Restraining the Heartless: Racist Speech and Minority Rights

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"It may be true that morality cannot be legislated, but behavior can be regulated. The law may not change the heart, but it can restrain the heartless."[1]

INTRODUCTION

> In Spain on November 17, 2004, during a friendly soccer match between Spain and England, two Black players for the English team were subjected to monkey noises and racist slogans chanted by thousands of fans in the 55,000-seat stadium.[2]
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> In 2002, a Black woman purchased a house in an all-White neighborhood in Mobile County, Alabama. Upon arriving at the house to prepare it for occupancy, she found the back door of the house had been kicked in. The intruders had sprayed "KKK" and "Nigga" in red letters across the living room walls of her new home.[3]
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> In New York City, an anti-Semitic smear was found in a bathroom on a college campus building. The images discovered were a swastika and a caricature of a man wearing a yarmulke, which had been drawn in black ink on a stall door.[4]

Racially offensive slogans like those directed at the English soccer players in the anecdote above—slurs, epithets, and symbols—are all forms of racist speech. In the United States, racist speech, along with anti-gay and anti-religious speech, falls into the category called "hate speech."[5] Though there is no commonly agreed upon definition of hate speech, the international advocacy organization Human Rights Watch defines

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1. MARTIN LUTHER KING, JR., An Address Before the National Press Club, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 99, 100 (James Melvin Washington ed., 1986).

2. Keith B. Richburg, *Fans' Racist Taunts Rattle European Soccer: Governing Federations Debate New Rules, Sanctions to Curb Abusive Behavior in Stands*, WASH. POST, Dec. 13, 2004, at A12.

3. Rhoda A. Pickett, *Mobile-Area Families Grapple with Race-Driven Vandalism*, MOBILE PRESS-REG. (Mobile, Ala.), July 22, 2002, at 1A.

4. Elissa Gootman, *Noose Case Puts Focus on a Scholar of Race*, N.Y. TIMES, October 12, 2007, at B1.

5. *See* SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 8 (1994).

hate speech expansively as "any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women."[6] While people who are targeted by such an expression because of their race or ethnicity can be victims of racist hate speech, the broad nature of this definition reaches out to those who are frequently targeted by any form of hate speech. At least when reports are analyzed, the majority of victims of hate speech all too often lack social power, and are frequently discrete or insular minorities. In addition, the victims are likely to belong to groups that have been historically discriminated against.

In this Article, I limit my focus to racist speech, which I define as speech that is offensive to individuals or groups on the basis of their actual or perceived race, color, ethnicity, or nation of origin. Part I dissects and examines racist expression by providing contemporary manifestations of racist speech and briefly describing the attendant difficulties that such expression creates for those at whom it is targeted. Part II examines how such expression has been regulated in the United States. Part III argues for regulation due to the connection between racist speech and extremist violence.

I. THE CIRCUMSTANCES OF CONTEMPORARY RACIST EXPRESSION IN THE UNITED STATES

A. The Locale: The Home, the Workplace, and Public Spaces

The complicated racial history of the United States has led to significant racial tension in this country over the last several hundred years. Perhaps unsurprisingly, vestiges of the United States' tumultuous racial history remain as racial, ethnic, and religious minorities in areas across the country have been frequently targeted by racist expression in both public and private spaces. One of the most disturbing places in which individuals have faced racist speech and behavior has been in their living spaces—their homes.[7] Such behavior is still prevalent in the United States. Even in the past twenty years, minorities moving to all-White neighborhoods in cities across the country have faced slurs, epithets, and other expressions of racism directed at them by White neighbors who wish to drive them out of the community.[8] One prominent example of racist expression occurring in and around individuals' homes is when a cross is burned on someone's lawn. In the United States, a burning cross is a powerful symbol. Cross burning is strongly associated with the violence that was perpetrated by the Ku Klux Klan and others. Cross burning was accompanied by other sorts of violence, or served as its precursor.[9] Given this history, it is perhaps unsurprising that in the majority of cases, cross burnings are directed at Black Americans, or those

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6. *Id.*

7. *See, e.g.*, Pickett, *supra* note 3 (describing three families who discovered racist graffiti on their homes).

8. *See, e.g.*, STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS (2000); Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. LAW 47 (2007); Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335 (2002).

9. *See* Rubinowitz & Perry, *supra* note 8, at 355–56.

associated with them—for example, a member of an interracial couple.[10] Not all racist expression targeted at individuals in their homes involves an action, such as cross burning. In some cases, racist expression directed at individuals in their homes may simply consist of harassment in the form of racial and ethnic slurs.[11]

Federal and state cases alleging workplace discrimination suggest that racist speech is also common in U.S. workplaces. The legal tolerance for such expression varies based on the severity of the expression. Courts have allowed the infrequent use of slurs and epithets in the workplace.[12] If the use of racist speech in the workplace meets the legal standard for harassment, however, it may violate federal and state laws providing for equal opportunity in employment.[13] Despite such sanctions under federal and state law, research has found racial harassment in the form of racist expression to be quite prevalent.[14] A few of the more graphic examples of speech used by co-workers and supervisors of minority employees include slurs and epithets, for example, referring to a Black employee as "that stupid nigger,"[15] racist jokes, and cartoons or symbols left in the employees' work area.[16] The different venues in which workplace speech may be experienced depends on the circumstances of one's employment. As the soccer anecdote at the beginning of this Article suggests, racial minorities who are athletes

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10. *See* United States v. May, 359 F.3d 683, 685 (4th Cir. 2004) (cross burning near property of interracial couple); United States v. Hartbarger, 148 F.3d 777, 780 (7th Cir. 1998) (cross burning in front of interracial couple's trailer); United States v. Sheldon, No. 96-4375, 1997 U.S. App. LEXIS 3435, at *1 (4th Cir. Feb. 26, 1997) (convicting defendant for burning a cross on the front lawn of an interracial couple's house).

11. *E.g.*, Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 328 (7th Cir. 2004) (ethnic slur written on the Jewish plaintiffs' property); Ohana v. 180 Prospect Place Realty Corp., 996 F. Supp. 238, 239 (E.D.N.Y. 1998) (slurs directed at Jewish residents by their neighbors).

12. *See. e.g.*, Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250 (6th Cir. 1985).

13. Title VII prohibits discrimination by an employer "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2000). In order for the employer to be held liable, however, behavior must be "sufficiently severe or pervasive." Jerome R. Watson & Richard W. Warren, *"I Heard it Through the Grapevine": Evidentiary Challenges in Racially Hostile Work Environment Litigation*, 19 LAB. LAW. 381, 401 (2004). Courts have interpreted this language to mean that the occasional ethnic slur does not rise to the level of racial harassment under Title VII. *See id.*

14. *See* Vincent J. Roscigno, Lisette M. Garcia & Donna Bobbitt-Zehzer, *Social Closure and Processes of Race/Sex Employment Discrimination*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 28–34 (2007).

15. Armstrong v. Lance, Inc., No. 93-1298, 1994 WL 173192, at *2 (4th Cir. May 9, 1994); *see also* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1408 (10th Cir. 1987) (Blacks referred to as niggers and coons); Gilbert v. City of Little Rock, 799 F.2d 1210, 1213 n.7 (8th Cir. 1986) (use of slurs, anti-Black graffiti against workers); Snell v. Suffolk County, 782 F.2d 1094, 1098 (2d Cir. 1986) (use of slurs and racially offensive cartoons and photographs); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981) (referring to employees as niggers); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 87 (8th Cir. 1977) (referring to employee as a "dago" and to other Italian-American employees as the "Mafia").

16. EEOC v. Nw. Airlines, Inc., 188 F.3d 695, 697–98 (6th Cir. 1999) (Ku Klux Klan symbols and racial graffiti in the work area).

may be confronted with racist speech "backstage" in the locker room and also while performing, as fans hurl slurs and epithets from the stands.[17]

B. The Impact of Racist Speech on Individuals

Those who argue for restrictions on racist speech base many of their arguments on its negative impact on its intended targets. An early examination of racist speech focused on the psychological effects on the victims and the devastating impact hate propaganda has been found to have on the self-esteem of its victims.[18] Mari Matsuda writes that racist hate messages, threats, slurs, and epithets convey messages of inferiority that hit the gut of those in the target groups.[19] Victims who attempt to avoid such negative messages may be restricted in their personal freedom as they "quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor."[20]

Researchers have attempted to evaluate in a more concrete way how hate speech affects its victims. One national study of 2000 people investigated whether individuals have physical or psychological symptoms when they are targeted by others' prejudice.[21] The researchers were surprised to find abuse to be so prevalent; roughly thirty percent of the sample indicated that they had experienced at least one incident of prejudice-motivated violence or abuse during the preceding twelve months.[22] Though the study asked about violence broadly, including physical violence, verbal attacks were the most frequent type of violence reported. Of the individuals surveyed, roughly one-third had experienced verbal attacks—abusive language, harassing telephone calls, or hate mail.[23] Most individuals who indicated that they had experienced "group defamation" identified their skin color or race as the reason.[24]

Examining racist and other types of prejudice-motivated speech, the researchers identified distinctive psychological effects on individuals at whom this type of

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17. For a discussion of the usage of slurs and epithets by players and fans, see Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L.J. 287, 295–99 (1995).

18. *See* Martin Kazu Hiraga, *Anti-Gay and -Lesbian Violence, Victimization, and Defamation: Trends, Victimization Studies, and Incident Descriptions*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 109, 109–10 (Laura J. Lederer & Richard Delgado eds., 1995); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND 53, 53–55 (Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, & Kimberlè Williams Crenshaw eds., 1993); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND, *supra*, at 17, 20–22.

19. Matsuda, *supra* note 18, at 23–24.

20. *Id.* at 24.

21. Howard J. Ehrlich, Barbara E. K. Larcom & Robert D. Purvis, *The Traumatic Impact of Ethnoviolence*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY, *supra* note 18, at 62, 63–64.

22. *Id*. at 64.

23. *Id.*

24. *Id.* at 65. "Group defamation" consists of statements, verbal or otherwise, that are directed at the group to which an individual belongs or with which she identifies rather than at the individual herself. *Id.*

expression is targeted. After the attack, individuals targeted because of their skin color or race tend to have significantly greater negative psychological symptoms than victims of non-prejudiced attacks. Some of these symptoms include fear, stress, and depression. A follow-up study conducted by the same researchers focused on workers' experiences with incidents involving prejudice in a large corporation.[25] Again a large percentage of the events—twenty-one percent—consisted of race-based name-calling, ethnic jokes, and comments.[26] The second study found similar degrees of stress and also that few victims reported the behavior of coworkers or supervisors to higher-ups.[27]

Research on racist speech has revealed much concerning its prevalence, context, and circumstances. This research reveals that, at least in the United States, such expression may leave racial and ethnic minorities at risk of verbal attacks in a variety of locales ranging from their homes and workplaces to other public spaces. The research also shows that racist expression can be more than just mildly distressing to its victims. Race-based name-calling can make its victims fearful, leading to stress and depression.[28] These harmful effects have raised the specter of state regulation. United States federal regulations on racist speech are considered in the next Part.

II. AMERICAN JURISPRUDENCE ON HATE SPEECH

A. The Relatively New Freedom of Protected Speech and Its Gradual Minimization

In the United States the biggest obstacle to state regulation of racist speech is the First Amendment of the U.S. Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."[29]

The First Amendment places the United States in a somewhat distinctive position with respect to hate speech.[30] Though the United States has an established reputation

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25. *Id*. at 69.

26. *Id.* at 71.

27. *Id.* at 71–74.

28. *See* Howard J. Ehrlich, Barbara E. K. Larcom & Robert D. Purvis, *The Traumatic Impact of Ethnoviolence in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY, *supra* note 18, at 62, 62–79.

29. U.S. CONST. amend. I.

30. The U.S. position—one that is strongly opposed to regulations on hate speech—was stated clearly in the revised draft it submitted of Article 4, Section (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 1964. The United States favored a weaker position, one of only disallowing direct incitement to racist violence rather than incitement to discrimination and violence. The U.S. position was rejected in the final version of Article 4. *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195, *available at* http://www.unhchr.ch/html/menu3/b/d_icerd.htm. The United States did not immediately ratify the Convention, *see* OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INT'L HUMAN RIGHTS TREATIES 12 (2004) (stating that the United States ratified the CERD in 1994), but rather signed it with a short reservation that does not bind the United States to any action that would violate the First Amendment. *See* United Nations, United Nations Treaty Collection: Declarations and Reservations, http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm.

for opposing governmental regulation of racist expression, it is important to remember that the meaningful protection of all individual rights in the United States, including freedom of expression, has emerged relatively recently. In the 1920s, free speech was considered a dangerous idea.[31] It was not until the 1930s that the U.S. Supreme Court issued the first opinions protecting freedom of speech.[32]

The Supreme Court first confronted the issue of racist speech with challenges made by an extremist White power group, the Ku Klux Klan, to state restrictions on expression.[33] In these early cases, the Supreme Court found that states could restrict activities involving racist speech and other types of hate speech. In 1928, in *Bryant v. Zimmerman*,[34] the Supreme Court upheld a New York law that required certain groups to register with the state. Some groups, but not the Klan, who challenged the law, were exempted—labor unions, the Masonic order, and others—based on the idea that they were legitimate.[35] The Supreme Court found it constitutional to require the Klan to register with the Secretary of State and turn over its membership lists.[36]

Roughly a decade later, in *Chaplinsky v. New Hampshire*,[37] the Court again considered the issue of extremist speech in a case involving a Jehovah's Witness who became involved in a confrontation with police. Chaplinsky was arrested and convicted for calling a police officer a "God damned racketeer" and "a damned Fascist" under a state law criminalizing the address of any "offensive, derisive or annoying word to any other person" in public.[38] According to the Supreme Court, the restrictions against Chaplinsky were deemed appropriate since Chaplinsky's words were considered "fighting words," a new category of speech which the Court found not to deserve constitutional protection.[39]

In the early 1950s, the Supreme Court again turned to the issue of racist speech, this time by tackling the issue of group libel. The case of *Beauharnais v. Illinois*[40] involved the prosecution of Joseph Beauharnais, president of the White Circle League of America, an organization created by Beauharnais to resist housing integration. The City of Chicago was in the middle of a fractured battle over housing integration and Beauharnais was convicted for distributing literature that stated: "If persuasion and the need to prevent the White race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[41]

Beauharnais was charged with publishing lithographs portraying "depravity, criminality, unchastity or lack of virtue of citizens of [the] Negro race" and exposing them to "contempt, derision, or obloquy."[42] Beauharnais's actions violated an Illinois

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31. WALKER, *supra* note 5, at 12.
32. *Id.*
33. *See id.* at 25–26.
34. 278 U.S. 63 (1928).
35. *Id.* at 73.
36. *Id.* at 77.
37. 315 U.S. 568 (1942).
38. *Id.* at 569.
39. *See id.* at 571–72.
40. 343 U.S. 250 (1952).
41. *Id.* at 252 (omission in original).
42. *Id.*

statute that proscribed publications or other expressive works targeting "citizens of any race, color, creed, or religion."[43] Though several state statutes of this type were proposed in the 1930s and 1940s, the Illinois statute was one of very few "race hate" or group libel statutes to actually get enacted.[44] Beauharnais challenged the Illinois statute, which had been passed in 1917, as unconstitutionally vague and violative of the First Amendment.[45] Citing Illinois's difficult racial history, and relying in part on its decision in *Chaplinsky*, the Supreme Court upheld Beauharnais's conviction. The Court decided that Beauharnais's conduct fell outside the scope of First Amendment protection and that the legislature had the authority to take reasonable measures to mitigate racial conflict, which was deemed a serious social evil.[46]

B. Limits on Regulation: Marches, Speech Codes, and Cross Burning

Though *Beauharnais* seems to suggest that the First Amendment provides the government with significant leeway allowing the State to restrict racist speech that constitutes group libel, the five decades since that decision have been marked by a tightening of the doctrine which heavily constricts the government's ability to regulate racist speech. Even before the Supreme Court weighed in on the issue of hate speech in the early 1990s, *Collin v. Smith*[47] and *Doe v. University of Michigan*,[48] two lower court cases, were important bellwethers of limited state regulation of racist speech. In both of these cases the courts chose to privilege the value of freedom of expression over the equality interests of those who might be harmed by hate speech.

Collin concerned a challenge to three ordinances passed by the Village of Skokie, Illinois, in response to a planned demonstration by Nazi leader Frank Collin, who had previously led demonstrations that resulted in violence.[49] Collin's proposed demonstration in front of the village hall involved fifty of his followers wearing Nazi uniforms. In response to Collin's proposal, the village passed the three ordinances. The first ordinance at issue required those applying to demonstrate in public to have significant liability and property insurance; the second ordinance at issue banned demonstration by those in uniform; and the third ordinance prohibited the distribution

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43. *Id.* at 251.

44. New Jersey's race hate statute was declared unconstitutional in 1934. WALKER, *supra* note 5, at 82. Rhode Island's proposed statute was vetoed by its governor in 1944. *Id.* at 83. In the few cases that states had passed such laws, in New Jersey and Massachusetts, for example, the laws were rarely enforced. *Id.* at 82. In 1943, a federal law, H.R. 2328, was proposed that would have allowed the postmaster general to prohibit the mailing of material containing "defamatory and false statements" based on "race or religion." *Id.* at 83. The American Civil Liberties Union, which had opposed other such legislation, mounted a campaign against H.R. 2328 and it was defeated. *Id.* at 83–84.

45. *Beauharnais*, 343 U.S. at 251 (challenging statute under Fourteenth Amendment for state's violation of First Amendment rights).

46. *Id.* at 261–67.

47. 578 F.2d 1197 (7th Cir. 1978).

48. 721 F. Supp. 852 (E.D. Mich. 1989).

49. Immediately preceding the Skokie incident, Collin had been involved in stirring up controversy over racial integration on the west side of Chicago. WALKER, *supra* note 5, at 120–21. White neighborhood Marquette Park was quite resistant to Blacks moving in and Collin found an audience sympathetic to his racist views. *Id.*

of literature that promotes and incites hatred against persons by reason of race, national origin, or religion.[50] These ordinances were enacted because over half of the town's residents were Jewish, several thousand of whom were survivors of the Nazi Holocaust. Collin challenged the ordinances. In responding to the challenge, the village relied on *Beauharnais,* but the Seventh Circuit rejected this argument, contending that *Beauharnais* had been significantly weakened.[51] The court declared the uniform and literature bans unconstitutional on the grounds that the ordinances attempted to regulate the content of the message being communicated by the demonstrators.[52]

Doe evaluated hate speech in an entirely different context than *Collin*.[53] This case from the Eastern District of Michigan challenged the University of Michigan's campus hate speech code. Campus speech codes prohibiting the use of racist and other offensive speech on campus were passed by several colleges and universities in the 1980s and early 1990s in the wake of several high-profile racial incidents on college campuses.[54] *Doe* was the most well-known case, though several other cases challenged similar codes.[55] Michigan's code "prohibited individuals, under the penalty of sanctions, from 'stigmatizing or victimizing' individuals or groups on the basis of their race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status."[56] According to the case, the policy had been enacted in the wake of a number of racially offensive incidents. The policy was challenged by Doe, a biopsychology graduate student. Doe, who had never been sanctioned under the policy, mounted a facial challenge to it, arguing the code had a chilling effect on classroom discussion.[57] He maintained that controversial theories, for instance, those positing biologically based differences between sexes and races, might be perceived as "sexist" and "racist" by some students.[58] "[H]e feared that discussion of such theories might be sanctionable under the [p]olicy."[59] His challenge asserted that "his right to freely and openly discuss such theories was impermissibly chilled, and he requested that the policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth."[60]

The court agreed with the plaintiff that the policy was vague and overbroad, insisting that the terms of the Michigan policy "were so vague that its enforcement

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50. *See Collin*, 578 F.2d at 1199–1200.

51. *See id.* at 1204.

52. *See id.* at 1200–08.

53. *Compare Collin*, 578 F.2d 1197 (challenging city ordinances on the basis that they unconstitutionally restricted freedom of expression), *with Doe*, 721 F. Supp. 852 (challenging university hate speech on grounds that it unconstitutionally restricted freedom of expression in the classroom).

54. WALKER, *supra* note 5, at 129. One of these incidents occurred at the University of Massachusetts after the 1986 World Series and involved White Boston Red Sox fans chasing and beating Black New York Mets fans. *Id.*

55. *See, e.g.*, UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (striking down Wisconsin's code on the grounds that it violated the First Amendment).

56. *Doe*, 721 F. Supp. at 853.

57. *See id.* at 858.

58. *Id.*

59. *Id*.

60. *Id.*

would violate the due process clause."[61] Although the district court was sympathetic to the university's obligation to ensure equal educational opportunities for all of its students, it issued an injunction preventing the policy from being enforced. The court found that the university had not "seriously attempted to reconcile [its] efforts to combat discrimination with the requirements of the First Amendment."[62] In failing to strike this balance, the court indicated that the university's actions were taken "at the expense of free speech."[63]

Doe and *Collin* were quickly followed by a very significant limitation on any state's ability to regulate racist speech, this time from the U.S. Supreme Court. *R.A.V. v. City of St. Paul*[64] involved a challenge to a conviction for having burned a cross on a Black family's lawn. The defendant was charged under St. Paul's Bias-Motivated Crime Ordinance. This particular ordinance restricted the placement on public or private property of an object or symbol, such as a burning cross or Nazi swastika, that one has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[65] R.A.V., along with three other individuals, was charged and convicted under the ordinance after having burned several crosses on the lawn and in the vicinity of the Joneses' home. The Joneses were Black and had recently moved to a White neighborhood.

R.A.V. challenged his conviction on First Amendment grounds, alleging that the ordinance under which he was convicted was substantially overbroad.[66] He also maintained that the statute was impermissibly content based. On appeal to the Minnesota Supreme Court, this challenge was rejected. The Minnesota Supreme Court interpreted the ordinance to simply regulate "fighting words," a permissible form of regulation for speech according to the Supreme Court's decision in *Chaplinsky v. New Hampshire*.[67] With respect to the issue of whether the ordinance ran afoul of the First Amendment because it constituted content-based regulation, the Minnesota court held that the ordinance was narrowly tailored to address the compelling government interest of protecting the community against possible violence and disorder.[68]

On appeal, the Supreme Court reversed the defendant's conviction. The Court firmly rejected the argument that the First Amendment allows a city to use the fighting words doctrine to regulate racist speech. According to the Court, the city's mistake was regulating fighting words that provoke violence on the basis of race, color, creed, religion, or gender. By regulating only this particular subset of fighting words and not other forms of fighting words as well, the city had engaged in impermissible content-based regulation. This particular statute, according to the Court, signaled that the city was trying to suppress messages inherent in particular symbols. In doing so, the city had unconstitutionally "impose[d] special prohibitions on those speakers who express

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61. *Id*. at 867.
62. *Id.* at 868.
63. *Id.*
64. 505 U.S. 377 (1992).
65. *Id.* at 380.
66. *Id.*
67. *In re* Welfare of R.A.V., 464 N.W.2d 507, 509–10 (Minn. 1991) (citing Chaplinksy v. New Hampshire, 315 U.S. 568 (1942)), *rev'd*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
68. *Id.* at 511.

views on disfavored subjects."[69] The Court also rejected the city's argument that it could use this particular form of legislation to prevent violence and disorder. As a content-based regulation, this particular ordinance was not aimed at the secondary effects of the speech, but rather at its primary effects—the listener's negative reaction.[70]

Perhaps because it was a speech case that involved conduct, *R.A.V.* had a far-reaching effect on the state regulation of bias-motivated speech and behavior. After the decision, state courts in Washington, South Carolina, Maryland, Virginia, and New Jersey held their cross-burning statutes unconstitutional.[71] In each of these cases, the courts justified their decisions by relying on the *R.A.V.* opinion.

C. A Slight Expansion of States' Right to Regulate

The most recent Supreme Court cases addressing hate speech suggest that the Court may have retreated from the hard-line, anti-regulation approach it took in *R.A.V.* The first of these cases to signal a slight rejection of the Court's earlier approach was *Wisconsin v. Mitchell*.[72] *Mitchell* involved a First Amendment challenge to Wisconsin's hate crime statute. Hate crimes, which may or may not involve "hate speech," are a fairly new category in American criminal law. Hate crimes are criminal acts motivated by prejudice on the basis of race, religion, ethnicity, or any other protected category.[73] Wisconsin's hate crime statute was a penalty enhancement statute.[74] If the defendant was found guilty of committing a hate crime, then the penalty associated with the underlying crime increased.[75]

Wisconsin v. Mitchell involved a challenge by Todd Mitchell, a Black man who had urged the attack of Gregory Reddick, a fourteen-year-old White youth.[76] For his role in the attack, Mitchell was charged and convicted under Wisconsin's hate crime penalty enhancement statute, which allowed increased penalties for crimes against victims or property intentionally selected because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of the individual or property owner. Because the jury found that the crime had been committed as a result of Reddick's race, Mitchell's sentence was increased from two to four years. In his challenge, Mitchell

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69. *R.A.V.*, 505 U.S. at 391.

70. *See id.* at 393–96.

71. *See* State v. Sheldon, 629 A.2d 753 (Md. 1993); State v. Vawter, 642 A.2d 349, 354–55 (N.J. 1994); State v. Ramsey, 430 S.E.2d 511 (S.C. 1993); Black v. Commonwealth, 553 S.E.2d 738 (Va. 2001), *aff'd in part and vacated in part by* Virginia v. Black, 538 U.S. 343 (2003); State v. Talley, 858 P.2d 217 (Wash. 1993).

72. 508 U.S. 476 (1993).

73. *See* BLACK'S LAW DICTIONARY 399 (8th ed. 2004).

74. *Mitchell*, 508 U.S. at 480 & n.1.

75. *See id.*

76. State v. Mitchell, 485 N.W.2d 807 (Wis. 1992). According to the court, before the attack the men had been discussing the film *Mississippi Burning*, which depicts the investigation of the 1964 murder of three civil rights workers by White supremacists. After watching the film, Mitchell is reported to have asked the group, "Do you all feel hyped up to move on some White people?" When he spotted Reddick, Mitchell said, "There goes a White boy, go get him." Mitchell counted to three and then the group attacked Reddick. *Id.* at 813–14.

contended that the Wisconsin statute was overbroad. According to Mitchell, by regulating both protected and unprotected speech, the statute violated the First Amendment.[77] Relying primarily on *R.A.V.*, the Wisconsin Supreme Court found the statute facially invalid because it directly punished a defendant's constitutionally protected thought. The statute was struck down.[78]

At the U.S. Supreme Court, however, the Justices took a different approach and found that the Wisconsin hate crime statute was constitutional. The Court closely examined the issue of motivation and whether the use of evidence of racial motivation, such as slurs or epithets, impermissibly violated the First Amendment.[79] The Court chose to rely on an earlier case, *Barclay v. Florida*,[80] which involved a group trying to start a race war. In that case, the Court approved the use of the defendant's racial motivation as an aggravating factor in deciding whether or not he would be eligible for the death penalty.[81] By allowing Wisconsin and other jurisdictions to use hate crime statutes, the Court was in effect ruling that Mitchell's racist speech, when indicative of why he committed a crime, was not expression protected by the First Amendment.[82] The Court rejected the argument, made by several scholars critical of hate crime legislation, that using racist speech as evidence of motivation constitutes punishment for bigoted sentiments and violates the First Amendment by creating "thought" crimes.[83] The decision in *Mitchell* affirmed that punishing a criminal because he selected a victim based on that individual's race will not violate the First Amendment.[84]

The Supreme Court's most recent decision evaluating racist speech also dealt with speech bundled with racist violence. In *Virginia v. Black*,[85] the Supreme Court once again examined the First Amendment protection for cross burning. *Black* involved an appeal by the Commonwealth of Virginia from a Virginia Supreme Court decision that struck down the Commonwealth's cross-burning statute on First Amendment grounds. Virginia's statute provided:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, or highway or other public place. Any person who shall violate any provision of this section shall be guilty of a class 6 felony.[86]

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77. *Id.* at 809.
78. *Id.* at 814–17.
79. *Mitchell*, 508 U.S. at 485–87.
80. 463 U.S. 939 (1983) (plurality opinion); *see also Mitchell*, 508 U.S. at 486.
81. *Barclay*, 463 U.S. at 949.
82. *See Mitchell*, 508 U.S. at 489.
83. *See generally* Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991); Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 29. For a discussion of the arguments made by scholars critical of hate crime legislation, see Bell, *supra* note 8, at 74–76.
84. *Mitchell*, 508 U.S. at 487–90.
85. 538 U.S. 343 (2003).
86. VA. CODE ANN. § 18.2-423 (1996).

Similar to the statute in *R.A.V.*, which had been passed in the 1970s when many of St. Paul's synagogues were under attack,[87] Virginia's statute was a response to actual racial violence. It passed its cross-burning statute in 1952, after a spate of cross burning by the Ku Klux Klan.[88] The First Amendment arguments directed at the statute in *Black* involved two fairly different fact scenarios. One of the defendants, Barry Elton Black, was convicted of violating the statute after supervising the burning of a cross at a Ku Klux Klan rally. The cross, which was between twenty-five and thirty feet tall, was located on a piece of property near the highway. The second set of defendants, Richard J. Elliott and Jonathan O'Mara, were charged with having violated Virginia's cross-burning statute when they burned a cross in the yard of James Jubilee, Elliott's Black next-door neighbor. According to the defendants, the cross burning was in response to Jubilee's complaint about Elliott firing shots in the backyard. Like Black, both Elliott and O'Mara were convicted of having violated the Virginia statute.

The three defendants' cases were consolidated at the Virginia Supreme Court. On appeal, Black, Elliott, and O'Mara argued that Virginia's statute was unconstitutional because it engaged in viewpoint and content discrimination.[89] In evaluating the petitioners' arguments, the Virginia Supreme Court considered *R.A.V.*, in which the Supreme Court had invalidated a conviction for cross burning. The Virginia Supreme Court insisted that the statute at issue in *Black* was "analytically indistinguishable" from the statute at issue in *R.A.V.* and, therefore, constituted content-based regulation of speech.[90] According to the court, even though the Virginia statute did not mention race or gender, its specific prohibition of cross burning—which occurs in a distinct contemporary context—indicated that the Commonwealth's interest was focused on the content of the expression.[91] Though content-based legislation is sometimes acceptable on First Amendment grounds, in this case, despite the Commonwealth's insistence that the statute had been passed "[i]n an atmosphere of racial, ethnic, and religious intolerance," the court found that the statute was not aimed at the negative "secondary effects" of cross burning.[92] Because the statute was aimed at regulating content, and it was overbroad, it was struck down.

When *Black* was argued before the Supreme Court, the Commonwealth maintained that the cross-burning statute merely signaled its wish to prevent an especially pernicious form of intimidation.[93] In support of its contention that the statute was content neutral, the Commonwealth highlighted both the statute's content-neutral language and the existence of several racially discriminatory laws at the time the cross-burning statute was passed as evidence that it was not interested in proscribing the message in cross burning. Rather, according to this argument, the fact that the Commonwealth had not eliminated the racially discriminatory laws at the time the

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87. Laura J. Lederer, *The Prosecutor's Dilemma: An Interview with Tom Foley*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY, *supra* note 18, at 194, 196.

88. Black v. Commonwealth, 553 S.E.2d 738, 742 (Va. 2001), *aff'd in part and vacated in part by* Virginia v. Black, 538 U.S. 343 (2003).

89. *Id.* at 740–41.

90. *Id.* at 742–43.

91. *Id.* at 743–44.

92. *Id.* at 745.

93. Brief of Petitioner at 17–19, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107).

cross-burning statute was passed indicated that the statute was not directed at White supremacists' views.

In its decision upholding the ability of jurisdictions to regulate cross burning in particular circumstances, though mindful of the cross burners' right to freedom of expression, the Supreme Court gave far more deference than it had in *R.A.V.* to the way cross burning has been used historically to terrorize Black Americans. The opinion began with a long description of the historical use of cross burning. The Court maintained that "[t]he person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan."[94]

After condemning the historical use of cross burning by the Klan, the Court divided cross burnings into two categories: (1) cross burnings in which the perpetrator had intended to intimidate, and (2) those in which the perpetrator had no wish to intimidate listeners. The second category consists of cross burning that occurs in several different contexts, for instance, when cross burning is used as a statement of ideology, as a sign of group solidarity, or, finally, purely for artistic expression.[95] The Court's decision allows states to regulate the first category, cross burnings undertaken with the intent to intimidate. Justice O'Connor located the rationale for this allowance in one of the exceptions to the general prohibition on content-based regulation created by the Court in the *R.A.V.* case. Under this exception, when the State is attempting to regulate a subset of a category that may be excluded, the entire category may be prohibited.[96] The second category, referred to by Justice Thomas in his dissent as "innocent" cross burnings,[97] is identified by the Court as core political speech, and the decision prohibits states from regulating it.[98]

The U.S. approach to regulation of racist speech is one of broad protection, with the exception of situations in which such speech is coupled with violence. Attempts to regulate racist speech on college campuses has largely failed, with hate speech codes challenged at the University of Michigan[99] and the University of Wisconsin.[100] Interestingly enough, research in this area reveals that, though the universities whose codes were held unconstitutional complied by removing their codes, twenty-five percent of schools nationwide failed to comply with court decisions and left their codes intact.[101] In the public arena, after *R.A.V.*, racist speech is subject to little regulation and may not be prohibited simply because the State disfavors the viewpoint it offers. *Wisconsin v. Mitchell* and *Virginia v. Black*, the cross-burning cases that left *R.A.V.* intact, are the Court's two most recent statements on racist speech, and they permit regulation of racist speech. Taken together, these final two cases suggest that the safest path to the regulation of racist speech, from a First Amendment perspective, is to regulate racist speech only when it is coupled with violence.

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94. Virginia v. Black, 538 U.S. 343, 357 (2003).
95. *Id.* at 372 (Scalia, J., concurring).
96. *Id.* at 361–63.
97. *Id.* at 398 (Thomas, J., dissenting).
98. *Id.* at 365–67.
99. Doe v. Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).
100. UMW Post v. Bd. of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); *see supra* text accompanying notes 53–63.
101. JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 159 (2005).

III. COMPARATIVE APPROACHES TO DEALING WITH RACIST SPEECH

A. Approaches to Racist Speech

The U.S. approach, in which racist speech is protected except when it constitutes a threat, contrasts quite strongly with the treatment of racist speech worldwide. For instance, more than thirty European countries place restrictions on racist speech. Countries with restrictions on the use of racist speech include both common law countries (like Great Britain, Canada, India, Australia, and Nigeria) and countries that follow a civil law tradition (including, but not limited to, France, Germany, the Netherlands, Sweden, and Israel). Commentators have divided these regulations into two types: those designed to safeguard public order, and those aimed at protecting human dignity. Criminal laws in the area of hate speech in Great Britain, Northern Ireland, Israel, and Australia are of the former variety. They are based on the idea that hate speech that vilifies a group poses a more serious threat to the public order than insults directed at a person for his or her personal characteristics.[102] Unfortunately, the existence of these laws by themselves is no guarantee that the rights of minorities will be protected. According to Sandra Coliver, this type of hate speech law has not been effectively enforced, in part because the laws are not used as often as they should be. For example, as of 1992, Northern Ireland had only one prosecution for incitement to religious hatred in the twenty-one years that the law had been in force.[103]

Canada, Denmark, France, Germany, and the Netherlands have fairly similar hate speech laws, which commentators say are actively enforced. Hate speech laws in these countries have both criminal and civil penalties and are premised on the need to protect human dignity "quite apart from any interest in safeguarding public order."[104] A conviction under the criminal incitement laws of Canada requires proof of either intent to incite hatred or, in the alternative, the likelihood of breaching the peace. By contrast, one can be convicted under the hate speech laws of France, Denmark, Germany, and the Netherlands without intending to incite hatred and without having breached the peace.[105]

The approach taken by countries around the world to place restrictions on racist speech is also reflected in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. These human rights instruments, though they explicitly protect freedom of expression, also recognize the link between hate speech and discrimination and allow significant restrictions on hate speech.[106] Article 20(2) of the International Covenant on Civil and Political Rights states that "any advocacy of national, racial or

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102. Sandra Coliver, *Hate Speech Laws: Do They Work?*, *in* STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 363, 366 (Sandra Coliver ed., 1992).

103. *Id.*

104. *Id.* at 363.

105. *Id.* at 364.

106. For an interesting discussion of the debates over the hate speech articles in these treaties, see Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1 (1996).

religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[107] Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires governments to outlaw all dissemination of ideas based on racial superiority or hatred. It also requires them to prohibit all organizations which promote and incite racial discrimination.[108]

B. Comparative Race Theory and Racist Speech

The approach taken by countries around the world, which divorces states' abilities to regulate racist speech from the threat of violence, has much in common with the arguments made by scholars in the American Critical Race Theory movement. Critical Race Theory consists of writings by leftist scholars that challenge the ways in which race and racial power are constructed and represented in American legal culture and society.[109] The work of critical race theorists has two aims. The first is to understand how a White supremacist regime that oppresses people of color is maintained in America. The second is to break the bond that currently exists between law and racial power.[110] The writings of critical race theorists present arguments weighted in favor of equality in a way that might allow American courts to strike a better balance between freedom of expression and the rights of states to safeguard equality and prevent violence.

Critical race theorists support restrictions on hate speech because they believe that its use results in the subordination of people of color in society. One example of subordination caused by the use of hate speech is the inequality in the exchange of ideas between those who use it and those against whom it is used. In direct contrast to those who believe that all ideas are traded freely in the "marketplace of ideas," critical race theorists argue that bigoted ideas have more influence than other views. Charles Lawrence argues that the experience of Black Americans and other people of color has shown the tenacity of racism in the supposedly ideologically neutral free market. He writes that the "idea of the racial inferiority of non-Whites infects, skews, and disables the . . . market . . . ."[111] In addition, the menacing historical legacy of threats and violence means that racist words become inextricably linked to racial violence. Thus, the very real fear of provoking violence silences people of color. Critical race theorists argue that if all people are allowed to exchange ideas freely, then racist speech, which does not allow the normal social intercourse necessary for the free exchange of ideas, should be restricted.[112]

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107. International Covenant on Civil and Political Rights art. 20, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

108. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

109. *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (1995).

110. *Id*.

111. Lawrence, *supra* note 18, at 53, 77.

112. *See, e.g.*, *id.* at 77 (describing how racist speech distorts the marketplace of ideas).

Aside from the harm that hate speech causes, critical race theorists argue that hate speech should be regulated because the implications of violent racist ideas conflict with democratic ideals of a diverse society.[113] Richard Delgado maintains:

> Racism is a breach of the ideal of egalitarianism, that "all men are created equal" and each person is an equal moral agent, an ideal that is a cornerstone of the American moral and legal system. A society in which some members regularly are subjected to degradation because of their race hardly exemplifies this ideal.[114]

The most compelling argument in support of equality made by critical race theorists and others to justify hate speech regulations is the link between racist and other hate speech and an incitement to violence. One commentator, Loretta Ross, finds a link between the use of hate speech by hate groups and the occurrence of hate crimes—crimes motivated by prejudice on the basis of race, religion, sexual orientation, or color.[115] She asserts that hate speech is a powerful weapon of hate groups. Public rallies and demonstrations help such groups gain visibility and attract recruits.[116] Hate speech encourages even those who are not members to commit hate crimes.[117] Klan marches in the United States, Ross points out, often polarize residents and may provoke violence after the events.[118] The resulting violence in this instance is discriminatory and linked directly to speech. This connection between hate speech and the intentional selection of victims should create a burden on the government to restrict the speech that leads to violence.

In a similar vein to the work of Ross, Alexander Tsesis uses several historical examples to illustrate the connection between racist ideology and extreme forms of racialized violence.[119] In his book illustrating the historical lessons and dangers of hate speech, Tsesis examines anti-Jewish rhetoric in Germany, White supremacist rhetoric in the United States, and images depicting indigenous Americans as inferior.[120] Racist expression in these contexts is far from harmless. Such expression, according to Tsesis, is characteristic of "misethnicity" group hatred and intends not just to demean individual members of particular groups, but also to characterize entire groups as morally corrupt and inferior.[121] "Dehumanizing the targeted outgroup legitimizes efforts to harm them."[122]

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113. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, *in* WORDS THAT WOUND, *supra* note 18, at 89, 108 (insisting racial insults do not further the goal of permitting individuals to voice their opinions).

114. *Id.* at 92–93.

115. Loretta J. Ross, *Hate Groups, African Americans, and the First Amendment*, *in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY, *supra* note 18, at 151, 153.

116. *Id.*

117. *Id.* at 154.

118. *Id.*

119. *See* ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 9–79 (2002).

120. *Id.* at 11–65.

121. *Id.* at 81–82.

122. *Id.* at 105.

Tsesis maintains that racist hate speech is far from a harmless release for those who do not like particular groups. Rather, it can be a tool for those intent on spreading group hatred. Tsesis describes the work of "hate propagandists" who have used racist and other forms of hate speech to spread group hatred at various points in European and American history. Members of outgroups are labeled as problems, are objectified, and are considered an infestation corrupting the body politic. The cures for this "infestation," manufactured through the spreading of group hatred, are all too often violent—genocide, unfair and inequitable subordination, and separation.[123]

CONCLUSION

The structure of First Amendment doctrine in the United States has led to a regime that is ill prepared to deal with important negative consequences of racist speech. As a primary matter, this is true because, at least after *R.A.V.*, racist speech is explicitly protected under the First Amendment. The U.S. approach also is characterized by an unwise and artificial separation between hate speech, which is protected expression unless it advocates violence, and hate crime, which may be punished.

This wall of separation between nonviolent hate speech and hate crime fails to recognize the critical interaction between the two entities, as demonstrated by the following example. In 1996, Matthew Hale assumed leadership of the World Church of the Creator (WTC), an organization dedicated to the supremacy of the White race. Among other things, Hale preached that racial and ethnic minorities are inferior to Whites. In 1999, one of his followers, Benjamin Smith, took his gospel dehumanizing minorities seriously. Smith embarked on a shooting spree targeting Jews, Blacks, and Asian Americans that left two people dead and twelve people injured.[124]

Because Hale had not explicitly preached violence, his speech was protected. The U.S. approach, which protects racist speech that does not threaten or incite violence, fails to acknowledge that White supremacists' racist ideology blames racial and ethnic minorities for all of society's ills. When demagogues and leaders of hate groups use racist and hate propaganda, they are seeking followers whose attachment to the organization is premised on seeing members of outgroups as less than human. Once minorities are assumed to be subhuman, there is no longer any reason not to eliminate them by attacking them physically. At least some followers of the WTC seem to share the view that minorities should be eliminated through attack. Smith was one of several members of the WTC engaged in violence against minorities.[125] Contrary to the views of critics of hate speech legislation who dismiss arguments suggesting a connection between racist rhetoric and violence, the actions of Smith and others like him suggest that racist speech urging listeners to disregard the humanity of particular citizens may have violent and not unforeseeable consequences.

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123. *See id.* at 117.

124. Pam Belluck, *Hate Groups Seeking Broader Reach*, N.Y. TIMES, July 7, 1999, at A16; Bill Dedman, *Suspect Sought in Attacks Said to Kill Himself*, N.Y. TIMES, July 5, 1999, at A1.

125. Belluck, *supra* note 124 (describing the killing of a number of minorities by individuals affiliated with the World Church of the Creator).