HATE SPEECH, FIGHTING WORDS, AND BEYOND—WHY AMERICAN LAW IS UNIQUE

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During the waning days of the turbulent presidential campaign of 2012, the issue of free speech was bound to emerge. President Barack Obama chose this moment to declare to the United Nations General Assembly his abiding commitment to the uniquely American value of unfettered expression.[1] In a diverse society, he reaffirmed, "efforts to restrict speech can become a tool to silence critics, or oppress minorities."[2] The catalyst for this declaration was the appearance of "a crude and disgusting video"[3] caricaturing the Prophet Muhammad which had triggered violent protests in more than twenty nations, mainly in the Middle East.[4] President Obama made clear both his disdain for the video and his unswerving faith in the singularly American insistence on free expression.[5]

Curiously (or some would say paradoxically) the Obama Administration only weeks earlier had actively supported passage of a resolution in the United Nations Human Rights Council to create an international standard restricting some anti-religious speech; the Egyptian ambassador to the United Nations had lauded this measure by recognizing that "'freedom of expression has been sometimes misused' to insult religion."[6] Secretary of State Hilary Clinton had added her view that speech or protest resulting in the destruction of religious sites was not, she noted, "fair game."[7] In a recent and expansive analysis of these contrasting events,

* University of Virginia and Association of Governing Boards, Albany Law Review Symposium, September, 2012.

1 Helene Cooper, *Obama Tells U.N. New Democracies Need Free Speech, A Challenge for Arabs*, N.Y. TIMES, Sept. 26, 2012, at A1.

2 *Id.* (internal quotation marks omitted).

3 *Id.* at A9 (internal quotation marks omitted).

4 David D. Kirkpatrick, *Cultural Clash Fuels Muslims Raging at Film*, N.Y. TIMES, Sept. 17, 2012, at A1.

5 *See* Cooper, *supra* note 1, at A1.

6 Jonathan Turley, *Shut Up and Play Nice: How the Western World is Limiting Free Speech*, WASH. POST, Oct. 14, 2012, at B1.

7 *Id.* (internal quotation marks omitted).

constitutional scholar Jonathan Turley noted the paradox: "President Obama's U.N. address last month declaring America's support for free speech, while laudable, seemed confused—even at odds with his administration's own efforts."[8]

In fact, such asymmetries abound in the contrasting views of the United States and virtually all other western nations. Countries as geographically close and politically congenial as Canada view free expression in starkly different ways than do we in the United States. In mid-October of this year, Canadian officials barred from our mutual border Reverend Terry Jones, the notorious Koran-burning pastor who has been the target of venomous hatred but has not been charged with any crime in this country; Jones was interrogated at length by Canadian officials and eventually turned away, unable to attend a Toronto gathering at which he had been invited to speak weeks earlier.[9] In sharp contrast, President Obama, the Pope, and religious and military leaders have consistently implored Reverend Jones to abandon his Koran-burning, and his church's tax exempt status has been stripped for technical reasons.[10] But even under the rubric of "incitement,"[11] criminal sanctions and even civil penalties have not been imposed.[12] And just as a timely reminder of how dramatically different is the U.S. approach to hateful speech, a federal district court in the same week ruled that the Metropolitan Washington Transit Authority could not constitutionally prevent or delay the posting of a controversial ad reading "IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE, SUPPORT THE CIVILIZED MAN. SUPPORT ISRAEL. DEFEAT JIHAD."[13] District Judge Rosemary Collyer ruled that such a message could not be barred or excluded from the bus and subway poster spaces simply because it might upset (or even inflame) some Metro riders.[14]

Finally in this very recent overview, we might note the growing

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[8] *Id.*

[9] *See Barring Pastor a Tricky Affair*, TORONTO STAR, Oct. 12, 2012, at A2.

[10] *Id.*

[11] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (noting that speech is protected under the First Amendment "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

[12] *See Barring Pastor a Tricky Affair*, *supra* note 9, at A2 (discussing several actions taken by Jones that incited violence, but did not lead to legal recourse).

[13] Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth., No. 12-1564, 2012 U.S. Dist. LEXIS 147052, *1 (D.D.C. Oct. 12, 2012).

[14] *Id.* at *27–*28.

tension over restrictions imposed by U.S. internet providers upon expression in other parts of the world. Google, for example, is blocking access in two countries to a crude and inflammatory anti-Muslim video, but without removing the video from the YouTube website.[15] And a few weeks later, Twitter was reported to have blocked German Twitter users from accessing an account of the activities of a neo-Nazi group that is banned in Germany, since the use of Nazi symbols and slogans and insignia is widely banned and subject to severe criminal sanctions.[16] The following day, however, a French Jewish group reported that Twitter had removed the anti-Semitic postings and had reopened access even to German users.[17] Obviously, such developments reflect a work in progress and merit close scrutiny in coming months and years.

Quite simply, we in the United States approach hate speech very differently than do virtually all other western nations. We seldom pause to explain why we persistently hear a different drummer. We might now ask just how we came to this improbably unique position among democratic countries with which we share so many values. Even our neighbors as close as Canada, and even more clearly other developed western nations, have adopted a markedly different course, and periodically charge anti-Semites and other prophets of hate on matters of gender, race, nationality, and sexual orientation with civil or criminal liability.[18] Those in Western Europe who share virtually all our other beliefs, including the basic precepts of free expression, depart even more clearly from our abiding commitments and, for example, target neo-Nazi propaganda as we consistently look the other way and tolerate such spiteful material.[19] No easy or convenient explanation invites adherence on our part. Thus we need to revisit the century-old roots of this striking paradox.

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[15] Claire Cain Miller, *As Violence Spreads in Arab World, Google Blocks Access to Inflammatory Video*, N.Y. TIMES, Sept. 14, 2012, at A12.

[16] Nicholas Kulish, *Twitter, Entering New Ground, Blocks Germans' Access to Neo-Nazi Account*, N.Y. TIMES, Oct. 19, 2012, at A10.

[17] Steven Erlanger & Alan Cowell, *Twitter Removes French Anti-Semitic Posts*, N.Y. TIMES, Oct. 20, 2012, at A9.

[18] *See generally* Kathleen Mahoney, *Hate Speech, Equality, and the State of Canadian Law*, 44 WAKE FOREST L. REV. 321, 326–48 (2009) (discussing hate speech laws in Canada and specific cases charging individuals with discrimination based on a range of topics including sexual orientation, race, national origin, and sex).

[19] *See generally* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523–54 (2003) (comparing the different approaches to hate speech by the United States, Canada, United Kingdom, and Germany).

A RETROSPECTIVE ON U.S. LAW OF HATEFUL AND OFFENSIVE SPEECH

We in the United States have not always been so tolerant. Indeed, as recently as World War II, the Supreme Court took a quite uncongenial view of such expression.[20] We begin this journey with the seemingly trivial case of *Chaplinsky v. New Hampshire*. It began on a busy Saturday afternoon in the town center of Rochester, New Hampshire.[21] A Jehovah's Witness named Chaplinsky had persistently unsettled spectators by loudly denouncing the tenets of more traditional faiths.[22] The local constabulary, without making an arrest, escorted the dissident to the police station.[23] Chaplinsky then turned on the officer and uttered the words that would soon become the basis for an immediate criminal charge and ultimately for a Supreme Court ruling.[24]

The precise words remain in doubt to this day, since only the two protagonists were present at the time.[25] The arresting officer insisted that he had been called, to his face, "a damned fascist" and "a God damned racketeer."[26] Chaplinsky maintained with equal force that he had politely but firmly "informed the officer, that '[y]ou, sir, are damned in the eyes of God' and [are] 'no better than a racketeer.'"[27] In the absence of any witnesses, the recorder's court found against the itinerant speaker.[28] Chaplinsky was convicted of violating a state law that made it a crime to "address any offensive, derisive, or annoying word to any other person who is lawfully in

[20] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–73 (1942) (concluding there are certain classes of speech that are subject to prohibition and New Hampshire's statute prohibiting face-to-face speech likely to cause a breach of peace, did not violate the First Amendment).

[21] *Id.* at 569–70.

[22] *Id.*

[23] *Id.* at 570.

[24] *Id.*

[25] *See id.* at 570 (stating Chaplinsky's version of the incident was slightly different and he admitted to saying some words but not to the name of the Deity).

[26] *Id.* at 569 (internal quotation marks omitted).

[27] Robert M. O'Neil, *Rights in Conflict: The First Amendment's Third Century*, 65 LAW & CONTEMP. PROBS. 7, 17 (2002).

[28] *See id.* at 17 n.73 ("This alternative version of Chaplinsky's words, advanced in the trial court by the defendant himself, was rejected in the absence of any third-party corroboration. The judge understandably favored the account given by the arresting officer, which provided the record and, in substantial part, the rationale for successive affirmance of Chaplinsky's conviction.").

any street or other public place, nor call him by any offensive or derisive name."[29]

The state supreme court affirmed the conviction, finding that the statute was appropriately limited to "face-to-face words plainly likely to cause a breach [through] . . . 'classical fighting words.'"[30] Afterward, "[a] unanimous Supreme Court affirmed, including several Justices who had consistently supported free expression in the past."[31] It was "Justice Murphy [who] wrote for the Court, and Justices Black and Douglas joined without comment [in] a brief opinion that [clearly] allowed [the] states to punish the [expression] of mere words, albeit under unusual [circumstances]."[32] The key to the ruling was the view of the Court that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[33]

So dismissive a view of expression that was both unquestionably offensive and provocative now seems not only archaic but also wholly illogical. That view was even more remarkable given the deeply religious context in which Chaplinsky expressed his disdain for the police—whichever version of "God damned" and "racketeer" he actually uttered.[34] But a unanimous Court—including its strongest free speech champions—was convinced that such words forfeited any claim to First Amendment protection when they were uttered face-to-face in a manner that was "likely to cause a breach of the peace," whether or not any disorder actually ensued.[35] The New Hampshire law was deemed "[a] statute punishing verbal acts" which, through interpretation, had been "limited to define and punish specific conduct lying within the domain of state power."[36] Such exegesis left the charged words devoid of any constitutional protection, even in the eyes of the Court's several otherwise sensitive members.[37]

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[29] *Chaplinsky*, 315 U.S. at 569 (internal quotation marks omitted); State v. Chaplinsky, 18 A.2d 754, 757 (N.H. 1941).

[30] *Chaplinsky*, 315 U.S. at 573; *Chaplinsky*, 18 A.2d at 762.

[31] O'Neil, *supra* note 27, at 17 (citing *Chaplinsky*, 315 U.S. at 574).

[32] O'Neil, *supra* note 27, at 17 (citing *Chaplinsky*, 315 U.S. at 574).

[33] O'Neil, *supra* note 27, at 17 (quoting *Chaplinsky*, 315 U.S. at 572).

[34] *See Chaplinsky*, 315 U.S. at 569–70; O'Neil, *supra* note 27, at 17–18.

[35] *Chaplinsky*, 315 U.S. at 573.

[36] *Id.* at 573–74.

[37] *Id.*

Commentators have observed over the years that this ruling contained two elements. First, there was an assumption that utterance of epithets under such conditions inherently inflicts psychic injury on a person who is their immediate target.[38] Second, when such verbal hostility creates or threatens an imminent breach of the peace, government may intervene even though only words are involved and no actual violence ensues.[39] Justice Murphy's cryptic opinion left little guidance to those—police and judges—who would in the years that followed do their best to reconcile the inherent tension between the "damaging words" and "breach of the peace" premises which the judgment inartfully blended.[40]

Seventy years later, *Chaplinsky* remains a persistent source of constitutional confusion.[41] It might have been mercifully overruled long since, but that never happened. Indeed, the case has been persistently cited with sufficient deference to imply that uttering "fighting words" remains a recognized exception to First Amendment freedoms.[42] As recently as the seminal "hate speech" ruling in 1992, the majority simply assumed *Chaplinsky*'s continuing vitality, stressing only in passing that those fighting words that were used to convey a particular viewpoint could not be selectively disfavored on a subject-matter basis.[43] In that ruling, Justice Scalia expressly declined an invitation to "modify the scope of the *Chaplinsky* formulation,"[44] a step he deemed unnecessary to the majority's disposition of the case.[45] Despite its nearly complete disregard at all levels of the judicial system, rumors of *Chaplinsky*'s demise appear to have been greatly exaggerated.[46] Lower courts

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[38] *See* Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 471–74 (2004) (discussing "Category 5(a)" speech as that which "by [its] very utterance, inflict[s] injury"); Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, 106 HARV. L. REV. 1129, 1129, 1137–38 (1993) [hereinafter *The Demise*].

[39] Caine, *supra* note 38, at 471–74; *The Demise*, supra note 38, at 1129, 1130–31.

[40] *See* Ronald K.L. Collins, *Foreword: Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 399 (2013).

[41] *See* Caine, *supra* note 38, at 460 (noting that the language contained in the decision provides a "maddening level of imprecision").

[42] Michael L. Siegel, *Hate Speech, Civil Rights, and the Internet: The Jurisdictional and Human Rights Nightmare*, 9 ALB. L.J. SCI. & TECH. 375, 385 (1999).

[43] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

[44] *Id.* at 381.

[45] *Id.*

[46] *See, e.g.*, Nash v. Texas, 632 F. Supp. 951, 973–74 (E.D. Tex. 1986) (using the *Chaplinsky* "fighting words" exception in analyzing a Texas statute, stating that the "vice of 'fighting words' relates to their 'tend[ency] to incite an immediate breach of the peace' or

may not have followed the case, but rather have consistently distinguished *Chaplinsky* in virtually indistinguishable cases of verbal assault and affront, while leaving this anomalous precedent intact.[47]

Before leaving *Chaplinsky* and the anomaly it has created for three-quarters of a century, two observations may be useful. For one, just to make things worse, *Chaplinsky*'s severely constrained view of free speech and press was manifestly incompatible with two highly protective 1937 Supreme Court cases that involved political advocacy espoused by radical labor organizers. In *De Jonge v. Oregon*[48] and *Herndon v. Lowry*,[49] a majority of the rapidly shifting Court committed itself to a First Amendment stance closely reflective of the Holmes and Brandeis dissents of a decade earlier, although at the time surprisingly little note was taken of this sharp reversal.[50] What might have happened had World War II not intervened so soon thereafter, we can only speculate.

Even more anomalous was a wholly gratuitous dictum that received at the time even less attention than the basic doctrinal departure marking the case. Near the end of Justice Murphy's strangely apologetic opinion emerged this prescient warning: "There 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. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ."[51] The core of the opinion of course addressed solely the "fighting words" exception.[52] No previous (or subsequent) mention was made of defamation, obscenity, or profanity.[53] It seemed quite sufficient at that time to banish all such expression within the blanket condemnation that "such utterances are no essential part of any exposition of ideas."[54]

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assault; specifically, that they foment unlawful acts") (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)); *see also* O'Neil, *supra* note 27, at 18.

[47] *Nash*, 632 F. Supp. at 973–74 (facing the issue of whether the mass picketing statute of Texas was constitutional, and distinguishing the Texas statute from the New Hampshire statute in *Chaplinsky*).

[48] De Jonge v. Oregon, 299 U.S. 353 (1937).

[49] Herndon v. Lowry, 301 U.S. 242 (1937).

[50] *See De Jonge*, 299 U.S. at 364; *Herndon*, 301 U.S. at 256.

[51] *Chaplinsky*, 315 U.S. at 571–72 (footnote omitted).

[52] *Id.* at 569–74.

[53] *See id.* at 572–73.

[54] *Id.* at 572; *see generally* O'Neil, *supra* note 27, at 18 (explaining the holding in *Chaplinsky*).

We now fast forward to the Vietnam War and a dramatically different setting. When draft resistance advocate Paul Cohen walked about the lobby of the Los Angeles courthouse wearing a jacket which bore in prominent letters the unambiguous message "Fuck the Draft," he was arrested and charged with violating a California breach of the peace law.[55] The state courts affirmed the conviction.[56] But to the great surprise of most observers, the Supreme Court not only agreed to review this seemingly trivial (or juvenile) epithet but reversed the conviction.[57] Justice Harlan's opinion—remarkable as much for its authorship as its content—told us more of what the case did not involve than what it did entail.[58] There was no evidence of actual or even disorder in the courthouse.[59] Nor was the issue one of potential incitement; neither Cohen's intent nor the probable effect of his words could be so characterized.[60]

Clearly there was no possible charge of obscenity, despite the Court's continuing ambivalence on that front.[61] Although the courthouse display of an offensive taboo word undoubtedly offended many in Cohen's audience, they could hardly have been deemed a "captive audience" as long as they could "effectively avoid further bombardment of their sensibilities simply by averting their eyes."[62] Any claim based on the need for actual courtroom decorum invited no deference in the corridor; when Cohen actually entered the courtroom with his jacket, he immediately doffed his jacket and folded the offending words inside when asked by a bailiff to do so.[63] Nor could Cohen's message possibly have prejudiced any pending judicial proceeding, since draft resistance trials (of which there were many then in process) were all tried in federal rather than state courts.[64]

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[55] Cohen v. California, 403 U.S. 15, 16 (1971) (quoting CAL. PENAL CODE § 415 (West 1970)).

[56] *Cohen*, 403 U.S. at 17.

[57] *Id.*

[58] *Id.* at 18–22.

[59] *See id.* at 16–17.

[60] *Id.* at 18.

[61] *Id.* at 19–20.

[62] *Id.* at 21.

[63] *Id.* at 19 n.3.

[64] *See* 50 U.S.C. § 460(b)(3) (2006) (stating there will be no review of selective service designation of the registrant until after criminal proceedings have been started when compelled service has been resisted); *see also* 28 U.S.C. § 1361 (2006) (granting original

Perhaps most troubling was California's claim that Cohen had uttered "fighting words" and could thus could be prosecuted under the still viable *Chaplinsky* ruling.[65] This seemingly close analogy offered one of the growing number of occasions for possibly distinguishing *Chaplinsky*.[66] Yet Justice Harlan offered a sharply different view: "While the four-letter word displayed by Cohen . . . is not uncommonly employed in a personally provocative fashion," the Court declared "in this instance it was clearly not 'directed to the person of the hearer'" and thus could not logically be deemed a "fighting word."[67]

The significance of *Cohen* thus surpassed its clear rejection of various possible theories of potential liability. Beyond what was essential simply to sustain the reversal of Cohen's conviction, Justice Harlan went on to make almost a virtue of the defendant's choice of language, noting that: "one man's vulgarity is another's lyric."[68] If government could ban the public utterance of particular words, those in power "might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."[69] Accordingly, the Court warned "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[70]

Herein lies the paradox of *Cohen* and its uneasy coexistence as an arbiter of civility in public discourse. The most pertinent question, which the Justices had no occasion to address and have carefully avoided ever since, is how far this judgment reflects the *political* context of Cohen's statement and the "unpopular view" whose expression was enhanced by the selective use of a taboo four-letter word.[71] A few simple variants may suggest how quickly we could enter the realm of uncertainty. First, suppose Mr. Cohen had returned to the courthouse flaunting his Supreme Court triumph, sporting the very same jacket, but having removed "the draft" in order to place the single offending word in bold relief. While

jurisdiction to the federal district courts in actions compelling any agent, officer, or employee of the United States to perform a duty owed).

[65] *Cohen*, 403 U.S. at 18, 20; Chaplinsky v. New Hampshire, 315 U.S. 568, 572–73 (1942).

[66] *Cohen*, 403 U.S. at 20.

[67] *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)).

[68] *Cohen*, 403 U.S. at 25.

[69] *Id.* at 26.

[70] *Id.*

[71] O'Neil, *supra* note 27, at 20.

charging him with a breach of the peace would still be problematic on the original facts, the gathering of a restive crowd angered by such an isolated epithet might alter the circumstances.[72] Any charge based on the use of a vulgar and taboo word in isolation would clearly require some assessment of the anti-war context of the actual *Cohen* case.[73] While there is ample support in Justice Harlan's eloquent opinion for a non-contextual view—"one man's vulgarity is another's lyric"[74]—there are also implications from the opinion that its reach should be confined to protecting public incivility through the use of a vulgar or taboo term in order to, as the Court put it, "express[] . . . unpopular views."[75] The actual language on the back of Cohen's infamous jacket would unmistakably support such an inference; the single, unadorned and non-contextual taboo word, however, would be far more problematic.[76]

Let us ponder one other plausible variant. Suppose Mr. Cohen were to return to the courthouse wearing the jacket, on which he had carefully substituted the single pronoun "you" for "the draft." If he simply walked about the lobby, displaying the jacket as he did in the actual case, presumably no sanction could be imposed either on the basis of a potential breach of the peace or possible incitement.[77] But suppose Cohen now took off the jacket and pointedly—indeed intrusively—displayed its message to random passersby, though taking care not to obstruct pedestrian passage. Undoubtedly, most observers would be more deeply offended than were any of Cohen's actual audience. But could such a variant possibly amount to the "fighting words" which *Chaplinsky* strongly implied were unprotected speech?[78] It is true that the Supreme Court, while never overruling or even qualifying *Chaplinsky*, has persistently failed to find even in-your-face epithets provocative enough to

[72] *See id.* at 20; Feiner v. New York, 340 U.S. 315, 321 (1951) (upholding conviction for violation of public peace where speech "undert[ook] incitement to riot").

[73] *Cohen*, 403 U.S. at 26.

[74] *Id.* at 25.

[75] *Id.* at 26.

[76] *See id.* at 20; Roth v. United States, 354 U.S. 476, 484–85 (1957) (holding that obscenity is not constitutionally protected speech).

[77] *See Cohen*, 403 U.S. at 20.

[78] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

warrant criminal sanctions.[79] The context of those cases seems more redemptive than that of *Cohen* who no longer wishes to convey a political message, but simply wants to affront or assault occasional passersby with taboo and offensive language.[80]

There remains, to be sure, a quite plausible claim that the very act of publicly flaunting taboo words to shock or offend, without more, conveys a message. Justice Brennan once observed, in rebuking his colleagues on the Court, for allowing the FCC to ban broadcasts of George Carlin's "seven dirty words"[81] that there was justification for "confirming Carlin's prescience as a social commentator"[82] since he had evoked public anger and government sanctions over satire which the author deemed "harmless and essentially silly."[83] Perhaps such a theory gives our putative "in your face" Cohen even greater extenuation than he deserves. Surely, if *Chaplinsky* was given no comparable latitude in the course of seeking adherents for his religious faith, one who mindlessly flaunted vulgar words at onlookers should fare no better. Such a case would inevitably invite (indeed would compel) an ultimate reconciliation of two judgments that have coexisted, albeit uncomfortably, for three decades.[84] *Chaplinsky* and *Cohen* cannot survive indefinitely in parallel, because one declares that offensive epithets "are no essential part of any exposition of ideas"[85] while the other insists with equal force that "one man's vulgarity is another's lyric."[86]

Let me quickly fast-forward to the twenty-first century and *Cohen*'s implications to the current status of relevant First Amendment doctrine. In the *United States v. Stevens*[87] case, Chief Justice Roberts blended concisely a set of basic free expression

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[79] *See, e.g.*, Street v. New York, 394 U.S. 576, 578–79, 581 (1969) (holding that the statement "[w]e don't need no damn flag," after burning an American flag could not constitutionally be criminalized).

[80] *Compare Cohen*, 403 U.S. at 20, *with* Virginia v. Black, 538 U.S. 343, 359 (2003) (holding that "fighting words . . . are generally proscribable under the First Amendment.").

[81] FCC v. Pacifica Found., 438 U.S. 726, 763–65, 777 (1978) (Brennan, J., dissenting).

[82] *Id.* at 777.

[83] *Id.* at 730 (majority opinion).

[84] *See infra* text accompanying notes 85–86.

[85] *Chaplinsky*, 315 U.S. at 572.

[86] *Cohen*, 403 U.S. at 25.

[87] United States v. Stevens, 130 S. Ct. 1577 (2010). The *Stevens* case considered where a federal statute, which barred the commercial creation, sale or possession of certain depictions of animal cruelty, was constitutional.

precepts.[88] He noted that "the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas' . . . including obscenity, . . . defamation, . . . fraud, . . . incitement, . . . and speech integral to criminal conduct."[89] Such categories of unprotected expression, noted the Chief Justice, quoting *Chaplinsky*, "have never been thought to raise any Constitutional problem."[90]

Implicit in this most recent recapitulation of the few and narrowly defined exceptions lie several precepts. First, unlike the free expression law of virtually all other western nations, our Bill of Rights essentially presumes that speech and press are protected until and unless the contrary—that is, the absence of protection—has been clearly and explicitly stated.[91] Second, in consequence of that presumption, the speaker who is targeted for civil or criminal sanctions, receives in most situations the benefit of the doubt—until and unless, that is, one of the narrowly defined exceptions applies.[92] And finally, as we noted earlier and will probe more deeply in a moment, most of our western neighbor nations approach the matter quite differently.[93] It is now time to look more closely at the strikingly different way in which our First Amendment principles have evolved to bring us to the condition that Chief Justice Roberts most recently described in the *Stevens* case.[94]

THE EVOLUTION AND TRANSFORMATION OF U.S. "HATE SPEECH" REGULATION

The history of racially and otherwise hostile speech deserves a

[88] *Id.* at 1584.

[89] *Id.* (citations omitted).

[90] *Stevens*, 130 S. Ct. at 1584 (quoting *Chaplinsky*, 315 U.S. at 572).

[91] *See Stevens*, 130 S. Ct. at 1584. The Court noted: "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (alteration in original) (quoting Ashcroft v. ACLU, 535 U.S. 564, 573 (2002)) (internal quotation marks omitted). The Court continued: "From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations." *Stevens*, 130 S. Ct. at 1584 (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992)) (internal quotation markets omitted).

[92] *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000) ("'Content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." (quoting *R.A.V.*, 505 U.S. at 382)).

[93] *See infra* text accompanying notes 195–234.

[94] *See supra* text accompanying notes 87–90.

brief recapitulation, given its tortuous twists and turns. It was, in fact, just a century ago that the New York Legislature imposed what appeared to be the very first curb on ethnically offensive language.[95] The earliest version of what would come to be known as group libel laws specifically forbade hotels from discriminatory advertising—that is, from publicly announcing a refusal to accommodate overnight guests on the basis of race, color, or religion.[96] That action preceded the Federal Public Accommodations Laws by a half century, and involved no apparent attention to free expression.[97] Curiously, the only vocal opposition at the time came from those who feared that hotels might be unable under the New York law to refuse rooms to persons infected with tuberculosis.[98]

It was not long before other states followed suit. By the mid-1920s, at least seven other legislatures had adopted similar anti-discrimination laws that targeted hostile words as well as acts.[99] Concern for the legal protection of minorities was further heightened in the post-World War I era by anti-Semitic publications, notably Henry Ford's scurrilous *Dearborn Independent* with its focus on the infamous Protocols of Zion.[100] Specific efforts were made by a number of cities, with mixed success, to ban distribution of Mr. Ford's newspaper.[101] And most notably, for the first time, free speech and press concerns were expressly raised in opposition.[102] These efforts encountered mixed success.[103] The Michigan Legislature declined to adopt such a measure largely because newspaper editors attacked the statute as chilling free speech.[104]

Meanwhile, a Cleveland ordinance was successfully challenged in federal court, producing what was undoubtedly the first judgment invalidating government sanctions on racist or ethnically offensive

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[95] 1913 N.Y. Laws 481–82.

[96] *Id.*; *see* Evan P. Schultz, *Group Rights, American Jews, and the Failure of Group Libel Laws, 1913–1952*, 66 BROOK. L. REV. 71, 90–91 (2000).

[97] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a (2006)).

[98] *See* Schultz, *supra* note 96, at 92.

[99] *See id.* at 99 ("The states were Illinois, Colorado, New Hampshire, Connecticut, Pennsylvania, Maine, and Minnesota.").

[100] *Id.* at 100–01.

[101] *Id.* at 104.

[102] *Id.* at 105.

[103] *See id.* at 105–06.

[104] MORTON ROSENSTOCK, LOUIS MARSHALL: DEFENDER OF JEWISH RIGHTS 150 (1965).

expression.[105] The American Jewish Committee, by contrast, viewed the controversy with marked ambivalence and kept its distance from the *Dearborn Independent*, declining to take sides.[106] The president of the Anti-Defamation League of B'Nai B'rith lamented in 1935 that, although the First Amendment "was never intended as a protection against group libel any more than [as an obstacle against] individual libel,"[107] it nonetheless posed "an insurmountable obstacle in bringing before the bar of justice one of the lowest forms of malefactors."[108] In *Near v. Minnesota*,[109] the United States Supreme Court had struck down as a prior restraint Minnesota's attempt to enjoin future publication of scandalous or defamatory matter, albeit without specific emphasis on the content of the material.[110] Curiously, though, the First Amendment content issue would not be tested until two decades later.[111]

In the interim, events in Europe leading to World War II would intensify the concerns that generated the earlier laws.[112] "The most direct response to the [international] impact of Nazi propaganda was a two-part article written by [a] young [lawyer named] David Riesman."[113] Trained as a lawyer in the 1930s and teaching as a law professor in the 1940s, he achieved fame and stature as a sociologist and author of such memorable books as *The Lonely Crowd*.[114] But much earlier he had issued a forceful call for the wider enactment and more vigorous enforcement of group libel laws, which he viewed "as the most effective antidote to Nazi propaganda."[115] Though he could hardly have overlooked the

[105] *See* Dearborn Pub. Co. v. Fitzgerald, 271 F. 479, 482, 486 (N.D. Ohio 1921).

[106] *But see* Victoria Saker Woeste, *Insecure Equality: Louis Marshall, Henry Ford, and the Problem of Defamatory Antisemitism, 1920–1929*, 91 J. AM. HIST. 877, 880, 887 (2004) (noting the American Jewish Committee employed a policy of not litigating anti-Semitism and deliberately kept a distance from the Cleveland controversy).

[107] Schultz, *supra* note 96, at 111 (citation omitted).

[108] *Id.* (citation omitted).

[109] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

[110] *See id.* at 703–04, 737–38 (Butler, J., dissenting). The Court stated that the Minnesota statute, in suppressing newspaper or periodical materials, is ultimately infringing upon the "liberty of the press and of speech" that is "safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Id.* at 707 (majority opinion).

[111] *See* Beauharnais v. Illinois, 343 U.S. 250, 251–52 (1952).

[112] O'Neil, *supra* note 27, 23–24.

[113] *Id.* at 24 (citing David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942)).

[114] *David Riesman, Sociologist Whose 'Lonely Crowd' Became a Best Seller, Dies at 92*, N.Y. TIMES, May 11, 2002, at A18.

[115] O'Neil, *supra* note 27, at 24 (citing Riesman, *supra* note 113, at 777–78).

tension that such laws would create for free speech and press, "he insisted that, in perilous [times], even Bill of Rights guarantees must yield to national exigency: '[I]t is [no] longer tenable to continue a negative policy of protection from the state . . . [which] plays directly into the hands of the groups whom supporters of democracy need most to fear.'"[116]

Just as Senator Joseph McCarthy was mobilizing virulent anti-Communist sentiment on one side, Professor Riesman had rallied a number of state lawmakers to a different cause.[117] A substantial number of states did in fact heed his plea, and enacted "laws that specifically targeted racist, anti-religious, and otherwise ethnically demeaning publications."[118] The validity of such laws was now bound to reach the Supreme Court, as it did in 1951.[119] The specific focus was an Illinois statute[120] that imposed penalties on those publishing or exhibiting material which:

> 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.[121]

The officers of the White Circle League were specifically charged with organizing the distribution of a provocative leaflet that urged the Chicago city government "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro"[122] and called upon "[o]ne million self respecting white people in Chicago to unite."[123] The leaflet also warned of ominous prospects—"rapes, robberies, knives, guns and marijuana of the negro"[124]—should such pleas not be

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[116] O'Neil, *supra* note 27, at 24 (alterations in original) (quoting Riesman, *supra* note 113, at 780).

[117] *See* O'Neil, *supra* note 27, at 24; ROBERT GRIFFITH, THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE 31, 73–74 (2d ed. 1987).

[118] O'Neil, *supra* note 27, at 24 (citing Beauharnais v. Illinois, 343 U.S. 250, 251 (1952)).

[119] O'Neil, *supra* note 27, at 24.

[120] The Illinois statute, which was passed by the Illinois Legislature in 1917 as section 224a, and cited by the Court as part of the Criminal Code, was tested and upheld in *Beauharnais*. *See Beauharnais*, 343 U.S. at 251, 266–67; Act of June 29, 1917, § 1, 1917 Ill. Laws 362, 363 *repealed by* Act of June 30, 1961, § 35-1, 1965 Ill. Laws 1983, 2044).

[121] *Beauharnais*, 343 U.S. at 251 (citations omitted).

[122] *Id.* at 252 (internal quotation marks omitted).

[123] *Id.* (internal quotation marks omitted).

[124] *Id.* (internal quotation marks omitted).

promptly held by the white community.[125]

The Illinois courts sustained the convictions and rejected both First Amendment and due process claims.[126] The statute, observed the lower court, provided a defense only for "publi[cations] with good motives and for justifiable ends,"[127] but that sufficed in extenuation.[128] The state courts also rejected the defendants' plea that a "clear and present danger" must exist before such a sanction could be imposed on expression, however hateful.[129] The *Dennis v. United States* anti-Communist conspiracy case was, of course, pending at precisely the same time, albeit focused on federal rather than state law matters.[130]

A sharply divided U.S. Supreme Court clearly recognized the paradox created by *Beauharnais*.[131] The majority found persuasive, however, an analogy to individual civil redress for defamation, derived from *Chaplinsky*, and also took judicial notice of recent racial tensions in Chicago neighborhoods.[132] "[W]e would deny experience," wrote Justice Frankfurter for the majority, "to say that the Illinois Legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented."[133]

The dissenters were predictably dismayed by such a ruling. Justice Black, who in later years would often cite *Beauharnais* as the High Court's single worst free speech precedent, insisted that the majority "acts on the bland assumption that the First Amendment is wholly irrelevant."[134] Even Justice Stanley Reed, seldom counted among the champions of free expression, dissented here—albeit more on due process than speech and press grounds.[135] Justice Robert Jackson, usually found on the other side of such issues after his experience at Nuremberg, also dissented from what he deemed an unsupportable and essentially unrebuttable inference

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[125] *See id.*
[126] *Id.* at 251.
[127] *Id.* at 254 (citations omitted) (internal quotation marks omitted).
[128] *Id.* at 253–54.
[129] *Id.* at 253, 266.
[130] Dennis v. United States, 341 U.S. 494, 495 (1951).
[131] *See Beauharnais*, 343 U.S. at 266–67.
[132] *Id.* at 254–57, 259–61.
[133] *Id.* at 261.
[134] *Id.* at 268 (Black, J., dissenting).
[135] *Id.* at 277–84 (Reed, J., dissenting).

of danger from a misguided and innocuous racist tract.[136]

Clearly, the *Beauharnais* ruling has not fared well over time and would be cited at an advocate's peril.[137] Yet despite ample opportunity to accord it a decent burial, the Court has never even substantially criticized it.[138] As recently as two decades ago, the Court cited the case as illustrative of categories of speech that have been denied First Amendment protection.[139] Clearly, the central premise of *Beauharnais* seems to survive in a different and more ominous form, possibly awaiting a renaissance. The simple fact is that for nearly three quarters of a century, this decision remains as the major constitutional cloud hanging over efforts to undermine or set aside sanctions on racist, sexist, and comparable speech.[140] Unless "group libel laws" were somehow entitled to a constitutional pass from the Court on grounds that would set apart all other forms of "hate speech" regulation, this paradox persists as one of the most baffling in First Amendment law.[141]

Curiously, though, despite *Beauharnais*, such laws were seldom invoked in the ensuing decade or two—perhaps because anti-Communism and McCarthyism now preempted the stage.[142] State lawmakers instead adopted a quite different but comparably speech-intrusive medium in the last quarter of the twentieth century.[143] A dozen or so states, without ever repealing their group libel laws, instead passed laws that imposed civil sanctions on those who uttered hostile epithets and otherwise uncivil language.[144]

The results in state courts were comic, and did little to reshape First Amendment law. It was under such a New York statute,[145] for example, that a Niagara Falls gift shop proprietor was ordered to remove from the window a pencil with an electric cord jokingly

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[136] *Id.* at 287–305 (Jackson, J., dissenting).

[137] *See, e.g.*, Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 672 (7th Cir. 2008) ("[T]hough *Beauharnais* . . . has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.").

[138] O'Neil, *supra* note 27, at 26.

[139] *Id.* (citing New York v. Ferber, 458 U.S. 747, 763 (1982)).

[140] O'Neil, *supra* note 27, at 26.

[141] Schultz, *supra* note 96, at 138 (discussing the Court's confusing justification of the group libel laws at issue in *Beauharnais*).

[142] *Id.* at 142.

[143] *See, e.g.*, ROBERT M. O' NEIL, FREE SPEECH IN THE COLLEGE COMMUNITY 23–24 (1997) (detailing rules, policies, and codes used to limit certain types of speech at state universities).

[144] *See, e.g.*, N.Y. EXEC. LAW § 296(2) (McKinney 2012) (forbidding the owner of an establishment from discriminating against particular groups).

[145] *Id.*

referred to as a "Polish Calculator."[146] Similarly, a Long Island restaurateur was compelled to apologize to a waitress whom he had publicly insulted as a "Jewish broad[]" because she allegedly sought special treatment at the counter.[147] A non-Jewish woman sarcastically telephoned her neighbor with the message "happy Jew day" on the morning of Rosh Hashanah—an indiscretion for which she was ordered by a New York judge to do penance.[148] While such laws were occasionally challenged in state courts in the early and mid-1980s, they seem to have languished on the books into the new century, rather like the earlier group libel laws.[149]

When it came to the most recent "hate speech" episode, however, the legal climate was quite different. Although the number of restrictive campus policies affecting such expression is impossible to estimate reliably, even a conservative survey would document a hundred or more such speech codes.[150] Watchdog free speech groups like the Foundation for Individual Rights in Education (FIRE) would insist the number has been far greater,[151] including in its count a number of essentially hortatory policies. But the courts have been absolutely uniform in their condemnation of such policies on First Amendment grounds.[152] Every case that has been brought against a public university on the basis of such a code has been decided against the institution, on free speech or due process grounds or both.[153] In one notable instance, based upon the one state law that forbids such policies, a California state court actually invalidated Stanford's restrictive speech code, and the university

[146] State Div. of Human Rights v. McHarris Gift Center, 418 N.E.2d 393, 393 (N.Y. 1980) (Cooke, J., dissenting) (internal quotation marks omitted).

[147] Imperial Diner, Inc. v. State Human Rights Appeal Bd., 417 N.E.2d 525, 527 (N.Y. 1980).

[148] *L.I. Woman Sentenced to Community-Service Work for Ethnic Slur*, N.Y. TIMES, May 14, 1982, at B2.

[149] O'Neil, *supra* note 27, at 26.

[150] O'NEIL, *supra* note 143, at 2.

[151] *See* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 2012: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES 2 (2012) [hereinafter SPOTLIGHT ON SPEECH CODES], *available at* http://thefire.org/public/pdfs/af4ac7f8368298b50f24db9175295189.pdf?direct (finding that 65% of the 392 schools surveyed had a restrictive speech code).

[152] Doe v. Univ. of Mich., 721 F. Supp. 852, 853–54 (E.D. Mich. 1989).

[153] *See* SPOTLIGHT ON SPEECH CODES, *supra* note 151, at 9 n.11 (citations omitted); *see also id.* at 27 (noting the successful challenges in the courts as well as what jurisdictions have overturned them).

decided not to appeal the ruling.[154]

Several points bear observation in giving perspective to the speech code saga. First, while the outcome has been consistently one-sided, despite wide variations in the content of such policies, every court has made clear that it imposed no categorical ban on restrictive codes, leaving open at least the theoretical possibility that someday a narrower ban could be written and would survive judicial challenge.[155] Second, both challengers and proponents have recognized considerations that transcend free speech and due process; scholars and legal experts have for at least two decades debated the educational and policy implications of speech codes and similar bans.[156] Finally, in large part because of the consistently negative outcome in the courts, boards and administrators have shown steadily decreasing interest in adopting such policies and have more often favored essentially educational approaches unlikely to invite judicial challenge.[157] Meanwhile, the speech code that could withstand judicial attack remains to be written, as all the cases have assumed it might.[158]

Two further chapters in this evolution serve to round out the hate speech experience. When a major challenge to a Minnesota municipal ban on hate speech reached the Supreme Court, about all that seemed certain was that the Justices would now be sharply divided, as indeed they were.[159] The ordinance in issue made it a crime to:

> Place[] on public or private property a symbol, object . . . 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 . . . .[160]

One of the first persons so charged was a juvenile who had just

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[154] *See* Corry v. Leland Stanford Junior Univ., No. 1-94-CV-740309, *41 (Cal. Super. Ct. Feb. 27, 1995) *available at* http:// www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm.

[155] *See, e.g.*, *Doe*, 721 F. Supp. at 861–63 (illustrating what would be permissible regulations in a restrictive speech code on campus).

[156] *See* O'NEIL, *supra* note 143, at 14–15, 21 (highlighting policy arguments in favor and against speech codes).

[157] *See id.* at 20.

[158] *See id.* at 21 (discussing failed university attempts to write a code that would pass constitutional muster).

[159] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 397, 415 (1992) (four Justices concurring in judgment, one writing separately).

[160] ST. PAUL, MINN. CODE § 292.02 (1990); *see also R.A.V.*, 505 U.S. at 380.

burned a cross on the lawn of an African-American family.[161] Although charges for trespass, arson, and other non-expressive conduct would normally have been in order, the prosecutor opted instead to invoke the newly enacted hate speech ordinance.[162]

The Minnesota Supreme Court rejected traditional First Amendment challenges, and the high court granted review.[163] For Justice Scalia, writing for a new majority, the fatal flaw of the ordinance was its reliance on content differentiation.[164] Even though the expression involved in such a case might well be less than fully protected—as fighting words, for example—its status did not empower government to "regulate [its] use based on hostility—or favoritism—towards the underlying message expressed."[165] While the city might well have forbidden all speech of a certain type, it could not selectively target only regulable speech that evoked tension or hostility "on the basis of race, color, creed, religion or gender"[166] and not for other reasons or in other realms of advocacy.[167]

For the Justices who concurred only in the result,[168] this view marked a dramatic shift. One of those Justices argued that this departure from familiar First Amendment jurisprudence potentially created more problems than it solved, and on that basis termed it "an aberration."[169] For these four judges, the same result should and could have been reached—and the conviction overturned—simply because of the overly broad reach of the St. Paul ordinance.[170] Under a narrower and more precise prohibition aimed sharply at such activity, three of the concurring Justices strongly implied they would have been ready to recognize state power to proscribe such hateful activity, even if it incidentally embraced some speech.[171]

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161 *R.A.V.*, 505 U.S. at 379.

162 *Id.* at 380.

163 *Id.* at 381.

164 *Id.* at 382, 387.

165 *Id.* at 386.

166 *Id.* at 380, 391 (quoting ST. PAUL, MINN., CODE § 292.02 (1990)).

167 *See R.A.V.*, 505 U.S. at 391.

168 *Id.* at 397, 416 (Justice White, joined by Justices Blackmun and O'Connor, concurred in judgment; Justice Stevens concurred in judgment in Part I which was joined by Justices White and Blackmun; Justice Blackmun also wrote separately).

169 *Id.* at 415 (Blackmun, J., concurring).

170 *Id.* at 397 (White, J., concurring).

171 *Id.* at 401 (arguing that if fighting words are not protected, then a subset of fighting words also would not be protected).

That latter suggestion soon proved prophetic. In the very next Term, again with unanimity, the Court held in *Wisconsin v. Mitchell*[172] that states might impose harsher sentences for those who commit certain criminal acts on the basis of the race of the victim.[173] Many states had, even while rejecting hate speech and campus codes, enacted versions of model laws that imposed a harsher sentence on the basis of proof that the defendant had "select[ed] the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[174]

In retrospect, distinguishing hate crimes from hate speech might have proved a virtually impossible task. Illustratively, the defendant in the *Mitchell* case insisted that a racially hostile motive or animus could be established only by the very type of speech that the St. Paul case seemed to shield from direct criminal sanctions.[175] Thus, the very words that apparently could not be reached directly because of the Court's concern about content selectivity now seemed wholly vulnerable to collateral or indirect use for the closely related purpose of justifying an enhanced penalty under the substantive statute.[176]

The *Mitchell* Court was, however, clearly determined to have it both ways. To the extent that a sentence-enhancement law indirectly (though unavoidably) targeted an actor or speaker's motive, that was not markedly different from relying on motive or animus for a host of other purposes.[177] Here the Court invoked two recent rulings that had allowed trial judges to take account of racial animus in the sentencing process and conveniently overlooked the difference between what was in those cases a judicially discretionary use of words that revealed bias, and the mandatory use of such evidence under the Wisconsin sentence enhancement

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[172] Wisconsin v. Mitchell, 508 U.S. 476 (1993).

[173] *Id.* at 487–88.

[174] *Id.* at 480 (citing WIS. STAT. § 939.645(1)(b) (2012)). Wisconsin's seminal ban on bias affecting sexual orientation or homophobia had, of course, no direct import on the case, but is nonetheless notable because of its enhancement of the law's protective scope. *See* WIS. STAT. § 939.645(1)(b).

[175] *Mitchell*, 508 U.S. at 487.

[176] *Id.* at 483–86 (arguing that the Court is not bound in the same manner as it was in *R.A.V.* and that the effect of the statute is subject to interpretation).

[177] *Id.* at 484–85.

law.[178]

Setting aside the *R.A.V.* case, *Mitchell* now focused on the key difference, whereas the St. Paul ordinance, the Court insisted only a year earlier, "was explicitly directed at expression,"[179] the Wisconsin statute "is aimed at conduct unprotected by the First Amendment."[180] Such a distinction was clearly unsatisfying at the time and, though the Court has not revisited the *Mitchell* decision since then, it remains troubling two decades later.[181]

Let us step back further and probe the hate crime/hate speech distinction a bit differently. Candor surely should have compelled the *Mitchell* Court to acknowledge more fully the degree to which penalty-enhancement laws in fact impose sanctions on protected expression, albeit in a slightly different manner than did the St. Paul ordinance.[182] The proffered distinction clearly remains untenable, although courts and prosecutors alike seem to have been remarkably ready to embrace that distinction despite its illogical character.[183] Leaving that premise on the table for the moment, we now add to an unsatisfying mix the last and clearly most puzzling case in the litany.

In *Virginia v. Black*,[184] a sharply divided Court reviewed a Virginia Supreme Court judgment involving the state's cross-burning law.[185] The statute criminalized the burning "with the intent of intimidating any person or group of persons, to burn, or caused to be burned, a cross on the property of another . . . . Any such burning of a cross shall be prima facie evidence of an intent to

[178] *Id.* at 485–86 (citing Dawson v. Delaware, 503 U.S. 159, 167 (1992); Barclay v. Florida, 463 U.S. 939, 949 (1983)).

[179] *Mitchell*, 508 U.S. at 487.

[180] *Id.*

[181] By this, it is meant that the Supreme Court has yet to overrule *Mitchell*. *See infra* note 183 for examples of trial courts applying *Mitchell*.

[182] *See Mitchell*, 508 U.S. at 487 (stating that this is different from the ordinance in *R.A.V.*, but failing to explain to what extent the Wisconsin statute impacts protected expression).

[183] A number of courts have cited and applied Mitchell since 1993. *See* Ward v. Utah, 398 F.3d 1239, 1249–50 (10th Cir. 2005) (stating that the *Mitchell* reasoning applies to the Utah statute, which was aimed at conduct unprotected by the First amendment). *See also* Terry v. Reno, 101 F.3d 1412, 1420 (D.C. Cir. 1996) (analogizing the case to *Mitchell* as the statute in question targets conduct); Cook v. Rumsfeld, 429 F. Supp. 2d 385, 408 (D. Mass. 2006) (discussing the use of statements as evidence to prove intent, relying on *Mitchell*), *aff'd*, 528 F.3d 42 (1st Cir. 2008).

[184] Virginia v. Black, 538 U.S. 343 (2003).

[185] *Id.* at 347.

intimidate a person or group of persons."[186] The majority eventually invalidated the cross-burning law because of the "prima facie evidence" provision,[187] noting that the jury instruction applied in the actual case created a constitutionally infirm presumption that, for example, the defendant has been charged and convicted solely because of evidence solely relating to the act of cross-burning itself, without more.[188] Meanwhile, however, the two younger cross-burning defendants saw their convictions remanded with the possibility that—absent the taint created in *Black* by the prima facie instruction—the Court might have sustained those convictions despite the prima facie clause.[189]

It was, however, on the core First Amendment issues that Justice O'Connor's prevailing opinion broke strikingly new ground.[190] After a lengthy review of the history of Ku Klux Klan activity and pervasive abuse in the United States, Justice O'Connor offered two core conclusions: the first conclusion served to distinguish *R.A.V.* as a case that involved (and proscribed) a form of statutorily disfavored expression, thus leaving open here the possibility that a state might validly impose such a ban without selectively favoring or disfavoring a particular viewpoint as the *R.A.V.* Court had in the majority's view done in the St. Paul case.[191]

But the second and clearly dominant element in *Black* lay in this substantive declaration:

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.[192]

Thus, the *Black* Court unmistakably and unambiguously added to the list of unprotected expression—along with the *Chaplinsky*

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[186] *Id.* at 348 (quoting VA. CODE. ANN § 18.2-423 (2012)) (internal quotation marks omitted).

[187] *Black*, 538 U.S. at 364.

[188] *Id.* at 365.

[189] *Id.* at 367.

[190] *See id.* at 363 (concluding that under the First Amendment, Virginia was able to prohibit cross burning done with the intent to intimidate because of the "particularly virulent" nature of that act).

[191] *Id.* at 361–62 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

[192] *Black*, 538 U.S. at 363.

reservations—cross burning with a clear threat to intimidate.[193] While cross burning remains a uniquely American form of brutality, that fact alone does not enlighten us. As a nearly unanimous Supreme Court would some years later affirm, a strong commitment to free expression in such contexts as irreverent funeral protests and animal cruelty videos, the stark exception for cross burning remains as puzzling as it was inadequately explained by the Justices.[194] Overruling, or even modification or qualification, seems inconceivable.

AN INTERNATIONAL PERSPECTIVE ON U.S. LAW: WHAT'S SO DIFFERENT?

First, as we look abroad, we need to remind ourselves just how unique a commitment U.S. free speech and press law has made in the last half century to suppressing racially and otherwise offensive speech in all forms, including digital and electronic. When a group of neo-Nazis sought to march in the Holocaust-sensitive village of Skokie, Illinois, both the federal appeals court and the state supreme court flatly and unequivocally ruled in favor of the marchers despite clear and compelling evidence of the potential impact on Holocaust survivors and their families of swastikas, Nazi uniforms and other insignia, and banners and flags glorifying the Third Reich.[195] While the overwhelming sentiment of most observers may have been more often ridicule or even amusement than genuine fear or anguish, the evidence supporting local efforts to suppress or reroute the Skokie march attested eloquently to the level of concern.[196] Moreover, when the Illinois Chapter of the American Civil Liberties Union took on the case, many Jewish members initially expressed strong disagreement, though later and calmer judgments would not only vindicate the ACLU, but would, eventually, greatly enhance its appeal and its national

[193] *Id.*

[194] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (holding the irreverent funeral protests were entitled to First Amendment protection); United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (holding the statute prohibiting certain depictions of animal cruelty as being "substantially overbroad" and thus in violation of the First Amendment).

[195] *See* Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 24 (Ill. 1978); Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978).

[196] In fact, one day after the leader of the National Socialist Party of America announced the planned march, the village enacted three ordinances which prohibited demonstrations with the specific characteristics of the neo-Nazi march. *See Collin*, 578 F.2d at 1199.

membership.[197]

A brief recap of the contrasting experience of other western nations illustrates the novelty of the U.S. approach to hateful and spiteful expression. Despite overwhelming similarities (both political and demographic) across our northern border, Canada's courts have expressly and consistently declined to follow the lead of the United States.[198] Two decades ago, the Supreme Court of Canada sustained the conviction of a teacher named Keegstra, who had told his students in class that Jews were "treacherous," "sadistic," "power hungry and child killers," and that "Jews [had] created the Holocaust to gain sympathy."[199] The criminal law under which Keegstra was convicted forbade "the willful promotion of hatred" against a group identifiable on the basis of "colour, race, religion or ethnic origin."[200] The statute made no reference to incitement to violence, and the charge reflected no proof that the teacher had any intent to lead his pupils to violence.[201] The Canadian court, though sharply split, affirmed Keegstra's conviction mainly on the basis of the probable impact of hate propaganda, noting the likelihood that members of both the targeted group and others would be degraded and humiliated, and might as a consequence avoid contact with members of other group within the larger society.[202]

A similar Canadian analysis has recently emerged with regard to websites maintained by noted anti-Semites and other purveyors of hateful and spiteful rhetoric.[203] The Canadian Human Rights Commission recently ruled that Holocaust denier Ernst Zündel must close down his Internet website because of the blatantly anti-Semitic messages it contained and disseminated.[204] Noting that, on Zundelsite, "Jews are vilified in the most rabid and extreme

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[197] Edward L. Rubin, *Nazis, Skokie, and the First Amendment as Virtue*, 74 CAL. L. REV. 233, 233 (1986) (reviewing DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985)) (noting that over 30,000 members dropped out of the ACLU because of their representation at Skokie).

[198] *See, e.g.*, R. v. Keegstra, [1990], 3 S.C.R. 697, 740–44 (Can.).

[199] *Id.* at 714 (internal quotation marks omitted).

[200] *Id.* at 713 (citing Canada Criminal Code, R.S.C. 1985, c. C-46, s. 319(2)).

[201] *See Keegstra*, 3 S.C.R. at 715–16, 772–73, 776–78.

[202] *See id.* at 746, 795.

[203] *See generally* Citron v. Zündel, (2002) 41 C.H.R.R. D/148, ¶ 2 (Can. H.R.T.), *available at* http://chrt-tcdp.gc.ca/search/files/t460_1596de.pdf (explaining how the Canadian Human Rights Tribunal ordered that the website, Zundelsite, be shut down because its anti-Semitic comments exposed Jewish persons to hatred and contempt).

[204] *See id.* ¶ 303.

manor,"[205] the Commission answered Zündel's free speech claims by observing that material such as that which he regularly posted on his website "can erode an individual's personal dignity and sense of self-worth."[206] Zundel was reported soon thereafter to have fled Canada for the southeastern United States, where he is reputedly hiding in the Tennessee Mountains.[207] One perceptive international observer notes the striking contrast between the premises of U.S. and Canadian law on such issues:

> Not only does the Canadian approach to hate speech focus on gradual long-term effects likely to pose serious threats to social cohesion rather than merely on immediate threats to violence, but it also departs from its American counterpart in its assessment of the likely effects of speech. Contrary to the American assumption that truth will ultimately prevail, or that speech alone may not lead to truth but is unlikely to produce serious harm, the Canadian Supreme Court is mindful that hate propaganda can lead to great harm by bypassing reason and playing on the emotions.[208]

The experience in the United Kingdom closely mirrors that of Canada, and once again stands in sharp contrast to the U.S. tolerance of hateful and spiteful rhetoric.[209] As early as 1936, Parliament enacted Section 5 of the Public Order Act, anticipating the rise of British Fascism.[210] This law also substantially supplanted the seditious libel standards by allowing punishment for mere intent to provoke violence short of an actual attempt, and permitted punishment of advocacy "likely" to lead to violence even if no violence actually occurred.[211] Three decades later, the British Parliament enacted Section 6 of the Race Relations Act (RRA) which made it a crime to utter in public or to publish words "which are threatening, abusive or insulting" and which are intended to incite

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[205] *Id.* ¶ 140.

[206] *Id.* ¶ 81.

[207] *See* Kirk Makin, *Rights Group Orders Zundel to Kill Hate Site*, GLOBE & MAIL (Toronto), Jan. 19, 2002, at A7.

[208] Rosenfeld, *supra* note 19, at 1543–44.

[209] *Id.* at 1544–45.

[210] *See* Nathan Courtney, Note, *British and United States Hate Speech Legislation: A Comparison*, 19 BROOK. J. INT'L L. 727, 730–31 (1993) (citations omitted) (internal quotation marks omitted).

[211] *Id.* at 731.

hatred on the basis of race, color, or national origin.[212] This later legislation (the RRA) focused on incitement to hatred rather than on incitement to violence, though it reintroduced proof of intent as a prerequisite to conviction.[213]

A British case in 1968 identified limitations in the current legal structure, despite efforts to convict a publication that advocated the "return of people of other races from this 'overcrowded island' to 'their own countries.'"[214] An amendment in 1976 removed the intent requirement in the earlier RRA and resulted in several convictions, including that of a black defendant for having asserted publicly that whites are a "vicious and nasty people"[215] and for condoning examples of black attacks on whites; the speaker was charged, *inter alia*, for having said: "If you ever see a white man lay hands on a black woman, kill him immediately."[216] Most recently, in 1986, Parliament added a provision to the Public Order Act that "made hate speech punishable if it amounted to harassment of a target group or individual," and later enacted, in 1997, the Protection from Harassment Act.[217] As one observer noted recently,

> British legislation has been much more successful in combating fascism and Nazism than in dealing with hatred between whites and non-whites. Perhaps . . . [because] a much greater consensus has prevailed . . . concerning fascism than concerning the absorption and accommodation of the large, relatively recent influx of racial minorities.[218]

Germany and the special case of Holocaust denial merit distinct attention.[219] A recent article notes that at least nine European countries have laws on their books that make Holocaust denial a crime.[220] In addition, at least one other country (Spain) reached the same result without comparably explicit sanctions, relying instead

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[212] *Id.* at 733 (quoting Race Relations Act, 1965, ch. 73 § 6(1) (Eng.) *repealed by* Race Relations Act, 1976, ch. 74 Sch. 5 (Eng.)) (internal quotation marks omitted).

[213] *Id.* at 733–34.

[214] Daniel R. Vining, Jr., *On Racism*, 6 OCCIDENTAL Q. 63, 67 (2006).

[215] *Bitter Attack On Whites*, TIMES (Eng.), Jul. 25, 1967, at 1 (internal quotation marks omitted).

[216] *Id.* (internal quotation marks omitted).

[217] Rosenfeld, *supra* note 19, at 1547; *see* Public Order Act, 1986, c. 64 § 4A (Eng.); Protection from Harassment Act, 1997, c. 40 §§ 1–7 (Eng.).

[218] Rosenfeld, *supra* note 19, at 1547.

[219] *Id.* at 1552.

[220] *See* Peter R. Teachout, *Making "Holocaust Denial" A Crime: Reflections on European Anti-Negationist Laws From the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 656 n.9 (2006).

on punishing false statements or statements in reckless disregard of truth "about groups or associations on the basis of ideology, religion or creed, family situation, ethnicity or race, national origin, sex, sexual orientation, or disability."[221] German law (and comparable sanctions imposed by other western nations) "include criminal and civil laws that protect against insult, defamation and other forms of verbal assault, such as attacks against a person's honor or integrity."[222] Hate speech targeting racial, ethnic and religious groups, and anti-Semitic propaganda "have been routinely curbed by . . . German courts."[223]

German publishers, for example, have been punished for spreading pamphlets that charged "the Jews" with various transgressions, "and even [attaching] a sticker . . . saying [only] 'Jew' on the election posters of a candidate running for office [have been] deemed . . . punishable" under German law.[224] Quite simply in these countries, "Holocaust denial is [viewed] as robbing . . . Jews in [Western Europe] of their individual and collective identity and dignity, [while] threatening to undermine" an environment which the Jewish community and Jewish citizens may feel themselves accepted as an essential component.[225]

Finally, within this brief transnational review, we should note the presence and visibility of several international covenants which also differ markedly from U.S. First Amendment principles.[226] The International Covenant on Civil and Political Rights, for example, specifically condemns hate speech while broadly protecting free expression.[227] Especially forceful among such covenants is the specific condemnation of hate speech and the command to criminalize it, found in Article 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which commits to disparaging "propaganda

[221] *Id.* (citations omitted) (providing a partial English translation of the Spanish Criminal Code).

[222] Rosenfeld, *supra* note 19, at 1551.

[223] *Id.*

[224] *Id.*

[225] *Id.* at 1552.

[226] *See id.* at 1523.

[227] International Covenant on Civil and Political Rights art. 20(2), *opened for signature* Dec. 19, 1966, 999 U.N.T.S 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

. . . based on ideas or theories of superiority of one race or group"[228] and which "attempt to justify or promote racial hatred and discrimination in any form."[229] State parties to the CERD are also obliged to declare as a punishable offense "all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination."[230]

Meanwhile, at a regional level, the European Court of Human Rights (ECHR) has sustained convictions for hate speech as concordant with national free speech guarantees. Specifically, a group of Danish youths had been charged with making derogatory and offensive remarks against immigrants, calling them, *inter alia*, "niggers" and "animals" when interviewed by a documentary producer.[231] The Danish courts sustained the convictions under Danish and European Human Rights law.[232] But when the documentary journalist appealed, a sharply divided ECHR ultimately vindicated the interviewer on the ground that he had not endorsed, but merely chronicled, the spiteful views of the racist youths.[233] Thus a subtle but vital distinction emerged between the clearly culpable youths whose epithets were recorded and the journalist/producer.[234]

CONCLUDING THOUGHTS: IS THE U.S. VIEW OF HATE SPEECH TRULY ALL THAT DIFFERENT?

This regrettably brief survey of hate speech regulations and sanctions unmistakably clarifies the vast differences between U.S. First Amendment law and the most nearly comparable approaches of most other western nations.[235] It also invites a few conclusions in no particular order.

First, let us be fully candid about the contrast between these clearly disparate approaches to freedom of expression. At a

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[228] International Convention on the Elimination of All Forms of Racial Discrimination art. 4, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) (ratified by the United States Oct. 21, 1994) [hereinafter CERD].

[229] *Id.*

[230] *Id.* at art. 4(a); *see also* Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 356–57 (1998).

[231] Jersild v. Denmark, 19 Eur. Ct. H.R. 1, 1, 4 (1994).

[232] *Id.* at 1.

[233] *See id.* at 17–18.

[234] *See id.*

[235] *See supra* text accompanying notes 195–234.

philosophical level, each view reflects profoundly differing premises and precepts. But at more a pragmatic level, we must recall the many twists and turns along the road to twentieth and twenty-first century free speech and press law. Notably, none of the several widely condemned and disparaged precedents such as *Chaplinsky* or *Beauharnais* has ever received decent burial, as readily as scholars and judges concede the frailty of reliance on their precedential value.[236] Justice Scalia's treatment of *Chaplinsky*, for instance, might well leave even well informed foreign observers with the badly mistaken perception of much more than survival, even partial redemption.[237]

Then, just as we were becoming comfortable with what seemed to have become a nearly absolute ban on hate speech sanctions, along came Barry Black as the inspiration for a wholly new exception.[238] Purportedly building on *R.A.V.*'s imperative for viewpoint neutrality, Justice O'Connor declared, "[t]he First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation."[239] While other countries are unlikely to follow suit by adopting a comparable sanction on cross burning designed to intimidate—if only because the incidence of such violent acts is minimal even in Canada, let alone in Western Europe—the imprimatur of a new exception emerged unmistakably in the *Black* decision.[240]

Second, however, despite our complete candor in recognizing an imperfect pattern within our own constitutional system, we need to acknowledge how far U.S. free expression law has developed in the past century. When it comes to the doctrine of incitement, it is quite clear that the Supreme Court categorically disavowed the teaching of *Dennis* and unequivocally embraced the exceptionally rigorous conditions imposed by the *Brandenburg* and *Hess*

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[236] 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, 892, 947 (1996) (asserting that *Chaplinsky* and *Beauharnais* should be explicitly overruled "to align First Amendment doctrine with current legal realities and social needs").

[237] *See* Virginia v. Black, 538 U.S. 343, 363 (2003) (discussing R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992)).

[238] *Black*, 538 U.S. at 363.

[239] *Id.*

[240] *Id.*

rulings.[241] For the ensuing four decades or so, peacetime conditions essentially prevailed.[242]

After the hijackings and destruction of September 11, 2001, however, we knew that life (and First Amendment freedoms) would never be quite the same.[243] Indeed, many of us feared that in a time of attacks by hostile powers on U.S. soil, conditions might prove vastly different, and all bets might well be off in a post-peacetime world. Mercifully, and quite surprisingly, the sky did not fall. Despite tighter national security induced restrictions on intelligence gathering and other impositions brought about by the PATRIOT Act and other wartime measures,[244] the dramatic change that might well have been feared simply did not occur.[245] Nor, mercifully, was there anything approaching a resurgence of McCarthyism; no new loyalty oaths or legislative subversive inquiries followed in the wake of the most destructive hostile act on American soil, at least since Pearl Harbor.[246]

Finally, in what should still be considered a work in progress, the evolving impact of new technologies seems to have maintained the basic differences between internet regulation in the United States and in other nations.[247] In several instances, Canadian authorities have notably shut down anti-Semitic and racist websites despite the far greater degree of access that U.S. users and those in other parts of the world enjoy through digital and electronic media.[248] The dissemination by electronic and digital means of neo-Nazi

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[241] *See* Dennis v. United States, 341 U.S. 494, 507 (1951); Brandenburg v. Ohio, 395 U.S. 444, 447 (per curiam) (1969) (establishing the imminent lawless action "incitement" standard); Hess v. Indiana, 414 U.S. 105, 108 (1973) (applying the *Brandenburg* test).

[242] *But see Remarks of William Van Alstyne on the* Brandenburg *Panel*, 44 TEX. TECH L. REV. 85, 87 (2011) (discussing whether *Brandenburg* should be abandoned post-9/11); *see also* Nadine Strossen, *The Regulation of Extremist Speech in the Era of Mass Digital Communications: Is* Brandenburg *Tolerance Obsolete in the Terrorist Era?*, 36 PEPP. L. REV. 361, 362 (2012) (discussing free speech progression in the "digital terrorist age").

[243] Charles A. Flint, Comment, *Challenging the Legality of Section 106 of the USA PATRIOT Act*, 67 ALB. L. REV. 1183, 1183–84, 1204 (2004).

[244] *Id.* at 1183.

[245] *Cf.* Strossen, *supra* note 241, at 362–64 (listing several post-9/11 government measures that "seriously undermine First Amendment rights").

[246] *See* Dr. Herbert London, *Profiling As Needed*, 66 ALB. L. REV. 343, 346 (2003) (comparing the hysteria of the September 11 attacks to that of Pearl Harbor).

[247] *See Fast Facts on United States Submitting Initial Proposals to World Telecom Conference*, U.S. DEP'T OF STATE (Aug. 1, 2012), http://www.state.gov/e/eb/rls/fs/2012/195921.htm (asserting the United States will not "broaden the scope of the [International Telecommunications Regulations] to facilitate any censorship of content or blocking the free flow of information and ideas").

[248] Makin, *supra* note 206, at A7.

paraphernalia has been restricted in France and other European nations, while U.S. users have seemed thus far to escape such intrusive regulation.[249] Once the U.S. Supreme Court had fully committed itself to full protection for electronic and digital communications—even going well beyond the limited protection for motion pictures, cable and licensed broadcasting—the future both in cyberspace and in print seemed quite certain to distinguish sharply between the United States and the rest of the world.

[249] *See* Russell L. Weaver, *The Internet, Free Speech, and Criminal Law: Is It Time for a New International Treaty on the Internet?*, 44 TEX. TECH. L. REV. 197, 207–08 (2011) (discussing Holocaust denial and Nazi symbols within the context of Internet free speech regulation and the possibility of a new international treaty for the Internet).