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Hate Speech: The Present Implications of a Historical Dilemma

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I. INTRODUCTION

FREE speech is sacred to any democratic society. However, the sometimes painful bite of unfettered speech leads many to ask two perfectly logical questions: At what cost? And for what pain? Those questions are particularly acute when asked about hate speech, speech that causes considerable pain and offers little in the way of societal benefit. Yet our courts have fashioned a strong defense of hate speech that is unique in the world. What is it about United States constitutional history that has resulted in such extensive protection being afforded to "hate" speech? Why do the United States' courts act in a fashion so out of fashion—a manner wholly at odds with the wisdom of the remainder of what passes for the civilized world?[1] Do our judges simply fail to see what is clear to everyone else?

II. PROTECTING FREE SPEECH

United States constitutional jurisprudence stands alone, to be sure, for its treatment of a rather wide range of cases relating to free speech. Without doubt, American jurists afford far greater protection to free expression than exists anywhere else in the world. Speech that other countries would deem libelous as to public officials and public figures is protected in the United States unless such speech is made with actual knowledge of falsity or with serious doubt as to its truth or falsity.[2] Protection is even applied to false statements about "private" people if those statements are made in a nonnegligent manner.[3] The United States

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1. *See generally* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives In Collision*, 85 NW. U. L. REV. 343, 361-71 (1991) (discussing international perspectives on hate speech); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341-49 (1989) (reviewing international legal responses to hate speech).

2. New York Times v. Sullivan, 376 U.S. 254 (1964) (establishing the "actual malice" standard for alleged defamatory statements toward public officials).

3. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). In *Gertz*, the Court held that "so long as [the States] do not impose liability without fault,

Constitution protects speech that other countries would restrict as revelations that actually—or "may" or "could"—threaten national security.[4] The Constitution also protects comments about pending legal cases which is speech that other countries would consider inappropriate and contemptuous.[5]

In all of these areas and more, the United States affords more legal protection to freedom of expression than is even conceivable in most (and probably all) other democratic countries. We might argue at length about whether United States constitutional history has struck the best balance between freedom and order; we should not argue about the actual balance this history has struck.

A. *Hate Speech and the Constitution*

In United States constitutional history, the area of hate speech has been distinguishable from other areas of expression in terms of its policy considerations and the resulting legal treatment. To understand the legal protection of hate speech, one must consider the policies in which constitutional interpretation is rooted. The law affords broad protection in areas such as li-

[they] may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* The Court also held "that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349.

4. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971). In refusing to enjoin publication of a classified study regarding United States policy in Vietnam, the *New York Times* Court adopted the presumption that any system of prior restraint on expression is unconstitutional. *Id.* This presumption was adopted despite the strong evidence that the publication would reveal potentially damaging information. *Id.* at 717 (Black, J., concurring).

5. *See* Garrison v. Louisiana, 379 U.S. 64, 67-75 (1964) (limiting state's power to impose sanctions for criticizing conduct of state court judges to statements made with knowledge of falsity or with reckless disregard of truth); Pennekamp v. Florida, 328 U.S. 331, 347-50 (1946) (stating public criticism of judges' inclinations does not present clear and immediate danger to fairness of judicial administration and therefore "the door[s] of public comment" remain open); Bridges v. California, 314 U.S. 252, 272-73 (1941) (holding "inherent tendency" and "reasonable tendency" of out-of-court publication to cause disrespect for judiciary or to interfere with administration of justice during litigation is not enough to justify restriction of free expression).

bel,[6] prior restraints on reporting,[7] and constructive contempt[8] because of the judicial conclusion that only by providing protection to all forms of valuable speech—whether a minority or majority position—can the public be assured of the "uninhibited, robust and wide-open debate" that was promised in *New York Times v. Sullivan*.[9] This argument is rarely made about hate

6. *See Gertz*, 418 U.S. at 343-48 (protecting freedom of speech so long as speaker's conduct or statements do not rise to level of negligence); *Sullivan*, 376 U.S. at 279-80 (providing broader protection than *Gertz* to statements made about public officials and public figures; person challenging free speech has heightened burden of proving that speaker made defamatory statement with actual malice, not simply negligence); *see also*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510-11 (1984) (applying "actual malice" standard from *New York Times v. Sullivan* to protect publication of critical product review in magazine).

7. *See New York Times*, 403 U.S. at 714 (adopting presumption of unconstitutionality for review of any injunction imposing prior restraint on reporting function of newspaper); Near v. Minnesota, 283 U.S. 697, 722 (1931) (holding unconstitutional Minnesota statute that allowed government to enjoin publication of certain types of articles based on content). The *Near* Court stated that "[c]harges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication." *Near*, 283 U.S. at 722-23.

8. *See Pennekamp*, 328 U.S. at 331 (holding that newspaper editorials and cartoons criticizing court actions are protected; Court applied "clear and present danger" rule despite recognizing that this was difficult standard for challengers to overcome); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (holding that trial judge may not punish news media through contempt powers for publishing information even though "strongly implicative" of criminal defendant). For additional discussion of *Pennekamp* and other related cases, see *supra* note 5.

9. *Sullivan*, 376 U.S. at 270. The Court noted the purpose and intent behind advocating robust public debate:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. (quoting Whitney v. California, 274 U.S. 357, 375-76 (1926) (Brandeis, J., concurring)); *see* ANTHONY LEWIS, MAKE NO LAW 183-248 (1991) (discussing high level of protection afforded to speech by "reckless disregard" standard articulated in *New York Times v. Sullivan*); *see also*, *Gertz*, 418 U.S. at 339-40 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."); Abrams v. United

speech.[10] Those commentators, including myself, who favor the relative tolerance with which the current law treats hate speech, do not seek to defend this body of law by maintaining that without the totality of hate speech the public would sustain some grievous loss.[11] On the contrary, hate speech is typically defended as the price society has determined it must pay in order to assure a system of free expression.[12]

Notwithstanding the sense of uneasiness that afflicts defenders of those that engage in hate speech in the United States, such speech has received a significant amount of legal protection. The best known cases may well be the *Skokie* cases, which affirmed the right of Nazis to march on a public street in a community populated with World War II concentration camp survivors.[13] In *Bran-*

States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

10. *But cf.* FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 94-99, 132-35 (1981). Haiman is one commentator who offers explanations regarding the potential importance of "low value" speech such as group libel and "fighting words" to the public discourse. Haiman recognizes that group libel "serves no useful function in the search for truth that is the purpose of a free marketplace of ideas." *Id.* at 94. He argues, however, that if group defamation is banned from the public arena, it will merely "go underground" where the defamatory views will intensify. *Id.* at 98. Haiman opines that "frequent reexamination of our own beliefs and values, in the face of the most extreme . . . challenges," brings these beliefs to the surface where public debate may possibly sway them. *Id.* at 98-99.

Haiman also argues against the underlying rationale of the "fighting words" doctrine. *Id.* at 132-134. His argument begins with the premise that courts believe the ideational content of certain types of epithets and personal abuse are so minimal that legal restraint is permissible. *Id.* at 132-33. Haiman states: "How it can seriously be argued that calling a policeman a 'Fascist,' or school board members 'mother-fuckers,' is without ideational content escapes me completely. . . . Indeed I would suggest that it is precisely the ideational content that makes the listener so angry." *Id.* at 133.

11. *See, e.g.*, Ralph K. Winter, *A First Amendment Overview*, 55 BROOK L. REV. 71-73 (1989) (suggesting that free speech seeks to protect self-expression and dignity; free flow of information helps create a democratic culture); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CINN. L. REV. 1, 10-12 (1991) (arguing that protecting free speech eliminates need to perform impossible task of distinguishing between varying degrees of truth and consequently stifles expanding censorship).

12. *See, e.g.*, Gerald Gunther, *Good Speech Bad Speech: Should Universities Restrict Expression That Is Racist Or Otherwise Denigrating? Two Views*, 24 STAN. LAW. 4, 7 (1990). Gunther states that "[t]he refusal to suppress offensive speech is one of the most difficult obligations the free speech principle imposes upon all of us; yet it is one of the First Amendment's greatest glories—indeed it is a central test of a community's commitment to free speech." *Id.* at 9.

13. Collin v. Smith, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *and cert. denied*, 439 U.S. 916 (1978). In *Collin*, the court held that an ordinance that prohibited a demonstration by the National Socialist Party was unconstitutional under the First Amendment. *Id.* at 1207. The court stated that "[t]he result we

denburg v. Ohio, a landmark case decided by the Supreme Court in 1969, the right of the Ku Klux Klan to publicly call for the expulsion of African Americans and Jews from the United States, and the right to suggest the desirability of violence (in veiled but unmistakable terms) were upheld, unless the speech was intended to cause violence and had a high likelihood of producing such a result imminently.[14] The words used by the Klansmen in *Brandenburg* are instructive: they said that "it's possible that there might have to be some revengeance taken";[15] that the "nigger should be returned to Africa, the Jew returned to Israel";[16] that we should "[b]ury the niggers";[17] and other equally vulgar statements. Despite the Klansmen's use of racist and hate-filled language, the *Brandenburg* Court adopted a legal test that must be met before such speech can be punished. The Court provided:

> [T]he 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.[18]

This test is nearly impossible to meet.

While cases such as these set some of the parameters for understanding the legal treatment of hate speech under the Constitution, as a whole it is an incomplete body of law and a number of critical issues remain open. These open issues include: (a) the continued viability of the so-called "fighting words" exception to the First Amendment (and the precise definition of just what sort of words are inevitably "fighting words");[19] (b) the continued vi-

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have reached is dictated by the fundamental proposition that if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises." *Id.* at 1210.

14. Brandenburg v. Ohio, 395 U.S. 444 (1969). The *Brandenburg* Court considered the constitutionality of the Ohio Criminal Syndicalism statute. *Id.* at 444-45. The Court found the statute unconstitutional because it punished the mere advocacy of an action and therefore violated the First and Fourteenth Amendments. *Id.* at 449.

15. *Id.* at 446.

16. *Id.* at 447.

17. *Id.* at 446 n.1.

18. *Id.* at 447.

19. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "fighting words" as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 534 (1980) ("In the almost forty years since

ability of any group libel law, given the Supreme Court's generally negative views on such laws as in *New York Times v. Sullivan*;[20] and (c) the constitutionality of campus restrictions on racist speech other than those involving direct threats, personal harassment or the like.[21]

Although these issues are significant and currently disputed, they should not divert attention from the remarkable degree of judicial support for a body of law which generally tolerates even the most vile hate speech.[22] This support has recently been strengthened by the Supreme Court's decision in *R.A.V. v. City of St. Paul*.[23] *R.A.V.* involved the prosecution of several teenagers

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Chaplinsky was decided, the Court has not upheld a single conviction for the use of fighting words"; and " 'the Court, despite its protestations to the contrary, is merely paying lip service to Chaplinsky and that, in fact, the fighting words doctrine is moribund . . . . " (quoting Gooding v. Wilson, 405 U.S. 518, 537 (1972) (Blackmun, J., dissenting))); *cf.* Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL'Y 81, 101-05 (1991) (noting disagreement between two approaches to "fighting words" doctrine: the civil-liberties approach (marketplace of ideas) and the civil-rights approach (society of equal groups)).

20. For a discussion of *New York Times v. Sullivan*, see *supra* notes 2 & 9 and accompanying text. *See also* Beauharnais v. Illinois, 343 U.S. 250, 266-67 (1952) (upholding constitutionality of criminal group libel statute which prohibited dissemination of racist material; Court expressed no approval of legislation's wisdom or efficacy); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-17, at 926-27 (2d ed. 1988) (discussing U.S. Supreme Court's decreased receptiveness to claims of group libel after *Beauharnais*); *cf.* Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 694-96 (1988) (suggesting *New York Times v. Sullivan* did not restore First Amendment protection to all forms of libelous speech and that *Beauharnais* and group libel laws are still alive).

21. *See* UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin, 774 F. Supp. 1163, 1181 (E.D. Wis. 1990) (enjoining enforcement of university anti-harassment policy because it was unconstitutionally vague; interpreting "fighting words" as only one area of speech that can be regulated); Doe v. University of Michigan, 721 F. Supp. 852, 861-67 (E.D. Mich. 1989) (finding university hate speech and harassment policy unconstitutional because it was overbroad and vague; stating speech can be limited if it falls within category of "fighting words" (*Chaplinsky*), speech inciting imminent lawless action (*Brandenburg*) and speech that is vulgar, offensive and shocking (Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986))); *see also* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-48 (1990) (discussing tension between free speech and equality and arguing that regulation of racist speech is necessary in order to battle racism; citing *Brown v. Board of Education* as precedent supporting campus hate speech regulations); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 495-520 (1990) (discussing limited forms of campus hate speech that may be regulations supported by current First Amendment precedent).

22. *See generally* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 151-69 (1992) (supporting First Amendment laws by stating that reason and tolerance must triumph over prejudice and hate through education, but efforts to achieve such tolerance should not preempt the "market place of ideas").

23. 112 S. Ct. 2538 (1992).

for burning a cross on an African American family's lawn.[24]

In *R.A.V. v. City of St. Paul*, the defendants were prosecuted under a city ordinance that prohibited bias-motivated conduct.[25] The Court held that the ordinance was facially invalid under the First Amendment because the ordinance only applied to behavior or speech that fell within one of the articulated disfavored topics.[26] Treating such selective limitations as content-based discrimination, the Court invalidated St. Paul's hate speech ordinance.[27]

III. HISTORY'S HARD LESSONS AND THE FIVE FACTORS THAT DRIVE THE TREATMENT OF HATE SPEECH UNDER THE FIRST AMENDMENT

Although there are numerous reasons for the high level of judicial consensus regarding the treatment of hate speech, there are five repeatedly expressed factors, or concerns, which I believe are at the heart of past interpretations and will continue to be at the heart of future interpretations. These five recurring factors are: (a) doctrine, (b) precedent, (c) prudence, (d) American political culture and (e) the high risk of suppressing *any* speech.

A. *Doctrine*

The first concern, and probably the most important basis underlying our First Amendment interpretation, is doctrinal. No principle has been articulated more consistently in First Amendment law than the doctrine that legislation affecting speech may not be based on disapproval of its content.[28] This principle,

24. *Id.* at 2541.

25. *Id.* The relevant portion of St. Paul's Bias-Motivated Crime Ordinance stated:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id.

26. *Id.* at 2547.

27. *Id.* at 2550.

28. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988) (holding First Amendment prohibits suppression of speech merely because of offensive content); Carey v. Brown, 447 U.S. 455, 461-63 (1980) (finding Illinois anti-picketing statute unconstitutional because it restricted expressive activity based solely on message's nature and content); Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972) (noting that "the First Amendment means that government has no power to restrict expression because of its message, its ideas,

which was recently reasserted in two Supreme Court opinions striking down statutes that banned flag burning, is at the heart of constitutional law.[29] Even more recently, this well founded principle was the basis for holding New York's "Son of Sam" law unconstitutional.[30] As summarized by Professor Laurence Tribe: "If the Constitution forces government to allow people to march, speak, and write in favor of peace, brotherhood, and justice, then it must also require government to allow them to advocate hatred, racism, and genocide."[31] Thus, the generally accepted view of the matter is clear—legislation may not prohibit speech simply because its content is vulgar or offensive.[32]

B. *Precedent*

The second concern which tempers the temptation to accept hate speech regulation concerns the precedential impact of such limitations. If racist speech may be banned because it inflicts psychic pain, what other currently controversial speech would be denied protection? How would we treat speeches by David Duke or Pat Buchanan that many have viewed as being racist? What of speech that is said to be denigrating to women or homophobic?[33] What of movies such as "*The Last Temptation of*

its subject matter, or its content"); Cohen v. California, 403 U.S. 15, 25-26 (1971) (noting that offensive expression must be tolerated because suppression of speech risks suppression of ideas and such censorship may be used by governments to ban unpopular views).

29. *See* United States v. Eichman, 496 U.S. 310, 318-19 (1990) (holding statute prohibiting flag burning unconstitutional because basic principle underlying First Amendment is that it protects expression society finds offensive); Texas v. Johnson, 491 U.S. 397, 409 (1989) (reversing conviction for flag desecration; stating that function of free expression is to invite dispute and may best serve its purpose when unrest, dissatisfaction or anger is induced).

30. Simon & Schuster v. New York Crime Victims Bd., 112 S. Ct. 501, 509 (1991). *Simon & Schuster* involved the review of New York's "Son of Sam" statute which required an accused or convicted criminal to deposit income from artistic works describing his or her crime into an account to be made available to victims of the crime and creditors. *Id.* at 505-06. The law also provided that any entity contracting with a criminal for production of a book, movie or other type of work depicting the crime must pay the Crime Victims Board any money that the entity owed to the criminal. *Id.* The Court found that this law violated the First Amendment because it established a financial disincentive to create or publish a work based on the work's specific content. *Id.* at 509.

31. TRIBE, *supra* note 20, § 12-8, at 838 n.17.

32. For a discussion of the doctrine against content-based legislation, see *supra* notes 28-30 and accompanying text.

33. In the case of speech that is denigrating to women, the question is hardly academic. The proposed Pornography Victims Compensation Act, currently before the Senate Judiciary Committee, would grant victims of violent sex crimes the right to sue a producer of pornography if the victim can prove her

Christ" or books such as Salman Rushdie's "*The Satanic Verses*," which offended Christian and Islamic religious believers, respectively?[34]

In this area, the much discussed "slippery slope" is real.[35] It should come as no surprise, in this respect, that so much of the most enduring case law established under the First Amendment has arisen in cases concerning racist speech. When confronted with even the lowest forms of speech, the courts have consistently reiterated the need to be aware of the potential negative consequences to all forms of speech posed by creating limited exceptions. If longstanding doctrines are upset by attempts to ban racist speech, the enduring principles that define our general First Amendment protections would be compromised and, along with them, many forms of desirable speech. If *Near v. Minnesota* should fall because the speech in that case was anti-Semitic, and therefore judged not worthy of protection, the important precedent established by *Near* (which bars virtually *all* governmental attempts at prior restraints) would be placed, once again, at issue.[36] Similarly, if *Brandenburg v. Ohio* should fall, the Supreme Court once again would have to review the core issue of when speech referring to and perhaps advocating illegal conduct may be banned.[37] These rulings are at the very core of First Amendment law. Reconsideration of these holdings for the sole purpose of developing a "new" approach[38] to permit the banning of hate speech

attacker was incited by the defendant's product. *Legislative Proposals for Compensation of Victims of Sexual Crimes: Hearings on S. 1521 Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 471 (1991) (statement of Senator Strom Thurmond, South Carolina).

34. *See* Floyd Abrams, *A Worthy Tradition: The Scholar and the First Amendment*, 103 HARV. L. REV. 1162, 1172 (1990) (reviewing HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1988)).

35. "Slippery slope" refers to the belief that once you start down the path of regulation, inevitability the initial precedent will be used to expand the scope of regulated subject matters. The inability to draw distinguishable lines between protected matters and unprotected matters will inhibit the courts' ability to stop the expanding regulation. *See* Wolfson, *supra* note 11, at 10. For example, in the freedom of speech context some believe that the precedent set by an attempt to suppress wholly undesirable speech, such as hate speech, may eventually be used to suppress desirable speech.

36. *See* Abrams, *supra* note 34, at 1172. For a discussion of *Near v. Minnesota*, see *supra* note 7.

37. *See* Abrams, *supra* note 34, at 1172. For a discussion of *Brandenburg*, see *supra* notes 14-18 and accompanying text.

38. *See, e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 376-87 (1991) (highlighting inadequacies of conventional First Amendment analysis in dealing with hate speech issues); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2374-80 (1989) (concluding that narrow interpretation of

would threaten critical Supreme Court rulings at the very time in which those rulings need continued support, given the changing personae on the Court.

Freedom of speech has never been considered an absolute. Every major new doctrinal exception to the general rule that speech may not be infringed leads in turn to new demands for further exceptions.[39] What else would one expect? As Duke Law Professor Walter Dellinger observed in opposing a constitutional amendment which would overrule the flag-burning cases:

> What would this proposed act of constitutional revision do to the moral legitimacy of the stance our Constitution has taken (and will continue to take) in defense of expression that offends many Americans as deeply as flag-burning offends the great majority of us? . . . Once we have quickly passed the . . . Amendment to protect the sensibilities of those who revere the flag, what do we say to those who are particularly offended by, but must continue to tolerate, the burning of crosses by hooded members of the Ku Klux Klan . . . ? And what do we say to those who find themselves silenced and marginalized by sexualized (but not constitutionally "obscene") portrayals of women? What enduring constitutional principle will remain unimpaired that will legitimately surmount these claims . . . ?[40]

Despite constant repetition of the "slippery slope" concept, or whatever metaphor one chooses to apply, the fact remains that the free speech doctrine is not easily conducive to amendment. Although strong arguments can be made regarding the restriction on certain categories of speech, the courts have repeatedly shown—and rightfully so—that free speech must be viewed as an integrated whole, not as a conglomeration of components. Thus, when one argues to limit one component of speech, or one appli-

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First Amendment in response to hate speech perpetuates racism; calling for doctrinal change from private to public sanctions).

39. *See* Robert C. Post, *Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267, 314-15 (1991) (arguing that past balancing tests have resulted in overbroad restrictions on speech, and noting that "in the American context, the temptation to balance rests on what might be termed the fallacy of immaculate isolation").

40. *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 24 (1989) (statement of Prof. Walter Dellinger, Duke University Law School).

cation, the courts cannot disregard the delicate balance between the targeted speech and all other forms of speech.

C. *Prudence*

Prudence is the third factor that prevents limitation on hate speech and protects free speech in general. The dictates of prudence rest on the historically proven reality that limitations on speech—even on racist speech—have predominantly been used to suppress speech of minorities rather than to protect those minorities. In England, for example, the Race Relations Act of 1965 has led to repeated prosecutions of black leaders, whose rhetoric has tended thus far to be more inflamed than that of white bigots.[41] On at least one American campus the same has been the case: at the University of Michigan, whose rule banning hate speech was subsequently declared unconstitutional,[42] white students filed more than twenty complaints accusing African American students of racist speech.[43]

The experience of Jews has been similar. Nadine Strossen has, for example, recalled that none of the anti-Semites who were responsible for arousing France against Captain Alfred Dreyfus were ever prosecuted for group libel.[44] Emile Zola, however, was prosecuted for libel after writing *J'Accuse* (which depicted the French clergy and military poorly) and was forced to flee France as a result.[45] When rules—aimed at the neo-Nazi National Front—were imposed on British campuses and applied to representatives of "openly racist and fascist organizations" in an attempt to encourage students to silence their speakers "by whatever means necessary," who was silenced? It was, of course, the Israeli ambassador to England and other Israeli and Zionist speakers.[46] More recently, Aryeh Neier, defending the ACLU's

41. Kenneth Lasson, *Racism in Great Britain—Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161, 166, 169, 171-73 (1987) (discussing past use of England's Race Relations Act of 1965 to prosecute black speakers at Black Power gatherings and in other similar contexts).

42. *Doe v. University of Michigan*, 721 F. Supp. 852, 856, 867 (E.D. Mich. 1989) (University of Michigan adopted policy in attempt to curb rise of racial intolerance and racially motivated harassment on campus; regulation was held unconstitutionally overbroad and vague). For a discussion of the holding in *Doe*, see *supra* note 21.

43. Strossen, *supra* note 21, at 557.

44. *Id.* at 556.

45. *Id.*

46. *Id.* Strossen notes: "In perhaps the ultimate irony, [the British Race Relations Act of 1965], which was intended to restrain the neo-Nazi National Front, instead has barred expression by the Anti-Nazi League." *Id.*

(and his own) defense of the Nazis in the *Skokie* cases, observed that:

> It is a matter of self-interest. The oppressed are the victims of power. If they are to end their oppression, they must either win [their] freedom or take power themselves.
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> . . . .
>
> . . . Jews and friends of Jews may hold power in Skokie, but they do not hold power in the rest of the country. Nor will they ever. The Jews in Skokie require restraints on power to guard themselves. Keeping a few Nazis off the streets of Skokie will serve Jews poorly if it means that the freedoms to speak, publish, or assemble any place in the United States are thereby weakened.
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> . . . .
>
> . . . It is dangerous to let the Nazis have their say. But it is more dangerous by far to destroy the laws that deny anyone the power to silence Jews if Jews should need to cry out to each other and to the world for succor.[47]

D. *American Political Culture*

A fourth consideration which has allowed for broad free speech protection is rooted in the exceptional nature of American political culture. Unlike other nations, the United States has remained relatively unthreatened by the baleful social conflicts that have buffeted other nations to the point that hate speech regulations had been deemed necessary. Even though slavery was prevalent during the drafting of our Constitution (and was, to some extent, explicitly incorporated in the Constitution), the United States has never been so near explosion as a result of speech that broad speech regulations have ever been deemed necessary. There are no current risks of the communal violence that has plagued India (and has led to significant restrictions on speech); no history, fortunately, such as that of Germany (which has led to laws making it a crime to deny the reality of what occurred at Auschwitz[48]) or the like. Whatever sense of self-assurance an Ameri-

47. ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 5-7 (1979).

48. *See* Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies,"* 85 MICH. L. REV. 277 (1986). The Federal Re-

can speaks with about his or her own nation—before and after the Los Angeles riots—simply may not be applicable to foreign nations with very different traditions and histories. Except, that is, that restrictions on speech should be a last resort everywhere.

E. *Risk*

The fifth factor affecting free speech protection, and by far the most problematic, is that even racist speech may nonetheless contain views or information that we ban only at our peril. Take for example, as noted above, two prior candidates for the presidency of the United States who repeatedly expressed in the past what some considered as racist and anti-Semitic views. Would we ever consider a ban on expression of such views? In fact, has our society not benefitted from knowing that these individuals subscribed to such views? More broadly, views about distinct groups which are potentially racist in nature may well be the basis for public policy positions in the future. If some psychologists perceive African Americans as genetically inferior, that may well affect the view of those people about how to deal with poverty in the United States. As offensive and outrageous as those views are, can they really be banned without impoverishing the scope of public debate?[49] It is often the radical and potentially offensive viewpoints that act as important catalysts for public discussion of difficult and oft-avoided issues.

IV. CONCLUSION

The previously discussed factors hardly exhaust the list utilized by those people who have chosen to protect free speech and not to ban hate speech. But these factors have a single theme in common: the risks inherent in suppressing speech—even racist speech—tend to outweigh whatever gains may be thought to flow from the suppression of those views. Constitutional law is filled

public of Germany reformed its Criminal Code in 1985 to prosecute against propaganda known as the "Auschwitz lie"—the claim that the extermination of the Jews by the National Socialist regime never took place. *Id.* at 280.

49. Recall, for example, the anger with which (now Senator) Daniel Patrick Moynihan's report on the black family was met when it was first published in 1965. *See* OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) (analyzing the difficult challenges faced by the average black family in America); *see also* LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY (1967). Moynihan's analysis became the basis for significant public debate, some of which has been acerbic in nature, but serious in content. *See, e.g.*, CHARLES MURRAY, LOSING GROUND (1980).

with expressions of concern about good faith efforts to avoid harm by banning speech. "Men feared witches and burnt women," wrote Justice Brandeis;[50] "[i]t is the function of speech to free men from the bondage of irrational fears."[51] On one level, Justice Holmes observed, "[e]very idea is an incitement" to action.[52] But to protect speech that one thinks is immoral or even dangerous does not "indicate that you think the speech impotent."[53] As Holmes summarized, "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[54]

Fortunately—most fortunately—that day has never arisen in the United States. Nor, I suggest, has it arisen often enough outside the United States to justify the ease and the frequency with which freedom of expression has so commonly been overcome.

I know that the temptation to ban speech that we think—and think we know—is "bad" is sometimes overwhelming. Speech matters; it can do harm; it sometimes has done harm. But our approach under the Constitution, at its very best, has generally been to risk the harm that speech may inflict to avoid the greater harm that the suppression of speech has so often caused.

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50. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (suggesting that fear of injury cannot justify suppression of speech regardless of good intentions).

51. *Id.* (stating that free speech cannot be suppressed unless there is reasonable fear that serious injury is imminent).

52. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Justice Holmes believed that every idea offers itself for belief and will be acted upon unless its energy is stifled or another belief outweighs it. *Id.* He stated that "[t]he only difference between the expression of an opinion and an incitement . . . is the speaker's enthusiasm for the result." *Id.*

53. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

54. *Id.*