

# The Right to be Despicable: “Cancel Culture” as the Marketplace of Ideas’ De Facto Hate Speech Regulation

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*“Persecution for the expression of opinions seems to me perfectly logical.”<sup>1</sup>*

– Oliver Wendell Holmes Jr.

## *Abstract*

*As online communication has evolved throughout the Digital Age, so has the prevalence of harassing, demeaning, and divisive online speech targeted at minority groups, which most Western democracies prohibit as what is colloquially called “hate speech.” The United States stands in stark contrast to its peers in the global community in that the First Amendment constitutionally protects hate speech, with courts eschewing hate speech legislation in favor of allowing the marketplace of ideas to regulate itself. Accordingly, as both hateful rhetoric and hate crimes have mounted since 2016, the free market has responded to the proponents of such speech in the form of “Cancel Culture,” creating a solution within the marketplace of ideas to a problem that American law cannot constitutionally solve. This Article discusses contemporary issues surrounding hate speech in the United States and abroad, and illustrates how Cancel Culture came to be the*

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

*United States’ de facto free market hate speech regulation. Part II briefly discusses what “hate speech” is, other countries’ implementations of hate speech regulations, how hate speech has manifested in the modern world, and the advantages and disadvantages of legally anathematizing it. Part III discusses the history of hate speech jurisprudence in the United States, and courts’ preference that the marketplace of ideas regulate itself. Part IV illustrates how Cancel Culture acts as the marketplace of ideas’ self-regulation, operating as a free-market alternative to hate speech legislation. Part V briefly concludes.*

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## I. INTRODUCTION

The First Amendment’s guarantee of the right to free speech is arguably the United States’ most publicly celebrated and dearly held constitutional right: the right to espouse and express beliefs, including—and especially—controversial beliefs, without fear of

repercussion from the state.<sup>2</sup> As Justice Robert H. Jackson eloquently (if pretentiously) explained, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[,] or force citizens to confess by word or act their faith therein.”<sup>3</sup>

Courts have recognized only very limited exceptions to the right to free speech, notably and quite deliberately absent from which is a category of unprotected “hate speech.” Proponents of hate speech legislation have argued that some applications of the freedom of speech support oppressive narratives which demean social equality and equal protection under the law—for instance, if the speech further divides societal classes, contributes to legal and cultural inequities, or tacitly incites violence.<sup>4</sup> Opponents of hate speech legislation duly point out that the definition of “hate speech” is inherently amorphous and subject to interpretation. It can create a slippery slope down which an incumbent party can prosecute political dissidents under the guise of fighting hate speech.<sup>5</sup>

Notwithstanding the presence of some form of hate speech regulations in many other Western democracies, the United States’ courts have routinely held that hate speech is precisely the type of speech that the First Amendment was designed to protect: unpopular speech that does not enjoy the built-in societal protection of popularity.<sup>6</sup> As United

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2. See *Matal v. Tam*, 582 U.S. 218, 246 (2017) (“[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” (quoting *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”))).

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

4. See Daniel M. Downs & Gloria Cowan, *Predicting the Importance of Freedom of Speech and the Perceived Harm of Hate Speech*, 42 J. APPLIED SOC. PSYCH. 1353, 1353–75 (2012) (studying how personality and attitudinal factors may influence an individual’s judgments on the importance of free speech as well as the harm of hate speech).

5. See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952).

6. See, e.g., *Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 688–89 (1959) (“This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional

States Senator Rand Paul described it in 2015, “the First Amendment is about the right to be despicable.”<sup>7</sup>

Against this legal backdrop, as cultural and political tensions have grown alongside the 21st century’s unprecedented explosion of mass communication in the form of social media, incidents of “hate speech” are undoubtedly on the rise in American culture. As Western civilization has become more inclusive of minority groups and more cognizant of systemic inequities and the importance of representation (or “woke”), individuals and organizations opposed to this progressive shift have made their voices heard.<sup>8</sup> The COVID-19 Pandemic in particular saw an enormous uptick in online harassment aimed at the Black, Asian, and LGBTQIA+ communities, much of which could be directly traced to subsequent physical violence.<sup>9</sup>

As harassing and divisive rhetoric has increased in the United States with no legal mechanism to stymie it, a more powerful force than the law has emerged to fill that void: the free market. Indeed, this is exactly what First Amendment jurisprudence has advocated as an alternative to hate speech legislation: the marketplace of ideas offers no protections for hate speech and, as the Supreme Court has held for over a century, is the appropriate place for bad ideas to die. In the absence of a legal means of reducing hate speech, “Cancel Culture” has emerged as a capitalistic vehicle through which consumers and employers can use their own First Amendment rights to compete with hate speech in the public square—and to disincentivize it in the marketplace relative to its social utility.

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or shared by a majority. . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.”).

7. Tom McCarthy, *Rand Paul Points to Ku Klux Klan in Citing Aversion to “Ground Zero Mosque,”* GUARDIAN (July 14, 2015, at 17:06 ET), <https://www.theguardian.com/us-news/2015/may/27/rand-paul-jon-stewart-daily-show-ku-klux-klan-ground-zero-mosque>.

8. Michael Baggs, *Online Hate Speech Rose 20% During Pandemic: “We’ve Normalised It,”* BBC (Nov. 15, 2021), <https://www.bbc.com/news/newsbeat-59292509>.

9. Press Release, U.N. Off. of the High Comm’r for Hum. Rts., *Tsunami of Hate and Xenophobia Targeting Minorities Must Be Tackled, Says UN Expert* (Mar. 15, 2021), <https://www.ohchr.org/en/press-releases/2021/03/tsunami-hate-and-xenophobia-targeting-minorities-must-be-tackled-says-un>.

This Article explores how the unconstitutionality of hate speech laws in the United States has helped create Cancel Culture as a free market solution to the problem of hate speech, and how the very jurisprudence that deemed hate speech laws unconstitutional called for Cancel Culture (or something like it) as the proper means of dissuading hateful ideas. This Article will explore the differences between the American approach to hate speech and that of other Western democracies, and how the First Amendment's protection of hate speech created a vacuum in which the private sector and national consumer base had to regulate themselves. Part II unpacks conflicting definitions of "hate speech," explores the hate speech regulations of the global community, presents arguments for and against hate speech enjoying legal protection, and explores modern manifestations of hate speech and the problems that they cause. Part III discusses the historical significance of hate speech in the United States, its larger societal consequences, and its contemporaneous jurisprudence. Part IV highlights similarities between hate speech regulations and Cancel Culture and unpacks how Cancel Culture filled the gap in the United States that hate speech regulations constitutionally cannot. Part V concludes.

## II. WHAT IS "HATE SPEECH," AND WHY IS IT A PROBLEM?

At a 30,000-foot level, hate speech presents two problems: one procedural, one substantive. Procedurally, the problem lies in the inherently subjective nature of hate speech and the lack of a universally agreed-upon definition. Substantively, instances of hate speech correlate heavily with instances of violence motivated by the same prejudices that the hate speech in question espouses.

### A. *Defining Hate Speech*

The most problematic aspect of any hate speech law is simply defining "hate speech": what speech, or categories of speech, does a law prohibit? There is no legal definition of hate speech under United States law, nor for evil ideas, racism, or any other kind of speech or ideology that reasonable people might condemn.<sup>10</sup> In fact, virtually

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10. *Cf.* discussion *infra* Sections III.C–D (discussing federal and state laws penalizing "hate crimes").

every legal and scholarly source consulted in researching this Article employed a different definition of hate speech. Generally, however—and as used in this Article—“hate speech” is any form of expression through which speakers intend to vilify, harass, humiliate, or incite hatred against a group or a class of persons on the basis of race, religion, skin color, sexual identity, gender identity, ethnicity, disability, or national origin.<sup>11</sup>

It is difficult, if not impossible, to divorce hate speech from the prejudices that give it life. If prejudice is a disease, then hate speech is the symptom that the laws, policies, and social reactions discussed here seek to treat.<sup>12</sup> In defining hate speech in the context of what a government can criminally punish, however, this distinction is critical. Thought crime—the idea that a person can be punished for what they internally believe, regardless of their actions or words pertaining to those thoughts—is the hallmark of an Orwellian society.<sup>13</sup> Technology has, thankfully, not reached the point where the regulation of mere thought is possible. Consequently, only the outward manifestations of a hateful idea, rather than the hateful idea itself, can and should be the subject of any definition of hate speech.

To enforce any hate speech law successfully and equitably, requires discrete, clearly defined categories of what is prohibited—that is, which speech does *not* enjoy protection, necessarily leaving everything else under the protection of free speech. Even with categories that are as clearly defined as possible, it is impossible to eliminate the gray area of speech on which reasonable minds can differ—is it Islamophobic to decry the violent tenets of Wahhabism?<sup>14</sup> Is it antisemitic to

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11. Kenneth Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733, 765 (1998).

12. While the underlying ideas driving harmful rhetoric deserve their own discussion, this Article deals primarily with speech itself rather than the ideas this speech espouses.

13. See generally CHRISTOPHER HITCHENS, WHY ORWELL MATTERS (2002) (defending George Orwell’s continued relevance); GEORGE ORWELL, 1984 (1949) (discussing totalitarianism and thought police).

14. “Wahhabism is an Arabian form of Salafism, the movement within Islam aimed at its ‘purification’ and the return to the Islam of the Prophet Mohammed and the three successive generations of followers.” Galina Yemelianova, *Explainer: What is Wahhabism in Saudi Arabia?*, THE CONVERSATION (Jan. 30, 2015, at 01:25 ET),

criticize the Netanyahu administration's actions in Israel's invasion of Gaza? Is it racist to point out facts that, while technically true, paint an entire ethnic group in a bad light based on an incomplete narrative: for example, that White people caused the Holocaust?

### 1. Hate Speech Laws Outside the United States

Most countries that have implemented hate speech regulations do not simply disallow "hate speech" as a broad category. They lay out specific and easily identifiable subjects of unprotected speech, rather than, for example, listing specific minorities or other categories of people whom it is forbidden to speak ill of.

For example, Article 4 of the International Covenant on Civil and Political Rights requires parties to outlaw conduct which most would consider within the elusive definition of hate speech: "all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form."<sup>15</sup>

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<https://theconversation.com/explainer-what-is-wahhabism-in-saudi-arabia-36693>. It is most often associated with—and espoused by—terrorist leaders and organizations such as Osama bin Laden and Al Qaeda, who used it as justification to commit mass murder in the name of Islam.

15. G.A. Res. 2106 (XX), at 48, International Convention for the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965). Notably, in August 2022, the CERD Committee reviewed the United States' compliance (or lack thereof) with its human rights obligations under CERD, including the United States' reservation to Article 4's prohibition of hate speech. *U.S. Government and Compliance With CERD Treaty*, CTR. FOR CONST. RTS. (Feb. 18, 2025), <https://cerjustice.org/us-government-and-compliance-cerd-treaty>; Comm. on the Elimination of all Forms of Racial Discrimination, Concluding Observations on the Combined Tenth to Twelfth Reports on the United States of America, U.N. Doc. CERD/C/USA/CO/10-12 (Sep. 21, 2022). The Committee's Report recommended that the United States reconsider its reservation to Article 4, and "strengthen its efforts to combat racist hate crimes and hate speech effectively" by "adopting all measures necessary to prevent, condemn and combat racist hate speech, including on the Internet and social media, and by politicians and public figures," setting up a data collection system on incidents of hate speech, working with internet service providers to combat hate speech, mandating the reporting of hate crimes to the FBI, providing mandatory training on preventing and combating hate speech to law enforcement officials, and prohibiting organizations that

Similarly, the European Union's Framework Decision 2008/913/JHA sets a uniform definition of, and criminal penalties for, specific forms of hate speech and hate crime, and expressly acknowledges that "[r]acism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law."<sup>16</sup> Decision 2008/913/JHA "requires Member States to take the necessary measures to criminalize the public incitement to violence or hatred on" the grounds of race, nationality, color, religion, descent and national or ethnic origin (though omitting categories such as sexual orientation, gender, and age).<sup>17</sup> In another form, Directive 2000/31/EC, known as the e-Commerce Directive, establishes the EU's legal framework for regulating hate speech online.<sup>18</sup> Pursuant to the e-Commerce Directive, service providers can be required to remove or disable access to illegal content, including hate speech, upon notification.<sup>19</sup>

The German Penal Code (the "Strafgesetzbuch," or "StGB") criminalizes incitement of hatred and the dissemination of hate symbols.<sup>20</sup> Section 130(1) of the Strafgesetzbuch (entitled, "Incitement of Masses") imposes a penalty of three months to five years' imprisonment for "incit[ing] hatred against a national, racial, religious group or a group defined by their ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them," or "violat[ing] the human dignity of others by insulting, maliciously maligning or defaming one of the

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promote and incite racial hatred. *Id.* ¶ 15. But the United States has held to the necessity to conform to its constitutional requirements protecting hate speech.

16. Council Framework Decision 2008/913/JHA, 2008 O.J. (L 328) 55 (EU); see also Nina Peršak, *Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes Under Article 83(1) TFEU*, 33 CRIM. L. FORUM 85, 88 (2022).

17. Peršak, *supra* note 16, at 87–88.

18. Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ("Directive on Electronic Commerce"), 2000 O.J. (L 178) 1 (EC).

19. *Id.* ¶ 40.

20. Strafgesetzbuch [StGB] [Penal Code], §§ 130, 185–87, [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html).

aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population.”<sup>21</sup>

The French Law on the Freedom of the Press of 29 July 1881 (or, the “Law of 1881”) protects the freedom of the press, but limits it by placing prohibitions on, *inter alia*, hate speech: Article 24 of the Law of 1881 prohibits the incitement of “hatred or violence against a person or group of persons on account of their sex, sexual orientation or gender identity or their disability” by any means set out in Article 23.<sup>22</sup>

The Canadian Criminal Code makes the advocacy of genocide against any “identifiable group” a criminal offense, and imposes a maximum sentence of five years’ imprisonment for doing so.<sup>23</sup> It is likewise a criminal offense to publicly “incit[e] hatred” against any identifiable group, earning offenders a penalty of up to two years’ imprisonment.<sup>24</sup> An “identifiable group” is defined as “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.”<sup>25</sup> And these laws have withstood judicial review.<sup>26</sup>

Thus, while most countries do not have an all-inclusive “hate speech” umbrella, they narrowly tailor their laws to prohibit discrete categories of unprotected speech, usually aimed at protecting historically marginalized groups that were the victims of systemic inequality, oppression, or genocide.

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21. *Id.* § 130(1).

22. Loi du 29 juillet 1881 sur la liberté de la presse [Law of 29 July 1881 on the Freedom of the Press], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 29, 1881, p. 3963, art. 24, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000877119/> (as amended) (“[]ceux qui . . . auront provoqué à la haine ou à la violence à l’égard d’une personne ou d’un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou identité de genre ou de leur handicap . . .”).

23. Criminal Code, R.S.C. 1985, c. C-46, § 318(2).

24. *Id.* § 319(1).

25. *Id.* § 318(4).

26. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 699 (finding “Parliament’s objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding” the constitutional freedom upon freedom of expression).

## 2. The Spectrum of Hate Speech: From Slurs to Dogwhistles

Part of the nuance in defining hate speech relates to its more subtle manifestations. Few would argue that slurs, for example, are anything other than hate speech. Slurs are typically characterized as “a type of insult that targets race, gender, sexual orientation, nationality, ability, politics, immigrant status, geographic region, and other categories. . . . [S]lurs are understood as conventionalized ways of demeaning . . . individuals or groups [as opposed to a] neutral counterpart.”<sup>27</sup> Most western societies already consider some such words so inherently vile that it is taboo to even use them in reference to the words themselves.<sup>28</sup>

While slurs are explicitly derogatory, there are more subtle forms of derogatory communication, including racially coded “dogwhistles” that seek to access existing racial resentment by making thinly-veiled racial appeals.<sup>29</sup> Dogwhistles can be explicit or implicit, and further, intentional or unintentional. Professor Jennifer Saul of the University of Waterloo defines an “overt intentional dogwhistle” as “a speech act designed, with intent, to allow two plausible interpretations, with one interpretation being a private, coded message targeted for a subset of the general audience, and concealed in such a way that this general audience is unaware of the existence of the second, coded interpretation.”<sup>30</sup>

Saul uses an excerpt from George W. Bush’s 2003 State of the Union speech as an example of an overt intentional dogwhistle: “[y]et there’s power, wonder-working power, in the goodness and idealism

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27. Luvell Anderson & Michael Barnes, *Hate Speech*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/archives/fall2023/entries/hate-speech/> (last visited Jan. 4, 2026).

28. For example, “the ‘N’ word.” See John McWhorter, *How the N-Word Became Unsayable*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/30/opinion/john-mcwhorter-n-word-unsayable.html>.

29. See Jennifer M. Saul, *Dogwhistles, Political Manipulation, and Philosophy of Language*, in NEW WORK ON SPEECH ACTS 360, 364–65 (Daniel Fogal, Daniel W. Harris & Matt Moss eds., 2018).

30. *Id.* at 361–62 (quoting Kimberly Witten, *Dogwhistle Politics: The New Pitch of an Old Narrative* (Spring 2008) (unpublished term paper for Narrative & Discourse Analysis, San Francisco State University) (on file with *The University of Memphis Law Review*).

and faith of the American people.”<sup>31</sup> Saul posits that the phrase “wonder-working power” is meant as an overt intentional dogwhistle for evangelical Christians—who can take two possible messages from Bush’s speech—the first a simple translation, “[y]et there’s power, the power of Christ, in the goodness and idealism and faith of the American people.”<sup>32</sup> The second message is that Bush identifies with his audience on a more personal level, and is signaling to them that he is in-tune with their biases and preconceptions.<sup>33</sup> This is not a dogwhistle that amounts to hate speech, but rather an appeal to the religious convictions of a demographic of voters. But it is illustrative of messages contained between the lines of speech that are neutral on the surface.

A covert dogwhistle, according to Saul, is “a dogwhistle that people fail to *consciously* recognize.”<sup>34</sup> Examples of covert intentional dogwhistles are the phrases “international bankers” and “globalists,” which are well-known dogwhistle codes for Jews, derived from the antisemitic propaganda publication *The Protocols of the Elders of Zion*.<sup>35</sup> Critics of President Donald Trump point to his famous slogan “Make America Great Again” as subtly referring to the pre-Civil Rights Act Jim Crow era in the United States as a period when America was “great,” and to rhetoric such as Trump’s description of undocumented immigrants as “poisoning the blood of our country” as covertly dogwhistling to the racial resentments in White voters.<sup>36</sup>

In recent years, sentiments as innocuous as support for police officers and the acknowledgement of the importance of “all lives” have been used as dogwhistles. In 2013, the Black Lives Matter movement began in response to a long trend of police unnecessarily shooting

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31. *Id.* at 362 (quoting George W. Bush, State of the Union Address (Jan. 28, 2003)).

32. *Id.*

33. *Id.* at 363.

34. *Id.* at 365 (emphasis added).

35. Israel Shamir, *The Elders of Zion and The Masters of Discourse*, 7 WORLD AFFS., April–June 2003, at 89, 101–02.

36. Ross Douthat, *The Donald and Decadence*, N.Y. TIMES (Aug. 10, 2015, at 15:19 CT), <https://archive.nytimes.com/douthat.blogs.nytimes.com/2015/08/10/the-donald-and-decadence>; Edward Helmore, “*He’s Dog-Whistling*”: Trump Denounced over Anti-Immigrant Comment, GUARDIAN (Dec. 17, 2023, at 11:54 ET), <https://www.theguardian.com/us-news/2023/dec/17/trump-denounced-anti-immigrant-comment>.

unarmed Black men and women, and the milquetoast response from police departments, courts, and elected officials.<sup>37</sup> In 2014, police unions founded Blue Lives Matter as a counter-movement to Black Lives Matter, ostensibly to emphasize the importance of police officers to their communities and the risk associated with being a police officer, and to highlight recent killings of police officers.<sup>38</sup> Even further, Blue Lives Matter blamed several murders of police officers on Black Lives Matter organizers, specifically the murders of two NYPD officers in 2014, and a 2016 mass shooting in Dallas that claimed the lives of five police officers.<sup>39</sup>

While these positions developed, however, white supremacist organizations like the Proud Boys and Oath Keepers took up the Blue Lives Matter mantle as a means of applauding the marginalization of impoverished Black communities by police departments across the United States.<sup>40</sup> Even if not overtly supporting the negative ways police departments relate to minority communities, Blue Lives Matter came to be consubstantial with the dismissal of the societal issues that Black Lives Matter was aimed at combating, and, if nothing else, an acceptance of the status quo.<sup>41</sup>

Contemporaneously, the All Lives Matter movement emerged as a negative reaction to Black Lives Matter, positing that all lives—as opposed to *only* Black lives—matter.<sup>42</sup> In a vacuum, the phrase “all lives matter” leaves little to quarrel with; on a cursory reading, any reasonable person would think something to the effect of, “of course all lives matter, I can agree with this.” Yet despite the importance of all lives being precisely the point of Black Lives Matter, All Lives Matter became a dismissive retort to Black Lives Matter as opposed to a

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37. Adina Campbell, *What Is Black Lives Matter and What Are the Aims?*, BBC (June 12, 2021), <https://www.bbc.com/news/explainers-53337780>.

38. Christopher E. Smith, *Blue Lives Matter Versus Black Lives Matter: Beneficial Social Policies as the Path Away from Punitive Rhetoric and Harm*, 44 VT. L. REV. 463, 463–64, 466 (2020).

39. *Id.* at 466–67.

40. India Thusi, *Blue Lives & the Permanence of Racism*, 105 CORN. L. REV. ONLINE 14, 17, 20–21 (2020).

41. *Id.* at 26.

42. Nikita Carney, *All Lives Matter, but so Does Race: Black Lives Matter and the Evolving Role of Social Media*, 40 HUM. & SOC’Y, 180, 182 (2016).

broadening of its scope and reflects a view of “racial dismissal, ignoring, and denial.”<sup>43</sup>

While many may have benign motives for using the phrase, criticism of Black Lives Matter in favor of All Lives Matter is frequently paired with racist sentiments.<sup>44</sup> For example, in June 2020, a group of All Lives Matter protestors counter-protested a Black Lives Matter march by mockingly re-enacting George Floyd’s murder.<sup>45</sup> Abroad, Councillor David Jack of Sandbach, England opposed local Black Lives Matter protests, was an administrator of a Facebook group (the “Sandbach Sarcastic Society”) whose users published private information about the protestors alongside comments echoing the All Lives Matter slogan, and threats to send the protestors’ addresses to the Ku Klux Klan.<sup>46</sup>

Accordingly, the seemingly innocent phrases “Blue Lives Matter” and “All Lives Matter” became dogwhistles for people who espoused anti-Black sentiments (whether consciously or unconsciously) and acted as calling cards for white supremacist organizations. Does that, however, make those phrases “hate speech”?

The use of dogwhistling and other insidious forms of speech can make the definition and detection of hate speech more difficult.<sup>47</sup> Dogwhistles’ innocuous nature makes them especially difficult to categorize beyond a surface-level interpretation, despite their often intentional use to stir up racial or religious resentments.<sup>48</sup>

43. David T. Goldberg, *Why “Black Lives Matter” Because All Lives Don’t Matter in America*, HUFFINGTON POST (Sep. 25, 2016, at 11:06 ET), [https://www.huffpost.com/entry/why-black-lives-matter\\_b\\_8191424](https://www.huffpost.com/entry/why-black-lives-matter_b_8191424).

44. See generally Keon West, Katy Greenland & Colette van Laar, *Implicit Racism, Colour Blindness, and Narrow Definitions of Discrimination: Why Some White People Prefer “All Lives Matter” to “Black Lives Matter,”* 60 BRIT. J. SOC. PSYCH. 1136 (2021) (examining possible racial undertones of the All Lives Matter movement).

45. Paul P. Murphy & Elizabeth Joseph, *All Lives Matter Protesters Re-Enacted George Floyd’s Death as a Black Lives Matter March Went By*, CNN (June 11, 2020, at 08:46 ET), <https://www.cnn.com/2020/06/10/us/all-lives-matter-reenact-george-floyd-black-lives-matter-trnd>.

46. West, Greenland & van Laar, *supra* note 44, at 1139.

47. See Saul, *supra* note 29, at 375–76.

48. *Id.*

Based on the many forms it takes, the phrase “hate speech” is generally used colloquially as a catch-all for explicitly or implicitly derogatory speech directed at outgroups, or groups different from those to which the speaker belongs, whether on an individual or collective level.<sup>49</sup> Whether explicit or implicit, however, there is a mountain of evidence and scholarship demonstrating that hate speech is linked to a plethora of societal harms.

### *B. The Harms of Hate Speech*

While reasonable minds differ on whether it should be protected, few would argue that “hate speech” itself is a good thing. If nothing else, it is unkind. “Hate speech,” however, transcends mere insults and indignities. It undermines the public good and is empirically linked to negative externalities such as physiological changes in the brain, social marginalization, calls to violence, and even eroding national security.

The virtue of diversity—of religions, ideas, races, sexualities, nationalities, ethnicities, and colors—is indelibly embedded in the history and tradition of the United States. The ability of anyone in any country to come to our shores seeking freedom and prosperity, enjoy the equal protection of our laws, live their lives free from intrusion, and participate in the symphony of cultures bringing light and life to our cities and towns is in no small part what makes America great. Our culture celebrates this in countless songs, folktales, literary works, and films, and embodies it in the official motto of the United States, “E Pluribus Unum”: out of many, one. It is therefore imperative for the public good that the people of the United States can live their lives free from the persecution that millions came here to escape, both by the hand of the state and by the hand of their fellow Americans. Hate speech is inherently contrary to this goal.

As scholar Jeremy Waldron explains, “[h]ate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be.”<sup>50</sup> It does so “not only by intimating discrimination and violence, but by reawakening living nightmares of what this society was like—or what other societies have been like—

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49. *See supra* text accompanying note 11.

50. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 4 (2012).

in the past.”<sup>51</sup> Thereby, it can create an environment where “it becomes harder and less natural for even the good-hearted members of the society to play their part in maintaining this public good.”<sup>52</sup>

Many scholars have differentiated “assaultive hate speech”—or discrete instances of inter-group speech, such as a White man making a racially charged remark to a Black man—and “propagandistic hate speech,” which is generally intra-group speech, such as a post on a neo-Nazi forum such as Stormfront.<sup>53</sup> One such distinction from Jeremy Waldron focuses mainly on hate speech in its propagandistic mode, which he argues undermines the public assurance of equal social standing that members of non-dominant communities are entitled to—in his terms—their assurance of dignity.<sup>54</sup> As Professors Anderson and Barnes posit, public hate speech—such as flyers reading “Muslims Out!”—are “an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word.”<sup>55</sup> In this sense, hate speech poses harm not only to individuals, but the massive collectives of individuals that comprise entire societies and civilizations or, as Anderson and Barnes eloquently put it, “the strength of an entire nation.”<sup>56</sup>

Perhaps more acutely, race-based discrimination (encompassed in many forms of hate speech) correlates closely with tangible health issues such as depression, anxiety, and posttraumatic stress disorder (PTSD), as well as diabetes, hypertension, and obesity.<sup>57</sup> As research has shown, “[y]oung adults who faced discrimination frequently . . . were around 25% more likely to be diagnosed with a mental health disorder and twice as likely to develop severe psychological distress than

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51. *Id.*

52. *Id.*

53. *See, e.g., id.* at 4–6; Rae Langton & Caroline West, *Scorekeeping in a Pornographic Language Game*, 77 AUSTRALASIAN J. PHIL. 303, 318 (1999) (analyzing the functions of pornographic speech and pornography-influenced speech as silencing female desires in discourse between men and women).

54. *See* WALDRON, *supra* note 50, at 5.

55. *Id.*; *see also* Anderson & Barnes, *supra* note 27.

56. *See* Anderson & Barnes, *supra* note 27.

57. Amy Novotney, *Hate Crimes Are on the Rise in the U.S. What Are the Psychological Effects?*, AM. PSYCH. ASS'N (May 18, 2023), <https://www.apa.org/topics/gun-violence-crime/hate-crimes>.

those who hadn't experienced discrimination or did less often . . . ."<sup>58</sup> Research also indicates that people who find themselves the targets of hate speech and hate-motivated behavior develop a "self-hatred," resulting in placing blame on, and feeling reduced empathy for, that person's fellow victims.<sup>59</sup>

Predictably, this phenomenon is particularly problematic in online platforms, manifesting notably in the context of political campaigns and elections. For example, a study on the effects of Proposition 8 in California (a pre-*Obergefell* ballot measure that sought to amend California's state constitution to disallow same-sex marriage) noted that the LGBTQIA+ individuals who would be affected by the policy implications of the election's outcome were affected just as much by the pre-election campaign than the results of the election itself.<sup>60</sup> The study found that "media campaigns that disparage gay and lesbian people, seeing yard signs and bumper stickers of individuals who are against same-sex marriage, and/or having stressful conversations with people regarding the ballot measure" were particularly problematic for participants.<sup>61</sup>

While hate speech has a plainly detrimental effect on its individual targets, it has an insidious effect on the societies in which it spreads. This takes two main forms: first, the propensity of hate speech to instill animosities that very often result in hate crimes; and second, the identity politics that hate speech champions, which has an inherently undermining effect on national unity and national security. Hate speech normalizes animosity towards entire groups of people and

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58. *Id.* For purposes of this study, the term "discrimination" refers to interpersonal discrimination as opposed to institutional or structural discrimination, and "interpersonal discrimination" refers to the behavior of individual members of one group that is intended to have a harmful effect on the members of another group.

59. *Id.*

60. David M. Frost & Adam W. Fingerhut, *Daily Exposure to Negative Campaign Messages Decreases Same-Sex Couples' Psychological and Relational Wellbeing*, 19 GRP. PROCESSES & INTERGROUP RELS. 477, 480 (2016).

61. Natalya C. Maisel & Adam W. Fingerhut, *California's Ban on Same-Sex Marriage: The Campaign and its Effects on Gay, Lesbian, and Bisexual Individuals*, 67 J. SOC. ISSUES 242, 243 (2011).

creates an environment in which offenders feel safe to manifest their hateful ideas as harmful, physical acts: hate crimes.<sup>62</sup>

The increase in hate speech over the last decade has correlated with a global increase in hate crimes.<sup>63</sup> In June 2015, twenty-one-year-old white supremacist Dylann Roof murdered nine people and injured another in a mass shooting at Emanuel African Methodist Episcopal Church in Charleston, South Carolina.<sup>64</sup> After Roof's arrest, he confessed to committing the shooting in the hopes of starting a race war.<sup>65</sup> Authorities later found a "half-literate" manifesto attributed to Roof, which was laden with offensive racial characterizations of Black Americans and other minority groups, bemoaned the trend of White Americans moving to suburban areas as "[White people] running because they are too weak, scared and brainwashed to fight," described people of Hispanic descent as "our enemies," and offered such sentiments as, "if we could somehow destroy the [J]ewish identity, then they wouldn't

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62. See John Shattuck & Mathias Risse, *Reimagining Rights and Responsibilities in the United States: Hate Crimes*, CARR CTR. FOR HUM. RTS., Spring 2021, at 10, <https://nrs.harvard.edu/URN-3:HUL.INSTREPOS:37378167>. While hate speech is protected in the United States, hate crimes are not. The First Amendment does not prevent prosecuting a crime just because its conduct is rooted in philosophical beliefs. *Learn About Hate Crimes*, U.S. DEP'T OF JUST. (July 2, 2024), <https://www.justice.gov/hatecrimes/learn-about-hate-crimes>. On the contrary, federal law imposes additional criminal penalties for most violent crimes committed "because of the actual or perceived race, color, religion, or national origin of any person." 18 U.S.C. §§ 245(b)(2), 249; see also *2022 FBI Hate Crimes Statistics*, U.S. DEP'T OF JUST. (Oct. 30, 2023), <https://www.justice.gov/archives/crs/highlights/2022-hate-crime-statistics> (defining "hate crime" more broadly as a crime motivated by bias against race, color, religion, national origin, sexual orientation, gender, gender identity, or disability).

63. See, e.g., Gloria Oladipo, *FBI Report Shows Stark Increase in US Hate Crimes and Drop in Violent Crime*, GUARDIAN (Oct. 16, 2023, at 17:38 ET), <https://www.theguardian.com/us-news/2023/oct/16/hate-crimes-increasing-fbi-report>; *2022 FBI Hate Crimes Statistics*, supra note 62.

64. Ray Sanchez & Ed Payne, *Charleston Church Shooting: Who Is Dylann Roof?*, CNN (Dec. 16, 2016, at 15:13 ET), <https://www.cnn.com/2015/06/19/us/charleston-church-shooting-suspect/index.html>.

65. Ralph Ellis, Greg Botelho & Ed Payne, *Charleston Church Shooter Hears Victim's Kin Say, "I Forgive You,"* CNN US (June 19, 2015, at 10:58 ET), <https://www.cnn.com/2015/06/19/us/charleston-church-shooting-main/index.html>.

cause much of a problem.”<sup>66</sup> During the shooting, Roof told one of his victims, “I have to do it . . . . You rape our women, and you’re taking over our country. And you have to go.”<sup>67</sup>

The manifesto cites a website operated by the Council of Conservative Citizens (“CCC”), another alleged hate group, as the source of the shooter’s urgency to address “black on white murders.”<sup>68</sup> A description of the CCC on the group’s official Facebook page explained that its members believe in “racial integrity” and that the United States is a Christian nation, while the website itself expressly referred to Black people as “a retrograde species of humanity.”<sup>69</sup> Regardless of whether they should enjoy First Amendment protection, few would argue that the manifesto and the CCC’s online literature constitute anything but hate speech.

Roof was convicted on thirty-three federal hate crime and murder charges, and is the first person to receive a death sentence for federal hate crimes.<sup>70</sup>

In another example, the “Unite the Right” rally in August 2017 saw men and women marching through downtown Charlottesville, Virginia protesting the removal of Confederate statues and carrying tiki torches and Nazi and Confederate flags: the banner of one regime whose core tenet was the vilification and extermination of the Jewish

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66. Lenny Bernstein, Sari Horwitz & Peter Holley, *Dylann Roof’s Racist Manifesto: “I Have No Choice,”* WASH. POST (June 20, 2015), [https://www.washingtonpost.com/national/health-science/authorities-investigate-whether-racist-manifesto-was-written-by-sc-gunman/2015/06/20/f0bd3052-1762-11e5-9ddc-e3353542100c\\_story.html](https://www.washingtonpost.com/national/health-science/authorities-investigate-whether-racist-manifesto-was-written-by-sc-gunman/2015/06/20/f0bd3052-1762-11e5-9ddc-e3353542100c_story.html).

67. *Id.*; see also Paul Lewis, Amanda Holpuch & Jessica Glenza, *Dylann Roof: FBI Probes Website and Manifesto Linked to Charleston Suspect*, GUARDIAN (June 21, 2015, at 09:15 ET), <https://www.theguardian.com/us-news/2015/jun/20/dylann-roof-fbi-website-manifesto-charleston-shooting>.

68. See Lewis, Holpuch & Glenza, *supra* note 67.

69. *Id.* The CCC’s website has since been taken down. *Id.*

70. See *United States v. Roof*, 10 F.4th 314, 331 (4th Cir. 2021) (affirming conviction and sentence); *U.S. Court Upholds Conviction, Death Sentence of Dylann Roof*, REUTERS (Aug. 25, 2021, at 14:00 CT), <https://www.reuters.com/legal/government/us-court-upholds-conviction-death-sentence-dylann-roof-2021-08-25/>; *Dylann Roof Sentenced to Death, 1st to Get Death Penalty for Federal Hate Crimes*, ABC NEWS (Jan. 10, 2017, at 17:01 CT), <https://abcnews.go.com/US/charleston-church-shooter-dylann-roof-sentenced-death/story?id=44674575>.

people and the other of a failed rebellion against the United States, predicated on the notion that states have rights, but Black people do not.<sup>71</sup> On the steps of the University of Virginia's Rotunda, where students held an anti-hate vigil for victims of the Pulse Nightclub shooting less than a year prior,<sup>72</sup> the mob of neo-Nazis,<sup>73</sup> white nationalists, and other white supremacists<sup>74</sup> encircled a smaller group of counter-protesters, and attacked them.<sup>75</sup> The following day, after extensive clashes between far-right groups, counter-protestors, and police, self-described neo-Nazi James Alex Fields, Jr. deliberately drove his vehicle into a group of counter-protestors, killing one person and injuring thirty-five others.<sup>76</sup>

The evidence introduced at Fields' trial included a text message exchange the day before the rally, in which Fields' mother wrote to him, "[b]e careful," to which Fields responded with a picture of Adolf Hitler and the message, "[w]e're not the one[s] who have to be careful."<sup>77</sup> Interviews of people who knew Fields reveal that Fields often spread antisemitic and other hateful sentiments reminiscent of those of the Nazi party, including inexplicably describing the French people as

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71. See, e.g., Cleve R. Wootson, *Here's What a Neo-Nazi Rally Looks Like in 2017 America*, WASH. POST (Aug. 13, 2017), <https://www.washingtonpost.com/news/local/wp/2017/08/13/heres-what-a-neo-nazi-rally-looks-like-in-2017-america/>; Joel Gunter, *Charlottesville: One Killed in Violence over U.S. Far-Right Rally*, BBC (Aug. 12, 2017), <https://www.bbc.com/news/world-us-canada-40912509>.

72. CWCVILLE TOURIST, *UVA Students Hold Memorial Service for Pulse Nightclub Victims WVIR Charlottesville VA News Sports*[], (YouTube, June 13, 2017), [https://www.youtube.com/watch?v=n062B5gurp0&list=PL6D00JAZTbpIigJy409CbDnwXB4\\_HIqc0&index=6](https://www.youtube.com/watch?v=n062B5gurp0&list=PL6D00JAZTbpIigJy409CbDnwXB4_HIqc0&index=6).

73. See Wootson, *supra* note 71.

74. Kamala Kelkar, *Three Dead After White Nationalist Rally in Charlottesville*, PBS (Aug. 12, 2017, at 13:17 ET), <https://www.pbs.org/newshour/nation/state-emergency-charlottesville-va-fights-erupt-white-nationalist-rally>.

75. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/>.

76. EDWARD MICKOLUS, *TERRORISM WORLDWIDE*, 2018, at 170 (2019).

77. Farah Stockman, *In Charlottesville Murder Trial, Courtroom Relives Trauma of a Violent Day*, N.Y. TIMES (Dec. 5, 2018), <https://www.nytimes.com/2018/12/05/us/charlottesville-trial-fields.html>.

being “lower than us and inferior to us.”<sup>78</sup> Reviews of Fields’ social media accounts revealed that he was a regular consumer of hate-speech-laden content from alt-right and neo-Nazi groups, and was photographed at the rally holding a shield emblazoned with the logo of Vanguard America, a self-described neo-Nazi organization.<sup>79</sup> Fields was ultimately sentenced to life in prison after pleading guilty to twenty-nine federal hate crime charges.<sup>80</sup>

Countless peer-reviewed studies have explored the link between hate speech and violence. A 2023 study conducted by the Faculty of Psychology at the University of Warsaw found that exposure to hate speech, especially online hate speech, can “lead to prejudice, dehumanization, and lack of empathy towards members of outgroups.”<sup>81</sup> One study of violence in Sweden found—unsurprisingly—that hate speech has the effect of instilling negative feelings in its listeners towards the target group at issue.<sup>82</sup> Another study conducted in Germany found that increases in anti-refugee sentiments on Facebook led to increases in violence against refugees; conversely, when Facebook had an outage, or when different events dominated the news, violence fell.<sup>83</sup> Yet

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78. Dake Kang & Sarah Rankin, *Charlottesville Driver Previously Accused of Beating Mother*, ASSOCIATED PRESS (Aug. 15, 2017, at 19:19 CT), <https://ap-news.com/article/ffec757d4c084bcda2c9ee4224e91c36>.

79. *Charlottesville: What We Know About James Alex Fields*, AL JAZEERA (Aug. 13, 2017), <https://www.aljazeera.com/features/2017/8/13/charlottesville-what-we-know-about-james-alex-fields>; see also Kang & Rankin, *supra* note 78 (noting that Vanguard America has denied any affiliation with Fields).

80. Press Release, U.S. Dep’t of Just., Ohio Man Sentenced to Life in Prison for Federal Hate Crimes Related to August 2017 Car Attack at Rally in Charlottesville, Virginia, (June 28, 2019), <https://www.justice.gov/opa/pr/ohio-man-sentenced-life-prison-federal-hate-crimes-related-august-2017-car-attack-rally>.

81. Agnieszka Pluta et al., *Exposure to Hate Speech Deteriorates Neurocognitive Mechanisms of the Ability to Understand Others’ Pain*, 13 SCI. REPS. 1 (2023), <https://www.nature.com/articles/s41598-023-31146-1> [<https://doi.org/10.1038/s41598-023-31146-1>].

82. Daniel L. Byman, *How Hateful Rhetoric Connects to Real-World Violence*, BROOKINGS (Apr. 9, 2021), <https://www.brookings.edu/articles/how-hateful-rhetoric-connects-to-real-world-violence/>; Mattias Wahlström, Anton Törnberg & Hans Ekbrand, *Dynamics of Violent and Dehumanizing Rhetoric in Far-Right Social Media*, 23 NEW MEDIA & SOC’Y 3290, 3304–05 (2021).

83. Karsten Müller & Carlo Schwarz, *Fanning the Flames of Hate: Social Media and Hate Crime* 42 (Univ. of Warwick Ctr. for Competitive Advantage in the

another found that violent rhetoric from politicians increased support for political violence among those surveyed.<sup>84</sup> Hateful and divisive rhetoric is additionally dangerous because it legitimizes political violence against target communities with the tacit approval of the state.

Rhetoric of this kind also creates a more dangerous political climate in general. Patrick Crusius, the “El Paso Walmart shooter” who killed almost two dozen people of mostly Hispanic heritage, argued in his manifesto that he was “simply defending [his] country from cultural and ethnic replacement brought on by an invasion,” parroting conspiracy theories peddled in several conservative media outlets.<sup>85</sup> Another study found that hate speech from politicians and elected officials increases political polarization, and that this, in turn, makes domestic terrorism more likely.<sup>86</sup> A 2020 news article reported that fifty-four criminal cases of assaults and threats were connected to individuals who cited President Donald Trump or echoed his rhetoric while carrying out or justifying their actions.<sup>87</sup>

A 2018 study by law professors at the University of Alabama and Loyola University found that the current political environment is associated with “a statistically significant surge in [reported] hate crimes” across the United States, “even when controlling for alternative explanations.”<sup>88</sup> FBI data shows an “anomalous spike in hate crimes”

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Glob. Econ., Working Paper Series, Paper No. 373, 2018), [https://warwick.ac.uk/fac/soc/economics/research/centres/cage/manage/publications/373-2018\\_schwarz.pdf](https://warwick.ac.uk/fac/soc/economics/research/centres/cage/manage/publications/373-2018_schwarz.pdf).

84. Byman, *supra* note 82. For the study itself, see Nathan P. Kalmoe, *Fueling the Fire: Violent Metaphors, Trait Aggression, and Support for Political Violence*, 31 POL. COMM’N 545 (2014).

85. Jeremy W. Peters et al., *How the El Paso Killer Echoed the Incendiary Words of Conservative Media Stars*, N.Y. TIMES (Aug. 11, 2019), <https://www.nytimes.com/interactive/2019/08/11/business/media/el-paso-killer-conservative-media.html>; *see also* Byman, *supra* note 82.

86. James A. Piazza, *Politician Hate Speech and Domestic Terrorism*, 46 INT’L INTERACTIONS 431, 436 (2020).

87. Byman, *supra* note 82; Mike Levine, “No Blame?” *ABC News Finds 54 Cases Invoking “Trump” in Connection with Violence, Threats, Alleged Assaults*, ABC NEWS (May 30, 2020, at 07:20 CT), <https://abcnews.go.com/Politics/blame-abc-news-finds-17-cases-invoking-trump/story?id=58912889>.

88. Griffin Edwards & Stephen Rushin, *The Effect of President Trump’s Election on Hate Crimes* 20 (Jan. 14, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3102652](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652).

since the 2016 presidential election, inexplicably concentrated in counties that Donald Trump won by larger margins.<sup>89</sup> This marked the second-largest uptick in hate crimes in the twenty-five years for which data is available, second only to the spike after the September 11, 2001, terrorist attacks.<sup>90</sup> A study conducted by *The Washington Post*, based on data collected by the Anti-Defamation League, shows that United States counties that hosted a Trump campaign rally in 2016 saw hate crime rates more than double compared to counties that did not host a rally.<sup>91</sup>

During the COVID-19 Pandemic, instances of hate speech and hate crimes against Asian Americans skyrocketed.<sup>92</sup> Because COVID-19 was first discovered in Wuhan, China, a number of pundits and individual social media users took to referring to the virus as the “China virus” or the “kung flu,” which stoked xenophobic sentiments and encouraged intolerance towards people of Asian descent.<sup>93</sup> This trend correlated with a rise in public and workplace harassment of Asian Americans, and it developed so quickly and pervasively that the FBI issued a prophetic warning in March 2020 about a potential rise in hate crimes against Asian Americans.<sup>94</sup>

As derogatory speech towards Asian Americans increased, so too did hate crimes; the FBI reported a 77% increase in hate crimes

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89. Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What Do the Data Say?*, BROOKINGS (Aug. 14, 2019), <https://www.brookings.edu/articles/trump-and-racism-what-do-the-data-say/>.

90. *Id.*

91. Ayal Feinberg, Regina Branton & Valerie Martinez-Ebers, *Counties That Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019), <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/>.

92. *See 2020 FBI Hate Crime Statistics*, U.S. DEP'T OF JUST. (Apr. 4, 2023), <https://www.justice.gov/crs/highlights/2020-hate-crimes-statistics>.

93. *See, e.g.*, Colby Itkowitz, *Trump Again Uses Racially Insensitive Term to Describe Coronavirus*, WASH. POST (June 23, 2020), [https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff\\_story.html](https://www.washingtonpost.com/politics/trump-again-uses-kung-flu-to-describe-coronavirus/2020/06/23/0ab5a8d8-b5a9-11ea-aca5-ebb63d27e1ff_story.html).

94. Josh Margolin, *FBI Warns of Potential Surge in Hate Crimes Against Asian Americans Amid Coronavirus*, ABC NEWS (Mar. 27, 2020, at 08:28 CT), <https://abcnews.go.com/US/fbi-warns-potential-surge-hate-crimes-asian-americans/story?id=69831920>.

targeted at Asian Americans between 2019 and 2020, which was the largest year-over-year increase in hate crimes by target demographic.<sup>95</sup> This is particularly remarkable given that 2020 also saw the protests and riots following the murder of George Floyd, and the sharp increase in racial tensions between Black and White Americans that accompanied them. Two such examples of anti-Asian hate crimes are the assault and hospitalization of a sixteen-year-old Asian American student accused by his classmates of having COVID-19,<sup>96</sup> and the stabbing of a Chinese American family at a Sam's Club store because the attacker thought they were "infecting people with the coronavirus."<sup>97</sup>

These studies show that hate speech can contribute to a climate of hostility, increase negative attitudes toward targeted groups, and escalate into acts of violence. While the relationship between hate speech and violence is complex and multifaceted, these studies underscore the importance of addressing hate speech as a potential precursor to violence and promoting tolerance and respect for diversity in society.

### *C. Hate Speech in the Digital Age*

The advent of the internet and social media provided a new frontier in which hate speech could spread. As it transitioned from an early internet trend to a ubiquitous forum of communication, social media took on a major role in influencing public opinion.

In addition to the examples laid out in the foregoing sections, instances of hate speech have been on the rise since 2016. Mainstream political factions like France's National Rally, the Austrian Freedom Party, the Hungarian Jobbik, the Italian League, the Dutch Freedom Party, the German Alternative für Deutschland, the Greek Golden Dawn, and the MAGA movement in the United States use fearful and divisive rhetoric in campaign speeches and material, both in print and

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95. See U.S. DEP'T OF JUST., *supra* note 92.

96. Christina Capatides, *Bullies Attack Asian American Teen at School, Accusing Him of Having Coronavirus*, CBS NEWS (Feb. 14, 2020, at 13:53 ET), <https://www.cbsnews.com/news/coronavirus-bullies-attack-asian-teen-los-angeles-accusing-him-of-having-coronavirus/>.

97. *FBI Calling Stabbing at Midland Sam's a Hate Crime*, FIRST ALERT 7 (Mar. 30, 2020, at 17:57 CT), <https://www.firstalert7.com/content/news/FBI-calling-stabbing-at-Midland-Sams-a-hate-crime-569233691.html>.

online.<sup>98</sup> As far-right parties have gained power in the United States and Europe, the ever-evolving internet provides a platform through which hateful rhetoric can spread faster to more specifically targeted audiences. Accordingly, instances of anti-immigrant and anti-minority rhetoric and hate crimes have multiplied both domestically and abroad in the last decade.<sup>99</sup>

According to a Pew Research Center survey of over 10,000 adults in July 2020, 23% of adult social media user respondents reported that social media content caused them to change their opinion on a political or social issue.<sup>100</sup> Thirty-five percent of those respondents cited the Black Lives Matter movement, police reform, and/or race relations; 18% of respondents reported a change of opinion on political parties, ideologies, politicians, and/or President Donald Trump; 9% of respondents cited social justice issues, such as LGBTQIA+ rights,

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98. See HUMAN RIGHTS FIRST, FAR-RIGHT PARTIES IN EUROPEAN ELECTIONS (2016), <https://humanrightsfirst.org/wp-content/uploads/2022/10/March2016Far-rightPartiesintheEuropeanElections.pdf> (noting that parties such as France's National Front, Austria's Freedom Party, Hungary's Jobbik, Italy's Northern League, Greece's Golden Dawn, and the Dutch Party for Freedom have been "roundly criticized for their antisemitic, Islamophobic, xenophobic, and/or racist rhetoric and policy proposals"); Emily C. Johnson, Making America Great Again? Considering Regimes of Truth in the Trump Campaign (Apr. 2018) (B.A. thesis, University of Calgary) (on file with author) (analyzing Trump's "Make America Great Again" campaign rhetoric as a fear-based, exclusionary discourse that constructs racialized "others" through white supremacist assumptions).

99. See, e.g., Manuela Caiani, Benedetta Carlotti & Enrico Padoan, *Online Hate Speech and the Radical Right in Times of Pandemic: The Italian and English Cases*, 28 JAVNOST—THE PUBLIC, J. EUR. INST. COMM'N & CULTURE 202, 214 (2021) (revealing hate speech from right-wing groups in the UK and Italy increased during the pandemic); APRIL GORDON, A NEW EURASIAN FAR RIGHT RISING: REFLECTIONS ON UKRAINE, GEORGIA, AND ARMENIA, [https://freedomhouse.org/sites/default/files/2020-02/FarRightEurasia\\_FINAL\\_.pdf](https://freedomhouse.org/sites/default/files/2020-02/FarRightEurasia_FINAL_.pdf) (2020); BRIGITTE L. NACOS, YAELI BLOCH-ELKON & ROBERT Y. SHAPIRO, HATE SPEECH AND POLITICAL VIOLENCE: FAR-RIGHT RHETORIC FROM THE TEA PARTY TO THE INSURRECTION (2024).

100. Andrew Perrin, *23% of Users in U.S. Say Social Media Led Them to Change Views on an Issue; Some Cite Black Lives Matter*, PEW RSCH. CTR. (Oct. 15, 2020), <https://www.pewresearch.org/short-reads/2020/10/15/23-of-users-in-us-say-social-media-led-them-to-change-views-on-issue-some-cite-black-lives-matter/>.

feminism, immigration, etc.; 8% of respondents changed their opinion on the COVID-19 Pandemic; and 10% cited other opinions.<sup>101</sup>

While 23% of a sample group is not a particularly large number in most other contexts, given the intense polarization of contemporary politics, it is remarkable that social media has changed the opinions of nearly a quarter of the population on at least one politically salient issue. Additionally, whether they engage in hate speech or not, a user's continued consumption of articles or posts expressing divisive sentiments will influence social media and search engines' algorithms to prioritize showing content to that user that conforms with the same biases and sentiments.<sup>102</sup> Based on these results, social media plays an important role in influencing public opinion, and is therefore an effective way for hate speech to spread.

Online speech presents a variety of problems that traditional forms of speech do not, namely how fast and far it can spread, the anonymity with which it can be shared, and, by extension, its permanence.<sup>103</sup> Unlike more traditional channels of communication, the internet and social media provide speakers with layers of personal and geographic anonymity, making it difficult for targets of hate speech to find its authors' real-life identities.<sup>104</sup> The use of "anonymous and pseudonymous" online personas "can . . . easily accelerate [the] destructive behaviour" of internet users.<sup>105</sup> Further, online information travels easily across multiple platforms—even if a post is taken down or a website is forced to close, online perpetrators can still maintain their existence by relocating to another forum or website.<sup>106</sup> Thus, incidents of hate

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101. *Id.*

102. *See generally* ELI PARISER, *THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK* (2011) (discussing how personalized search algorithms change how news is received).

103. *See, e.g.*, IGINIO GAGLIARDONE ET AL., UNESCO, *COUNTERING ONLINE HATE SPEECH* 13–15 (2015); Jelena Vučković & Sonja Lučić, *Hate Speech and Social Media*, 47 *TEME* 191, 191 (2023).

104. *See* GAGLIARDONE ET AL., *supra* note 103, at 14.

105. *Id.* (quoting Danielle K. Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship For Our Information Age*, 91 *B.U. L. REV.* 1435, 1447 (2011)).

106. *See, e.g.*, Giuseppe Russo et al., *Spillover of Antisocial Behavior from Fringe Platforms: The Unintended Consequences of Community Banning*, 17 *PROCS. INT'L AAAI CONF. ON WEB & SOC. MEDIA* 742, 742 (2023) (finding that increases in

speech can grow exponentially online, and in many cases, harmful content can remain online indefinitely.

One infamous example of a “hate website” is Stormfront.<sup>107</sup> Founded by a former Klan leader in 1995,<sup>108</sup> Stormfront became a popular space for discussing ideas promoting neo-Nazism and white nationalism.<sup>109</sup> In its infancy, Stormfront was mostly limited to users based in the United States, but it came to encompass a global user base and context of discussion.<sup>110</sup> The forum hosts discussions “call[ing] for a racial holy war and incitement to use violence to resist immigration and is considered a space for recruiting activists and possibly coordinating violent acts.”<sup>111</sup>

As noted in a 2015 UNESCO publication, far-right activists have dismissed Stormfront as merely a gathering place for “keyboard warriors.”<sup>112</sup> One such activist stated, “I have read quite a few pieces around [Stormfront], and it strikes me that a great fuss is made, whereas little happens.”<sup>113</sup> Stormfront users’ responses to these accusations have been similarly telling: as one of them argued, “[s]urely, I am entitled to have an opinion without actively carrying it out. . . . If this makes me a keyboard warrior, that is all right. I feel good this way . . . I am not ashamed of it.”<sup>114</sup> The Southern Poverty Law Center published a study in 2014 that found Stormfront users were accused of playing a role in the murders of nearly 100 people in the preceding five years.<sup>115</sup>

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banning posts on mainstream platforms correlates to users engaging more on fringe platforms).

107. Priscilla Marie Meddaugh & Jack Kay, *Hate Speech or “Reasonable Racism?” The Other in Stormfront*, 24 J. MASS MEDIA ETHICS 251, 253 (2009).

108. GAGLIARDONE ET AL., *supra* note 103, at 33.

109. Lorraine Bowman-Grieve, *Exploring “Stormfront”: A Virtual Community of the Radical Right*, 32 STUD. CONFLICT & TERRORISM 989, 996 (2009).

110. *Id.* at 997.

111. GAGLIARDONE ET AL., *supra* note 103, at 33 (citations omitted).

112. *Id.*

113. *Id.* (quoting Willem De Koster & Dick Houtman, “*Stormfront Is like a Second Home to Me*,” 11 INFO., COMM’N & SOC’Y 1153, 1169 (2008)).

114. *Id.*

115. HEIDI BEIRICH, SPLC, WHITE HOMICIDE WORLDWIDE 2 (2014), [https://www.splcenter.org/wp-content/uploads/files/d6\\_legacy\\_files/downloads/publication/white-homicide-worldwide.pdf](https://www.splcenter.org/wp-content/uploads/files/d6_legacy_files/downloads/publication/white-homicide-worldwide.pdf).

Dylann Roof is another example of the radicalizing effect of hate speech, with the manifesto discovered after the Charleston shooting pointing to the CCC's online propaganda as the call to action for the shooting.<sup>116</sup> James Alex Fields, Jr., the Charlottesville attacker, was also radicalized by online content from neo-Nazi groups.<sup>117</sup>

In 2016, in response to an uptick in online hate speech, several major social media companies including Facebook, YouTube, and Twitter (now "X") signed the European Union's code of conduct pertaining to hate speech, which requires tech platforms to address material that their users flag as hate speech within twenty-four hours.<sup>118</sup> This code gives a functional definition of hate speech as the incitement to violence or hatred against a group, defined in relation to race, religion or ethnicity.<sup>119</sup> The code also emphasizes the need to safeguard freedom of speech, even in relation to shocking, politically subversive, or disturbing material.<sup>120</sup>

Many social media sites also disallow "hate speech" in their terms of service, which, as non-government entities, they are perfectly entitled to do. Facebook, for example, has a robust hate speech policy

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116. See Bernstein, Horwitz & Holley, *supra* note 66. Of note in Roof's situation is that authorities believe that Roof did not actively participate in discussions with CCC representatives or other individuals espousing racist beliefs; Roof's actions, according to prosecutors, were "consistent with the concept of leaderless resistance and martyrdom advocated by white supremacy extremist groups and self-radicalization leading to violence." Meg Kinnard, *Feds: Church Shooting Suspect Entrenched in His Beliefs*, ASSOCIATED PRESS (Aug. 23, 2016, at 06:41 CT), <https://apnews.com/general-news-cac83b3a26794585a371661106e00c10>. In other words, the content that Roof consumed (which was certainly "hate speech" in any reasonable interpretation of the phrase) managed to radicalize him to the point of committing mass murder in the name of the hateful ideologies that the content espoused, without anyone directly encouraging him to do so.

117. See AL JAZEERA, *supra* note 79.

118. *The EU Code of Conduct on Countering Illegal Hate Speech Online*, EUR. COMM'N (2016), [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online\\_en#relatedlinks](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#relatedlinks); see also Alex Hern, *Facebook, YouTube, Twitter and Microsoft Sign EU Hate Speech Code*, GUARDIAN (May 31, 2016, at 20:16 ET), <https://www.theguardian.com/technology/2016/may/31/facebook-youtube-twitter-microsoft-eu-hate-speech-code>.

119. EUR. COMM'N, *supra* note 118.

120. *Id.*

with a broad range of disallowed speech, including “dehumanizing speech, statements of inferiority, expressions of contempt or disgust, cursing, and calls for exclusion or segregation” directed at people with one or more of Facebook’s defined “protected characteristics,” which include race, ethnicity, gender, sexual identity, and disability, among others.<sup>121</sup> Facebook users are able to “flag” other users’ posts or comments that they believe violate the hate speech policy, which Facebook’s administrators will review to determine if the content in question should be removed.<sup>122</sup> However, Facebook has received criticism for its alleged selective (or at least inconsistent) enforcement of this policy, allowing offensive content aimed at Muslim and Jewish individuals, for example, to remain on the site, but removing offensive content aimed at White men.<sup>123</sup> Facebook also allows private groups promoting white nationalism and other inherently racist ideologies to exist on its site.<sup>124</sup>

In April 2023, “X” updated its terms of service to disallow content that “directly attack[s] other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.”<sup>125</sup> However, “X” has faced serious criticism regarding how this rule is enforced. According to a report published by the Center for Countering Digital Hate, 86% of “X” posts flagged as “hate speech” remained on the platform

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121. *Hateful Conduct*, META, <https://transparency.meta.com/policies/community-standards/hateful-conduct/> (Jan. 7, 2025) (navigate to “Jan 7, 2025” tab under “change log”).

122. Ariana Tobin, Madeleine Varner & Julia Angwin, *Facebook’s Uneven Enforcement of Hate Speech Rules Allows Vile Posts to Stay Up*, PROPUBLICA (Dec. 28, 2017, at 17:53 CT), <https://www.propublica.org/article/facebook-enforcement-hate-speech-rules-mistakes>.

123. *Id.*; see also Julia Angwin & Hannes Grassegger, *Facebook’s Secret Censorship Rules Protect White Men from Hate Speech but Not Black Children*, PROPUBLICA (June 28, 2017, at 05:00 CT), <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms>.

124. Naomi Nix, *Facebook Bans Hate Speech but Still Makes Money from White Supremacists*, WASH. POST (Aug. 10, 2022), <https://www.washingtonpost.com/technology/2022/08/10/facebook-white-supremacy-ads/>.

125. *Hateful Conduct*, X: HELP CENTER (Apr. 2023), <https://help.x.com/en/rules-and-policies/hateful-conduct-policy> (last visited Nov. 1, 2025).

for a week after being reported.<sup>126</sup> Since billionaire Elon Musk purchased the platform in 2022, famously desiring to foster an environment of free speech, reported posts with racial slurs more than tripled on the site.<sup>127</sup> Antisemitic posts and anti-gay slurs each increased by around 60%.<sup>128</sup>

Despite major online platforms making only superficial efforts at combating hate speech, the Communications Decency Act (“CDA”) shields platforms from liability. Section 230 of the CDA provides that a website on which content is posted is not legally considered the author or publisher of content “provided by another information content provider” and thereby absolves internet companies of liability for the consequences of said content.<sup>129</sup> There have been efforts in recent years to revisit the CDA and update it to reflect the evolution of the internet from its state in 1996.<sup>130</sup> For now, however, social media platforms cannot, as a matter of law, be considered the author or publisher of any of the content posted by their users and, therefore, cannot face meaningful legal consequences for their content.

The benefits of hate speech laws obviously lie in preventing (or at least reducing) the harms outlined above. However, opponents of hate speech laws argue that they provide an unwanted moral paternalism, have a chilling effect on speech, and create a slippery slope down which governments can ban conceivably unlimited amounts of speech and prosecute political opponents under the guise of fighting hate speech.<sup>131</sup>

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126. Ivana Saric, *Watchdog Accuses X Again of Not Moderating Hate Speech*, AXIOS (Sep. 13, 2023), <https://www.axios.com/2023/09/13/x-twitter-hate-speech-moderation-report>.

127. Sheera Frenkel & Kate Conger, *Hate Speech’s Rise on Twitter Is Unprecedented, Researchers Find*, N.Y. TIMES (Dec. 2, 2022), <https://www.nytimes.com/2022/12/02/technology/twitter-hate-speech.html>.

128. *See id.*

129. 47 U.S.C. § 230(c)(1).

130. *See* House Energy & Com. Comm., *Chairs Rodgers and Latta Announce Hearing on the Future of Section 230* (Apr. 4, 2024), <https://energycommerce.house.gov/posts/chairs-rodgers-and-latta-announce-hearing-on-the-future-of-section-230>.

131. *See, e.g.*, Anderson & Barnes, *supra* note 27 (listing six common objections to hate speech laws).

#### D. Cons of Hate Speech Laws

The most common and compelling argument against hate speech legislation lies in the inherent difficulty of consistently defining hate speech, even in instances where statutes lay out very specific categories of prohibited speech. Because hate speech (or any category of prohibited speech) is a necessarily amorphous concept open to potentially infinite interpretations, the fear is that whoever is put in charge of enforcing hate speech rules will abuse that power—that the ability to ban hate speech gives the state too much power to decide what may and may not be said based on the viewpoint expressed, which threatens state neutrality, skews political debate, and infringes on individual liberties.<sup>132</sup> As Justice Anthony Kennedy wrote in his concurrence in *Matal v. Tam*, “[a] law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all.”<sup>133</sup>

While there are countless examples of authoritarian regimes imprisoning or outright executing political opponents arbitrarily under various legal pretexts, proponents of this argument fail to identify discrete instances of hate speech laws being similarly abused in Western democracies that guarantee due process of law. In other words, hate speech laws have existed for decades in democratic countries outside of the United States, and they have not been abused in this way. Quite the contrary: political ideologies that vilify the very groups that hate speech laws are designed to protect are on the rise, as far-right groups the world over have surged into prevalence since 2016. To be sure, enforcement of hate speech and related public-order laws in Europe has at times swept too broadly, resulting in arrests and investigations that critics plausibly describe as instances where “the process is the punishment.”<sup>134</sup> While it would be hyperbole to say that EU member states systematically use these provisions to imprison mainstream political

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132. *See id.*

133. 582 U.S. 218, 253–54 (2017) (Kennedy, J., concurring).

134. Frederick Attenborough, *One in Four Irish Citizens Worried About Losing Right to Free Speech*, FREE SPEECH UNION (June 19, 2024), <https://freespeechunion.org/one-in-four-irish-citizens-worried-about-losing-right-to-free-speech/?v=7885444af42e>.

opponents, it would also be inaccurate to say that they are always invoked impartially.

While many opponents of hate speech laws find a home among the far-right, defense of the right to use “hate speech” is not merely a conservative or libertarian principle; “[t]he left-leaning American Civil Liberties Union (ACLU) has defended the speech rights of Nazis and of KKK members” on First Amendment grounds.<sup>135</sup> As Julian Adorney of the Foundation for Economic Education notes, “[o]ne reason for the ACLU’s decades of principled defense” is the idea that if societies empower governments “to censor people whose views we find abhorrent,” that same power will eventually “be turned against people whose views we find noble.”<sup>136</sup> In short, we live in a society.

Targets of hate speech, in any form, are usually understandably upset by the speech in question. However, there does not exist in any known civilization a right not to be offended.<sup>137</sup> On a philosophical level, there is an argument that one cannot be held responsible for another’s thoughts and feelings.<sup>138</sup> On a practical level, laws based on a right to not be offended veer dangerously close to thought crime. This is because “offense,” like hate speech, “is inherently subjective; speech that offends one person can make another simply shrug (and vice versa).”<sup>139</sup>

Richard Delgado and Jean Stefancic distill what they view as paternalistic arguments against hate speech legislation into three broad categories: the “pressure valve” argument, the “best friend” objection,

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135. Julian Adorney, *Hate Speech Laws: The Best Arguments for Them—and Against Them*, FOUNDA. FOR ECON. EDUC. (Jan. 14, 2023), <https://fee.org/resources/hate-speech-laws-the-best-arguments-for-them-and-against-them/>; see also *Nat’l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); CHRISTOPHER M. FINAN, *FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA* 158–59 (2007) (describing how the ACLU argued against declaring the Communist Party of America illegal).

136. Adorney, *supra* note 135.

137. *Id.*

138. *Id.*

139. *Id.*; cf. Jonathan Turley, Opinion, *Europe’s “Anti-Hate” Laws and Arrests a Warning for Free Speech in US*, N.Y. POST (Dec. 26, 2022, at 22:18 ET), <https://ny-post.com/2022/12/26/europes-anti-hate-laws-and-arrests-a-warning-for-free-speech-in-us/> (relating then recent examples of “thought crime” prosecutions in the UK).

and the “talk back” argument.<sup>140</sup> The thrust of the “pressure valve” argument is that prohibiting hate speech will inherently backfire and, ironically, put groups that would otherwise be the target of hate speech in more peril.<sup>141</sup> By suppressing racists’ ability to speak their racist sentiments, they will suppress the emotions associated with these thoughts until they manifest in a potentially more violent form.<sup>142</sup> Free speech, as Delgado and Stefancic observe, “serves as a pressure valve, allowing tension to dissipate before it reaches a dangerous level.”<sup>143</sup> Theoretically, if advocates of hate speech laws understood this, they would change their positions.<sup>144</sup> Accordingly (and notwithstanding the evidence to the contrary outlined in the foregoing section), the “pressure valve” argument posits that minorities are safer without hate speech laws than they would be with them.<sup>145</sup>

The second paternalistic argument against hate speech laws posits that free speech has historically been minorities’ “best friend” (i.e., the “best friend” argument).<sup>146</sup> Those trying to achieve reform (i.e., minorities), should resist obstructing the freedom of speech in any form. One school of thought posits that the First Amendment has historically been a tool for social reformers and progressive ideals, with the Civil Rights Movement being an obvious example.<sup>147</sup> Delgado and Stefancic argue that this is an oversimplification of the historical relationship between minorities and the First Amendment, as the Civil Rights Movement saw numerous members arrested and jailed as a result of their speech: “[t]hey rallied, were arrested and convicted; sat in, were arrested and convicted; marched, were arrested and convicted. Their speech was deemed too forceful, too disruptive.”<sup>148</sup> Ironically, this angle presents an argument against hate speech regulations, as it illustrates the negative effect that laws ostensibly prohibiting “bad” speech

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140. Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475, 477 (1996).

141. *Id.*

142. *See id.* at 477–78.

143. *Id.* at 477.

144. *Id.* at 478.

145. *Id.* at 477.

146. *Id.* at 479.

147. *See id.*

148. *Id.*

can have in practice: the suppression of dissent and the discouragement of progressive movements fostering the expansion of individual liberties.

Delgado and Stefancic's "more speech" category identifies the third argument against hate speech legislation as essentially creating further dependence by minority groups on the majority establishment.<sup>149</sup> This argument says that targets of hate speech should talk back to their antagonists (i.e., using "more speech" to counter hate speech), emphasizing self-reliance, strengthening their self-image, and taking control of their own destiny, as opposed to relying on laws imposed by the majority.<sup>150</sup> This position argues that, if a target of "hate speech explains matters, [they] may alter the speaker's perception so he or she no longer will utter racist remarks," and potentially even come to a better way of thinking.<sup>151</sup> While educating the ignorant is certainly a desirable goal, this argument ignores the fact that both things can exist at once: hate speech can theoretically be disallowed, and its targets can still stand up for themselves and seek to alter a speaker's view. In any case, given both the intense political and ideological polarization of contemporary discourse, and the omnipresence of divisive content online (whether or not that content could, itself, be considered hate speech), it is unlikely that using the "more speech" approach will lead to any productive result.

In summary, hate speech is detrimental to fostering a civil community and empirically linked to a plethora of well-documented harms. Hate speech is unequivocally linked to violence against its targets, and laws seeking to suppress it are generally desirable to ameliorate that very problem. Yet, as its opponents argue, "hate speech" is incredibly difficult to define regardless of what categories or definitions are assigned to it, and such laws necessarily leave room for the chilling of speech and abuse by governments enforcing them. Regardless, the current geopolitical climate has seen an explosion of hate speech, and a consubstantial uptick in similarly motivated violent crimes meriting a response.

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149. *Id.* at 480.

150. *Id.* at 480–81.

151. *Id.* at 480.

The following sections will discuss how the laws of the United States address hate speech and how the free marketplace of ideas addresses hate speech in the form of Cancel Culture.

### III. AMERICAN HATE SPEECH JURISPRUDENCE

In stark contrast to its peer Western democracies, American law does not recognize “hate speech” as a category of unprotected speech. Derogatory or demeaning language targeted at a group of people—absent an explicit call to incitement of violence—is protected. To understand this disparity, it is critical to contextualize American First Amendment jurisprudence with the events taking place alongside it, domestically and globally. Accordingly, this section will first discuss the historical events and the contemporaneous societal sentiments and ideologies that brought the question of hate speech before American courts, and it will then discuss the courts’ answer to this and other questions surrounding the First Amendment.

#### *A. Historical Context*

Most First Amendment case law developed in the 20th century, in a time when human beings’ capacity for speech metastasized from mere spoken and printed words to radio and television broadcasts that could instantaneously reach millions of people. With this new advent of mass communication, speech could suddenly spread in ways that the framers of the Constitution would find indistinguishable from sorcery.

Before the 20th century, the United States’ courts had promulgated virtually no free speech jurisprudence of any kind; the First Amendment’s protection of speech was considered more or less absolute.<sup>152</sup> The relevant portion of the First Amendment reads: “Congress shall make no law . . . abridging the freedom of speech . . .,”<sup>153</sup> and for much of American history, this effectively meant “no law.” As the 20th century progressed, so would First Amendment jurisprudence. Why was this the case?

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152. See generally Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 *FORDHAM L. REV.* 263 (1986) (exploring numerous—but inconsequential—First Amendment-related cases within the titular date range).

153. U.S. CONST. amend. I.

As America entered the 1950s, the preceding century had been fraught with racially motivated bloodshed and political upheaval: less than a decade prior, Nazi officials stood trial at Nuremberg for the industrialized dehumanization and murder of millions of Jews, Roma, Slavs, and gay men and women across Europe. The Holocaust was made possible in large part by the sickeningly effective state-sponsored propaganda campaign against the Jewish people, spearheaded by Joseph Goebbels.<sup>154</sup> Goebbels and his ilk created a veritable ecosystem of drawn caricatures, literature, films, radio broadcasts, and school textbooks depicting the Jewish people and other “undesirables” as untrustworthy, parasitic *unttermenschen* (subhumans) who were responsible for all of society’s ills, from wealth inequality to Germany’s defeat in World War I.<sup>155</sup> As the German people became indoctrinated into Hitler’s and Goebbels’ beliefs, they not only became numb to the forcing of their Jewish neighbors into ghettos (and subsequent “deportation” therefrom), but supportive of it.<sup>156</sup>

Domestically, the United States itself was less than a century removed from the Civil War, in which half of the country took up arms against their fellow Americans to defend the idea that states have rights, but Black people do not. Following the Hayes-Tilden Compromise in 1877, America entered the Jim Crow era, which for decades saw white supremacist groups like the Ku Klux Klan lynch and murder Black Americans to discourage their political participation and maintain what the Klan viewed as racial control.<sup>157</sup> As the 19th century gave way to the 20th, racially motivated violence against Black Americans took the form of an ongoing lynching epidemic (often ignored—if not

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154. See JEFFREY HERF, *THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST* 17 (2006) (discussing Goebbels’ role in the Nazi propaganda machine).

155. See, e.g., Marie Corelli, *Poisoning Young Minds in Nazi Germany: Children and Propaganda in the Third Reich*, 66 *SOC. EDUC.* 228, 228–30 (2002).

156. See HERF, *supra* note 154, at 49.

157. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 425–443 (updated ed. 2014). Arguably this ground was lost much earlier with President Johnson’s lackluster start-up of reconstruction. See ROBERT S. LEVINE, *THE FAILED PROMISE: RECONSTRUCTION, FREDERICK DOUGLASS, AND THE IMPEACHMENT OF ANDREW JOHNSON* 49–65 (2021).

participated in—by law enforcement),<sup>158</sup> the Red Summer Riots of 1919, the Tulsa Massacre of 1921, and a myriad of instances of violence throughout the Civil Rights Movement.<sup>159</sup>

As this was going on, immigration to the United States began to explode like never before, and so too did xenophobic sentiments. Hundreds of thousands of Chinese immigrants arrived on the West Coast while similar numbers of Irish and Italian immigrants arrived on the East Coast, both of whom were almost immediately met with hostility: Chinese workers were put to building railroads heading east, and were subjected to low wages, long hours, and poor treatment by employers and non-Chinese coworkers.<sup>160</sup>

Two of the largest mass lynchings in American history happened in 1871 Los Angeles against Chinese immigrants, and in 1891 New Orleans against Italian immigrants.<sup>161</sup> A series of riots erupted in cities like San Francisco and New York, often carried out by White mobs motivated by anti-Chinese sentiment, economic competition, and racial prejudice.<sup>162</sup> In 1882, Congress passed the Chinese Exclusion Act, which suspended the immigration of Chinese laborers for ten years and prevented Chinese immigrants already in the United States from becoming naturalized citizens, reflecting widespread anti-Chinese and anti-immigrant sentiment and discrimination.<sup>163</sup> Congress would later pass the Immigration Act of 1924, which established immigration

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158. See Christopher Waldrep, *National Policing, Lynching, and Constitutional Change*, 74 J. S. HIST. 589, 605 (2008); see also DeNeen L. Brown, *HBO's "Watchmen" Depicts Deadly Tulsa Race Massacre That Was All Too Real*, WASH. POST (Oct. 21, 2019), <https://www.washingtonpost.com/history/2019/10/21/hbos-watchmen-depicts-tulsa-race-massacre-that-was-all-too-real-hundreds-died>.

159. See PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 254–56 (2002).

160. See GORDON H. CHANG, *GHOSTS OF GOLD MOUNTAIN: THE EPIC STORY OF THE CHINESE WHO BUILT THE TRANSCONTINENTAL RAILROAD* 3–6, 10 (2019).

161. See MICHAEL J. PFEIFER, *ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874–1947*, at 22–23 (2004) (eleven Sicilians shot and hanged after around 20,000 gathered); JAMES D. HART, *A COMPANION TO CALIFORNIA* 94, 585 (rev. ed. 1987) (“fifteen or more” men hanged in mob violence; twenty-one Chinese people killed the year before during riots in San Francisco).

162. See ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 47–74 (2003).

163. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58.

quotas based on national origin, favoring immigrants from Northern and Western Europe while severely limiting immigration from Southern and Eastern Europe, as well as Asia.<sup>164</sup>

As the West Coast dehumanized Chinese immigrants, the East Coast did the same to Irish and Italian immigrants. In 1854, the nativist “Know Nothing” Party<sup>165</sup> emerged in opposition to the influx of immigrants, using the baseless populist appeal that Catholics (i.e., the overwhelming majority of Irish and Italian immigrants) were plotting to subvert the civil liberties of Protestants by controlling large blocks of voters.<sup>166</sup> Throughout the mid-19th century, the Know Nothing Party was responsible for riots across the country, all of which were motivated by the party’s anti-Catholic and anti-immigrant ideologies, and the false belief that contemporaneous elections had been rigged against the Know Nothings’ preferred candidates.<sup>167</sup> Parenthetically, historians have drawn parallels between the Know Nothing Party and the “Birther,” Tea Party, and MAGA movements in the modern United States, seeing those movements’ animosities towards Latin American and Middle Eastern immigrants and Black Americans as similarities.<sup>168</sup>

Anti-Catholic and/or anti-immigrant sentiments led to many employers refusing to hire Irish immigrants, displaying signs reading

164. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

165. See Benjamin R. Tuska, *Know-Nothingism in Baltimore 1854–1860*, 11 CATH. HIST. REV. 217–19 (1925) (explaining the origins of the “Know Nothing Party” and how the name came from the admonition given to its members to answer any questions from outsiders about the Party’s specifics with, “I know nothing”).

166. Marcella Alsan, Katherine Eriksson & Gregory Niemesh, *Understanding the Success of the Know-Nothing Party* 6–11 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28078, 2020).

167. See Luke Ritter, *The St. Louis Know-Nothing Riot of 1854: Political Violence and the Rise of the Irish*, 32 GATEWAY 27, 27–30 (2012); cf. Tuska, *supra* note 165, at 218–19, 222 (describing similar events in Baltimore).

168. See *Know Nothings*, in *Chaos in the Streets! The Philadelphia Riots of 1844*, VILLANOVA UNIV.: FALVEY LIBR. (Oct. 16, 2025), <https://exhibits.library.villanova.edu/chaos-in-the-streets-the-philadelphia-riots-of-1844/know-nothings>; *Resolution: The Tea Party Movement*, NAACP (2010), <https://naacp.org/resources/tea-party-movement> (providing statistics demonstrating that members of the Tea Party movement were disproportionately White, massively less likely than others to recognize persistent discrimination against people of color, “engaged in explicitly racist behavior” and “displayed signs and posters intended to degrade people of color generally and President Barack Obama specifically”).

“No Irish Need Apply” in shop windows.<sup>169</sup> As a result, large numbers of unemployed or very poor Irish Catholics lived in squalid conditions in the slums and tenements, and much of the work available to Irish immigrants, like that of their Chinese counterparts, took the form of building railroads and other infrastructure for westward expansion.<sup>170</sup> Italian immigrants faced similar discrimination as they arrived in the United States in larger numbers later in the 19th century, becoming the targets of harassment, lynchings, and being stereotyped as “labor agitators” and anarchistic criminals.<sup>171</sup>

The 20th century was just as fraught with hate-stoked violence, including the Chicago Race Riot of 1919,<sup>172</sup> the Tulsa “Black Wall Street” Massacre of 1921,<sup>173</sup> widespread riots during the Civil Rights Era of 1940 to 1971,<sup>174</sup> to events as recent as the 1992 Rodney King

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169. Mick Mulcrone, *The Famine Irish and the Irish-American Press: Strangers in a Hostile Land*, 20 AM. JOURNALISM, Summer 2003, at 49, 69 n.15.

170. See *The Sanitary and Moral Condition of New York City*, 7 CATH. WORLD 53, July 1868, at 553, 555, 563 (describing the squalid living conditions of Irish and other immigrants in New York City at the time); CHANG, *supra* note 160, at 2–3, 64 (describing the workforce of the Union Pacific Railroad during the construction of the Transcontinental Railroad).

171. *Id.*; see also Giorgio Bertellini, *Black Hands and White Hearts: Italian Immigrants as “Urban Racial Types” in Early American Film Culture*, 31 URB. HIST. 375–399 (2004); see generally BRUCE WATSON, *BREAD AND ROSES: MILLS, MIGRANTS, AND THE STRUGGLE FOR THE AMERICAN DREAM* (Viking 2005) (recounting a major labor strike led by textile workers demanding fair wages and dignity).

172. E. Jason Wambsgans & William Lee, “Ready to Explode”: How a Black Teen’s Drifting Raft Triggered a Deadly Week of Riots 100 Years Ago in Chicago, CHI. TRIB. (July 18, 2024, at 15:27 CT), <https://www.chicagotribune.com/2019/07/21/ready-to-explode-how-a-black-teens-drifting-raft-triggered-a-deadly-week-of-riots-100-years-ago-in-chicago/>.

173. Bayeté Ross Smith & Jimmie Briggs, *Tulsa Race Massacre at 100: An Act of Terrorism America Tried to Forget*, GUARDIAN (May 31, 2021, at 03:00 ET), <https://www.theguardian.com/us-news/2021/may/31/tulsa-race-massacre-at-100-act-of-terrorism>.

174. See Errin Whack, *Who Was Edmund Pettus?: The March to Freedom Started on a Bridge That Honors a Man Bent on Preserving Slavery and Segregation*, SMITHSONIAN MAG. (Mar. 7, 2015), <https://www.smithsonianmag.com/history/who-was-edmund-pettus-180954501/>.

Riots<sup>175</sup> and the Summer 2020 protests and riots following the murder of George Floyd.<sup>176</sup> This was the backdrop against which American hate speech laws evolved.

*B. Early Exceptions to the Freedom of Speech, and the  
“Marketplace of Ideas”*

The First Amendment’s right to free speech not only proscribes the vast majority of state and federal restrictions on the form or substance of speech. It also protects the right to receive information,<sup>177</sup> prohibits most government restrictions that discriminate between speakers,<sup>178</sup> limits the tort liability of individuals for certain speech,<sup>179</sup> and prevents the government from requiring individuals and corporations to speak or finance certain types of speech with which they do not agree.<sup>180</sup> This expansive interpretation of the free expression clause has resulted in only very limited types of speech being denied its protection.

The Supreme Court has held that “advocacy of the use of force” does not enjoy constitutional protection when it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>181</sup> True threats do not enjoy First Amendment

175. Charles Rosenberg, *Los Angeles Uprising (1992)*, in *REVOLTS, PROTESTS, DEMONSTRATIONS, AND REBELLIONS IN AMERICAN HISTORY: AN ENCYCLOPEDIA* 1095–1100 (Steven L. Danver ed., 2011).

176. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

177. Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 175–76 (2003); see also Ian Klein, *Enemy of the People: The Ghost of the F.C.C. Fairness Doctrine in the Age of Alternative Facts*, 42 HASTINGS COMM’N & ENT. L.J. 45, 54–56 (2020).

178. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

179. *Snyder v. Phelps*, 562 U.S. 443, 451–52, 457–60 (2011).

180. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 800–01 (1988).

181. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); see also *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger . . .”).

protection,<sup>182</sup> nor does speech that is deemed so inflammatory and likely to provoke violence (i.e., “fighting words”).<sup>183</sup> False statements of fact are also unprotected in contexts such as fraud,<sup>184</sup> defamation,<sup>185</sup> and perjury;<sup>186</sup> very narrow categories of “obscenity” are unprotected,<sup>187</sup> as is child pornography in all instances.<sup>188</sup> In upholding statutes that criminalize—or impose civil penalties for—these types of speech, the Supreme Court consistently reasoned that these kinds of speech exceeded mere indignities, and would lead to substantive harm: harm of one’s reputation or to the justice system, in the case of defamation and perjury, harm to “standards of decency” in the case of obscenity, but most importantly and most broadly, physical harm.<sup>189</sup>

Despite later case law reaching the opposite conclusion, early First Amendment cases upheld restrictions on speech. However, the dissenting opinions from those cases, most notably from Justices Oliver Wendell Holmes Jr. and Louis Brandeis, would become the backbone of modern First Amendment jurisprudence, and hate speech jurisprudence specifically.

*Schenck v. United States* provided the catalyst for a line of cases relating to unprotected speech broadly, as well as hate speech

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182. *Watts v. United States*, 394 U.S. 705, 708 (1969).

183. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

184. *See Donaldson v. Read Mag., Inc.*, 333 U.S. 178, 191 (1948) (finding not even “the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom . . . to use the mails for perpetration of swindling [sic] schemes”).

185. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that public officials can recover damages for defamatory statements made with “actual malice”).

186. *United States v. Alvarez*, 567 U.S. 709, 720–21 (2012) (reasoning that perjured statements are unprotected under the First Amendment because “[p]erjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system” (citing *United States v. Dunnigan*, 507 U.S. 87, 97 (1993))).

187. *Roth v. United States*, 354 U.S. 476, 485–87 (1957) (distinguishing sex from obscenity and holding that obscenity is not constitutionally protected); *Miller v. California*, 413 U.S. 15, 36 (1973) (reaffirming *Roth*).

188. *See New York v. Ferber*, 458 U.S. 747, 764 (1982) (explaining that “[t]here are, of course, limits on the category of child pornography, which like obscenity, is unprotected by the First Amendment”).

189. *See cases cited supra* notes 184–88.

specifically: the “clear and present danger” test.<sup>190</sup> Charles Schenck, a prominent socialist, was convicted under the Espionage Act for mailing pamphlets encouraging men not to submit to the military draft.<sup>191</sup> Schenck appealed his conviction to the Supreme Court, which held in a unanimous decision that the First Amendment did not protect speech encouraging men to resist the draft because, “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”<sup>192</sup> In other words, the Court held that the circumstances of war allow for greater restrictions on free speech than those of peacetime, if only because new and greater dangers are present.

The essence of *Schenck* is captured in the famous quote from Justice Oliver Wendell Holmes Jr.’s majority opinion, which has come to be known as the “clear and present danger” test:

[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.<sup>193</sup>

In short succession to *Schenck*, the Court reached similar conclusions in *Frohwerk v. United States* and *Debs v. United States*—both opinions in which Justice Holmes wrote for the majority, upholding the petitioners’ Espionage Act convictions on the ground that their anti-war advocacy could be punished as having the purpose and effect of obstructing military enlistment and recruitment, making the speech at issue sufficiently dangerous to fall outside of First Amendment

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190. 249 U.S. 47, 52 (1919).

191. *Id.* at 48–49.

192. *Id.* at 52.

193. *Id.* (citation omitted).

protection.<sup>194</sup> It is worth noting that although *Schenck*, *Frohwerk*, and *Debs* were decided after World War I had ended, the speech at issue in all three cases occurred while the war was ongoing.<sup>195</sup>

In a shift from his more restrictive stance in the *Schenck* string of cases, Justice Holmes took a more libertarian position in his dissent in *Abrams v. United States*, and in so doing, provided the principle that would guide virtually all subsequent free speech cases: that unpopular ideas should have their opportunity to compete in the “marketplace of ideas.”<sup>196</sup>

In *Abrams*, several activists were convicted of violating the Sedition Act of 1918 by distributing leaflets decrying the United States’ intervention in the Russian Civil War, expressing support for the communist side in the Russian Revolution, and calling for a general strike in American munitions factories that manufactured arms to be sold for use by anti-Bolshevik forces.<sup>197</sup> The *Abrams* defendants challenged their convictions on both evidentiary and First Amendment grounds.<sup>198</sup> Writing for the 7-2 majority, Justice Clark’s opinion dismissed the First Amendment argument in a single sentence, citing the case’s factual similarity to *Schenck*, and instead discussing the evidentiary issue at length before upholding the defendants’ convictions.<sup>199</sup>

Justice Holmes, dissenting, did not believe that the leaflets presented a clear and present danger, and believed that the evidence was insufficient to establish the intent necessary to violate the Espionage Act.<sup>200</sup> Holmes reaffirmed his belief that the state can restrict speech that poses a clear and present danger, but that “*only* the present danger

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194. *Frohwerk v. United States*, 249 U.S. 204, 208–10 (1919); *Debs v. United States*, 249 U.S. 211, 215–17 (1919).

195. *See Schenck*, 249 U.S. at 49–50 (incident occurred in August 1917); *Frohwerk*, 249 U.S. at 205 (articles circulated between July and December 1917); *Debs*, 249 U.S. at 212 (incitement occurred in June 1918).

196. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

197. *Id.* at 617–23 (majority opinion). While effectively consubstantial with the Russian Civil War of 1917–22, the twin Russian Revolutions of 1917 (often called the “February” and “October Revolutions”) were discrete events.

198. *Id.* at 618–19.

199. *Id.* at 619 (“[Petitioners’ First Amendment argument] is sufficiently discussed and is definitely negated [sic] in *Schenck v. United States* . . . and in *Frohwerk v. United States* . . .”).

200. *Id.* at 628–29 (Holmes, J., dissenting).

of *immediate* evil or an intent to bring it about . . . warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.”<sup>201</sup> Even in instances such as the leaflets at issue in *Abrams*, “Congress certainly cannot forbid all effort to change the mind of the country.”<sup>202</sup>

In such instances, quite critically, Holmes eschews the prohibition of speech in favor of a more holistic societal approach: allowing speakers to air their ideas publicly, and allowing those ideas to be accepted by the body politic, or organically suppressed by collective disagreement from the “marketplace of ideas”:

[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>203</sup>

Though the majority’s holding in *Abrams* has since been called into question, the Supreme Court has cited Justice Holmes’ dissent dozens of times in subsequent First Amendment cases—notably in case law surrounding hate speech—to strongly disfavor restrictions on free speech and to champion the idea that the “marketplace of ideas,” or the natural discourse and discussion of ideas among the body politic, is the appropriate method of regulating speech and weeding out detestable ideas.

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201. *Id.* at 628 (emphasis added).

202. *Id.*

203. *Id.* at 628–29.

Though still near enough in time to *Schenck* for the majority to uphold the conviction of another anti-war propagandist, Justice Brandeis' concurrence in *Whitney v. California* (in which Justice Holmes joined) echoed Holmes' dissent in *Abrams* and emphasized the framework for future hate speech jurisprudence. Brandeis suggested reevaluating the "clear and present danger" test, and suggested what some have called a "time to answer" test: speech cannot be considered to pose a "clear and present danger" if there is full opportunity for discussion.<sup>204</sup> Brandeis argued that while governments have the right to curb truly dangerous expression, governments must clearly define the nature of that danger; mere fear of unpopular ideas will not do.<sup>205</sup> Instead, Brandeis, like Holmes, emphasized his belief that the appropriate means of dealing with unpopular or regressive ideas was to allow those ideas to enter the public discourse, be defeated through their inherent unpopularity, and be organically silenced by better ideas.<sup>206</sup> In Justice Brandeis' words:

[t]hose who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; *that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine* . . . . But they knew that order cannot be secured merely through fear of punishment for its infraction; . . . that repression breeds hate; that hate menaces stable government; *that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.*<sup>207</sup>

While perhaps overly poetic, Justice Brandeis' concurrence echoes the opinions of Holmes and champions the idea that the appropriate solution for "evil counsels" and "noxious doctrine" is to allow them to

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204. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

205. *Id.*

206. *See id.* at 375–76.

207. *Id.* at 375 (emphasis added).

be shared in civil discourse (i.e., the marketplace of ideas), wherein better ideas can weed them out. Unless they forfeit the First Amendment's protection by virtue of directly inciting violence, hateful ideas are free to compete with non-hateful ideas in the collective American civil discourse, where the people will weigh ideas on their merits and values, and reason will prevail.<sup>208</sup>

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208. See *IT'S ALWAYS SUNNY IN PHILADELPHIA: Sweet Dee Gets Audited* (Hulu, aired Oct. 6, 2011) ("Reason will prevail!").

C. *Beauharnais v. Illinois and the Court's Acknowledgement of Hate Speech's Propensity to Spark Violence*

Although the Supreme Court has never reviewed a statute that imposed a blanket ban on “hate speech,” nor the language “hate speech” itself, the Court has considered multiple cases in which states sought to punish speech based on its discriminatory or hateful nature—in other words, “hate speech” in the conventional sense of the term. The Court has consistently held that these statutes are unconstitutional and that the First Amendment protects the speech they seek to ban.

However, one of the earliest Supreme Court cases concerning hate speech upheld the constitutionality of a state statute criminalizing hateful publications.<sup>209</sup> In *Beauharnais v. Illinois*, Joseph Beauharnais—the president of the White Circle League of America, a white supremacist group—distributed a leaflet “calling on the Mayor and City Council of Chicago ‘to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro.’”<sup>210</sup> Beauharnais was then convicted under an Illinois statute that made it unlawful to portray the “depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion” when such portrayal “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.”<sup>211</sup> While the Illinois statute never explicitly used the phrase “hate speech,” it can reasonably be interpreted to proscribe hate speech.

Beauharnais challenged the Illinois law, arguing that it violated his free speech rights under the First and Fourteenth Amendments, and was also unconstitutionally vague.<sup>212</sup> The Supreme Court rejected Beauharnais’ arguments and upheld the Illinois statute in a 5-4 decision.<sup>213</sup> Justice Felix Frankfurter’s majority opinion pointed to the long history of racial strife in both Illinois and the United States as a whole, specifically identifying a laundry list of racially motivated riots and murders from 1837 to 1917 (after which the Illinois law in question

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209. See *Beauharnais v. Illinois*, 343 U.S. 250, 266–67 (1952).

210. *Id.* at 252.

211. *Id.* at 251 (emphasis added).

212. *Id.*

213. *Id.* at 266–67.

was passed), and the effect that prejudice-fueled speech has on creating and proliferating violence of this kind.<sup>214</sup> Critically, the Court differentiated the speech that the Illinois law prohibited (i.e., hate speech) from ordinary political discourse, describing “the utterances here in question” as “the systematic avalanche of falsehoods which are circulated concerning the various groups, classes and races which make up the countries of the western world.”<sup>215</sup>

Citing its 1940 opinion in *Cantwell v. Connecticut*, the Court emphasized that, “[t]he danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of . . . the exercise of their liberties, is emphasized by events familiar to all.”<sup>216</sup> Acknowledging the prevalence of racial, religious, and anti-immigrant animosities in the United States, the Court concluded that the rationale of the Illinois statute was the same as that of the laws the Court upheld in *Cantwell*, and thus also upheld the Illinois law.<sup>217</sup>

The Court likened the Illinois statute’s categories of banned speech to categories of unprotected speech such as libel, fighting words, and incitement to violence, which “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.”<sup>218</sup> In upholding the Illinois statute, the Court considered the prevalence of stereotyping ethnic groups by, essentially, accusing all members of that group of being prone to commit crimes or to engage in antisocial behavior. In so doing, the Court equated the Illinois statute to libel laws, broadening that category of unprotected speech to encompass “group libel.”

If a[] [libelous] utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a

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214. *Id.* at 258–60.

215. *Id.* at 261, n.16 (quoting David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 727 (1942)).

216. *Id.* at 261.

217. *Id.*; see also *Cantwell v. Connecticut*, 310 U.S. 296, 307–10 (1940) (discussing the state’s authority to regulate solicitation generally and other conduct threatening public safety and peace).

218. *Beauharnais*, 343 U.S. at 257.

State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful [sic] and purposeless restriction unrelated to the peace and well-being of the State.<sup>219</sup>

The *Beauharnais* Court repeatedly pointed to discrete instances of violence that made up larger societal trends of violence motivated by prejudice and noted that speech of the kind prohibited by the Illinois statute was of an identical nature to that of fighting words, incitement of violence, and libel, but on the order of entire populations.<sup>220</sup> This speech not only could, but had repeatedly and systemically caused violence on a nationwide scale.<sup>221</sup> Importantly, the Court paid no mind to the disjunctive “or” in the Illinois statute, which separated the disallowed “hate speech” from other language that had the propensity to incite violence, adopting the position that hate speech itself tended to incite violence.<sup>222</sup>

Addressing the vagueness issue, the Court held that because the Illinois statute included language that apparently limited its application to speech that was likely to cause a “breach of the peace or riots” (again ignoring the fact that this language was separated from the hate speech provision by the disjunctive “or”), it narrowed its scope to ban only speech that would be unprotected for the same reason as fighting words, incitement, and libel: it would lead to violence.<sup>223</sup> Critically, the Court considered this language only upon reaching the issue of vagueness; its reasoning for allowing the Illinois statute to pass First Amendment muster was rooted in the United States’ long history of violence motivated by the animosities that the Illinois statute sought to prohibit, and the fact that this type of speech, by its very nature, would incite violence.<sup>224</sup> Even Justice Douglas noted in his dissent that the Nazis were an example of “how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy,”

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219. *Id.* at 258.

220. *Id.* at 259–61.

221. *Id.*

222. *Id.*

223. *Id.* at 251–53.

224. *Id.* at 261–62.

and that he “would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense.”<sup>225</sup>

*Beauharnais* stood for the principle that “hate speech” in and of itself can and does incite violence. Since *Beauharnais*, however, the United States Supreme Court has consistently held that hate speech, unless it *explicitly* incites violence or poses an imminent threat (i.e., is unprotected for a reason independent of its hateful nature), is protected expression.

#### *D. Modern Hate Speech Jurisprudence*

In a departure from the Court’s reasoning in *Beauharnais*, *Brandenburg v. Ohio* established the current legal standard for determining when speech can be restricted based on its potential to incite violence, and overturned the line of cases stemming from *Whitney v. California*.<sup>226</sup> Clarence Brandenburg, a Ku Klux Klan leader, was convicted under an Ohio law that criminalized advocating violence or lawless action as a means to achieve political reform.<sup>227</sup> Brandenburg made several speeches at a Klan rally, during which he expressed white supremacist views and made derogatory statements about Black Americans and Jewish people.<sup>228</sup> One of the speeches made reference to the possibility of taking “revengeance” because “our President [Lyndon Johnson], our Congress, our Supreme Court, continues to suppress the white, Caucasian race,” and announced plans for a march on Congress to take place on the Fourth of July.<sup>229</sup> Another speech advocated for the forced expulsion of “the [n - -]er” to Africa and “the Jew” to Israel.<sup>230</sup>

Brandenburg was convicted of advocating violence under Ohio’s criminal syndicalism statute for his participation in the rally, and for the speeches he made. In relevant part, the statute—enacted in 1919, during the First Red Scare—disallowed “advocat[ing] . . . the

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

226. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (“The contrary teaching of *Whitney v. California* . . . cannot be supported, and that decision is therefore overruled.”).

227. *Id.* at 444–45.

228. *Id.* at 446.

229. *Id.*

230. *Id.* at 447.

duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and “voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.”<sup>231</sup>

In a unanimous decision, the Supreme Court overturned *Brandenburg*’s conviction, ruling that the Ohio law violated the First Amendment.<sup>232</sup> In so doing, the Court established the *Brandenburg* test: speech can only be restricted if it “is directed at inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>233</sup> The Court clarified that mere advocacy or abstract discussion of violence or lawlessness is protected by the First Amendment unless it is specifically intended to incite imminent unlawful conduct, and is likely to actually do so.<sup>234</sup> The Court emphasized that the government cannot punish individuals for their beliefs or for expressing offensive or hateful ideas.<sup>235</sup> Instead, the government may only restrict speech when it presents a clear and present danger of imminent violence or harm.<sup>236</sup>

*Brandenburg v. Ohio* strengthened the protection of free speech under the First Amendment and established an important precedent for evaluating restrictions on incitement to violence. It recognized that the

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231. *Id.* at 444–45.

232. *Id.* at 449.

233. *Id.* at 447.

234. *See id.* at 448 (“[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action . . . . A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First . . . Amendment[.]” (internal citations and quotation marks omitted)).

235. *See id.* at 449 (“Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First . . . Amendment[.]”).

236. *See id.* at 450 (Douglas, J., concurring) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.” (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919))).

government's power to regulate speech is limited and that the right to express unpopular or offensive ideas is essential to the functioning of a democratic society.

The Supreme Court addressed the issue of hate speech again in its 1992 opinion in *R.A.V. v. St. Paul*.<sup>237</sup> The case arose when a teenager burned a cross on a Black family's lawn in St. Paul, Minnesota, and was subsequently convicted under a local ordinance that criminalized the display of symbols that "arouse[d] anger, alarm or resentment on the basis of race, color, creed, religion or gender."<sup>238</sup> On review, the Supreme Court held that the St. Paul ordinance violated the First Amendment.<sup>239</sup> The Court rejected the argument that race-based hate speech should be categorically unprotected.<sup>240</sup> It instead emphasized that content-based restrictions on speech are subject to strict scrutiny, which requires that the restriction in question be narrowly tailored to a compelling state interest.<sup>241</sup> The Court found that the ordinance's overbreadth allowed for the punishment of constitutionally protected speech, as it failed to distinguish between mere offensive speech and speech that incites imminent violence, defeating the "narrowly tailored" prong of the test.<sup>242</sup> Furthermore, the Court noted that the government's interest in prohibiting hate speech could be achieved through other means, such as prosecuting acts of intimidation, threats, or specific instances of incitement—in other words, speech that was unprotected for reasons other than its hateful nature.<sup>243</sup> The decision reaffirmed the principle that "hate speech," unless paired with language that independently incites violence or poses an imminent threat, is protected by the First Amendment.

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237. 505 U.S. 377 (1992).

238. *Id.* at 379–80.

239. *Id.* at 391.

240. *Id.* at 384–85 ("[A] simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence . . ." (footnote omitted); *see also id.* at 406 (White, J., concurring) (noting the Court's rejection of a categorical analysis).

241. *Id.* at 395 (majority opinion) ("[T]he 'danger of censorship' presented by a facially content-based statute, requires that that weapon be employed only where it is 'necessary to serve the asserted [compelling] interest.'" (citations omitted)).

242. *Id.* at 393–94.

243. *Id.* at 396 ("St. Paul has sufficient means at its disposal to prevent [hate speech] without adding the First Amendment to the fire.").

*R.A.V. v. St. Paul* further highlighted the importance of protecting free speech while recognizing that certain narrowly defined categories of speech, such as true threats or incitement to imminent violence, can be genuinely and acutely harmful to society, and therefore subject to regulation. A decade after *R.A.V.*, the Supreme Court held in *Virginia v. Black* that while cross burning itself was an act of protected speech, doing so with the intent to intimidate amounted to a “true threat,” and therefore did not enjoy First Amendment protection.<sup>244</sup>

In *Snyder v. Phelps*, the Supreme Court overturned, 8-1, a civil damages award for the hateful speech of Westboro Baptist Church and its founder, Fred Phelps—known for picketing military funerals with signs that read “God Hates Fags” and “Thank God for Dead Soldiers”—after a 2006 protest near the funeral of Lance Corporal Matthew A. Snyder, a Marine killed in Iraq.<sup>245</sup> Westboro Baptist Church is infamously homophobic: its members believe that God punishes the United States for its tolerance of homosexuality by causing its soldiers to be killed, and they spread this idea by abrasively—but otherwise peacefully—protesting outside of the funerals of United States military personnel.<sup>246</sup> The church notified local authorities in advance that they intended to picket Corporal Snyder’s funeral, staged the picket on public land adjacent to a public street, and complied with all police instructions.<sup>247</sup> Following the funeral and the church’s protests, Corporal Snyder’s father sued Phelps for intentional infliction of emotional distress, to which Phelps responded by claiming that his and his church’s speech was protected by the First Amendment.<sup>248</sup> The trial court

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244. *Virginia v. Black*, 538 U.S. 343, 365–66 (2003) (stating that the act of burning a cross may indicate a person engages in either “constitutionally proscribable intimidation” or “core political speech”); *id.* at 362 (holding that the statute does not violate the First Amendment “insofar as it bans cross burning with intent to intimidate”). *But see id.* at 388 (Thomas, J., dissenting) (“I believe that the majority errs in imputing an expressive component to the activity in question . . . . A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.” (citations omitted)).

245. 562 U.S. 443, 448 (2011).

246. *Id.* at 448–49.

247. *Id.* at 457.

248. *Id.* at 450.

awarded Snyder \$10.9 million in damages, which the Fourth Circuit reversed.<sup>249</sup>

In holding that Phelps' speech did, in fact, enjoy First Amendment protection, the Supreme Court reasoned that—because (a) “any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself,” and (b) viewpoint-based restrictions on speech are presumptively unconstitutional—a verdict punishing viewpoints like that of Phelps was unconstitutional.<sup>250</sup> The Court employed a similar line of reasoning to that of opponents of hate speech legislation who point to hate speech’s necessarily subjective nature: the standard for the tort of intentional infliction of emotional distress requires that speech be “outrageous,” and “outrageous” is, itself, “a highly malleable standard with ‘an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.’”<sup>251</sup>

Additionally, Chief Justice Roberts, writing for the majority, reasoned, “[g]iven that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to special protection under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.”<sup>252</sup> Speaking on the nature of restrictions of speech, Roberts wrote, “[a]s a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”<sup>253</sup>

One of the most recent Supreme Court cases addressing disparaging speech was *Matal v. Tam*, in which the Court struck down a provision of the Lanham Act that prohibited the registration of trademarks that may “disparage” persons, institutions, beliefs, or national

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249. *Id.* at 450–51.

250. *Id.* at 457.

251. *Id.* at 458 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988)).

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

253. *Id.* at 461. *But see id.* at 463, 465 (Alito, J., dissenting) (“Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case. . . . [The Church] maintained that the First Amendment gave them a license to engage in such conduct. They are wrong.”).

symbols.<sup>254</sup> Simon Tam was the Asian American founder of a band called “The Slants,” so named to “‘reclaim’ and ‘take ownership’ of stereotypes about people of Asian ethnicity.”<sup>255</sup> When Tam tried to register a trademark for “The Slants” with the United States Patent and Trademark Office, his application was rejected because the office considered the name to be derogatory towards people of Asian descent, which therefore violated the Lanham Act’s prohibition against trademarks that “‘disparage . . . or bring . . . into contemp[t] or disrepute’ any ‘persons, living or dead.’”<sup>256</sup>

After Tam challenged this provision of the Lanham Act on First Amendment grounds, the Supreme Court unanimously held that the prohibition on disparaging language was presumptively unconstitutional because it constituted viewpoint-based discrimination.<sup>257</sup> Citing Justice Holmes’ dissent in *Schwimmer v. United States*, Justice Alito’s majority opinion posits, “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”<sup>258</sup> In his concurring opinion, Justice Anthony Kennedy noted that “[any] law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all,” echoing the popular argument against the prohibition of hate speech.<sup>259</sup> Furthermore, Kennedy noted, by effectively mandating positive attitudes towards “persons, living or dead,” the law at issue

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254. 582 U.S. 218, 223 (2017).

255. *Id.* at 228.

256. *Id.* at 223.

257. *Id.* at 247. Justice Neil Gorsuch had not yet been confirmed at the time of oral arguments and did not participate in the 8-0 decision.

258. *Id.* at 246 (citing *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

259. *Id.* at 253–54 (Kennedy, J., concurring in part and concurring in the judgment); see also Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?*, 25 S. ILL. U. L.J. 243, 258 (2000) (“Laws that penalize speech or membership are also subject to abuse by the dominant racial or ethnic group. Some of the most stringent ‘hate speech’ laws, for example, have long been in force in South Africa, where they have been used almost exclusively against the black majority.” (citation omitted)).

had the propensity to “silence dissent and distort the marketplace of ideas.”<sup>260</sup>

The purpose of the First Amendment is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”<sup>261</sup> The veritable chorus of case law relating to hate speech (or regulations of speech based on its offensive nature more broadly) is that hateful ideas, however repugnant or unpopular, cannot be punished by the state simply because they are repugnant, and must be allowed in public discourse. “The thought that we hate” is precisely the type of speech that the First Amendment exists to protect.<sup>262</sup> Regardless of what approaches and attitudes other Western democracies take towards hate speech, the culture, tradition, and laws of the United States establish that such speech, absent an explicit call to violence, is entitled to its place in the marketplace of ideas, of which the government cannot deprive it. There is no further protection, however, for ideas that the marketplace of ideas itself deems to be unacceptable.

#### IV. CANCEL CULTURE

Modern First Amendment jurisprudence—like Justice Holmes’ dissent in *Abrams* from which it grew—stands for the idea that the law must not interfere with the free exchange of thought, and cannot discriminate against certain ideas or viewpoints in a way that threatens to drive them from the marketplace of ideas. However, the marketplace of ideas offers no similar protection, and, as the Supreme Court has held for over a century, is the appropriate place for bad ideas to die. This concept of the marketplace of ideas “regulating out” unpopular ideas, which Justices Holmes and Brandeis portended in 1919 and 1927, has reached full maturity in the early 21st century in the form of “Cancel Culture.”

“Cancel Culture” refers to the cultural phenomenon in which some people, companies, or other groups who are deemed to have spoken or acted unacceptably are ostracized, boycotted, or shunned.<sup>263</sup>

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260. *Matal*, 582 U.S. at 246, 249.

261. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

262. *Schwimmer*, 279 U.S. at 655 (Holmes, J., dissenting).

263. *See, e.g.*, Jonah E. Bromwich, *Everyone Is Canceled*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/style/is-it-canceled> (explaining the

Those subject to such repercussions are said to have been “canceled,” giving the phenomenon its name.<sup>264</sup> This often takes the form of a person making a racist, transphobic, or other derogatory statement on social media, followed by widespread backlash from the speaker’s fans or other viewers of that statement, and often culminates in that speaker falling into disfavor in their industry, if not being blacklisted entirely from it.<sup>265</sup> “Cancellation” of this kind does not necessarily mean that a person completely disappears from public life or can never find work again, but it refers, essentially, to instances in which a person or entity faces severe public backlash—almost always involving the loss of money and/or economic opportunity—as a result of their expressions or actions.

As discussed at length above, hate speech and the ideas that create it, while constitutionally protected, are widely unpopular and reviled by most people. While the law cannot punish loathsome ideas, individuals have every right to do so with the most powerful weapon available to them, or to any civilization throughout history: despite United States courts’ poetic dicta suggesting otherwise,<sup>266</sup> it is not the law that keeps the wheels of modern civilization turning, nor is it justice or equity, nor truth, beauty, or love—but money.

Money, specifically profit, is the chief incentive of any for-profit business, including and especially the mega-corporations that

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rising popularity of “canceling” people and things); cf. Ealasaid Munro, *Feminism: A Fourth Wave?*, 4 POL. INSIGHT, Sep. 2013, at 22 (exploring how some feminist activists have leveraged social media to police offensive speech); Sophie Ills et al., *Rape Culture and Social Media: Young Critics and a Feminist Counterpublic*, 16 FEMINIST MEDIA STUDS. 935, 937 (2016) (explaining that online spaces “provide a ‘counterpublic’ . . . that operates not only as a forum for women’s and girls’ voices, but in which online activists can seek accountability and justice outside of the criminal justice system”).

264. *What it Means to Get “Canceled,”* MERRIAM-WEBSTER, <https://www.merriam-webster.com/wordplay/cancel-culture-words-were-watching>.

265. *See infra* notes 274–314.

266. *See, e.g.,* *Miranda v. Arizona*, 384 U.S. 436, 480 (1966) (“The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of its criminal law.”); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[,] or force citizens to confess by word or act their faith therein.”).

have (at least optically) seized de facto if not de jure power over critical aspects of public and private life since the turn of the millennium.<sup>267</sup> After the Supreme Court’s controversial holding in *Citizens United v. FEC*, Americans’ already jaded perception of the political process lost any suspension of disbelief that the wealthy had significantly greater access to lawmakers—and, by extension, justice and the law itself—than working-class Americans.<sup>268</sup> Justice Anthony Kennedy wrote in *Citizens United* that limiting political spending by corporations and other groups violates the First Amendment right to free speech.<sup>269</sup> Kennedy wrote for a bare majority of Justices that corporations’ “independent expenditures” in political campaigns would not be corrupt, would not result in political favoritism, and would remain transparent.<sup>270</sup>

This idea being preposterous on its face, Kennedy’s assumptions have proved to be wildly incorrect. A study by the Corporate Reform Coalition found that eight out of ten Americans agreed that “corporate political spending drowns out the voices of average Americans,” with nearly “half strongly agreeing.”<sup>271</sup> Nearly as many Americans

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267. See Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sep. 13, 1970), <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>; see also Amy Merrick, *Is the Friedman Doctrine Still Relevant in the 21st Century?*, CHI. BOOTH REV. (May 24, 2021), <https://www.chicagobooth.edu/review/friedman-doctrine-still-relevant-21st-century> (providing an analysis of Friedman’s work as well as critiques of it from experts); see generally SHELDON WHITEHOUSE & MELANIE W. STINNETT, CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY (2017) (describing how corporations “buy” influence over our government by paying representatives, senators, regulators, judges, prosecutors).

268. See GERALD F. DAVIS, TAMING CORPORATE POWER IN THE 21ST CENTURY 14 (Arie Y. Lewin & Till Talaulicar eds., 2022) (identifying the trend of “[c]orporations [growing] too big and [using] their wealth and power to corrupt politics and unjustly enrich an elite class of robber barons and Wall Street bankers at the expense of the common person”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372 (2010) (reversing the district court’s decision regarding the constitutionality of restricting corporate independent expenditures on political campaigns).

269. *Citizens United*, 558 U.S. at 372.

270. *Id.* at 359–60, 371.

271. Liz Kennedy, *Citizens Actually United: The Bi-Partisan Opposition to Corporate Political Spending and Support for Common Sense Reform*, DEMOS (Oct. 25, 2012), [https://www.demos.org/policy-briefs/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and#footnote5\\_aynnny6](https://www.demos.org/policy-briefs/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-and#footnote5_aynnny6).

agreed “that corporations spend money on politics to influence legislation,” and eighty-five percent of Americans “call it corruption when financial supporters have more access and influence with members of Congress than average Americans.”<sup>272</sup>

In a post-*Citizens United* world, the power of working-class Americans, especially those belonging to minority communities, to effect meaningful societal change comes not from their votes, but from their wallets. The corporations and private interests that Americans perceive to own the ability to influence policy are dependent on the money that American consumers spend on their goods and services. Just like with any unpopular business practice, if a company or someone acting on its behalf publicly makes a hateful remark or takes a stance that consumers find undesirable, consumers can simply choose not to patronize that company. The resulting decrease in revenue (and, by extension, profits) forces that company to change the business practice at issue, which can include changing its stance or severing ties with the person whose speech consumers take issue with: in short, the speaker of the unpopular speech, or the company itself, is “canceled.”

“Cancellation” is not a novel concept to modern civil discourse; it is merely a rebranding of the millennia-old economic principle that consumers in free markets can patronize whatever businesses and consume whatever media they please, and, by the same token, choose *not* to patronize certain businesses or consume certain media. This freedom of choice is precisely what makes a “free market” free. Cancel Culture is thus the natural confluence of this free-market principle with the unregulated marketplace of ideas under the economic, legal, and political paradigms of the modern-day United States.

The history of American sociopolitical discourse is replete with examples of groups using boycotts (or consumer-side economic pressure more broadly) to bring about social change. During the Civil Rights Movement, the Montgomery Bus Boycotts famously discouraged citizens of Montgomery, Alabama from using the city’s public buses, where Black patrons were required to give up their seats to White ones. It is estimated that the Montgomery Bus Boycott cost the Montgomery bus system \$3,000 per day: the equivalent of nearly

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272. *Id.*

\$36,000 in 2025 dollars.<sup>273</sup> As early as the years leading up to the American Revolution, American Colonists boycotted goods imported from Great Britain in protest of the Stamp Act, Declaratory Act, Quartering Act, and numerous other British impositions on Colonial life that boycotters saw as unjust.<sup>274</sup> Beyond the American context, in 20th-century India, boycotts against British goods organized by Mahatma Gandhi were instrumental in the campaign to achieve India's independence from England.<sup>275</sup>

If a corporation or other business “cancels” someone, it is because enough of that company’s consumer base would be opposed to that person’s speech that the company would risk a potentially large sum of money if consumers chose on that basis not to give business to that corporation. In other words, companies engage in “Cancel Culture” when a potential boycott based on speech connected to the company would be significant enough to make a concerning impact on profits. If enough people may be upset by an employee or affiliate’s speech that it would affect the company’s bottom line, the company will take action to prevent this by distancing itself from the speaker at issue. Cancel Culture thus allows people to collectively use their voices through their purchases, subscriptions, or other patronization of a product or service to voice what viewpoints they find distasteful or morally unacceptable.

In this sense, some media commentators have opined that “Cancel Culture” should be renamed “Consequence Culture.”<sup>276</sup> The terms

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273. See Jen Eidson, *The Montgomery Bus Boycott & Labor: Not the Strategy You'd Expect*, UNIV. OF MD. LIBRS.: SPECIAL COLLECTIONS (Feb. 27, 2018), <https://hornbakelibrary.wordpress.com/2018/02/27/the-montgomery-bus-boycott-labor-not-the-strategy-you-d-expect/> (summarizing a brief history and importance of the letter to the AFL-CIO’s non-action on the boycott); *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS., [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Jan. 4, 2026).

274. Marc Egnal & Joseph A. Ernst, *An Economic Interpretation of the American Revolution*, 29 WM. & MARY Q. 3, 21–24 (1972).

275. STANLEY WOLPERT, *GANDHI’S PASSION: THE LIFE AND LEGACY OF MAHATMA GANDHI* 99–103 (2002).

276. Katherine Fung, *LeVar Burton Defends Cancel Culture, Says It Should Be Called “Consequence Culture,”* NEWSWEEK (April 26, 2021, at 13:52 ET), <https://www.newsweek.com/levar-burton-defends-cancel-culture-says-it-should-called-consequence-culture-1586506>.

have different connotations: “Cancel Culture” focuses on the effect whereby discussion is limited by a desire to maintain one certain viewpoint, whereas “Consequence Culture” emphasizes the idea that speakers are responsible for the effects or reception of their speech.<sup>277</sup>

An example of a celebrity who was “canceled” for their unpopular speech is Kanye West—a very popular and highly lauded musician throughout the 2000s and 2010s who inexplicably and unabashedly began sharing antisemitic sentiments on social media in 2022.<sup>278</sup> As a result of West’s rhetoric, the public began putting pressure on athletic manufacturer Adidas, with whom West had an extremely lucrative licensing deal for his “Yeezy” line of footwear, to terminate the deal and sever ties with West.<sup>279</sup> This pressure increased after an image spread on social media of a “banner draped over a Los Angeles highway reading ‘Kanye was right about the Jews,’ accompanied by a group of white supremacists giving the Nazi salute to the drivers below.”<sup>280</sup> As this was ongoing, Adidas’ stock price dropped “precipitously.”<sup>281</sup> After weeks of silence from Adidas prompted West to comment, “I can say antisemitic s[tuff] and Adidas cannot drop me,” Adidas dropped West.<sup>282</sup> And without Adidas, according to Forbes, West’s estimated net worth fell from over \$2 billion to \$400 million.<sup>283</sup>

West remains a popular musician with a lucrative career despite his antisemitism (even being invited to dine with President Donald Trump). But West lost a high-dollar deal with designer brand Balenciaga; was dropped by the Creative Artists’ Agency and law firm Cadwalader, Wickersham & Taft; saw multiple NFL and NBA stars withdraw as clients of his Donda Sports representation agency; and even

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277. Molly Schwartz, *Roxane Gay Says Cancel Culture Does Not Exist*, MOTHER JONES (Mar. 5, 2021), <https://www.motherjones.com/media/2021/03/roxane-gay-says-cancel-culture-does-not-exist/>.

278. Lisette Voytko-Best, *Billionaire No More: Kanye West’s Antisemitism Obliterates His Net Worth as Adidas Cuts Ties*, FORBES (Oct. 25, 2022, at 15:48 ET), <https://www.forbes.com/sites/lisettevoytko/2022/10/25/billionaire-no-more-kanye-wests-anti-semitism-obliterates-his-net-worth-as-adidas-cuts-ties/?sh=1dfdc4917e78>.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

had his “X” account suspended by the outspokenly “pro-free speech” Elon Musk.<sup>284</sup>

West’s cultural cancellation shows that just as public figures are free to speak, the public is free to wield its disapproval in response. While Kanye West is perhaps the biggest example of Cancel Culture in terms of sheer dollars, the list of “canceled” celebrities and the consequences they have faced is long and varied. More extreme examples include Harvey Weinstein, Bill Cosby, and Kevin Spacey, all of whom were not only fired and blacklisted from their respective industries, but also criminally prosecuted for sexual assault in the wake of the “#Me-Too” movement.<sup>285</sup> Though Spacey (unlike Cosby and Weinstein) was acquitted, he was fired from the popular Netflix series *House of Cards* which he starred in for years, resulting in his character being unceremoniously killed off-screen and his existence being all but ignored in the show’s final season.<sup>286</sup> Although these three men are examples of celebrities being “canceled” for allegations of sexual assault rather than for using any sort of hate speech, they are illustrative of the power of consumers’ collective intolerance for inappropriate conduct, and their power in both the marketplace of ideas and the marketplace in the broader economic sense.

Often, however, cancellation comes not only for the illicit conduct of the powerful, but also simply for speech. In 2018, comedian Kevin Hart was disinvited from hosting the Academy Awards after several of Hart’s homophobic tweets from earlier that decade came to light.<sup>287</sup> J.K. Rowling, the creator of the incredibly popular *Harry Potter* franchise, has come under fire and been shunned by many fans after

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284. Anna Chan, Rania Aniftos & Starr Bowenbank, *A Timeline of the Consequences [Kanye West] Has Faced for His “WLM” Shirts & Antisemitic Hate Speech*, BILLBOARD (July 2, 2025), <https://www.billboard.com/lists/kanye-west-hate-speech-consequences-timeline/dec-1-no-longer-buying-parler/>.

285. Orion Rummel, *Global #MeToo Movement Has Resulted in 7 Convictions, 5 Charges of Influential Figures*, AXIOS (Oct. 27, 2020), <https://www.axios.com/2019/09/01/global-metoo-movement-convictions-charges>.

286. *Id.*; Matt Webb Mitovich, *House of Cards: Kevin Spacey Fired*, TV LINE (Nov. 3, 2017, at 22:23 ET), <https://tvline.com/casting-news/house-of-cards-kevin-spacey-fired-883197/>.

287. Stephen Daw, *A Complete Timeline of Kevin Hart’s Oscar-Hosting Controversy, From Tweets to Apologies*, BILLBOARD (Jan. 13, 2020), <https://www.billboard.com/music/awards/kevin-hart-oscar-hosting-controversy-timeline-8492982/>.

a series of transphobic tweets and statements.<sup>288</sup> After actress Gina Carano made a series of tweets in 2020 likening the experience of American Republicans to that of the Jewish people in Nazi Germany, the hashtag “#FireGinaCarano” trended on Twitter, causing the actress to be fired from the popular television show *The Mandalorian*.<sup>289</sup> Actress Roseanne Barr was fired from a reboot of her eponymous ABC television show *Roseanne*, and the show itself was canceled in the literal sense of the term, only hours after Barr published a tweet describing Valerie Jarrett (a Black woman who was a senior advisor to Barack Obama) as “muslim brotherhood & planet of the apes had a baby=vj [sic].”<sup>290</sup>

While many conservative politicians and voters are critical of Cancel Culture as a “political weapon” of the left,<sup>291</sup> claiming that it is used disproportionately to punish conservative viewpoints, American conservatives have themselves engaged in another form of Cancel Culture. One need look no further than the popular slogan “go woke, go broke,” which often refers to corporations losing sales or seeing drops in their stock value after backlash for publicly supporting progressive efforts to empower women, LGBTQIA+ people, and minorities.<sup>292</sup> For example, when Anheuser-Busch announced a partnership with transgender TikTok user Dylan Mulvaney and temporarily added

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288. Jeetendr Sehdev, *The J.K. Rowling Effect: Navigating Controversy in Brand Behavior*, FORBES (Apr. 12, 2024, at 13:33 ET), <https://www.forbes.com/sites/jeetendrsehdev/2024/04/12/the-jk-rowling-effect-navigating-controversy-in-brand-behavior/?sh=5074f9f67737> (noting that efforts to “cancel” Rowling have been mildly successful at best, as the *Harry Potter* franchise continues to be extremely profitable).

289. *Gina Carano Fired from “Mandalorian” After Social Media Post*, PBS: NEWS (Feb. 11, 2021, at 13:44 ET), <https://www.pbs.org/newshour/arts/gina-carano-fired-from-mandalorian-after-social-media-post>.

290. John Koblin, *After Racist Tweet, Roseanne Barr’s Show is Cancelled by ABC*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/business/media/roseanne-barr-offensive-tweets.html>.

291. Ryan Lizza, *Americans Tune in to “Cancel Culture”—and Don’t Like What They See*, POLITICO (July 22, 2020, at 09:06 ET), <https://www.politico.com/news/2020/07/22/americans-cancel-culture-377412>.

292. Bernd Debusmann Jr., *If U.S. Companies “Go Woke,” Do They Really Go Broke?*, BBC (June 21, 2023), <https://www.bbc.com/news/world-us-canada-65918155>.

rainbows to their Bud Light can design, some Republican lawmakers called for their followers never to drink the beer again,<sup>293</sup> and some conservative voters bought cases of the beer just so they could shoot them.<sup>294</sup> Other examples include the blacklisting of country music group The Dixie Chicks (now called The Chicks) after the group made comments critical of then-President George W. Bush;<sup>295</sup> the blacklisting of former NFL quarterback Colin Kaepernick following his kneeling during pre-game performances of the national anthem to protest police murders of unarmed Black Americans;<sup>296</sup> the boycotting of retailer Target following its release of “Pride Month” merchandise in May 2023;<sup>297</sup> the boycott of the 2023 adaptation of Disney’s *The Little Mermaid* after a Black actress was cast as the titular character;<sup>298</sup> the boycott of M&M’s after the candy’s parent company de-sexualized its

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293. Aleks Phillips, *Bud Light Faces Boycott Over Dylan Mulvaney Partnership: “Never Drink It,”* NEWSWEEK (Apr. 6, 2023, at 10:59 ET), <https://www.newsweek.com/bud-light-faces-boycott-trans-activist-partnership-dylan-mulvaney-1792192>.

294. Miles Klee, *Kid Rock Buys Cases of Bud Light So He Can Shoot Them While Crying,* ROLLING STONE (Apr. 4, 2023), <https://www.rollingstone.com/culture/culture-news/kid-rock-bud-light-woke-trans-protest-dylan-mulvaney-1234709445/>.

295. John Pareles, *The Dixie Chicks: America Catches Up With Them,* N.Y. TIMES (May 21, 2006), <https://www.nytimes.com/2006/05/21/arts/music/21pare.html>.

296. Ta-Nehisi Coates, *The Cancellation of Colin Kaepernick,* N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/opinion/colin-kaepernick-nfl.html>.

297. Phil Helsel, *Target Pulls Some Pride Collection Items After Threats to Employees,* NBC NEWS (May 23, 2023, at 20:39 CT), <https://www.nbcnews.com/business-news/target-pride-collection-threats-employees-rcna85931>.

298. Joy Sewing, *As Christian Group Insists Real Little Mermaid Is White, Black Parents Share Daughters’ Joy,* HOU. CHRON. (Sep. 15, 2022, at 11:12 CT), <https://www.houstonchronicle.com/lifestyle/article/Christian-group-objects-to-Black-Little-Mermaid-17439168.php>.

female mascot;<sup>299</sup> and the backlash against video game developer Bethesda for depicting Nazis as evil in the game *Wolfenstein II*.<sup>300</sup>

The fallout surrounding the 2025 murder of conservative influencer Charlie Kirk offers a particularly striking example. In the wake of a gunman's attack at a Turning Point USA event—an organization Kirk founded to encourage conservative youth engagement and free speech—many right-wing commentators assigned collective blame to perceived political adversaries and those who publicly celebrated Kirk's death.<sup>301</sup> Within hours, online communities sympathetic to Kirk's brand of politics demanded the deplatforming and “cancellation” of individuals and news outlets they accused, often baselessly, of having “incited” the violence through their criticism of Kirk's rhetoric on race, gender, and immigration.<sup>302</sup> This metastasized into doxxing efforts and attempts by private individuals to have public critics of Kirk fired from their places of work.<sup>303</sup> The irony in a movement that had long condemned social accountability as “Cancel Culture” now engaging in an almost liturgical purge of dissenters was palpable.

Unlike preceding scandals that served as calls to action for consumers and businesses, the fallout from the Charlie Kirk shooting spread to actual government action. Shortly after the shooting and the mixed reactions that it received, United States Attorney General Pam

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299. David Folkenflik, *Tucker Carlson's War on M&M's*, NPR (Jan. 23, 2023, at 05:45 ET), <https://www.npr.org/2023/01/23/1150844961/tucker-carlsons-war-on-m-ms>

300. Tauriq Moosa, *Nazis As the Bad Guys in Videogames? How Is That Controversial?*, GUARDIAN (Oct. 27, 2017, at 15:00 ET), <https://www.theguardian.com/global/commentisfree/2017/oct/27/nazis-videogames-white-grievance-wolfenstein>.

301. See, e.g., Odette Yousef, *A Report Claims Left-Wing Terrorism Is Rising. The Data Paints a Complicated Picture*, NPR (Oct. 25, 2025, at 07:36 ET), <https://www.npr.org/2025/10/25/nx-s1-5583997/political-violence-left-right-wing>; Alex Farber, *“Get JK Rowling Next”: Bluesky Users Celebrate Death of Charlie Kirk*, THE TIMES (Sep. 12, 2025, at 10:28 BST), <https://www.thetimes.com/uk/media/article/bluesky-charlie-kirk-shooting-death-8h8xdrk0f/>.

302. Katie Rogers & Zolan Kanno-Youngs, *White House Plans Broad Crackdown on Liberal Groups*, N.Y. TIMES (Sep. 15, 2025), <https://www.nytimes.com/2025/09/15/us/politics/jd-vance-charlie-kirk-show.html>.

303. *Far-Right Groups Dox Online Critics After Charlie Kirk's Death*, AL JAZEERA (Sep. 13, 2025), <https://www.aljazeera.com/news/2025/9/13/us-teachers-targeted-by-far-right-in-doxing-after-charlie-kirks-death>.

Bondi publicly commented, “[t]here’s free speech, and then there’s hate speech, and there is no place, especially now, especially after what happened to Charlie, in our society. *We will absolutely target you, go after you, if you are targeting anyone with hate speech.*”<sup>304</sup> Bondi later purported to clarify that she was referring to “criminal groups or people that incite violence,” and not critics of Charlie Kirk, and that “[f]reedom of speech is sacred in our country, and we will never impede upon that right.”<sup>305</sup> Shortly thereafter, Bondi’s colleagues would, in fact, “impede upon” that right.

In September 2025, the late-night talk show host Jimmy Kimmel found himself on the receiving end of a high-profile cancellation episode after a monologue criticizing the MAGA movement following Kirk’s assassination.<sup>306</sup> FCC Chair Brendan Carr described Kimmel’s comments as “the sickest conduct possible” and warned of potential regulatory action against the broadcaster, American Broadcasting Company (“ABC”) and its parent, the Walt Disney Company.<sup>307</sup> In the days that followed, Nexstar Media Group and Sinclair Broadcast Group announced that they would remove *Jimmy Kimmel Live* from their ABC affiliates, and ABC itself suspended Kimmel indefinitely.<sup>308</sup>

After widespread bipartisan public backlash at the federal government manipulating speech by threatening administrative action against networks which broadcasted unfavorable speech—realizing the very “slippery slope” of which opponents of hate speech laws have for so long warned—including protests, threats by other celebrities to sever

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304. William Liang, *Pam Bondi’s Free Speech Blunder Is No Accident*, THE HILL (Sep. 22, 2025, at 13:00 ET), <https://thehill.com/opinion/civil-rights/5514446-bondi-hate-speech-blunder/> (emphasis added).

305. Marc Caputo, *Bondi Clarifies: “Hate Speech” Won’t Be Prosecuted*, AXIOS (Sep. 16, 2025), <https://www.axios.com/2025/09/16/bondi-clarifies-hate-speech-not-prosecute>.

306. Brian Stelter, Elizabeth Wagmeister & Liam Reilly, *ABC Yanks Kimmel’s Show “Indefinitely” After Threat from Trump’s FCC Chair*, CNN (Sep. 18, 2025, at 05:21 ET), <https://www.cnn.com/2025/09/17/media/jimmy-kimmel-charlie-kirk-trump-fcc-brendan-carr>.

307. *Id.*

308. *Id.*; see also Ted Johnson, *FCC Chairman Warns ABC Over Jimmy Kimmel Comment About Charlie Kirk Assassination Suspect*, DEADLINE (Sep. 17, 2025, at 14:05 CT), <https://deadline.com/2025/09/fcc-jimmy-kimmel-charlie-kirk-suspect-1236547238/>.

ties, cancellations of streaming subscriptions, and calls for boycotts, Disney lifted Kimmel's suspension; Nexstar and Sinclair followed suit in short order, citing a "commit[ment] to protecting the First Amendment."<sup>309</sup> As Beth Kowitt wrote of the situation, "[t]his shouldn't be confused for Disney . . . suddenly rediscovering their moral high ground; instead, it's a realization that submitting [to the Trump administration] may come with a higher price than pushing back."<sup>310</sup>

In this sense, the response to the Kirk shooting exemplified Cancel Culture's ideological neutrality: the instinct to punish speech deemed dangerous or immoral is hardly limited to one side of the political spectrum. Likewise, it underscored the importance of the lack of hate speech laws, and the susceptibility of abuse inherent in undefined and unprotected categories of "hate speech."

A highly debated facet of Cancel Culture is its impact on comedy and comedians specifically. While listeners of everyday offensive statements have no reason to interpret it at anything but its face value, when a comedian makes a disparaging (or even self-deprecating) joke based on racial, gender, or other stereotypes, it should be obvious to listeners that the speaker, as a comedian, is joking, and is not intentionally inciting hatred or spreading ill will. After all, that is precisely their job. Especially troubling for critics of the cancellation of comedians is the fact that disparaging jokes about different groups are taken more seriously than others: for example, a joke making fun of a Black racial stereotype may be considered less desirable (or, more "cancellable," if you will) than a joke making fun of a White racial stereotype. Treating jokes differently based on the group that they are making light of necessarily means that the groups themselves are treated differently, and afforded different levels of protection, presenting the free market version of an equal protection issue.

One response to this argument is the differentiation between "punching up" and "punching down": it is seen as perfectly acceptable for a speaker to tell demeaning jokes about individuals or groups in

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309. Sakshi Venkatraman & Aleks Phillips, *TV Station Owners Reinstate Jimmy Kimmel Show After Ban*, BBC (Sep. 27, 2025), <https://www.bbc.com/news/articles/cy7pm1jz0dlo>.

310. Beth Kowitt, *Bob Iger Just Learned a Hard Lesson*, BLOOMBERG (Sep. 24, 2025, at 10:12 CT), <https://www.bloomberg.com/opinion/articles/2025-09-24/kimmel-return-teaches-bob-iger-a-hard-lesson-about-trump>.

positions of greater means or, for want of a better phrase, higher social standing than themselves (i.e., “punching up”), while doing the same to a person or group of lesser means or greater social marginalization (i.e., “punching down”) is frowned upon.<sup>311</sup> There is a school of thought that says, essentially, “[e]ither everything is okay to joke about, or nothing is”: designating certain groups or ideas as unassailable endorses those groups or ideas as socially superior to those about which joking is acceptable. Furthermore, setting the standard as “punching up versus down” necessarily places different groups on different levels of social marginalization relative to which the speaker must weigh his position before telling a joke, and in so doing, perpetuates this disparity in power.<sup>312</sup>

Regardless of cogent arguments for and against this aspect of Cancel Culture, comedians have nonetheless faced repercussions for insensitive jokes. For instance, comedian Dave Chappelle was disinvited from performing at numerous venues and faced significant public backlash after making insensitive remarks about transgender people in a Netflix stand-up special.<sup>313</sup> In contrast to other platforms’ responses to scandals concerning performers on their shows,<sup>314</sup> Netflix came to Chappelle’s defense, sharing in an internal memorandum: “[n]ot everyone will like—or agree with—everything on our service . . . If you’d find it hard to support our content breadth, Netflix may not be the best place for you.”<sup>315</sup>

As comedian Ricky Gervais eloquently summarizes the plight of comedians in Cancel Culture (or Cancel Culture as a whole), “[y]ou can joke about whatever the [f - - ] you like . . . . And some people won’t like it[,] and they will tell you they don’t like it. And then it’s up

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311. Julian Adorney, *Stop Saying Comedy “Punches Down,”* WASH. EXAM’R (Sep. 17, 2023, at 10:00 CT), <https://www.washingtonexaminer.com/opinion/2450810/stop-saying-comedy-punches-down/>.

312. *See id.*

313. *Dave Chapelle Show Cancelled Over Transgender Jokes Controversy*, BBC (Jul. 21, 2022), <https://www.bbc.com/news/entertainment-arts-62249771>.

314. *See supra* notes 280–81, 285–86 and accompanying text.

315. *See* BBC, *supra* note 313.

to you whether you give a [f - -] or not. And so on. It's a good system."<sup>316</sup>

Cancel Culture and its effects are not limited to celebrities and corporations. There are myriad examples of ordinary people losing their jobs after making racist, anti-LGBTQIA+, or other hateful comments, both within and outside the context of their employment. For example, in 2015, a woman named Justine Sacco made a series of racist tweets after boarding a flight from New York City to Cape Town, South Africa; Twitter users brought these to the attention of Sacco's employer, and, upon landing in Cape Town, Sacco learned that she had been fired.<sup>317</sup>

In the aftermath of the death of George Floyd in May 2020, a woman named Heather McVey posted on her personal Facebook account that "she found the Black Lives Matter movement racist, claiming it caused segregation and alleging Black people were 'killing themselves.'"<sup>318</sup> The comments came to the attention of McVey's employer, AtlantiCare Health Systems, which fired her.<sup>319</sup> McVey sued AtlantiCare, claiming that her termination violated the First Amendment and Article I of the New Jersey Constitution,<sup>320</sup> which provides that, "[e]very person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right*."<sup>321</sup> The trial court dismissed McVey's case, and the appellate court upheld the dismissal, noting that constitutional rights (such as the First Amendment's Free Speech Clause) can be violated only through state action, and not

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316. KLIPH NESTERHOFF, *OUTRAGEOUS: A HISTORY OF SHOWBIZ AND THE CULTURE WARS*, at v-12 (2023) (ebook).

317. Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco's Life*, N.Y. TIMES MAG. (Feb. 12, 2015), <https://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html>.

318. Nikita Biryukov, *Woman Fired for Posting Anti-Black Lives Matter Comments Loses Appeal*, N.J. MONITOR (May 20, 2022, at 16:50 CT), <https://newjersey-monitor.com/2022/05/20/woman-fired-for-posting-anti-black-lives-matter-comments-loses-appeal/>.

319. *Id.*

320. *McVey v. AtlantiCare Med. Sys., Inc.*, 276 A.3d 677, 683 (N.J. Super. Ct. App. Div. 2022).

321. N.J. CONST. art. I, ¶ 6 (emphasis added).

by any private actor.<sup>322</sup> The New Jersey court pointed to numerous cases from across the United States in which courts rejected arguments like *McVey*'s where private-sector employees were terminated for what was otherwise a valid exercise of their right to free speech.<sup>323</sup> In other words, there is no right to free speech as against one's private employer, or against any other private entity or individual.<sup>324</sup>

This strikes against the chief criticism of Cancel Culture: that it stifles "free speech" in a similar manner to laws that the Supreme Court has held to violate the First Amendment. The critical distinction between unconstitutional state regulations of speech and Cancel Culture is that unlike attempted statutory regulations of hate speech (or speech of any kind), Cancel Culture is the result of consequences imposed by entities *other than* the government. The concept of "free speech" stands for the idea that governments cannot make laws restricting or prohibiting speech and cannot punish people for their words or beliefs. "Free speech" does not, however, mean that a speaker must be free from all consequences, public or private, stemming from their speech. There is no law in any country on Earth, nor in any ancient civilization yet discovered, that requires all speech to be given equal value. As Justice

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322. *McVey*, 276 A.3d at 681–83 (citing *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n.*, 929 A.2d 1060, 1067 (N.J. 2007)); *see also* *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893, 896, 899 (Cal. Ct. App. 2004) (noting a private employer's decision to fire an employee for participating in a pyramid scheme is not a state action).

323. *McVey*, 276 A.3d at 681. The New Jersey court cites *Edmondson v. Shearer Lumber Prod.*, 75 P.3d 733, 739 (Idaho 2003), *Petrovski v. Fed. Express Corp.*, 210 F. Supp. 2d 943, 948 (N.D. Ohio 2002), and *Prysak v. R.L. Polk Co.*, 483 N.W.2d 629, 634 (Mich. Ct. App. 1992), all for the proposition that there is no right of action against private employers for infringing against state or federal free speech rights. *Id.*

324. *Id.* at 683. This discussion focuses on private-sector employment. Public employees have somewhat greater First Amendment protection when speaking as citizens on matters of public concern, under the *Pickering* balancing test and its progeny. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–69 (1968) (adopting a balancing test weighing a public employee's interest, as a citizen, in speaking on matters of public concern against the government employer's interest in workplace efficiency); *Connick v. Myers*, 461 U.S. 138, 146–49 (1983); *cf.* *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment does not protect public employees' speech made pursuant to their official duties); *Lane v. Franks*, 573 U.S. 228, 231 (2014) (holding that sworn testimony outside the scope of ordinary job duties is citizen speech on a matter of public concern and protected under *Pickering*).

Holmes wrote, “[p]ersecution for the expression of opinions seems to me perfectly logical.”<sup>325</sup> The Court of Public Opinion offers no protections to the accused.

This “free speech” argument against Cancel Culture, however, posits that “free speech” in the broader philosophical sense (i.e., irrespective of any law protecting or abridging it) should be allowed in all forums, public or private, and that speakers should not be impacted by others’ negative receptions of their speech. The government may not be depriving “canceled” speakers of life, liberty, or property, but mob rule is. This causes people to lose their livelihood based on a potentially incomplete or skewed narrative of what a speaker said or did, and without the protections of due process.

This line of thinking is flawed for several reasons. First, it implies that speakers have an inherent right for their speech to be positively received, or at least for it to be heard and not disagreed with, regardless of the content or context of that speech. Second, this argument conflates “speech” with “behavior”: it champions the notion that speakers should be free to say whatever they want, wherever and however they want, free of all consequences. As anyone raised by responsible parents can tell you, this notion is simply not rooted in reality. Finally, it suggests that the speaker’s audience must be compelled to continue associating with the speaker, whether that association takes the form of continuing to employ the speaker, patronizing the speaker’s business, allowing the speaker at a private venue, or any other means.

The consequences that Cancel Culture imposed on Kanye West, for example, like those of anyone else who finds himself cancelled, came to the hands of private entities and individuals. Adidas is not a government entity, nor are Balenciaga, Cadwalader, Twitter, or professional athletes. As private parties, they are free to associate (or to refuse to associate) with whomever they please—both philosophically, and as a matter of law.

The First Amendment protects the right of individuals and organizations to associate—and *not* to associate—with other people or groups. In *NAACP v. Alabama*, the Court firmly and explicitly established that the Constitution protects the freedom of association.<sup>326</sup> In

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

326. *NAACP v. Alabama (ex rel. Patterson)*, 357 U.S. 449, 460 (1958).

striking down a state law that required the NAACP to disclose lists of its members, the Court reasoned that individual NAACP members had a right to associate together, and that mandatory disclosure of the group's membership lists violated that right: "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."<sup>327</sup>

*NAACP v. Alabama* preceded a long line of cases in which the Supreme Court relied on and expanded the freedom of private individuals to associate as they please.<sup>328</sup> In *Roberts v. United States Jaycees*, the Court upheld a law requiring the previously male-only Jaycees to admit women as full members because, as the Court explained, the state's compelling interest in combating gender discrimination outweighed any asserted adverse impact on associational rights.<sup>329</sup> However, the Court made it very clear that the "freedom of association . . . plainly presupposes a freedom *not* to associate."<sup>330</sup> In reaching this conclusion, the Court weighed the associational rights of the individual members of the Jaycees, rather than any institutional right of the Jaycees as an abstract organization.<sup>331</sup> The Court expanded these associational rights throughout the following decades, and eventually extended them to organizations themselves, as distinct entities from their individual members.<sup>332</sup>

This freedom of association locks hands with the notion of the "marketplace of ideas" theory, and points to Cancel Culture as the appropriate remedy for hate speech in American civil discourse. Cancel Culture deprives no speaker of his or her First Amendment right to be

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327. *Id.*

328. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (discussing intimate rights of association in the context of a marriage); *Moore v. City of East Cleveland*, 431 U.S. 494, 510 (1977) (Brennan, J., concurring) (examining the freedom of association vis-à-vis familial living arrangements).

329. 468 U.S. 609, 628 (1984).

330. *Id.* at 623 (emphasis added).

331. *Id.*

332. *See* Wayne Batchis, *Citizens United and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of the Association*, 36 N.Y.U. REV. L. & SOC. CHANGE 5, 17 n.70 (2012) (collecting cases).

free from government interference with their speech, and leaves speakers' audiences free to respond in kind, whether that responsive speech comes from their words or from their wallets. Just as a restaurant that serves bad food will lose customers, a business that espouses bad ideas—or gives a platform to a speaker who shares bad ideas—can lose customers. The restaurant can respond by improving the quality of its food, and the business can cut ties with the disfavored speaker, or by sharing a better message.

Who is to say what ideas are “good” or “bad”? This is precisely the point of a century of First Amendment jurisprudence, and more narrowly, of this Article: as Justices Holmes and Brandeis wrote, and generations of Supreme Court Justices echoed, the marketplace of ideas and the billions of people who comprise it are the arbiters of the merit of ideas. The First Amendment deprives governments of the ability to make viewpoint-based distinctions of speech (i.e., the ability to determine what ideas are “good” and “bad”) and leaves that power directly in the hands of the people as the individual components of the marketplace of ideas. Cancel Culture, therefore, is the natural confluence of the American people's collective First Amendment rights determining the thoughts that we champion, and the thoughts that we hate.

## V. CONCLUSION

The basic values of equal respect and human decency underscore the very founding of the United States: “[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>333</sup> To achieve this lofty ideal, the rights of any person to think and speak as he pleases must live in harmony with the rights of his audience to live free from the tyranny of oppression and marginalization. As hate speech and the violence that it provokes escalate alongside the massive technological explosion and political polarization of the 21st century, American law remains steadfast in its affirmation that the First Amendment protects all viewpoints equally, including hateful ones. Indeed, the protection of disgusting ideas is precisely the point of the First Amendment.

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333. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

As First Amendment case law has dictated for over a century, the marketplace of ideas, and not the government, is the appropriate arbiter of the value of viewpoints and ideas, and of their place (or lack thereof) in American society. It is thus the prerogative of the American people, as individual components of the capitalistic leviathan that is the marketplace of ideas, to choose which ideas they find noble and which ideas they find deplorable. Cancel Culture, therefore, is (and, indeed, always has been) the inevitable mechanism for those without power in the conventional sense to assert their power through their choices as consumers. This is the marketplace of ideas that Justice Holmes envisioned: speakers can exchange thoughts freely without fear of persecution from the government, leaving the people to decide what thoughts (and, indeed, speakers) are worthy of remaining.

Americans are free to think as we please and to speak as we think without fear of persecution from the government. By the same token, our peers are free to pass judgment on us based on the content of our speech and our ideas. Hate speech causes a myriad of harms, and while the government cannot punish its purveyors for their harmful rhetoric, Cancel Culture and the Constitution itself leave the speaker's friends, family, employer, fans, supporters, viewers, listeners, and customers free to abandon them. A wise man once said, "[f]ear leads to anger. Anger leads to hate. Hate leads to suffering."<sup>334</sup> As Cancel Culture has ensured as an agent of change, wrought by the economic push and pull of the marketplace of ideas, that suffering goes both ways.

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334. STAR WARS EPISODE I: THE PHANTOM MENACE, Disney+, at 39:40 (Lucasfilm 1999).