of Human Rights to the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Racial Discrimination. *Bropho*, 204 A.L.R. at ¶¶ 57–62.

of persons “on account of their race, colour, national or ethnic origin, belief or sexual orientation.”²⁴⁸ Apparently, in recognition of the importance free speech plays in Denmark’s culture, the Danish Director of Public Prosecutions has decided that the provisions of that law should be read narrowly to prevent any interference with democratic institutions.²⁴⁹ In practice, this cautious method means the law applies only when someone “‘might provoke in someone serious fear for his own or other persons’ lives, health or well-being, [or] threatens to commit a punishable act.”²⁵⁰

The rationale behind the Danish law has striking similarity to the U.S. Supreme Court’s holding in *Black*.²⁵¹ One Danish case arose from a cross burning incident “in the road outside a house” that the instigators “knew was inhabited by Turks.”²⁵² This was reminiscent of the public cross burning that two of the three defendants in *Black* had perpetrated to intimidate a neighborhood resident.²⁵³ As in the U.S. case, the High Court for the Eastern Division of Denmark convicted the defendants because they chose the symbol for its historically intimidating message.²⁵⁴

This case is distinct from circumstances involving the expression of the opinion that Danish and American universities cannot prohibit hate speech without infringing on individuals’ deep sense of freedom and self-determination. Protected opinion was involved in complaints from the Muslim Danish community regarding twelve cartoon images criticizing radical Islam.²⁵⁵ The Director of Public Prosecutions for Denmark decided

²⁴⁸ Christoffer Badse, The Test of Necessity in a European Context: The Case of Denmark 7, <http://www.badse.dk/Freedom%20of%20Expression%20-%20The%20Test%20of%20Necessity.pdf>; see also Comm. on the Elimination of Racial Discrimination, Rep. on its 68th Sess., Feb. 20–Mar. 10, 2006, U.N. Doc. CERD/C/68/D/34/2004, at n.1 (Mar. 15, 2006) [hereinafter CERD, Rep. on its 68th Sess.], available at <http://www.unhchr.ch/tbs/doc.nsf/0/6715d3bdbeff3c0dc125714d004f62e0?Opendocument> (translating Section 266(b)).

²⁴⁹ Memorandum from Henning Fode, Dir. of Pub. Prosecutions, Decision on Possible Criminal Proceedings in the Case of Jyllands-Posten’s Article “The Face of Muhammed” 8 (Mar. 15, 2006), available at http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf.

²⁵⁰ Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 36, U.N. Doc. CERD/C/280/Add.1 (May 3, 1995) [hereinafter CERD, *Consideration of Reports*], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/b95ac4e38d06ddd58025654e005c7c9b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b95ac4e38d06ddd58025654e005c7c9b?Opendocument) (quoting STRAFPELOV [PENAL CODE] § 266(b) (Den.)). This source is particularly helpful because it assesses the provisions of § 266(b) and three convictions for violating it. CERD, Rep. on its 68th Sess., *supra* note 248, at ¶¶ 32–36, 48–55.

²⁵¹ See *supra* Part II.B.

²⁵² CERD, *Consideration of Reports*, *supra* note 250, at ¶ 56.

²⁵³ *Virginia v. Black*, 538 U.S. 343, 350 (2003).

²⁵⁴ The Eastern Division of the High Court held that: “Under such circumstances, the High Court found it indisputable that the act involved a threat, an insult or a degradation of the inhabitants of the house on account of their ethnic origin and that the defendants were aware of this, and of the fact that their statement would be disseminated to a wide circle; the Court consequently found them guilty.” CERD, *Consideration of Reports*, *supra* note 250, at ¶ 56.

²⁵⁵ See STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 181–82 (2008) (suggesting that, despite charges that the cartoons amounted to hate speech, such charges were unfounded, and that

not to proceed with criminal charges against the newspaper, presumably because there was no indication that they were extremely derogatory or posed any serious danger to the well-being of any group.²⁵⁶ Similarly, to avoid running afoul of the First Amendment, a university community could only prosecute intimidating statements.

Finland is another country that honors free expression,²⁵⁷ but its law nevertheless criminalizes the use of racial, ethnic, and religious threats, slanders, and insults.²⁵⁸ An author and two newspaper editors were fined in 2007 under Finland's hate speech law for antisemitic remarks made in a published letter.²⁵⁹

The Swedish Constitution explicitly guarantees all citizens the rights "publicly to express [their] thoughts, opinions and sentiments, and in general to communicate information on any subject whatsoever on sound radio, television and certain like transmissions, films, video recordings, sound recordings and other technical recordings."²⁶⁰ A provision of the Swedish Penal Code, nevertheless, punishes anyone for spreading

"public discourse may not be restricted merely because it fails to conform to the religious principles of some members of the society"). The cartoons were various. They included (1) an image of Muhammad holding a walking stick trailed by a donkey laden with goods; (2) a depiction of Muhammad with a crescent moon halo made to look like satanic horns; (3) a caricature of his face with a crescent moon around it; (4) a man holding a knife with a sinister look and flanked by two women in burqas; (5) a drawing of a man standing in front of heaven saying, "Stop, stop, we have run out of virgins," to suicide bombers; (6) a drawing mocking the paper in which the comics were published, with a school boy standing in front of a blackboard with the Arabic words, "'Jyllands-Posten's journalists are a bunch of reactionary provocateurs'"; (7) a caricature of an artist at a drawing table hard at work drawing Muhammad, with sweat dripping from his brow and looking over his shoulder in fear; (8) a lineup of various men in turbans, one with a complete halo around it, and a man trying to identify them, but saying he cannot tell them apart; (9) an abstract image with the caption, when translated: "Prophet you crazy bloke! Keeping women under yoke[!]" (10) a drawing of a man holding his hand to stop two sword- and bomb-wielding characters, saying "[r]elax guys, it's just a drawing made by some infidel South Jutlander"; (11) a drawing of Muhammad in a turban containing a bomb; and (12) a thin-necked character with an orange in his turban with the words "PR stunt." *Danish Muslim Cartoons*, OUTSIDE THE BELTWAY, http://www.outsidethebeltway.com/danish_muslim_cartoons/ (last visited Nov. 4, 2010); *Row Deepens over Danish Cartoons*, NONE OF THE ABOVE (Feb. 10, 2006), http://steelurman.typepad.com/thesteeldeal/2006/02/allah_cartoons_.html.

²⁵⁶ See Edwin Jacobs, *Cartoon Case: Denmark Will Not Prosecute*, BRUSSELS J., Mar. 16, 2006, available at <http://www.brusselsjournal.com/node/915> (reporting that the Director upheld an earlier decision that the drawings received free speech protection, and noting the statements of a Danish prosecutor that expressions subjecting groups of persons to scorn and degradation on account of their religion or other characteristics did not constitute protected speech).

²⁵⁷ CONST. ch. 2. § 12 (Fin.), available at <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>.

²⁵⁸ PENAL CODE ch. 11, § 8 (Fin.), available at <http://www.finlex.fi/pdf/saadkaan/E8890039.PDF>. Actionable statements can be made "verbally, in writing, by illustration or by gestures." Lot Klo, Mikko Ellilä, *Ethnic Agitation, Preliminary Investigation*, LAIVA ON TÄYNNÄ (Apr. 5, 2007, 7:02 PM), <http://laivaontaynna.blogspot.com/search/label/english>.

²⁵⁹ FREEDOM HOUSE, FREEDOM IN THE WORLD 2008: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 257 (Arch Puddington et al. eds., 2008); *Finland*, U.S. DEP'T OF STATE, § 2(c) (Mar. 11, 2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100558.htm>.

²⁶⁰ REGERINGSFORMEN [RF] [CONSTITUTION] 1:1 (Swed.), available at http://www.riksdagen.se/templates/R_PageExtended____6066.aspx. An English translation of the Constitution may be found at http://www.riksdagen.se/templates/R_Page____6316.aspx.

“statements or communication[s]” that “threaten[] or express[] contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin or religious belief.”²⁶¹ A 2003 amendment to the law also criminalizes incitement against homosexuals.²⁶² The Swedish Supreme Court, in a 2005 decision, upheld this law. The opinion distinguished between “objective criticism of certain groups,” which the country’s constitution protects, and statements triggering criminal liability: “Naturally, the principles of freedom of speech and the right to criticize may not be used to protect statements expressing contempt for a group of people, for example, because they are of a certain nationality and hence are inferior.”²⁶³ Government restraints must

never exceed that which is necessary in light of the purpose for which it is created, and may not go so far as to constitute a threat against the free exchange of opinions, which is one of the foundations of democracy, and may not be done only on the grounds of political, religious, cultural or other such philosophy.²⁶⁴

The free exchange of even harsh criticism of groups on campuses and elsewhere is protected as long as it does not overstep the bounds of “objective and responsible discourse regarding the group in question,” but intentionally threatening messages or those expressed in contempt of the group are outside the scope of fundamental protections.²⁶⁵ The true threats provision of the Swedish decision is compatible with U.S. Supreme Court jurisprudence.²⁶⁶

As in the United States and Sweden, merely opinionated racism or ethnocentrism is not actionable in Norway. While access to information is “a cornerstone of Norwegian democracy,”²⁶⁷ this principle is not a bar against hate speech legislation. Norwegian Penal Code Section 135a prohibits the intentional public use of racist, xenophobic, ethnocentric, and

²⁶¹ BROTTSBALKEN [BRB] [CRIMINAL CODE] 16:8 (Swed.), available at <http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>.

²⁶² Prosecutor Gen. v. Green, Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2005-11-29 p. 4 B1050-05 (Swed.), available at http://www.domstol.se/Domstolar/hogstadomstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf.

²⁶³ *Id.*

²⁶⁴ *Id.* at p. 10. The European Commission Against Racism and Intolerance has recommended that Sweden can continue guarding free speech while prosecuting and punishing racist, xenophobic, and antisemitic speech on the Internet. EUROPEAN COMM’N AGAINST RACISM & INTOLERANCE, COUNCIL OF EUR., THIRD REPORT ON SWEDEN 32 (2004), http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/SWE-CbC-III-2005-26-ENG.pdf.

²⁶⁵ Green, Nytt Juridiskt Arkiv 2005-11-29, at p. 6.

²⁶⁶ See *Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (“[A] state, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate.”).

²⁶⁷ Kulturdepartementet (Ministry of Culture), Media in Norway (Aug. 31, 1996), http://www.regjeringen.no/nb/dep/kkd/dok/veiledninger_brosjyrer/1996/Media-in-Norway.html?id=419207.

homophobic speech to threaten or insult others or to subject them to hatred.²⁶⁸

This comparative analysis is meant to demonstrate that many democratic countries have criminal statutes punishing hate speech. These countries have found that pluralism is furthered by protecting the dignitary rights of targeted groups.

V. FORMULATING CONSTITUTIONAL COLLEGE SPEECH CODES

The reasoning in *Virginia v. Black*, which recognized states' power to prohibit intimidating cross burning, resembled international policies on hate speech more than any other Supreme Court decision in this area of law. The next case to reach the Supreme Court on the subject might expressly reflect on the lessons of foreign jurisprudence and how to protect free expression while prohibiting violent, group-based agitation. In *Black*, the Court struck a delicate balance between the right of self-expression and the social dangers of true threats. Integrity to the principles of the First Amendment involves respecting self-expression while preventing intimidation. Intellectual freedom is particularly critical to a university's mission to preserve an open educational atmosphere, but threatening discourse reviling particular groups of students detracts from their ability to participate in campus activities. Hateful intimidation is particularly incompatible with the university's role because it creates an insecure environment that detracts from students' sense of safety.²⁶⁹ Regardless of

²⁶⁸ STRAFFELODN [PENAL CODE] 13:135a (Nor.). A translation of section 135a is available at <http://www.legislationline.org/download/action/download/id/1690/file/c428fe3723f10dcbcf983ed59145.htm/preview>. See EUROPEAN COMM'N AGAINST RACISM & INTOLERANCE, COUNCIL OF EUR., THIRD REPORT ON NORWAY (2004), at 27, <http://www.unhcr.org/refworld/docid/46efa2e52d.html> (discussing Norway's intention to establish "clear guidelines on how to carry out investigations in cases brought under Article 135a"); Gro Lindstad, *Norway*, INT'L GAY AND LESBIAN HUM. RIGHTS COMM'N, at 133, 134 (2003), <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/53-1.pdf> (discussing section 135a as it pertains to hate speech directed at gays and lesbians); Royal Ministry of Foreign Affairs, Communication from Norway to the Committee on the Elimination of Racial Discrimination Regarding the View in Communication No. 30/2003—The Jewish Communities in Oslo and Trondheim et al vs. Norway 2–3 (Feb. 21, 2006), http://www.regjeringen.no/upload/kilde/jd/prm/2006/0014/ddd/pdfv/273990-cerd_relynorway.pdf (describing how the Norwegian government has strengthened section 135a since 2004, providing the law with more effective provisions against racist and ethnocentric speech). The applicable scienter standard for section 135a is found in section 40 of the Penal Code. STRAFFELODN [PENAL CODE] 3:40 (Nor.). A translation of Section 40 is available at <http://www.legislationline.org/download/action/download/id/1690/file/c428fe3723f10dcbcf983ed59145.htm/preview>.

²⁶⁹ The risk of intimidation is also high in grammar and high schools. Several state and local laws prohibit it in public schools because of how much harassment detracts from the educational environment. See 51 D.C. Reg. 3202 (2004) (finding that intimidation harms the educational environment); MD. CODE ANN., EDUC. § 7-424 (LexisNexis 2008) (requiring the Maryland Department of education to report occurrences of bullying, harassment, and intimidation creating a hostile educational environment); N.J. STAT. ANN. § 18A:37-14 (West 2010) (prohibiting intimidating acts based on "race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory handicap, or by any other distinguishing characteristic" on school property).

whether an individual displays a swastika, burns a cross, or delivers a dehumanizing speech in a dormitory corridor or at a campus commons, the alienating effect is the same. Those expressions of hatred are likely to instigate violence, alienate students, create deep racial and ethnic rifts, or make for a hostile learning environment. These expressions of hatred are very different than a piece of art without any advocacy component. The onus should be on the university's administration to prove that the charged statements did intimidate or advocate discrimination, violence, or exclusion. Parody, of course, would not fall under this definition since it enjoys First Amendment protections.²⁷⁰

In balancing the interests of intimidated individuals and persons wishing to express prejudiced opinions, the United States' free speech tradition provides public university officials with less latitude to punish group hatred than their administrative counterparts in countries like Canada, Germany, and England. American jurisprudence is nevertheless in accord with international findings that virulent forms of hateful expressions pose a threat to public safety. International norms and foreign laws on this subject suggest that hate speech is harmful to individuals as well as groups. The risk of leaving hate speech unchecked on campuses is that the targets of violent communications remain vulnerable to more harassment. Because targeted groups and individuals are often uncertain of their safety, they tend to be wary of pursuing the full breadth of available educational opportunities, trying to avoid locations and activities that might expose them to calumny or danger.

Black provides answers to most arguments put forth by opponents of hate speech regulations. Larry Alexander, for one, argues that hate speech is no more than verbal harm, conveying taunting ideas.²⁷¹ Suzanna Sherry is similarly dismissive of the gravity of harms flowing from hate speech. She argues that regulation of it is driven by a political agenda that is "designed to improve the virtue of an unvirtuous population."²⁷² She criticizes the use of university hate speech codes for paternalistically enforcing virtuous behavior rather than allowing students to be self-directed.²⁷³ John S. Greenup takes this argument one step further, arguing that university officials should grant organizations like the Ku Klux Klan access to university locations unless their activities pose overt threats.²⁷⁴ This perspective recognizes the risk of intimidation, but fails to assess

²⁷⁰ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (holding that a parody of Reverend Jerry Falwell was protected under the First Amendment from tort liability).

²⁷¹ Alexander, *supra* note 3, at 91.

²⁷² Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 936-37 (1991).

²⁷³ *Id.* at 943-44.

²⁷⁴ John S. Greenup, *The First Amendment: Does Hate Speech Deserve Protection?*, 34 J.L. & EDUC. 605, 612 (2005).

whether tolerating an avowed terrorist organization like the Ku Klux Klan on campus is threatening, divisive, and disruptive of teaching and learning.²⁷⁵

The notion that counterspeech will adequately combat group hatred and promote civil liberties, and is sufficient to maintain tolerance on campus, which Nadine Strossen and the ACLU have advanced,²⁷⁶ has been roundly rejected by the international community.²⁷⁷ The U.S. Supreme Court has now endorsed the consensus perspective on free speech policy. Just as with sexual harassment in the workplace, counterspeech is an inadequate remedy for the direct, intimidating attack of hate speech.²⁷⁸ Racism, chauvinism, ethnocentrism, and xenophobia are too deeply embedded in culture to be changed overnight. While public attitudes are being changed, hate speech continues to menace out-groups. Telling a university employee subject to racial or sexual coercion, racial degradation, or ethnic insults to simply respond to antagonists provides victims no legal redress but mere platitudes. Just as responding to comments in a hostile environment does not solve the problem of workplace harassment, neither does counterspeech decrease the risk posed by advocacy groups committed to carrying out a campus campaign of group intimidation, exclusion, and discrimination. Expecting students at public universities to simply talk things out and convince those who intimidate them of the fallacy of their threatening words and behaviors fails to provide a procedurally cognizable way of seeking legal redress. The mantra of more speech is based on libertarian faith that the world

²⁷⁵ See *Virginia v. Black*, 538 U.S. 343, 389 (2003) (Thomas, J., dissenting) (“To me, the majority’s brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods.”). Justice O’Connor’s opinion in *Black* actually sketches a history of the use of the burning cross for purposes other than intimidation. *Id.* at 365–66 (majority opinion). Her argument is weakest when it comes to the displays of terrorist groups, as these groups choose symbols to both menace and express their ideology, and far more convincing when it comes to using hate symbols for artistic depictions, as was the case with the film *Mississippi Burning*. *Id.* at 366. Even if a prosecutor must prove a cross burners’ frame of mind for burning a cross, the Klan’s use will invariably be linked to the organization’s history of persecuting opposition and minority groups. See DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* 272–73 (Duke Univ. Press 1987) (1965) (writing about how burning crosses would trigger melees); GLENN JEANSONNE & DAVID LUHRSEN, *A TIME OF PARADOX: AMERICA SINCE 1890*, at 107–09 (2006) (discussing the Klan and its use of burning crosses in the 1920s); Glenn Feldman, *Soft Opposition: Elite Acquiescence and Klan-Sponsored Terrorism in Alabama, 1946–1950*, 40 *HIST. J.* 753, 777 (1997) (discussing the Ku Klux Klan in post-World War II violence).

²⁷⁶ Strossen, *supra* note 101, at 562–64; see also Chemerinsky, *Unpleasant Speech*, *supra* note 5, at 772.

²⁷⁷ See *supra* Part III.

²⁷⁸ See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 421–22 (“[T]o the extent we allow verbal conduct creating a hostile working atmosphere, we thereby refuse to protect persons from certain forms of private racial and sexual discrimination. Conversely, to the extent that mere words can give rise to liability for employment discrimination, intentional infliction of emotional distress, or other causes of action, we acknowledge that an employer or co-worker can be punished for making such statements.”).

community discounted after it understood the effectiveness of antisemitic Nazi propaganda.²⁷⁹ It also elevates harassment and intimidation to an equal plane with dialogue. To the contrary, the former is a means of disengagement with its reviled object, while the latter is a form of mutual engagement between the interlocutors.

The potential harms are well illustrated by one of the most heinous cases of school hate speech. Dylan Klebold and Eric Harris revealed their murderous intentions, laced with neo-Nazi terms, before their gruesome attack against fellow students at Columbine High School.²⁸⁰ Had a hate speech policy been in place, school officials might have stopped them from carrying out their plans. The school did not take adequate notice of their wearing swastikas at school; writing essays about hatred, murder, and destruction; and presenting a class video project depicting their planned shooting spree.²⁸¹ Similarly, Jeff Weise went on a murderous rampage at his Red Lake, Minnesota, high school after extensive racial supremacist comments he expressed at school and on websites like www.nazi.org.²⁸²

Although not a hate speech case, the shooting spree at Virginia Polytechnic Institute and State University ("Virginia Tech") should be mentioned in this context because it demonstrates the real risk of administrative inaction. Before Seung Hui Cho killed thirty-two and injured many others, he had written a story for his college creative writing class depicting a young man killing fellow students before committing suicide.²⁸³ Even though the creative writing professor informed university officials of his concern about the violent nature of the composition, university officials decided not to intervene.²⁸⁴ It became obvious that

²⁷⁹ See *supra* text accompanying note 106.

²⁸⁰ Harris and Klebold regularly wore Nazi swastikas, spoke of committing acts of violence, and bragged about accumulating weapons. Tom Weber, *Values Key to Stopping Kid Violence*, BANGOR DAILY NEWS (Me.), Oct. 12, 2006, at B1. The young men also used Nazi salutes during bowling games. Jodi Wilgoren, *Eerie Parallels Are Seen to Shootings at Columbine*, N.Y. TIMES, Mar. 23, 2005, at A12. None of these things amounted to an imminent threat of conduct, but they could have been enough to prevent the young men's conduct under the *Virginia v. Black* model proposed in this Article. To prevent an attack similar to Harris and Klebold's, officials at one school recently reported a student who threatened to shoot students at an indefinite time in the future and collected white supremacist material, which led to his arrest. *High School Tragedy Averted*, ST. PETERSBURG TIMES (Fla.), Feb. 22, 2006, at 10A.

²⁸¹ *In Brief*, CHARLOTTE OBSERVER, Mar. 30, 2002, at 10A; Weber, *supra* note 280.

²⁸² Chris Maag & Sarah Sturmon, *Jeff Weise Lost His Parents but Had Close Friends*, TIME, Apr. 4, 2005, at 35. At school, other students often noticed Weise's drawings of the Nazi swastika and his conversations about guns. *Id.* He repeatedly described his desire to achieve ethnic purification, which was known by other students. *Id.*

²⁸³ Kristen Gelineau, *Earlier Warning Could Have Saved Lives at Va. Tech*, CENTRE DAILY TIMES (State College, Pa.), Aug. 30, 2007.

²⁸⁴ Sari Horwitz, *Paper by Cho Exhibits Disturbing Parallels to Shootings, Sources Say*, WASH. POST, Aug. 29, 2007, at A01. The lack of imminent harm, typically needed to prevent the expression of violent ideology, seems to have brought officials at Virginia Tech to avoid confrontation with Cho. Joseph Berger, *Deciding When Student Writing Crosses the Line*, N. Y. TIMES, May 2, 2007, at B7. Using the *Abrams v. United States* model, officials might have feared penalizing Cho; they failed to understand that his words were true threats and, therefore, were unprotected by the First Amendment.

something should have been done. If the facts are changed and a student writes a project publically extolling and advocating the eliminationist ideologies of the Nazi Party, the Khmer Rouge, the Ku Klux Klan, or radical Islamicism, or some such genocidal or violent organization, universities should have means of dealing with what may amount to realistic threats.

The Supreme Court regards the expressive use of symbols denoting violence to be potentially dangerous enough for states to pass laws prohibiting their public display without running afoul of the First Amendment.²⁸⁵ While solely preventing the display of hateful symbols will not put an end to racist attitudes,²⁸⁶ the state university can prohibit intimidating, true threats.²⁸⁷ The criteria courts use for identifying whether a communication poses a serious threat of unlawful violence assesses individuals' sense that the threatened violence will occur.²⁸⁸ The vitriolic speaker need not intend to commit the violence but only to intimidate listeners.²⁸⁹ A similar consideration should go into hate speech targeting an entire group, which threatens to harm any of its members.

Allowing students or faculty members to intimidate others through hate symbols or expressions favors the bigots' desire to advocate discrimination and violence while denying the victims' reasonable expectation of security while on campus.²⁹⁰ The constitutional importance of the First Amendment to democratic governance and self-assertion does not extend to menacing messages that tend to diminish the targeted group's sense of security and its ability to enjoy college commons areas and to attend university sponsored events.²⁹¹ Students and faculty members are more likely to think twice before going to hear the college orchestra or heading to the student union if it requires walking through an area where a

Creative writing teachers have concerns about limiting speech different than constitutional scholars that center on the squelching of intellectually creative impulses. April Simpson, *Writing Professors Debate Line Between Creativity, Peril*, BOS. GLOBE, Apr. 29, 2007, at B3.

²⁸⁵ See *Virginia v. Black*, 538 U.S. 343, 354 (2003) (associating Klan violence with burning crosses).

²⁸⁶ See Lee Ann Rabe, Note, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 J. MARSHALL L. REV. 205, 226 (2003) (claiming that one problem with hate speech regulations is that "[d]riving racist, sexist, and other discriminatory speech underground will not necessarily eliminate a student's thoughts and emotions").

²⁸⁷ See *Black*, 538 U.S. at 359 (per curiam) (reciting that the First Amendment permits a state to ban a "true threat" (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969))).

²⁸⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

²⁸⁹ See *Black*, 538 U.S. at 359–60 ("The speaker need not actually intend to carry out the threat.").

²⁹⁰ See Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1528 (2003) (arguing that the dangers hate speech poses should be based, in part, on the context in which they are uttered); Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 267–68 (2004) (stressing that hate crimes indicate the danger racist communications can pose to a community).

²⁹¹ See RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 207 (2004) (observing that the First Amendment may "d[o] little to protect" the targets of hate speech, who tend to "register[] their greatest advances when they act[] in defiance of the First Amendment").

cross has recently been burned, a swastika has been displayed, or a supremacist rally has taken place. Hate speakers are neither inviting intellectual debate and rejoinder nor seeking political dialogue. Theirs is a campaign of silencing through intimidation—something that threatens the university’s “marketplace of ideas” and is no benefit to educational interactions.²⁹² Academic freedom is not a license for harassment. Neither does hate speech further the pursuit for truth: calling Jews vermin, blacks apes, women whores, Native Americans savages, Tutsis cockroaches, or Mexicans lazy has nothing to do with truth. These derogatory statements are meant to exclude and stamp certain groups with the label of outsider to the university community. Derisive speech becomes academically punishable when it is meant to defame, intimidate, threaten, terrify, or instigate violence.

While *Black* provides college administrators with a good starting point for preventing the use of hate speech on campus, it does not go far enough in identifying expressive harms. Justice O’Connor’s view for the plurality that the First Amendment protects ideologically-driven cross burning not meant to intimidate fails to recognize the symbol’s intrinsically social and political connections to the Ku Klux Klan’s history of racial violence and white supremacy.²⁹³ The supremacist “statement of ideology,” which she distinguishes from “intimidation,” symbolizes an organization’s effort and willingness to segregate and to create racially-polarized forums.²⁹⁴ The same is true of other hate, exterminationist, or genocidal symbols—such as swastikas or Hamas flags²⁹⁵—that are displayed on campus to advance an ideological agenda. While the burning cross has a message specifically linked to group violence in the United States, the swastika

²⁹² See Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 792 (1992) (“Hate speech frequently silences its victims, who, more often than not, are those who are already heard from least.”).

²⁹³ See *Black*, 538 U.S. at 365–66 (stating that some persons who burn crosses may intend to express a racist ideology rather than to intimidate, or may neither intend to elaborate an ideology nor to intimidate).

²⁹⁴ I make this inference from the fact that Virginia’s cross burning statute had initially been enacted in 1952 to prevent the particularly virulent expression of support for Jim Crow laws. See Brief of Petitioner, *Virginia v. Black*, 538 U.S. 343 (2003) (No. 01-1107), 2002 WL 1885898 at *23–24 (describing the grounds for the Virginia legislature’s adoption of the state cross burning statute).

²⁹⁵ Hamas is a genocidal organization whose charter uses violent antisemitism, calling Jews “war mongers” who were behind all the world’s revolutions, World War I, World War II, and other catastrophic human events. The Hamas flag is just as ideologically violent as the swastika, relying on ancient Hadith to instigate mass murder:

[T]he Hamas has been looking forward to implement Allah’s promise whatever time it might take. The prophet [Muhammad], prayer and peace be upon him, said: The time [Judgment Day] will not come until Muslims will fight the Jews (and kill them); until the Jews hide behind rocks and trees, which will cry: O Muslim! there is a Jew hiding behind me, come on and kill him!

Hamas Charter (1988), THE JERUSALEM FUND (last visited Oct. 24, 2010), <http://www.thejerusalemfund.org/www.thejerusalemfund.org/carryover/documents/charter.html>. The presence of a Hamas flag signifies support for this genocidal plan.

symbolizes the worldwide effort to commit genocide against Jews and to subject other non-Aryans to subservience. Its threatening message is unambiguous. Further, many forms of hate speech are overtly dehumanizing, degrading, defamatory, and exclusionary.

In formulating a university hate speech code, it is important to distinguish between disciplinary measures available to administrators and punishments connected to criminal convictions. Educational penalties are designed to negatively impact a student's or faculty member's record, while criminal punishment is more onerous because it involves the curtailment of liberty and greater social stigma. Educators can assess penalties without following any rules of criminal procedure. The "beyond-a-reasonable-doubt" standard is meant to prevent mistaken deprivations of liberty, something that is unconnected to college sanctions.

Recognizing this contrast is important because the standard of proof for a criminal hate speech law, requiring proof beyond a reasonable doubt, is significantly more rigorous than what would be required for the censure of student hate speech. The O'Connor plurality's requirement in *Black* applies within the context of criminal liability, not civil penalties. If a college hate speech code prohibits the use of a prima facie presumption of a hate speaker's mental state, requiring a clear showing of intent, the regulation would have no problem passing the plurality requirement. College administrators are likely to have more latitude, however, because this standard of proof applies to criminal cases, not administrative codes like those that govern college campuses' activities.

The most closely analogous standard of civil liability comes from defamation law. In *Gertz v. Robert Welch, Inc.*, the Court established that a private plaintiff seeking to recover damages for defamation about a public matter must prove that the defendant acted negligently.²⁹⁶ That is, liability for defamation only attaches in cases of negligent publication.²⁹⁷ To withstand judicial review of adverse university decisions against hate speakers, campus codes should include at least a negligence fault component. This element must protect artistic and educational references

²⁹⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

²⁹⁷ See *id.* at 347 (setting out the standard for liability for the defamation of private parties). Defamation cases involving public figures conviction requires a showing of "actual malice." That standard can only be met if the speaker published a statement with the "knowledge that it was false" or the "reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). Following up with the definition, the Court explained that, unlike the reasonable prudence standard, "reckless disregard" occurs when a publisher actually "entertain[s] serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Unlike private defamation, which is predicated on an objective standard, public defamation examines the publisher's subjective state of mind. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). A plaintiff wishing to demonstrate the actual malice of a statement must present "clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984).

to words and symbols that might otherwise be punishable. The negligence standard is applicable to campus hate speech codes, which cover a greater set of expressions than the rather narrow tort of defamation. To avoid running afoul of the First Amendment, the campus complainant would need to demonstrate the speaker's negligence by a preponderance of the evidence.²⁹⁸ Such a standard would require proof that under the circumstances a reasonable speaker should have realized that hostile expressions based on people's race, gender, religion, nationality, or sexual orientation were likely to intimidate or harm the reputation of a defined group or individual students. *Gertz* is as interesting for what it says as for what it does not say: the Court retained a lower threshold for the private plaintiff to demonstrate liability in issues of public interest, but it placed no requirement for private parties to prove a culpable state of mind when they sue for defamation about private matters.²⁹⁹

University hate speech codes can create different gradations of proof predicated on whether the hate speech is private or public and at whom it is directed. The highest degree of proof and, perhaps, punishment would be linked to public matters about public figures. Here are a few examples to clarify the distinctions: A fraternity that puts out a flier with racist epithets against a college administrator reviling her for increasing tuition would be making a statement about a public figure on a public matter. Under these circumstances, defamation could only be proven, in accordance with *Sullivan*, upon proof of actual malice. If the fraternity published a racist flier about a fellow student's in-class statements about the tuition increase, that would rise to the level of the *Gertz* negligence standard. Finally, if the flier contained a racially derogatory remark against a student, and the fraternity brothers had only overheard that student supporting tuition hikes while talking to his parents on the phone, the university could resort to a common law standard of defamation for adjudicating the appropriate disciplinary penalty.

Defamation law had been established long before the decision in *Black*. That case demonstrated that historically violent symbols could express a true threat that did not give rise to First Amendment protections.

²⁹⁸ See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986) (finding, in a case where a newspaper published speech of public concern about a private figure, that “the Constitution requires us to tip [the scales] in favor of protecting true speech”). The “substantial truth” of a statement can be offered as a defense. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516–17 (1991).

²⁹⁹ Justice Powell, writing for a plurality of the Supreme Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, asserted that First Amendment protections that apply to statements about public matters are inapplicable in defamation suits brought by private parties to recover for defamatory statements about their private conduct. 472 U.S. 749, 758–62 (1985). Applying this reasoning to the facts of the case, the Court held that a credit statement was an individual interest that was not a matter of public concern. *Id.* at 761–62. The case allows for state common law rules of defamation to apply to private-matter defamation. See *Roffman v. Trump*, 754 F. Supp. 411, 415 (E.D. Pa. 1990) (“[T]he [Supreme] Court has created few restrictions on state defamation law with respect to suits brought by private plaintiffs based on speech relating to issues of private concern.”).

Hence the display of a burning cross or swastika from a dorm window would be a true threat that does not implicate the First Amendment.

The most difficult issues surrounding university hate speech codes concern the much maligned group defamation standard. Earlier in this Article I presented an argument for the continued constitutionality of group defamation statutes.³⁰⁰ A caveat should be added here that *Gertz* qualified *Beauharnais*: that is, if a private person makes a false public statement against an identifiable group, the plaintiff must prove at least that the publisher's conduct was negligent. The problem in group defamation is not of a constitutional nature but of an evidentiary one, because the bigger the group of students or faculty whose reputation is attacked, the more difficult it is to prove harm to reputation.³⁰¹ Evidence of hate group defamation requires the proof of harm as well as a showing of the previous historical impact of false, derogatory statements tending to harm a racial, ethnic, religious, gender, nationality, or sexual orientation group.

Where the defamed group is small enough, no such historical evidence is necessary. For instance, falsely accusing a four-person partnership of fraud because they are Jewish is likely to harm each partner's reputation. Even if the statement did not name any of the four, the accusation implicates each of them individually as Jews, providing each of them with standing to file a lawsuit. Proving, however, that a false statement made against a large group—for instance, purporting that the Holocaust is a hoax spread by Jewish students—requires historical proof and will be far more difficult to prove. The person filing a group defamation complaint with university authorities would need to show that the content of the statement would likely harm the reputation of an established campus organization or an identifiable but diffuse group of students or professors. Proffering historical evidence is crucial in the second scenario because, unlike the smaller group example, large-scale group defamation is difficult to link directly to the alleged defamatory statement. I have demonstrated

³⁰⁰ See *supra* text accompanying notes 116–32.

³⁰¹ The *Restatement (Second) of Torts* states:

As a general rule no action lies for the publication of defamatory words concerning a large group or class of persons. Unless the group itself is an unincorporated association, as to which see § 562, it cannot maintain the action; and no individual member of the group can recover for such broad and general defamation. The words are not reasonably understood to have any personal application to any individual unless there are circumstances that give them such an application.

RESTATEMENT (SECOND) OF TORTS § 564A cmt. a (1977). The Restatement then asserts that, typically, a small enough group to constitute an identifiable class for group defamation purposes involves twenty-five or less people. *Id.* § 564A cmt. b. Professor Nat Stern argues that the twenty-five-persons standard is helpful for distinguishing whether the defendant had a reasonable certainty of the statement's falseness. Nat Stern, *The Certainty Principle as Justification for the Group Defamation Rule*, 40 ARIZ. ST. L.J. 951, 983–84 (2008). It seems to me that some of the most noxious forms of group defamation, such as Holocaust denial, carry a great certainty of falsehood, probably rising above negligence to malice, even though they harm far more than twenty-five people.

elsewhere, through multiple examples, how racism, antisemitism, homophobia, xenophobia, and chauvinism have been instrumental for organizing hate crimes, rapes, slavery and genocide.³⁰²

Herein lies a paradox: Hate speech is more likely to instigate mass crimes and atrocities when it is directed against a large ethnic, religious, or racial group, but these complaints will be the least likely to succeed because of issues of standing. Nevertheless, to assure the constitutionality of a university group defamation code, university officials can rely on the Illinois law upheld in *Beauharnais*.³⁰³ The college code might, for instance, prohibit and punish any person or organization that uses university facilities to manufacture, sell, advertise, or publish any statements, graphics, or electronic communications that dehumanize, attribute criminality to, or proclaim the depravity of a class of students, faculty members, or college visitors based on their race, ethnicity religion, sexual orientation, or gender.

The weakness with *Beauharnais* will be one of presenting evidence tending to prove that a derogatory statement about a group caused students or faculty actual and substantial harm. European norms recognize that history provides ample cases of hate speech instigating violence. History overflows with examples making it clear that propaganda was essential to the Nazis' eventual genocide of Jews,³⁰⁴ the Hutu slaughter of Tutsis in Rwanda,³⁰⁵ the Islamist Arab Janjaweed continued mass murder and

³⁰² Elsewhere, I have developed a number of historical narratives of how supremacist groups rely on hate speech to gain support for their movements. See TESIS, *DESTRUCTIVE MESSAGES*, *supra* note 26; Alexander Tesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 740–55 (2000) (describing historical lessons about hate speech and its consequences).

³⁰³ In *Beauharnais*, the Court upheld the constitutionality of the following statute:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.

Beauharnais v. Illinois, 343 U.S. 250, 251, 266–67 (1952) (quoting 38 ILL. REV. STAT. § 471 (1949)). For a detailed study of the case, see *supra* Part II.B.

³⁰⁴ For a detailed discussion on the development of German antisemitism and its influence on Nazi politics, see TESIS, *DESTRUCTIVE MESSAGES*, *supra* note 26, at 23–26; see also JOSEPH W. BENDERSKY, *A CONCISE HISTORY OF NAZI GERMANY* 141 (2007) (describing Nazi exploitation of traditional European antisemitism); EVANS, *THIRD REICH*, *supra* note 181, at 27 (describing the interrelatedness of historical and modern antisemitism in Germany); SAUL FRIEDLÄNDER, *NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION, 1933–1939*, 3–4, 110, 324 (1997) (discussing the integration of European antisemitism in Nazi propaganda and its indoctrinating effect in Germany and Austria).

³⁰⁵ See JEAN HATZFELD, *MACHETE SEASON: THE KILLERS IN RWANDA SPEAK* 55 (Linda Coverdale trans., 2005) (describing radio broadcasts openly calling for Tutsi destruction prior to the 1994 genocide in Rwanda); MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM NATIVISM, AND THE GENOCIDE IN RWANDA* 212 (2001) (quoting from the Hutu-power *Kangura* newspaper, which dehumanized the Tutsi and called for their destruction); JOSIAS SEMUJANGA,

enslavement of Darfurians,³⁰⁶ the ethnic slaughter during the 2007 Kenya election,³⁰⁷ and the Turkish exterminationism perpetrated against Armenians.³⁰⁸ Despite indisputable centrality of hate propaganda in mass murder and hate crimes, the libertarian strain of American First Amendment law denies the potential harm resulting from speech, increasing the vulnerability of groups on campus.

VI. CONCLUSION

I have argued in this paper that the social and educational value of regulating intimidating and defamatory speech on campus outweighs the minimal burden it places on speakers. University hate speech codes raise First Amendment concerns that can best be resolved within the framework of Supreme Court jurisprudence on free speech. Public university officials aiming to improve campus safety can formulate policies compatible with the holding in *Virginia v. Black*. That case's applicability to the campus hate speech controversy had been overlooked prior to this Article. International conventions and laws on hate speech provide a wealth of additional guidance on how to balance the requirements for public safety against the interests of vitriolic speech. The policy of each state will inevitably be linked to its constitutional scheme, but the nearly universal

ORIGINS OF RWANDAN GENOCIDE 171–72 (2003) (providing an account of how racist ideology of the 1950s took root in Hutu politics and permeated the popular view of Tutsis).

³⁰⁶ Local authorities have periodically paid for the writing and performance of hate songs to continue the instigation of the Janjaweed's most recent onslaught against black African Darfurians. According to an Amnesty International report, one song's lyrics were:

The blood of the blacks runs like water
we take their goods
and we chase them from our area
and our cattle will be in their land.
The power of [Sudanese president Omer Hassan] al-Bashir
belongs to the Arabs
and we will kill you until the end, you blacks
we have killed your God.

Censored Singer Tries To Reform "Hate Singers," FREEMUSE (June 24, 2008), <http://www.freemuse.org/sw28705.asp>. This material was originally published in a Washington Post video news segment. A woman's song went:

You are gorillas
you are black
and you are badly dressed

Id. Such lyrics likely soothe the conscience of murderers, rapists, and torturers as they pillage blacks, seeking control of Sudan.

³⁰⁷ Kenyan hate radio programs helped instigate violence between the Kikuyu and Luo peoples. Kwamboka Oyaro, *The Media Is Not Innocent*, INTER PRESS SERVICE, Feb. 10, 2008, *available at* <http://www.ipsnews.net/africa/nota.asp?idnews=41049>; Ofeibea Quist-Arcton, *Tracing the Roots of Ethnic Violence in Kenya* (Nat'l Pub. Radio television broadcast Jan. 31, 2008), <http://www.npr.org/templates/story/story.php?storyId=18582319>.

³⁰⁸ See DANIEL JONAH GOLDHAGEN, *WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY* 209–10 (2009) (discussing how longstanding Turkish prejudice played a central role in the instigation of slaughter against Armenians).

recognition of group defamation should be further reflected in American universities' administration. Misinformation about the demise of group defamation should give way to careful analysis of how that actionable category of hate speech has been impacted but not abrogated by the elements of public slander.

Sanctions that punish the intentional dissemination of intimidating racist, xenophobic, homophobic, antisemitic, and chauvinistic messages on campus do not interfere with constitutionally protected free speech. Like the cross burning statute in *Black*, campus regulations can prohibit the public display of historically threatening symbolism. College administrators need not, however, require proof of intentional intimidation because the sanctions available to them are far less onerous than criminal penalties. Negligently placing others in apprehension of harm or asserting false facts that damage their reputations can be punished by suspension, disenrollment, or withdrawal.

Restrictions on intimidating and defaming students and university employees do not conflict with the university's mission to openly foster the discussion of ideas. Hate speech is unrelated to the pursuit of truth, and the interest in public order justifies reasonable limitations on its dissemination on campuses.