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# HATE SPEECH AND HARASSMENT: THE CONSTITUTIONALITY OF CAMPUS CODES THAT PROHIBIT RACIAL INSULTS

Alan E. Brownstein\*

## I. INTRODUCTION

Determining the constitutionality of campus regulations that restrict the expression of hate speech is a particularly difficult undertaking because the form and content of what may be reasonably regarded as hate speech, and the circumstances in which hate speech may occur, vary significantly.<sup>1</sup> Yet all of these conditions must be defined with some precision in order to understand exactly what speech is to be prohibited and whether that prohibition violates the First Amendment. The purpose of this Article is narrowly limited to address only one discrete issue in the hate speech controversy. Identifying even that single issue, however, will require considerable background explanation and analysis.

Regulations restricting hate speech can be divided into two categories, each of which is defined in functional terms. One category includes laws designed to prevent the insidious message of hate propaganda from directly or indirectly influencing the beliefs, attitudes, and ultimately, the actions of the speakers' audience. The other category involves regulations intended to protect individual members of victimized groups from being verbally abused by racist or sexist epithets and insults. This dichotomy oversimplifies the range and objectives of hate speech restrictions, but it has considerable utility for the purposes of this Article in limiting the subject of discussion.

Commentators do not always use the same language in describing the regulations that fall roughly in the first category. David Strauss talks about prohibiting speech that will "persuade those who hear it to do something

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<sup>1</sup> See, e.g., *UWM Post, Inc. v. Board of Regents of Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). For examples of actual and hypothetical applications of campus hate speech codes, see also James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163 (1991).

of which the government disapproves."<sup>2</sup> Calvin Massey describes attempts to purify the "dialogue of public discourse . . . in which we decide, collectively, who we are, what our values are, and what ends we will pursue."<sup>3</sup>

Notwithstanding these differences, the common foundation of laws in this first category is relatively clear. In the context of hate speech, these are regulations directed at public expression that attributes vile characteristics to ethnic minority groups. At issue is speech about black people, for example, and the effect of such speech on the community's attitudes toward black people. It is almost universally recognized that laws of this kind raise particularly acute constitutional problems and violate current First Amendment doctrine.<sup>4</sup>

The purpose of this Article is to evaluate the constitutionality of laws in the second category. The focus is on "wounding words . . . spoken directly to the victim . . . [where] there is little chance that any persuasion is occurring,"<sup>5</sup> on "non-public discourse,"<sup>6</sup> on "targeted vilification" in "face-to-face encounters" where the "aim is to wound and humiliate."<sup>7</sup> The problem that laws in this category seek to address is the harm to the individual that results when, in a university setting, a white bigot walks up to a black student and uses racial epithets to insult her while she is walking to class.

Two university hate speech codes attempting to prohibit targeted abusive speech causing individual harm have been challenged as violating the First Amendment and struck down by federal courts. In both cases, *Doe v. University of Michigan*<sup>8</sup> and *UWM Post, Inc. v. Board of Regents*

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<sup>2</sup> David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991).

<sup>3</sup> Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigm of Free Expression*, 40 UCLA L. REV. 103, 113 (1992).

<sup>4</sup> See, e.g., *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

<sup>5</sup> See Strauss, *supra* note 2, at 343.

<sup>6</sup> See Massey, *supra* note 3, at 113, 150-52. Massey does not describe the parameters of non-public or private discourse, but he does identify the "derision of one's fellow employee in . . . racially offensive terms" as falling within this category. *Id.* at 151. It should be clear that the public-private speech distinction is not based exclusively on the number of individuals to whom expression is directed, although that is certainly an important factor to consider. Public speech can be addressed to a single individual. For example, when a constituent attempts to persuade a member of Congress to vote against a pending bill, the site of the conversation may be private, but the speech is public discourse for First Amendment purposes.

<sup>7</sup> Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 306 (1990).

<sup>8</sup> 721 F. Supp. 852 (E.D. Mich. 1989).

of the University of Wisconsin,<sup>9</sup> the codes were held to be vague and overbroad.<sup>10</sup> Significantly, however, each court approached the vagueness and overbreadth issue from a different perspective.

In the University of Michigan case, the court identified a wide variety of kinds of speech, and situations in which speech was used to cause individual harm, that could be regulated without violating the First Amendment. These included, for example, "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words,' those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace," speech "sufficient to state a claim for common law intentional infliction of emotional distress," and "threats of violence or property damage made with the specific intent to harass or intimidate the victim."<sup>11</sup> The university's hate speech code was overbroad because it was not limited to restricting these kinds of speech, but also prohibited speech that the university disagreed with because of the "ideas or messages sought to be conveyed."<sup>12</sup> Thus, the university had violated the First Amendment by attempting to punish persuasive speech as well as abusive speech that caused harm to targeted individuals.

In the University of Wisconsin case, on the other hand, the court displayed a much more rigid and limited perspective with regard to the range of permissible speech regulations. In its view, virtually all persuasive speech, and most harmful speech directed at individuals, were immune from governmental sanction. Indeed, the only speech the university could constitutionally prohibit that the court recognized was a narrowly defined class of fighting words, speech that "by its very utterance tend[s] to incite violent reaction."<sup>13</sup> No other abusive and harmful speech targeted at an individual student could be punished.

The problem with the decisions of both of these courts is that the First Amendment standard that they apply to campus hate speech codes seems strangely divorced from conventional, real world restrictions on harmful speech. The University of Wisconsin decision is particularly vulnerable to this charge. Even a casual examination of state law in almost any jurisdiction demonstrates a wide range of speech regulations that cannot be defended as limited restrictions on "fighting words." Obscene phone

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<sup>9</sup> 774 F. Supp. 1166 (E.D. Wis. 1991).

<sup>10</sup> *UWM Post, Inc.*, 774 F. Supp. at 1168-81; *Doe*, 721 F. Supp. at 864-67.

<sup>11</sup> *Doe*, 721 F. Supp. at 862-63.

<sup>12</sup> *Id.* at 863.

<sup>13</sup> *UWM Post, Inc.*, 774 F. Supp. at 1172. The court rejected all other asserted grounds for restricting hate speech, repeatedly noting that these justifications exceeded the scope of the fighting words doctrine. *Id.* at 1172-78.

calls, which are almost never technically obscene,<sup>14</sup> abusive slurs and vicious practical jokes that constitute intentional infliction of emotional distress,<sup>15</sup> threats and verbal harassment,<sup>16</sup> and bigoted expression in the workplace are all subject to civil or criminal sanction.<sup>17</sup> Either the First Amendment tolerates restrictions on far more than fighting words, or the federal and state courts are exceedingly tolerant of laws that violate the First Amendment.

The court in the University of Michigan case recognizes the potential breadth of these conventional speech restrictions. It fails, however, to explain why the same vagueness and overbreadth concerns that required the invalidation of the university's hate speech code do not justify invalidating most of these limitations on speech as well. It may be that such laws survive constitutional scrutiny because courts recognize that there is no way to define obscene phone calls or the tort of intentional infliction of emotional distress with clarity and precision. That suggestion, however, does not explain why a similar rationale cannot be used to justify hate speech regulations.

The critical issue in reviewing university hate speech regulations, not adequately considered by either the Michigan or the Wisconsin court, is whether there is some principled way to defend the constitutionality of these generally accepted restrictions on speech that target an individual for abuse. The narrow fighting words principle adopted by the Wisconsin District Court, although it is grounded on United States Supreme Court precedent,<sup>18</sup> is too under-inclusive to be practical and is conceptually unsatisfying. It is impractical because it only applies to face-to-face

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<sup>14</sup> See, e.g., *People v. Hernandez*, 231 Cal. App. 3d 1376 (Cal. Ct. App. 1991) (stating that the use of the term "obscene" in telephone harassment statutes refers to language that is offensive to one's feelings or to prevailing notions of decency, not to language that meets the Supreme Court's definition of obscenity).

<sup>15</sup> See, e.g., Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990) (describing numerous intentional infliction of emotional distress cases in which the victim was not in a position to retaliate with physical violence); Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423, 463-66 (1988).

<sup>16</sup> See, e.g., *Watts v. United States*, 394 U.S. 705 (1969) (stating that a law prohibiting threats of violence against the President is constitutional on its face); *Bachowski v. Salamone*, 407 N.W.2d 533 (Wis. 1987) (upholding the application of an anti-harassment statute to expressive activity).

<sup>17</sup> See, e.g., *Snell v. Suffolk County*, 782 F.2d 1094, 1098-99 (2d Cir. 1986); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983).

<sup>18</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). For a more current discussion of "fighting words" as a category of unprotected speech, see *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992).

encounters that are likely to result in an immediate breach of the peace.<sup>19</sup> Thus, harassing and obscene phone calls could not be proscribed pursuant to its authority since the frequent anonymity of the caller and the distance between the offending speaker and his victim preclude immediate violent retaliation in most instances.<sup>20</sup> The fighting words principle is unsatisfying because it tolerates the victimization of the weak, of people who are incapable of protecting themselves from verbal abuse by threatening a physical response.<sup>21</sup> In ignoring the harm to the victims of invidious speech, the fighting words principle seems to be directed at a tangent to the core problem, without addressing what is most unacceptable about hate speech.

One alternative approach to resolving this problem is to define more expansively the kind of expression that falls within the category of fighting words. There is obvious precedent for this approach because *Chaplinsky v. New Hampshire*,<sup>22</sup> the case in which the fighting words doctrine originated, did not exclusively limit this category of unprotected speech to language that will immediately provoke a breach of the peace. Instead, harmful words "which by their very utterance inflict injury," such as epithets or personal abuse, were also recognized as being subject to sanction.<sup>23</sup>

A principle suggesting that all hurtful speech directed at an individual might be prohibited would make too much speech vulnerable to restriction, however, as cases decided after *Chaplinsky* have demonstrated.<sup>24</sup> The First Amendment clearly protects stinging rebukes and angry criticism directed at individuals despite the pain that such comments may cause. Thus, the broader description of fighting words in *Chaplinsky* represents relevant authority supporting the regulation of hurtful expression, but the question of determining precisely when hurtful speech can be constitutionally restricted remains an open issue requiring additional analysis.

The first step in addressing that question is to recognize that probably no single principle can explain and justify all the legitimate and permissible restrictions on harmful speech that exist. In the following

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<sup>19</sup> See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (stating that the fighting words doctrine identifies as unprotected speech only those "words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed").

<sup>20</sup> See *infra* note 56.

<sup>21</sup> See Greenawalt, *supra* note 7, at 297-98.

<sup>22</sup> 315 U.S. 568 (1942).

<sup>23</sup> *Id.* at 572; see also *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

<sup>24</sup> See, e.g., *Gooding*, 405 U.S. at 524-26; Massey, *supra* note 3, at 159 n.237 (arguing that post-*Chaplinsky* cases "confine [the] fighting words doctrine to instances where immediate violence is the likely product of the words in question"); see also *Terminiello v. Chicago*, 337 U.S. 1 (1949).

pages, I will argue that there are four factors that, in appropriate combinations, should be used by courts to uphold speech regulations designed to protect individuals from abusive expression directed at them. An evaluation of these factors, in turn, will determine the constitutionally permissible scope of campus speech codes.

## II. THE CONSTITUTIONAL GROUNDS FOR RESTRICTING TARGETED, ABUSIVE SPEECH

### A. *Defining the Relevant Factors*

First, and most obviously, speech can be restricted if it is part of a course of prohibited conduct. This factor justifies punishing expressive interactions that constitute a criminal conspiracy. It recognizes a conduct dimension to threats of physical violence.<sup>25</sup> Further, it explains why employers can be prohibited from creating or tolerating hostile working environments for racial minorities or women under federal anti-discrimination statutes. Since the government can prohibit the practice of race or sex discrimination in employment, it can also restrict expression that constitutes the implementation of discriminatory policies.<sup>26</sup>

A corollary ground for restricting expression recognizes that some speech is intended to provoke violence or other unlawful conduct and is so likely to produce that immediate result that it may be prohibited.<sup>27</sup> This limitation on speech represents the conclusion of the long, evolutionary development of the "clear and present danger" standard.<sup>28</sup> Under current standards, the doctrine is rigorously limited to apply only to speech that creates a significant risk of inciting violence within a relatively brief time frame.<sup>29</sup>

Second, expression may be subject to regulation because of the intensity of its impact on those who hear it or see it, *and* because the expression is of very limited communicative value. This factor is far more

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<sup>25</sup> See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 241-42 (1992).

<sup>26</sup> See Alan E. Brownstein, *Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles?*, 39 BUFF. L. REV. 1, 48-51 (1991). Important questions remain to be resolved, however, in identifying the circumstances in which employer or employee expression constitutes actionable discrimination and loses its protected status as speech.

<sup>27</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>28</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 832-56 (1988).

<sup>29</sup> See, e.g., *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973).

controversial than the first. Therefore, it bears emphasizing at the outset that, standing alone, the hurtful impact and limited communicative value of expression is rarely an adequate basis for restricting speech.

The factor does apply, however, in a narrow range of circumstances when it is combined with other factors. Even as stalwart a defender of First Amendment freedoms as Justice Brennan recognized this potential basis for restricting speech. While Brennan ultimately argued, for example, that obscene expression should be protected against suppression, he recognized that the state might legitimately protect unconsenting adults from “obtrusive exposure” to sexually explicit materials.<sup>30</sup> A person’s emotional reaction to erotic expression may be intense and personal. Displays of such power that they cannot be ignored by an unconsenting member of the audience jeopardize the ability of individuals to conceal deeply felt emotional responses from public scrutiny.<sup>31</sup>

The complementary principle to this concern is that the expression producing an intense emotional reaction must be of little communicative value to be subject to restriction. Shouting at a staff member leaving an abortion clinic that he or she “tears babies apart and murders them” may produce an intense, almost involuntary response on the part of the listener. The possibility of such a reaction is less likely to justify restricting this kind of speech, however, because of the political message communicated by the anti-abortion speaker. Prohibiting the vivid display of hard core, but technically not obscene, pornography in a public park among unconsenting adults enjoying a picnic on a Sunday afternoon is more defensible, in part, because of the limited message, if any, intrinsic to this expression.<sup>32</sup>

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<sup>30</sup> *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73, 113 (1973) (Brennan, J., dissenting).

<sup>31</sup> *Id.* at 106-07. The problem with such intrusive exposure to pornography is not that it may offend the unconsenting adults who confront it, but that it provokes personal reactions that the viewer does not wish to experience or display, particularly in a public environment. In that sense, the public distribution of pornography to an unconsenting audience constitutes an invasion of privacy. *Id.*; see *infra* notes 41-42 and accompanying text; see also *TRIBE*, *supra* note 28, at 953-55.

<sup>32</sup> Similarly, offensive as it is, a person deliberately burning an American flag in front of a war veteran and screaming, “[t]his is what I think of the country that fools like you fought for,” is communicating a political message even if an additional purpose of the speaker is to disturb and insult his victim. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that a person who burns the American flag for expressive reasons may not be punished because “a bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). It is far less clear that ideas are being communicated by displaying pornography to people having a picnic for the purpose of disturbing their event.



Third, expressive activity may be restricted if it invades the privacy of the person to whom it is directed. The weight assigned to the protection of privacy interests as a justification for restricting speech depends to a significant extent on the location of the listener. The right to be free of unwanted communications in one's own home is respected far more than a person's interest in not seeing or listening to expression on a public street.<sup>33</sup>

First Amendment case law recognizes both the primacy of privacy interests as well as the locational limitations that reduce this factor's ability to sustain the regulation of speech. Thus, for example, in *Rowan v. United States Post Office Department*,<sup>34</sup> the Supreme Court upheld a federal statute that permitted a homeowner receiving unwanted, sexually explicit advertisements to obtain a post office order requiring the sender to desist from sending additional materials to the protesting addressee.<sup>35</sup> Emphasizing that "a man's home is his castle," the Court noted that even First Amendment guarantees did not give vendors the right "to send unwanted material into the home of another."<sup>36</sup> Similarly, the Court pointed to "the unique nature of the home" in *Frisby v. Schultz*,<sup>37</sup> a case upholding a municipality's ban on residential picketing in front of an individual's house. "The State's interest in protecting the well-being, tranquillity, and privacy of the home" was held to be a value "of the highest order in a free and civilized society," and sufficient to justify a content-neutral restriction on expressive activity.<sup>38</sup>

The narrow boundaries within which an individual's privacy interests will be found to support restrictions on speech were stated in particularly strong terms in *Cohen v. California*.<sup>39</sup> The Court reversed the conviction

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The distinction between low value and high value speech and the distinction between low impact and high impact expression will inevitably involve content discriminatory judgments by decision makers. While one can sensibly discuss and debate important questions about who should make such judgments and what rules should limit the decision maker's discretion, it is pointless to pretend that people can be protected against abusive speech without examining and evaluating the content of what is being said. The telephone harassment cases, *see infra* notes 56-76 and accompanying text, demonstrate this conclusively. *See also* David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825, 853-60 (1991).

<sup>33</sup> *See* Brownstein, *supra* note 26, at 48.

<sup>34</sup> 397 U.S. 728 (1970).

<sup>35</sup> *Id.* at 735-38.

<sup>36</sup> *Id.* at 737-38.

<sup>37</sup> 487 U.S. 474, 484 (1988).

<sup>38</sup> *Id.* at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

<sup>39</sup> 403 U.S. 15 (1971).

of a young man arrested for wearing a jacket in the corridor of a courthouse with a phrase containing a vulgar, four-letter word on its back.<sup>40</sup> In defending its decision, the Court explained:

The mere presumed presence of unwilling listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.” [citing *Rowan*] The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.<sup>41</sup>

While the commitment of the Court to affirming personal privacy as an accepted limit on speech is clear, the rationale for recognizing this interest seems anomalous, particularly when the two most commonly accepted grounds for restricting abusive speech, protecting privacy and prohibiting fighting words, are considered together. In a sense these categories of expression represent almost contradictory interests. If the goal of prohibiting the use of “fighting words” is to avoid an ensuing brawl and the injuries and disorder that will follow, the state is primarily interested in restricting the *public* use of such language. It is in the public arena that “fighting words” can cause the most harm.

The objective of protecting the home against verbal invasions, on the other hand, is focused exclusively on private speech that causes personal harm. Speech intruding into the home can almost never constitute fighting words. The public seldom hears the offensive language, the surrounding environment is un conducive to social disorder, and, indeed, the speaker is rarely in sufficiently close proximity to the listener to make a violent reaction logistically possible. Viewed from this perspective, these two grounds for restricting speech have nothing to do with each other.

It may be, however, that there is more of a connection between protecting privacy interests and prohibiting fighting words than is generally

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<sup>40</sup> *Id.* at 16-17 (the defendant’s jacket bore the words “Fuck the Draft”).

<sup>41</sup> *Id.* at 21.

recognized. Perhaps the unprotected status of fighting words does not rest exclusively on the breach of the peace such language may provoke. The harm resulting from the use of fighting words may include not only the risk of physical damage to persons or property, but the emotional effect of these words on their intended victim as well.

This alternative injury to be avoided involves an emotional reaction so severe that it may be immediately expressed through violence. The victim of fighting words is not simply offended, rather he is confronted with expression that will often, predictably, result in the loss of his self-control. It is that shattering of a person's ability to maintain his public self and to restrain his private emotional responses that constitutes a distinct, unacceptable consequence of fighting words. If fighting words can be prohibited because of this result, then there is a sense in which this category of unprotected speech rests on an interest in preserving personal privacy and autonomy, as well as the need to maintain public order. The unprotected status of fighting words under this analysis is doctrinally linked to the protection provided to the individual against unwanted speech in her home. Both limits on expression are component aspects of a broadly defined interest in protecting the privacy and autonomy of the individual against intolerable intrusion.

Fourth, government may regulate expression to protect the autonomy interest of the person who does not want to listen to what a speaker has to say.<sup>42</sup> This factor is often overlooked by commentators who cite the cases described above and emphasize the limited range of locations in which privacy interests are strong enough to counter freedom of speech.<sup>43</sup> Yet the residential privacy cases make it clear that a fundamental component of the Court's concern for protecting personal privacy in the home is respect for the individual's decision to decline to be the recipient of directed communications. Indeed, it may be fair to argue that the individual's interest in residential privacy that the Court recognizes in these cases is merely a subset of the broader, more varied interest in personal autonomy.

In *Rowan*, for example, the Court acknowledged that allowing householders to demand that no further advertising by mail be delivered to their address might "impede the flow of even valid ideas."<sup>44</sup> That result, however, was acceptable since "no one has a right to press even

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<sup>42</sup> See, e.g., Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U. L. REV. 153 (1972).

<sup>43</sup> See, e.g., Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech": The View From Without and Within*, 53 U. PITT. L. REV. 631, 666-71 (1992).

<sup>44</sup> *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970).

'good' ideas on an unwilling recipient."<sup>45</sup> This principle was expressed even more directly in the *Frisby* decision. The Court stated explicitly that "[o]ne important aspect of residential privacy is protection of the unwilling listener."<sup>46</sup> Similarly, in one older case, *Martin v. Struthers*,<sup>47</sup> the Court struck down a ban on door-to-door soliciting in a community as a violation of the First Amendment, despite the city's argument that it was legitimately attempting to protect the privacy and tranquility of its residents.<sup>48</sup> While a total ban on all solicitation violated the First Amendment, what the city could do consistent with constitutional requirements was to "punish those who call at a home in defiance of the previously expressed will of the occupant."<sup>49</sup> Thus, while residential privacy concerns alone could not justify the suppression of expression, privacy interests combined with the autonomy interest in declining to receive expression outweighed the solicitor's freedom of speech.<sup>50</sup>

### B. *The Relationship Between Privacy, Autonomy, and Speech*

In order to determine the extent to which an individual may be protected against abusive speech in a public setting, it is necessary to carefully analyze the Court's apparent willingness to permit restrictions on unwanted speech that intrude into a person's home. How much of the Court's concerns about protecting the home against unwanted expression are based on the special status of residential privacy and how much are based on other factors that are applicable to more public locations as well? To facilitate the discussion of this question, let us designate the primary participants in an expressive interaction. We will identify A as the speaker, B as an individual who does not want to hear what A has to say, and C as an individual who does want to hear A's expression, or at least wants the opportunity to decide for himself whether A is worth listening to.

It is important to recognize in this kind of a hypothetical that all three participants may assert an autonomy interest that is worthy of respect. A's speech may be of little instrumental value in helping society to resolve important public policy issues, but it is still important as an expression of who A is and how he wants to be understood. B, of course, wants to be left alone, to choose to refuse to participate in the expressive encounter.

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<sup>45</sup> *Id.*

<sup>46</sup> *Frisby v Schultz*, 487 U.S. 474, 484 (1988).

<sup>47</sup> 319 U.S. 141 (1943).

<sup>48</sup> *Id.* at 144.

<sup>49</sup> *Id.* at 148.

<sup>50</sup> In doctrinal terms, the holding of *Martin* is also understood as requiring the state to use the least restrictive alternative in limiting speech to further legitimate state interests.

C insists on being treated as a morally responsible actor capable of deciding whether or not to listen to A without coercive interference. C wants the opportunity to hear what A has to say even if C ultimately decides that A is not worth listening to.<sup>51</sup>

In determining the scope of A's freedom of speech, all three of these competing autonomy interests have to be recognized and reconciled with each other. Obviously, however, it is impossible to provide all three interests complete protection. Under established First Amendment principles, courts have decided that attempts to protect B's autonomy interest in personal privacy must accommodate C's autonomy interest in hearing what A has to say. Thus, if A is communicating to the general public, a group that includes C, and B, a potential part of A's audience, will be terribly offended by what A has to say, the state cannot silence A to protect B. Given the choice between silencing A *and* depriving C of the opportunity to hear A, and asking B to take reasonable steps to withdraw from A's audience, the First Amendment generally prohibits the first option. B is left on his own to avail himself of whatever alternatives are open to him to avoid A's offensive speech. With regard to public expression, the autonomy interests of the unwilling listener, B, are outweighed by the autonomy interests of the potentially willing listener, C, and the free speech rights of A.

The substantial weight assigned to C's interest in receiving speech in resolving a conflict between A and B can be illustrated by the *Rowan* case discussed previously. Home resident B does not want to receive A's sexually explicit advertisements which are mailed to a large list of potential customers. To enable B to avoid confronting this material for even a brief period of time in his home, the state could ban the distribution of A's expression. Such a regulation would violate the First Amendment, however, since it would deprive the C's of the world of the opportunity to evaluate A's expression. B's privacy interests in his home cannot justify a law that would prohibit A from communicating to a potentially receptive audience.

While home resident B cannot escape from receiving that first unwanted communication from A, B can have his autonomy and privacy interests protected to some significant extent by forcing A to drop B from his mailing list. In this context, A can be prohibited from communicating with B, a person who has explicitly rejected receiving any further expression from A, without seriously interfering with A's ability to communicate with C or other third parties. Since a mechanism exists, by deleting B's name from A's mailing list, and essentially factoring C's

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<sup>51</sup> See Fried, *supra* note 25, at 233-41.

interests out of the equation, the Court in *Rowan* is asked to balance A's interests against B's interests directly. The result is that B's interests are protected.

What is less clear is why B's interests are protected in *Rowan*. How critical to the Court's conclusion is the fact that the expression at issue was directed to B's home? Alternatively, how much of the decision can be grounded on B's interest in refusing to receive further communications from A in a situation in which there is no C, no potentially willing recipient of A's speech whose autonomy rights would conflict with B?

That question cannot be answered easily in many situations because of the difficulty of disentangling the competing interests at stake. Thus, for example, an attempt to apply a *Rowan*-type regulation to the distribution of potentially offensive leaflets on a street corner, by allowing a pedestrian to tell the distributor not to attempt to give her a leaflet again, would almost certainly violate the First Amendment. That result can be explained by pointing to locational differences between the two situations. *Rowan* involves mail to a person's home, a private location, while the leafleting occurs on a public sidewalk.

The same result also follows, however, from the recognition that protecting B's autonomy interests cannot justify prohibiting A from communicating to C, a potentially willing listener whose autonomy interest in being allowed to read A's expression also deserves respect. In the leafleting situation, unlike direct mail activities in which names can be deleted from mailing lists, it would place an intolerable burden on the distributor to require him to be able to remember and identify each pedestrian who indicated that they did not want to receive leaflets in the future. Thus, in the leafleting example, the conflict between B and C's autonomy interests is unavoidable and continuing, while these competing interests are effectively reconciled when B is permitted to demand that A discontinue mailings to B's home.

The problem that is the focus of this Article requires an answer to this question. When A, a bigot, uses racial epithets to insult B, a black student walking to class, A is not attempting to communicate with the general public, or even to a group. A only wants to talk to B. There is no C, no potentially willing listener to complicate the expressive interaction. If B does not want to talk to A in this situation, the conflict between A's right to speak and B's autonomy interest in not listening to A is presented in its starkest form. Further, if B is not in his home, there is no locational privacy dimension to be added to B's autonomy interests in attempting to justify the abridgement of A's speech rights.

While recent Supreme Court decisions appear to accept the idea that evaluating restrictions on expression targeted at an individual involves a qualitatively different mix of speech and autonomy interests than reviewing

public speech regulations, they do not provide a functional framework for the balancing of those interests. In the *Frisby* case, in upholding a city's ban on residential picketing directed at a specific homeowner, the Court clearly recognized the special nature of this kind of communication, of "speech directed primarily at those who are presumptively unwilling to receive it."<sup>52</sup> Justice O'Connor, writing for the majority, explicitly noted that the type of picketing prohibited, anti-abortion protests at the home of a doctor who performed abortions, did "not seek to disseminate a message to the general public," but instead sought "to intrude upon the targeted resident, and to do so in an especially offensive way."<sup>53</sup> Still, focusing as it does on a residential picketing ban, the *Frisby* decision only illustrates again the common overlap of privacy and autonomy interests. It does not suggest how much value would be assigned to the latter interest alone if it is asserted as the basis for restricting speech.

Despite this ambiguity, it seems certain that each of these two factors, privacy and autonomy, must be evaluated by the courts when they are engaged in the evaluation of speech regulations. While the Court's language in some cases, such as *Cohen v. California*,<sup>54</sup> suggests that only the strongest kind of privacy interests could support the prohibition of offensive speech, it must be remembered that the message on Mr. Cohen's jacket was expressed to the general public. Some people may have been offended by Mr. Cohen's message, but other people may have approved of both its content and its language. The *Cohen* case did not involve abusive speech targeted at a particular individual.<sup>55</sup> Speech of that kind may also ultimately be protected against prohibition except when substantial privacy interests are at stake, but for a court to reach that conclusion it must carefully consider the autonomy interests of the victim of such expression, as well as the other factors discussed in this Article, in a way that the Court in *Cohen* did not. It simply cannot be assumed that Mr. Cohen's conviction would have been reversed if he had directed specific, abusive insults at racial minorities and women using the public courthouse.

### III. HATE SPEECH AND HARASSMENT

The necessity for applying the aforementioned factors in any evaluation of the constitutionality of a campus regulation prohibiting the use of racial epithets, as well as the utility in doing so, can be demonstrated by

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<sup>52</sup> *Frisby v Schultz*, 487 U.S. 474, 488 (1980).

<sup>53</sup> *Id.* at 486.

<sup>54</sup> 403 U.S. 15 (1971).

<sup>55</sup> *Cohen*, 403 U.S. at 20.

examining judicial decisions reviewing anti-harassment laws. Focusing on anti-harassment regulations serves several important objectives. The prohibition of harassment, particularly telephone harassment, is one of the most conventional and universally respected restrictions on speech. There have been dozens of court cases involving constitutional challenges to telephone harassment statutes, and the overwhelming majority of those decisions have upheld the challenged laws.<sup>56</sup>

In addition, in most cases of telephone harassment, the law cannot be defended on the grounds that it is narrowly addressed to the suppression of fighting words. Because of the logistics of the activity, there is virtually no possibility that a harassing phone call will result in an immediate, violent confrontation.<sup>57</sup> Thus, some other justification for restricting speech must be available to explain judicial support for this type of regulation. Furthermore, the language used in harassment statutes involves terminology that seems to be as vulnerable to claims of vagueness and overbreadth as the language employed in campus hate speech codes. Telephone harassment statutes typically prohibit speech intended to annoy, torment, embarrass, disturb, and, of course, harass the recipient of the call.<sup>58</sup>

Finally, and perhaps most importantly, even prominent proponents of freedom of speech recognize the legitimacy of campus codes that prohibit harassment based on race or sex. The Northern and Southern California affiliates of the American Civil Liberties Union, for example, have adopted

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<sup>56</sup> See, e.g., *State v. Gattis*, 730 P.2d 497, 501 n.1 (N.M. Ct. App. 1986) (citing decisions in 21 states and 2 Federal circuits upholding telephone harassment statutes against constitutional challenge); see also *infra* notes 59-75 and accompanying text. *But see Kramer v. Price* 712 F.2d 174 (5th Cir. 1983) (striking down Texas telephone harassment statute as unconstitutionally vague); *Walker v. Dillard*, 523 F.2d 3 (4th Cir. 1975), *cert. denied*, 423 U.S. 906 (1975) (striking down Virginia telephone harassment statute as overbroad); *People v. Klick*, 362 N.E.2d 329 (Ill. 1977) (stating that an Illinois telephone harassment statute is unconstitutionally overbroad).

After the Second Circuit upheld Connecticut's telephone harassment statute in *Gormley v. Director, Conn. State Dep't of Probation*, 632 F.2d 938 (2d Cir. 1980), the petitioner sought Supreme Court review, but her petition for certiorari was denied. *New York v. Howard*, 449 U.S. 1023 (1980). Justice White dissented from that decision, arguing that telephone harassment statutes raised significant overbreadth concerns. *Id.* at 1023-25.

<sup>57</sup> See, e.g., *Walker v. Dillard*, 523 F.2d 3, 5 n.7 (4th Cir. 1975), *cert. denied*, 423 U.S. 906 (1975); *Yates v. Commonwealth*, 753 S.W.2d 874, 875 (Ky. Ct. App. 1988); *Seattle v. Huff*, 767 P.2d 572, 574 (Wash. 1989) (en banc).

<sup>58</sup> See, e.g., *People v. Taravella*, 350 N.W.2d 780, 782 (Mich. Ct. App. 1984) (upholding state statute which provided: "(1) Any person is guilty of a misdemeanor who maliciously uses any service provided by a communications common carrier with intent to terrorize, frighten, intimidate, threaten, harass, molest or annoy any other person, or to disturb the peace and quiet of any other person by any of the following: . . . (d) using any vulgar, indecent, obscene or offensive language or suggesting any lewd or lascivious act in the course of a telephone conversation.").



a policy on campus hate speech codes which provides in part that, “[t]he intentional harassment of a person by another person or persons is not constitutionally protected.” The ACLU goes on to explain that, “[a]lthough ‘harassment’ is an imprecise term, it defines a type of conduct which is legally proscribed in many jurisdictions when it is directed at a specific individual or individuals and when it is intended in some measure to frighten, coerce, or unreasonably harr[y] or intrude upon its target.”<sup>59</sup>

Not only is this definition of harassment unclear; its lack of clarity suggests uncertainty as to the constitutional principle on which it is grounded. Exactly which first amendment theory recognizes the unprotected status of frightening, coercive, unreasonably harr[y]ing or intrusive speech? If there is a principled basis for prohibiting verbal harassment of the kind that the ACLU describes, the explanation of that principle must extend beyond a list of problematic effects. Similarly, there is no simple rule on which to ground the judicial receptivity to upholding telephone harassment statutes. Instead, it is necessary to carefully examine the decisions upholding these laws against constitutional challenge to understand the doctrinal foundation on which they are based.

#### *A. The Judicial Defense of Telephone Harassment Statutes*

Not surprisingly, many judicial decisions attempt to circumvent or avoid the difficult constitutional problems raised by anti-harassment laws. Thus, some courts contend that telephone harassment statutes do not regulate speech at all; instead, harassment laws are interpreted as being directed at the *conduct* of making a phone call with the intent to disturb the recipient of the call.<sup>60</sup> While that argument might have some merit in the situation in which the caller does not communicate with his victim, but simply uses the ringing of the phone to annoy another person, it makes little sense in the majority of cases where the content and language of the conversation between the speaker and listener is the primary basis for the

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<sup>59</sup> AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CAL. AND NORTHERN CAL., POLICY CONCERNING RACIST AND OTHER GROUP-BASED HARASSMENT ON COLLEGE CAMPUSES 2 (1991).

<sup>60</sup> See, e.g., *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988), *cert. denied*, 488 U.S. 984 (1988); *Gormley v. Director, Conn. State Dep't of Probation*, 632 F.2d 938, 941-42 (2d Cir. 1980), *cert. denied*, 449 U.S. 1023 (1980); *Baker v. State*, 494 P.2d 68, 70 (Ariz. Ct. App. 1972); *State v. Elder*, 382 So. 2d 687, 690 (Fla. 1980); *People v. Taravella*, 350 N.W.2d 780, 783 (Mich. Ct. App. 1984); *State v. Camp*, 295 S.E.2d 766, 768 (N.C. Ct. App. 1982).

court concluding that harassment has occurred.<sup>61</sup> In reality, in most cases “oral communication” is the “conduct” being punished, and expression, ugly and harmful as it may be, “is an essential element of the crime.”<sup>62</sup>

Put simply, to argue that telephone harassment statutes restrict conduct, not speech, is to distort the meaning of harassment and the nature of the offense. The content of an allegedly harassing phone call is not incidental to the determination that the call constitutes harassment. The content of the phone call is often what makes the activity harassment. It is the language used, the message conveyed, and the anticipated impact of the speech that distinguishes between a benign and a harassing phone call.<sup>63</sup> One can

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<sup>61</sup> Thus, in *Thorne*, for example, the court indicated that the defendant began the telephone calls on which his conviction was based by asking legitimate questions of university officials. As the conversations progressed, however, the defendant’s “language and tone became harassing” as he referred to university officials as “racist pigs” and “bigot[s].” *Thorne*, 846 F.2d at 243. The use of this “harassing language” was held to justify the defendant’s conviction. *Id.* at 243-44. Similarly, in *Gormley*, the defendant was convicted of a criminal offense for making a single phone call to the restaurant at which the complainant worked. In the course of that phone call, the defendant described the complainant as a “tramp,” stated that the complainant’s mother was a whore who had gone to bed with the defendant’s husband, and added that the “complainant’s family were a bunch of nuts and were all under psychiatric care.” *Gormley*, 632 F.2d at 940. The court concluded that an evaluation of the content of the defendant’s remarks was “indispensable to a proper determination” of whether sufficient intent to harass had been proven. *Id.* at 943.

<sup>62</sup> See, e.g., *Thorne*, 846 F.2d at 245 (Butzner, J., dissenting) (“Conversation is an essential element of the crime the statute punishes.”); *Gormley*, 632 F.2d at 944 (Mansfield, J., concurring) (“Labelling [a telephone harassment] statute as one prohibiting ‘conduct’ does not resolve this constructional dilemma [since] in most cases the ‘conduct’ punished is . . . oral communication . . . .”); *State v. Thorne*, 333 S.E.2d 817, 824 (W. Va. 1985), *cert. denied*, 474 U.S. 996 (1985) (Miller, J., dissenting) (stating that telephone harassment cases in which a court upholds a statute on the grounds it regulates conduct, not speech, “have a sophistry that I find repugnant where, as here, legitimate communication ensues”).

<sup>63</sup> See *supra* note 58. Even a carefully worded harassment statute that defines the offense as intentionally harassing another person “by causing the telephone of the other person to ring, such caller having no communicative purpose,” see, e.g., *State v. Hibbard*, 823 P.2d 989, 990 (Or. Ct. App. 1991), must be evaluated as a restriction on speech, not conduct, if the conversation between defendant and complainant is “the only evidence” of harassing intent. A critical element of the offense in such a case is the determination that the defendant’s expression lacked communicative purpose, a conclusion that must be recognized as raising freedom of speech concerns. Otherwise, virtually any speech restriction could avoid first amendment review through careful drafting. A law prohibiting one person from “approaching another person with the intent to harass that person” could be upheld as a constitutional regulation of conduct despite the fact that it was routinely applied to expressive activity, as is true with telephone harassment statutes.

reasonably argue that there is a conduct dimension to this expressive activity, but that does not alter the fact that it can be the speech being communicated, not the ringing of the telephone, that justifies criminal sanction.

Other courts acknowledge that telephone harassment statutes abridge speech, but argue that these laws are constitutional because the substantial privacy interest of the listener in her home outweighs the speaker's first amendment right to communicate with the listener in that location.<sup>64</sup> Protecting the privacy of the listener is certainly one factor that helps to justify upholding harassment statutes, but that objective by itself cannot successfully explain the relevant case law. Residential privacy alone has never been accepted as a sufficient basis for shielding the individual at home from all annoying or disturbing communications. Thus, Colorado's harassment statute, which restricted both telephone calls and mail, could not constitutionally be applied to punish an anti-abortion activist who sent graphic pictures of aborted fetuses along with anti-abortion literature to hundreds of homes.<sup>65</sup>

Moreover, most harassment statutes are not limited to calls to a person's home. People have been enjoined from or convicted for making harassing calls to places of employment, various business enterprises, government offices, public universities, and police stations.<sup>66</sup> Obviously,

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<sup>64</sup> See, e.g., *People v. Weeks*, 591 P.2d 91, 95-97 (Colo. 1979) (en banc) ("The First Amendment does not extend to any person the right to use his power of speech as a battering ram to destroy the tranquility and repose of another person's home."); *State v. Elder*, 382 So. 2d 687, 691-93 (Fla. 1980); *State v. Koetting*, 616 S.W.2d 822, 826-27 (Mo. 1981) (en banc); *State v. Kipf*, 450 N.W.2d 397, 406-09 (Neb. 1990).

<sup>65</sup> See *Bolles v. People*, 541 P.2d 80, 83-84 (Colo. 1975) (en banc) (stating that the goal of protecting the right of privacy in the home does not justify prosecution of distributor of graphic anti-abortion materials). See generally *Martin v. Struthers*, 319 U.S. 141, 150 (1943) (Murphy, J. concurring) (noting that the tension between constitutional rights of expression and religious liberty and the state's interest in protecting residential privacy should be resolved by "accommodation" rather than "repression"); *People v. Klick*, 362 N.E.2d 329, 332 (Ill. 1977) (stating that a right of privacy in the home only justifies prohibition of intolerably intrusive expressive activity).

<sup>66</sup> See, e.g., *Gormley*, 632 F.2d at 940 (regarding calls to restaurant where complainant was employed); *State v. Hagen*, 558 P.2d 750 (Ariz. Ct. App. 1976) (regarding calls to chief of police); *Town of Brookline v. Goldstein*, 447 N.E.2d 641 (Mass. 1983) (upholding injunction against harassing calls to government offices upheld); *People v. Taravella*, 350 N.W.2d 780 (Mich. Ct. App. 1984) (regarding a call to salesperson at furniture store); *State v. Finance Am. Corp.*, 440 A.2d 28 (N.J. Super. Ct. App. Div. 1981) (regarding a call to cashier supervisor at work); *People v. Smith*, 392 N.Y.S.2d 968 (N.Y. App. Term. 1977), cert. denied, 98 S. Ct. 393 (1977) (regarding calls to police department); *State v. Camp*, 295 S.E.2d 766 (N.C. Ct. App. 1982) (regarding calls to sheriff's department); *State v. Hibbard*, 823 P.2d 989 (Or. Ct. App. 1991) (regarding calls to 9-1-1 emergency service); *Collection Consultants, Inc. v. State*, 556 S.W.2d 787 (Tex.

privacy interests at these public locations must stand on a different and lower order of value than an individual's home, yet the convictions of callers to such locations have been sustained.

It is also argued that by limiting the coverage of harassment statutes to calls that are *intended* to annoy, torment, threaten, or harass the listener, the law can avoid violating the First Amendment.<sup>67</sup> An intent requirement, however, is hardly a constitutional cure-all for restrictions on speech. It does remedy some of the vagueness and overbreadth concerns that would otherwise be directed at these statutes. An intent requirement precludes the application of a harassment law to innocent remarks that unexpectedly offend the listener.<sup>68</sup> At best, that result only establishes that an intent requirement may be a necessary condition of a constitutional anti-harassment statute; it does not make an intent to annoy or disturb requirement sufficient grounds for upholding the regulation of speech.<sup>69</sup>

Indeed, the case law includes an almost limitless list of hypothetical examples of intentionally annoying telephone calls that are clearly protected against restriction by the First Amendment. These examples include calls by angry parents to a college student with failing grades, angry and dissatisfied consumers complaining to the provider of a defective good or service, a businessperson challenging the apparent

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Crim. App. 1977) (regarding calls to complainant at his office); *Perkins v. Commonwealth*, 402 S.E.2d 229 (Va. Ct. App. 1991) (regarding calls to pharmacy); *State v. Thorne*, 333 S.E.2d 817 (W. Va. 1985) (regarding calls to officials at public university). See generally *State v. Koetting*, 691 S.W.2d 328 (Mo. Ct. App. 1985) (applying telephone harassment statute applies to calls directed to specific individual at home or business).

<sup>67</sup> See, e.g., *United States v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978) ("Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives."); *State v. Elder*, 382 So. 2d 687, 691 (Fla. 1980); *State v. Thompson*, 701 P.2d 694, 697-98 (Kan. 1985).

<sup>68</sup> See, e.g., *Walker v. Dillard*, 523 F.2d 3, 5 (4th Cir. 1975) (stating that the provisions of harassment statute are so broad without intent requirement that they might apply to "[a]n intemperate expression of understandable and wholesome indignation"); *Radford v. Webb*, 446 F. Supp. 608, 610-11 (W.D. N.C. 1978); *People v. Taravella*, 350 N.W.2d 780, 784 (Mich. Ct. App. 1984); *State v. Koetting*, 691 S.W.2d 328, 331 (Mo. Ct. App. 1985); *State v. Koetting*, 616 S.W.2d 822, 824-25 (Mo. 1981).

<sup>69</sup> While an intent requirement reduces the vagueness of a telephone harassment statute, it does not eliminate the problem since "the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague." *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983). Requiring an intent to annoy or harass does not adequately explain what a person with such an intent may not do. *State v. Blair*, 601 P.2d 766, 768 (Or. 1979).

Vagueness aside, it is difficult to argue that the state may prohibit all telephone calls intended to annoy, disturb, or harass the recipient of the call without violating the First Amendment. See *infra* note 70.

dishonesty of a competitor or protesting the failure of a supplier to meet a contractual obligation, a colleague demanding the repayment of a debt, disgruntled or irate citizens challenging the conduct of public officials, political activists attempting to arouse a complacent constituency, neighbors demanding that a barking dog be silenced, and tenants insisting that adequate repairs be provided to their apartment by the lethargic landlord.<sup>70</sup> Many of these examples are posed by dissenting or concurring judges who are almost never successfully responded to by a judicial majority committed to upholding the challenged statute.<sup>71</sup> Nor is it likely that any proffered answer would be satisfactory since the First Amendment so clearly protects expression intended to criticize or provoke people in order to influence their behavior.<sup>72</sup>

It is easier to recognize the problem presented by this issue than it is to resolve it. Some states attempt to do so by explicitly excluding from the coverage of their telephone harassment statutes any phone call that is intended to serve a legitimate purpose on the theory that a law directed exclusively at expression of very limited communicative value has a stronger claim to constitutional acceptance.<sup>73</sup> The objective of this kind of

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<sup>70</sup> See, e.g., *Gormley*, 632 F.2d at 944 (Mansfield, J., concurring); *State v. Elder*, 382 So. 2d 687, 689 (Fla. 1980); *People v. Klick*, 362 N.E.2d 329, 331-32 (Ill. 1977); *Blair*, 601 P.2d at 768 (Or. 1979); *Kramer v. State*, 605 S.W.2d 861, 874 (Tex. Ct. App. 1980) (Roberts, J., dissenting); *State v. Thorne*, 333 S.E.2d 817, 824-25 (W. Va. 1985) (Miller, C.J., dissenting); *State v. Dronso*, 279 N.W.2d 710, 714 (Wis. Ct. App. 1979).

<sup>71</sup> See *supra* note 70.

<sup>72</sup> See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (stating that speech is protected even though it is "provocative and challenging," has "profound unsettling effects," or "stirs people to anger"); *Bolles v. People*, 541 P.2d 80, 83 (Colo. 1975) (explaining that the "absurdity" of contending that all speech intended to annoy or alarm the listener can be prohibited "is patently obvious to anyone who envisions our society in anything but a state of languid repose"); *State v. Kipf*, 450 N.W.2d 397, 407 (Neb. 1990) (citing *Bolles* for the principle that "a function of free speech under our system of government is to invite dispute, including unsettling, disturbing, arousing, or annoying communications.").

<sup>73</sup> See, e.g., *United States v. Darsey*, 342 F. Supp. 311, 313-14 (E.D. Pa. 1972) (stating that to avoid restricting normal, but heated, communication, Congress drafted federal telephone harassment statute to punish only calls made "solely to harass" recipients); *Elder*, 382 So. 2d at 691 (construing harassment statute not to apply to calls that "serve a legitimate communicative or informative function"); *Yates v. Commonwealth*, 753 S.W.2d 874, 875 (Ky. Ct. App. 1988) (holding that harassment statute only applies to calls that serve "no purpose of legitimate communication"); *State v. Gattis*, 730 P.2d 497, 501 (N.M. Ct. App. 1986) (holding that the requirement that harassing calls must be made "maliciously" excludes valid, but annoying calls made with "just cause or excuse"); *Bachowski v. Salamone*, 407 N.W.2d 533, 538-39, 542 n.4 (Wis. 1987) (limiting harassment statute to acts "which serve no legitimate purpose").

a provision is understandable; indeed, some such limitation may be a constitutional necessity. If a harassment statute is to withstand first amendment challenge, some distinction must be drawn between low value, high impact, harmful speech, and legitimate critical expression. The difficulty arises in trying to define this constraint with sufficient precision to avoid concerns about vagueness and overbreadth that are inherent in a "no legitimate purpose" standard.<sup>74</sup> One way that states have tried to do that is to describe with some particularity certain kinds of speech, sexually explicit, vulgar, or indecent, that are considered to have limited value for communicative purposes when they are directed at a non-consenting listener.<sup>75</sup>

An alternative approach is to focus on the extent to which the allegedly harassing calls are repeated.<sup>76</sup> Intuitively, frequently repeated phone calls represent especially convincing evidence that the defendant's expressive activity constitutes telephone harassment. If one person phones an alleged victim twenty or thirty times a week, a judge or jury will have little difficulty determining that such behavior is harassment and unprotected by the First Amendment unless there are extraordinary extenuating circumstances to justify the caller's activity.<sup>77</sup>

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<sup>74</sup> See, e.g., *Bolles*, 541 P.2d at 83 (holding that the phrase "without any legitimate purpose" is too vague to withstand first amendment review since it provides "no ascertainable standards" as to how that determination is to be made).

<sup>75</sup> See, e.g., *Darsey*, 342 F. Supp. at 313 (applying federal statute punishing telephone calls that include "obscene, lewd, lascivious, filthy or indecent" comments); *State v. Hagen*, 558 P.2d 750, 753 (Ariz. Ct. App. 1976) (holding that "[b]y specifying the *intent* with which the call must be made and the nature of the language prohibited [obscene, lewd or profane expression], the statute clearly demonstrates that the prohibited activities find no protection under the First Amendment."); *State v. Jaeger*, 249 N.W.2d 688, 689 (Iowa 1977) (prohibiting "obscene, lewd or profane" language); *People v. Taravella*, 350 N.W.2d 780, 782 (Mich. Ct. App. 1984) (prohibiting "vulgar, indecent, obscene or offensive language"); *Kipf*, 450 N.W.2d at 409 (Neb. 1990) (holding that the state has a compelling interest in protecting people from "sexual speech which intrudes upon the privacy of innocent citizens, not for the purpose of communicating any thought, but for the purpose of causing mental discomfort by conjuring up repugnant sexual images").

<sup>76</sup> See, e.g., *Darsey*, 342 F. Supp. at 313 (stating that violating federal statute requires that phone calls must be solely to harass recipient and must be repeated); *Constantino v. State*, 255 S.E.2d 710, 712 (Ga. 1979) (prosecuting defendants for telephoning complainants repeatedly to harass them); *State v. Meunier*, 354 So. 2d 535, 539 (La. 1978) (charging defendants with making repeated phone calls in a manner reasonably expected to harass the recipient).

<sup>77</sup> See, e.g., *United States v. Lampley*, 573 F.2d 783, 786 (3d Cir. 1978) (reporting that defendant "unleashed a barrage of incessant and subsequently abusive phone calls," on the average of 10 to 12 per week); *People v. Hernandez*, 231 Cal. App. 3d 1376, 1380 (Cal. Ct. App. 1991) (80 phone calls within a two week period); *State v. Camp*, 295 S.E.2d 766, 767-69 (N.C. App. 1982) (stating that the "content and number" of the 500

This commonsense intuition requires some explanation, however. Nothing in the First Amendment suggests, after all, that a person's freedom of speech is intrinsically limited to saying something only once. Why should a statement lose the constitutional protection it receives when it is first stated simply because it is repeated to the same audience?

### *B. Repetition as a Component of Harassment*

Repetition seems to justify the conclusion that expression is harassment and unprotected for three reasons. To begin with, the more a statement is repeated, the more doubtful we become that the speaker's purpose involves the communication of information or opinion. Even highly emotional criticism loses its persuasive force over time, although it may retain its ability to disturb and annoy. Thus, excessive repetition suggests that the person placing the phone calls does not intend his expressive activity to serve any communicative function that deserves respect or protection. Rather, the repeated calls are intended to be nothing more than bare, verbal abuse.

Similarly, while repeated phone calls are still technically communicative in nature, they are of little value in objective terms, regardless of their intent. Whatever message the caller hoped to communicate has already been received. While repetition can demonstrate the intensity of the caller's conviction or emotion, and his commitment to influencing the person receiving the call, the marginal reinforcement of that intensity will eventually be all but totally diluted as the number of calls increases. Ultimately, the very limited communicative value remaining in the content of the call is easily outweighed by the harm being inflicted on the listener.<sup>78</sup>

Finally, repeated phone calls almost always involve a listener who has indicated in unmistakable terms that they do not want to continue to be spoken to by the person placing the call.<sup>79</sup> A person's interest in avoiding

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phone calls placed by defendant demonstrate that his activities were not protected by First Amendment).

<sup>78</sup> Justice Stevens seemed to adopt this analysis in discussing the constitutionality of a ban on residential picketing applied to anti-abortion protestors at the home of a doctor who performed abortions. Stevens noted that "picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family." *Frisby v. Schultz*, 487 U.S. 474, 498 (1988) (Stevens, J., dissenting).

<sup>79</sup> See, e.g., *State v. Koetting*, 691 S.W.2d 328, 330 (Mo. 1985) (involving defendant who called complainant 11 or 12 times despite repeated requests that the calls be stopped); *Kipf*, 450 N.W.2d at 397, 402 (Neb. 1990) (involving defendant who

communication from another, like a person's interest in residential privacy, is not absolute. Critical and disparaging comments may be painful to hear, but such expression has recognized value even if it is repeated.<sup>80</sup> An individual's autonomy interest in not hearing criticism of her behavior will not typically justify state regulations preventing a speaker from calling someone back to continue telling them why her conduct should change.<sup>81</sup>

Still, the autonomy interest in not being spoken to, or in not receiving an unwanted telephone call, is another factor to consider in determining whether speech interests are outweighed by legitimate regulatory concerns. As the communicative value of the speaker's expression declines through repetition, the disturbance and harm resulting from repeated calls increase. Eventually, the conjunction of the listener's autonomy interests, the limited value of the speaker's expression, and the harm caused to the listener justify the suppression of speech and the punishment of additional calls as harassment.

The above discussion concerning the importance of repetition in determining that speech constitutes harassment is based on the assumption that the expression at issue had some claim to legitimacy in its initial utterance. Obviously, however, not all harassment prosecutions involve such ostensibly legitimate or valuable expression and they do not all require a significant number of repeated calls to sustain a conviction. Someone who disturbs a woman at three in the morning with a phone call

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"snickered" at request that he stop calling complainant); *State v. Gattis*, 730 P.2d 497, 504 (N.M. Ct. App. 1986) (involving defendant who ignored repeated requests to stop calling complainant).

<sup>80</sup> The Chief Justice of the West Virginia Supreme Court argued this point with particular clarity in his dissenting opinion in *Thorne*. The effect of the majority's decision to construe the state's telephone harassment statute to apply to *all* repeated phone calls made with an intent to harass, he explained:

would be to invite prosecution for any type of persistent telephone calls by persons who have legitimate objectives in mind. Certainly, I cannot conceive that the legislature intended to chill the right of our citizens to complain to a neighbor about his barking dog or his loud stereo and make repeated calls if he is rebuffed. Nor should he be fearful of repeatedly calling his landlord about the failure to correct conditions or to a repairman or merchant who has made inadequate repairs or has sold defective merchandise. A lethargic bureaucracy or business will hardly ever respond to one telephone call. Even if the legislature so intended, it could not do so under First Amendment principles.

*State v. Thorne*, 333 S.E.2d 817, 824-25 (W. Va. 1985) (Miller, C.J., dissenting).

<sup>81</sup> Because of its nature and purpose, critical speech intended to change the listener's behavior transcends the narrow category of targeted vilification. It is part of the domain of persuasive, public discourse, at least when it is initially expressed, and as such it receives stringent first amendment protection. *See supra* notes 2-7 and accompanying text; *see also infra* notes 86-90 and accompanying text.



filled with vulgar sexual ravings may be guilty of harassment on the basis of that call alone.

Such a restriction on speech is justified in the same way that restrictions on repeated phone calls are justified. The critical point is that the same factors that justify restricting speech in the context of repeated phone calls can be demonstrated to exist in other situations. The single late night sexually abusive phone call is determined to have little value as expression and is understood to have a particularly powerful and harmful impact on the recipient of the call. Furthermore, society recognizes presumptively that this kind of communication is undesired. Women do not have to inform each caller individually that they do not want to receive this kind of communication. Telephone harassment statutes make that point for all women as a preemptive assertion of their autonomy interest in not being subjected to verbal abuse.

### C. *Analogizing Telephone Harassment at Home to Hate Speech on Campus*

Even if the constitutionality of telephone harassment statutes can be persuasively defended and explained by using the multifactor analysis proposed in Part I of this Article, the more general utility of this model is not fully established. In particular, it remains to be determined whether this analysis of telephone harassment can be extended to apply to the regulation of hate speech at public universities. The most immediate analogy seems easy to accept. A middle of the night phone call filled with racial epithets to a black student in her dormitory room should constitute harassment. That analogy is arguably limited in its scope, however, by the especially disturbing time at which the call occurs, and, more importantly, by the hate message being directed to the student's residence, the location at which an individual's privacy interests are recognized by the case law to be the most deserving of protection.<sup>82</sup>

If we change these variables, however, a different analogy must be considered. Assume a minority student, B, is followed around campus during the day by another student, A, who continually chants racial epithets at his victim, despite repeated requests from B that he does not want to listen to A's speech. Surely that behavior constitutes actionable harassment, despite the less problematic time and place in which it occurs, for all the reasons that repeated annoying telephone calls are sanctionable.<sup>83</sup> The speech is of limited value, it is extremely disturbing and

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<sup>82</sup> See Brownstein, *supra* note 26, at 48; Massey, *supra* note 3, at 176-77.

<sup>83</sup> See generally Haiman, *supra* note 42, at 183-84, 193-94.

harmful, and it violates the autonomy interest of the victim in B's not being left alone as he requested.

The question then arises whether the restriction of continuous or repeated insults can be extended to cover a single event, A walking up to B and insulting him directly with racial epithets. I suggest that there is a strong argument that it can. Remember that repeated expressive activity is not some magic talisman that nullifies the force of the First Amendment. Rather, repeated expressive activity constitutes unprotected harassment because of a multi-factor analysis that justifies restrictions on speech in that circumstance. If a similar analysis applies with equal force in the different circumstance of a single harassing event, speech should also be subject to restrictions in that distinct context. Consider how the multi-factor analysis applies to our example. When A walks up to B and insults him with racial epithets, A is not engaging in public discourse. This is private expression that requires B as a particular individual to be the recipient of A's hate speech. Any claim that A's insults should be construed to be public expression because A expects others to witness his expressive activity must be categorically rejected. Whatever A's free speech rights may be, he has no right to conscript B into participating in the communication of a message to third parties against B's wishes. A cannot transform B's status from the recipient of A's private speech into an unwilling actor in some kind of public performance that A is orchestrating.<sup>84</sup>

Moreover, there is an additional, corollary, but equally important privacy dimension to the hate speech that A directs toward B. Because A is engaging in private discourse in a public setting, B's emotional response to this verbal assault is exposed to public scrutiny. Certainly this aspect of personal autonomy, the ability to control the exposure of one's deeply felt, personal feelings, is as substantial a "privacy" interest as is the protection of a safe location from expressive intrusions. Just as the open display of obscene materials can invade the privacy of individuals by forcing them to react to powerful stimulation under the eyes of others,<sup>85</sup> the public but personalized use of hate speech violates core privacy interests of the victim of such a verbal assault.<sup>86</sup>

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<sup>84</sup> The public harassment of a person does not become protected public discourse because a crowd is invited to witness the speaker's taunts and the victim's discomfort.

<sup>85</sup> See *supra* notes 30-31 and accompanying text.

<sup>86</sup> Because the distinction between what is public and private for first amendment purposes is slippery and multi-faceted, and because these terms have other, conventional meanings, the words "public" and "private" must be used with considerable care. Targeted ethnic insults constitute private discourse because they are addressed to a single individual or small group, they are not intended to persuade the listener of their truth or to change his behavior, and they do not involve matters of public concern. While these insults may be expressed in a public setting and may abridge the listener's privacy

The deliberate use of racial epithets to insult a person is high impact speech for other reasons. Hate speech based on race or ethnicity or gender is typically more hurtful and painful to the listener than are other types of generic insults. The literature describing the experience of being victimized by this kind of speech is extensive and convincing.<sup>87</sup>

The hurtful effect of targeted hate speech does not justify its prohibition by itself, however. The impact of such speech and the privacy implications of its expression in our example are only two of the relevant factors to consider. We must also evaluate a third factor and argument. Should the state wait to intervene until it is clear that B does not want to hear what A has to say? If we wait until B makes it absolutely clear that he does not want to continue to receive A's communications, and A's insulting language is nonetheless repeated, then we mitigate the difficult problem of identifying beforehand the precise speech that is to be prohibited as harassment. B's autonomy interests, after all, include both the right to be left alone and the right to decide what he or she is willing to hear.

Waiting until expression is repeated in defiance of B's insistence that he be left alone is a useful check on overly zealous restraints on expression. It is not clear that this is an essential element of an anti-harassment policy, however. Certain comments are so obviously intended to be communicated despite the listener's aversion to hearing them that it makes no sense to insist that the speaker be properly informed that the listener does not want to hear them again. As was true of the sexually degrading phone call, some speech can be identified by its content and context as constituting harassment even by way of a single utterance. If such a category of objectively unwanted expression exists, as the telephone harassment cases suggest, surely it is self-evident that the insulting use of racial epithets can also be classified as "speech directed primarily at those who are presumptively unwilling to receive it."<sup>88</sup>

Despite the arguments above, the case for prohibiting A's hate speech to B is not yet complete or convincing. Applying the factors already discussed still makes it too easy to suppress unpleasant speech. The fact remains that there is some insulting, demeaning, hurtful language that deserves to be protected in its expression even though it is abundantly

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interests because they force him to reveal personal emotions in a public location, neither of these conditions change the nature of the speech from private to public discourse.

<sup>87</sup> See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 372 (1991); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

<sup>88</sup> *Frisby v. Schultz*, 487 U.S. 474, 488 (1988).

clear that the person to whom it is directed will not want to hear it. If A wants to castigate B using vulgar or insulting language because A believes B is a bigot, or a liar, or a murderer of babies because she performs abortions, it is difficult to contend that A does not have the right to tell B at least once how angry A is at B's beliefs or conduct. The First Amendment does not require that all speech be amiable and civil in order to be protected against suppression.<sup>89</sup>

Hate speech, however, is different in a very fundamental way than the insulting, critical speech that warrants first amendment protection even when it is directed at a specific individual. Hate speech is particularly low value speech, not because it is a manifestation of reprehensible ideas, which it clearly is, but because it serves *no* purpose other than to cause injury. Negative expression directed at voluntary behavior or a personal characteristic that the individual can alter may have some claim to legitimacy depending on the circumstances; but anger and hate directed at a person because of immutable characteristics such as race or ethnicity cannot be defended as an attempt to encourage the listener to change what he does or what he believes. Such expression may be satisfying to the speaker, but it involves a form of self-gratification grounded on the harm it causes to the person being spoken to and nothing else.

Recognizing the unique irrationality and worthlessness of this kind of targeted hate speech has strong constitutional roots. Under conventional equal protection doctrine, suspect classifications are defined in part by the fact that they are based on immutable characteristics.<sup>90</sup> Immutability is a relevant criterion for determining which classes should receive heightened constitutional protection because it casts doubt on the reasonableness of the state's interest in disadvantaging people who cannot change their status. We can understand why the state burdens groups such as thieves and drug dealers. The state wants to encourage members of those groups to change

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<sup>89</sup> See, e.g., *People v. Klick*, 362 N.E.2d 329, 332 (Ill. 1977) (stating that "First Amendment protection is not limited to amiable communications.").

<sup>90</sup> See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1979) (affirming that "[r]acial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision."); *Nyquist v. Mauclet*, 432 U.S. 1, 17-18 (1977) (Rehnquist, J., dissenting) (arguing that a discreet and insular minority group, "like Blacks or Orientals, is one identifiable by a status over which the members are powerless"); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (stating that "the legal status of illegitimacy . . . is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (stating that sex, like race and national origin, is an immutable characteristic).

their behavior, and it wants to discourage nonmembers from joining these burdened classes. It is much more difficult to explain why a class defined by immutable characteristics, like race, should be deliberately and regularly disadvantaged; hence the presumption that discriminatory racial classifications are invidious or irrational.<sup>91</sup>

The same argument pertains to hate speech. The point is not that the Equal Protection Clause requires public universities to prohibit hate speech.<sup>92</sup> It is that some of the same reasoning that explains why racially discriminatory laws violate constitutional equality principles also helps to explain and justify why certain kinds of hate speech may be suppressed. Unlike other types of critical expression, hate speech directed at individual members of a suspect class<sup>93</sup> is uniquely valueless, irrational, and undeserving of constitutional protection because it is focused on irrelevant personal characteristics that the victim cannot change. Hate speech and other kinds of expression that can be identified as actionable harassment do not warrant this status because they communicate a noxious idea. Hate speech is harassment because it is targeted expression that serves no purpose other than the infliction of serious harm on its victims.<sup>94</sup>

#### D. *Prohibiting Harassment and Judicial Balancing*

Obviously, the narrow category of hate speech described above is not the only expressive activity on a college campus that can constitute harassment. Moreover, in light of the Supreme Court's recent decision in

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<sup>91</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 154-55 (1980). Of course, some laws burdening the members of a class defined by an immutable characteristic are rational, such as a regulation limiting the driving privileges of individuals with specific physical disabilities. Immutability is only one factor that is relevant to identifying a suspect class, and it is clearly not a sufficient basis for providing heightened equal protection review. Presumably, a rational law limiting the opportunities of class members with immutable disabilities would not be deliberately demeaning or punitive, however. A law that punishes blind people or people with Alzheimer's disease would be as irrational as expression that insults someone because of their race.

<sup>92</sup> See, e.g., Brownstein, *supra* note 26, at 23-47 (stating that the Equal Protection Clause does not require public universities to prohibit hate speech except in limited circumstances).

<sup>93</sup> By suspect class, I mean any racial group, not simply a minority or disadvantaged group. Under current equal protection doctrine, any group burdened by a racial classification is, in a sense, a suspect class, and the racial classification will be reviewed under strict scrutiny.

<sup>94</sup> Viewed in this way, certain kinds of hate speech are not a part of public discourse because the expression at issue is not intended to persuade the listener to change either his beliefs or his behavior through the communication of a message. See *supra* note 83; see also *supra* notes 2-7 and accompanying text.

*R.A.V. v. City of St. Paul*,<sup>95</sup> it might be unconstitutional to prohibit only hate speech harassment without restricting other forms of verbal harassment as well.<sup>96</sup> If I am correct in my argument that some content discrimination is intrinsic to the identification of verbal harassment, and that verbal harassment can be restricted without violating first amendment guarantees, then the *R.A.V.* decision should not preclude a university *per se* from adopting a carefully defined prohibition against verbal harassment. It should be clear, however, that such an undertaking today involves substantial risks.

In *R.A.V.* the Supreme Court struck down a St. Paul ordinance that prohibited the display on public or private property of hate symbols, such as a burning cross or a swastika, that are known to arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender."<sup>97</sup> Although the Minnesota Supreme Court narrowly construed the challenged ordinance to apply only to "fighting words,"<sup>98</sup> the United States Supreme Court held that even a law directed exclusively at unprotected expression may be unconstitutional if it involves impermissible content discrimination in addition to the content discrimination inherent in defining the relevant category of unprotected speech.<sup>99</sup> Thus, while an ordinance prohibiting all fighting words will be upheld despite the fact that the generic category of fighting words involves content discrimination, a law prohibiting only political fighting words or racist fighting words will be reviewed under strict scrutiny.<sup>100</sup>

In theory, if the Court was to accept the argument that verbal harassment is a form of unprotected expression, an anti-harassment regulation that included racial insults within its coverage should satisfy the threshold requirements set out in *R.A.V.* in conceptual terms. Practical problems in implementing the standard, however, may raise constitutional concerns that would preclude this result. The problem is that verbal harassment is defined in part by the low communicative value of the speech being expressed. That is why repeated angry calls to one's landlord to fix the furnace would not constitute harassment until some egregious level of repetition and vulgarity was reached, while one disturbing,

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<sup>95</sup> 112 S. Ct. 2538 (1992).

<sup>96</sup> See *infra* notes 97-121 and accompanying text.

<sup>97</sup> *R.A.V.*, 112 S. Ct. at 2541.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 2542-47.

<sup>100</sup> *Id.* at 2546 (arguing that a state may not prohibit only obscene speech that communicates a political message).

sexually graphic call to a stranger might be the basis of a successful telephone harassment prosecution.<sup>101</sup>

A limitation of this kind is hardly unique in defining a category of unprotected speech. Obscene expression must lack “serious literary, artistic, political, or scientific value”<sup>102</sup> and fighting words are defined in part as being “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>103</sup> A requirement of this kind is also intrinsically subjective, however, and it creates significant risks that prohibiting particular unprotected speech might involve the suppression of unpopular ideas, the very result that the Court in *R.A.V.* seemed determined to avoid.<sup>104</sup>

This risk is mitigated with regard to a category of unprotected speech like obscenity which includes other narrow and relatively rigorous elements that effectively limit the scope of what might be held to be obscene.<sup>105</sup> Categories of unprotected speech such as fighting words or verbal harassment, however, have more indefinite parameters that focus on the effect of speech on the audience and are much more vulnerable to unconstitutional manipulation. Indeed, the Court’s general unwillingness to employ the fighting words doctrine to sustain convictions and uphold statutes may reflect its concern that such an indeterminate category of unprotected speech may be misused to justify the suppression of unpopular

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<sup>101</sup> See *supra* notes 31-32, 67-82 and accompanying text.

<sup>102</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>103</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>104</sup> Whatever lack of clarity there may be in the Court’s general reasoning in *R.A.V.*, Justice Scalia’s analysis is totally unambiguous on this point. Scalia is primarily concerned that the “selectivity of the restriction” of a regulation may be conditioned on whether the government agrees with what the speaker has to say. *R.A.V.*, 112 S. Ct. at 2547. Thus, he recognizes that even content discrimination within a category of unprotected speech may be valid “so long as the nature of the content discrimination is such that there is no realistic possibility that the official suppression of ideas is afoot.” *Id.*

While there is an important distinction between restricting speech because it lacks communicative value and restricting speech because the government disagrees with the message being conveyed, it is a distinction that is acutely vulnerable to manipulation. Obviously, racist insults might be prohibited not because they lack communicative value, but because they deliver a message of hate and intolerance that deserves to be suppressed. Given Justice Scalia’s expressed concern regarding any “realistic possibility that the official suppression of ideas” may be motivating speech restrictions, there is little doubt that he would consider this aspect of the definition of verbal harassment to be conducive to the kind of content discrimination that the First Amendment forbids.

<sup>105</sup> The requirement that obscene material must be patently offensive, for example, has been interpreted to apply exclusively to graphic, hard core depictions of sexual conduct. See *Jenkins v. Georgia*, 418 U.S. 153 (1974).

messages.<sup>106</sup> Given the reaffirmation of this concern in *R.A.V.*,<sup>107</sup> it is arguably unlikely that the Court will accept a new category of unprotected speech that magnifies this possibility. It is also difficult to believe, however, that the Court is committed to a first amendment doctrine that prevents states from punishing verbal harassment and requires the invalidation of most telephone harassment statutes.

Even if verbal harassment, the deliberate violation of the privacy and autonomy interests of individuals through targeted verbal assaults that serve no legitimate communicative purpose, is recognized as unprotected speech, the *R.A.V.* decision may preclude universities from specifically identifying the use of racial insults as harassment. A regulatory presumption that racial insults constitute harassment is a form of content discrimination, but the *R.A.V.* opinion does not require the invalidation of all discriminatory restrictions on expression. Content discrimination within a category of unprotected expression is permissible “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.”<sup>108</sup> Thus, the Court explains, a state may elect to prohibit only the most prurient obscenity, but it could not prohibit only politically oriented obscenity.<sup>109</sup>

The utility of this exception for anti-harassment codes is uncertain since the examples in the *R.A.V.* opinion do not provide a complete picture of the possible regulatory options that might fall within its coverage. Obscene expression is defined by three requirements of which prurience

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<sup>106</sup> In *Lewis v. New Orleans*, 415 U.S. 130 (1974), the Court reversed the conviction of a woman who had been convicted of cursing a police officer to his face on the grounds that the ordinance under which she was charged was overbroad and not limited to actual fighting words. Justice Powell, in his concurrence, further justified the Court's decision by explaining that the challenged ordinance conferred on the police “a virtually unrestrained power to arrest and charge persons with a violation.” *Id.* at 135.

In *City of Houston v. Hill*, 482 U.S. 451 (1987), the Court held that a law making it unlawful to “oppose, molest, abuse or interrupt any policeman in the execution of his duty” was substantially overbroad and invalid. *Id.* at 451. While the Court suggested that an ordinance strictly limited to the prohibition of fighting words might be sustained, *id.* at 464 n.12, it also pointedly noted that “[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.” *Id.* at 462-63.

<sup>107</sup> *R.A.V.*, 112 S. Ct. at 2548-49 (condemning as “word-play” the argument that a prohibition of hate speech that constitutes fighting words is not directed at the invidious messages conveyed by hate speech, but at the unique harm such expression causes its victims).

<sup>108</sup> *Id.* at 2545.

<sup>109</sup> *Id.* at 2546.



is only one.<sup>110</sup> It is unclear whether the Court is defining this aspect of obscene expression as the critical rationale that justifies its unprotected status, or whether the state may discriminate with regard to the other requirements as well. May a state, for example, only prohibit the most sexually graphic obscene material without violating the First Amendment? More importantly, may a state decide to prohibit only that obscene expression which is particularly lacking in literary, artistic, political or scientific value? If the latter discriminatory regulation of obscene expression is permissible, then, by analogy, racial insults may be isolated and restricted as harassment since they are a type of derogatory speech that is uniquely irrelevant to any legitimate, albeit negative, communicative message.<sup>111</sup>

If the *R.A.V.* decision does not support this degree of flexibility in determining what are justifiable grounds for discriminating within a

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<sup>110</sup> In addition to appealing to the prurient interest of the viewer, obscene expression must depict or describe sexual conduct in a "patently offensive way" and it must lack "serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15 (1973).

<sup>111</sup> As the discussion in *supra* note 104 suggests, this argument is unlikely to prove persuasive to Justice Scalia or the other Justices who joined his opinion in *R.A.V.* In explaining his contention that a state may prohibit only the most prurient forms of obscenity without having its statute strictly scrutinized, Scalia implicitly requires a content discriminatory regulation of this kind to meet two requirements, not just one. The basis for the content discrimination must be the reason the class of speech is "proscribable," and the viewpoint discrimination must not create a "significant danger of idea or content discrimination." *R.A.V.*, 112 S. Ct. at 2545. Scalia obviously believes that prurience is a sufficiently neutral enough form of content discrimination that it is unlikely to mask the suppression of ideas. *R.A.V.*, 112 S. Ct. at 2545-46. It is far less clear that identifying speech that is uniquely lacking in communicative value is an equally "safe" standard.

The Court's concern about the suppression of ideas is not entirely misplaced. Still, a judicial refusal to allow states to choose for themselves whether or not "proscribable" speech is so valueless that it must be prohibited, intrusively subordinates the legislature's judgment to the Court's value choices. If a state legislature concludes that much of what the Court deems to be lacking in literary, artistic, political, or scientific value is legitimate expression of real worth, it is unclear after *R.A.V.* how that different perspective can be manifested as law.

A statute that only prohibits certain obscene expression that the legislature believes to be without value while permitting the distribution of other sexually graphic material must involve content discrimination. Moreover, content discrimination based on the communicative value of expression risks manipulation, misuse, and the suppression of ideas. If the legislature is denied the power to enforce such a statute, however, it must either prohibit all the expression the Court would find to be obscene regardless of the legislature's contrary judgment as to the value of the expression, or it must allow all obscene material to be distributed in the community it governs. It is difficult to accept that the First Amendment leaves legislatures with no option other than these two inadequate alternatives.

category of unprotected expression, an anti-harassment regulation singling out racial insults as presumptively invalid or worthy of special sanction would receive strict scrutiny.<sup>112</sup> Again, this should not mean that the regulation is necessarily unconstitutional. The argument that content discrimination of this kind should withstand even rigorous review has already been discussed. Unlike other abusive speech, racial insults and other degrading comments directed at an immutable characteristic that the victim can not change are presumptively valueless because they cannot be justified as an attempt to change the listener's behavior.<sup>113</sup>

This contention, however, may also be difficult to reconcile with the reasoning and holding of *R.A.V.* A similar argument by St. Paul, that its hate speech ordinance served the compelling interest of protecting the right of members of victimized groups to live in peace, was rejected by the Court on the ground that the challenged law was too imprecisely tailored to satisfy strict scrutiny.<sup>114</sup> While St. Paul's goals were clearly compelling, the Court saw no reason why a content discriminatory ordinance that singled out hate speech was necessary to further its objective. A content discriminatory ban on only certain unprotected messages, but not others, cannot withstand rigorous scrutiny, the Court concluded, because the state's compelling interests can always be adequately furthered by a more content neutral alternative. Thus, since a general ban on all fighting words effectively protects the victims of racist fighting words without engaging in additional content discrimination, the adoption of a law prohibiting only racist fighting words could not be justified. A statute prohibiting all fighting words would allow the state to prosecute unprotected hate speech just as vigorously as St. Paul's ordinance.<sup>115</sup>

The flaw in this analysis is that it places far too much faith in the utility of the Court's doctrinal descriptions of unprotected expression. It assumes that an ordinance generally prohibiting an entire category of unprotected speech, a law prohibiting all fighting words, for example, does not jeopardize first amendment guarantees. But the fact that a doctrinal category may effectively serve the purposes of judicial review does not mean that the same category should be enacted as a statutory standard. Nor is there any reason to believe that the Court's determination of the constitutional limits on state authority to restrict expression should correspond with the conclusions of any legislature with regard to the need to suppress speech in a particular community. Indeed, the Court's

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<sup>112</sup> *R.A.V.*, 112 S. Ct. at 2549-50 (stating that a content discriminatory regulation will be upheld if it meets strict scrutiny).

<sup>113</sup> See *supra* notes 86-90 and accompanying text.

<sup>114</sup> *R.A.V.*, 112 S. Ct. at 2549-50.

<sup>115</sup> *Id.*

definitions of unprotected speech may often be broader than necessary to meet a state's regulatory concerns<sup>116</sup> and are almost certainly too vague to be tolerated as a statutory standard.<sup>117</sup> Thus, under the *R.A.V.* framework, a state that believes that some sub-category of unprotected speech deserves to be prohibited is encouraged to prohibit the entire category of speech and to use language in doing so that will almost certainly chill the expression of fully protected speech.

The problematic consequences of a literal commitment to the reasoning of *R.A.V.* can be demonstrated by the difficulties it creates for a university attempting to draft a constitutional anti-harassment regulation. Officials might conclude, for example, under the authority of *R.A.V.*, that the only verbal harassment that may be constitutionally restricted must be more broadly defined than this Article suggests. In order to satisfy the Court's concerns that harassment rules would be used illicitly to punish the expression of unpopular ideas, the university might try to limit the definition

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<sup>116</sup> The state may conclude that not all of the expression covered by the Court's categories of unprotected speech deserve to be suppressed. Thus, a state may believe that some sexually graphic expression appealing to the viewer's prurient interest is tolerable even though this material may technically be obscene under the Court's definition of obscenity. *See supra* note 111.

<sup>117</sup> *See* TRIBE, *supra* note 28, at 1030-31. Tribe uses the example of a law that prohibits all public speech "unless the speech is protected by the first and fourteenth amendments" (italics omitted) to prove his point that constitutional rules cannot always be employed as a statutory standard because they are often unacceptably vague. *Id.* Put simply, "*the Constitution does not, in and of itself, provide a bright enough line to guide primary conduct.*" *Id.*

Vague standards, of course, are not simply unfair because they do not provide regulated persons adequate notice of what they are prohibited from saying. A vague restriction on expression constitutes an impermissible burden on freedom of speech because its uncertainty of application will deter or chill protected expression. This burden is the price the Court seems willing to pay to avoid content discriminatory regulations that selectively prohibit unprotected speech. It is not clear, however, that the benefits of this approach outweigh its costs.

If the Court tolerates content or viewpoint discrimination within a category of unprotected speech, the impact on freedom of speech is limited in a basic sense. The speech that is prohibited by such a law did not merit full first amendment protection. It could have been banned by a more general law. If, as the *R.A.V.* decision suggests, the Court will now tolerate broad statutory restrictions on speech that incorporate the Court's definition of a category of unprotected expression, the impact of that decision will be different and arguably far more damaging to freedom of speech. Such vague definitional categories will deter protected expression of recognized value that could not be directly suppressed. A law prohibiting only certain kinds of fighting words, clearly defined by their content, only burdens unprotected speech. A law prohibiting fighting words in general, with all of the indeterminacy such a statutory rule entails, creates a substantial risk that fully protected speech will be chilled.

of what constitutes verbal harassment to neutral descriptions of personal epithets and abusive speech.

It is difficult to understand the advantages of this approach. A basic civility statute of this kind may conform to the spirit of the *R.A.V.* decision in the sense that it does not involve any secondary content discrimination. The regulation's drawback is that it risks blanketing discourse in the community with a vague and chilling cloak of mandated gentility that unreasonably smothers the legitimate passion of angry expressive interactions.<sup>118</sup>

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<sup>118</sup> The difficulty with rigorous civility regulations is that they disable speakers from expressing their anger in circumstances that justify verbal responses of outrage. If a speaker states that he thinks it was a good thing that one million Jewish children were murdered during the Holocaust, it is not clear, at least to me, why that speaker should be protected from a moderately intemperate verbal reaction. Hate speech regulations protecting individuals against racial or ethnic insults, unlike general civility statutes, would not prohibit strong verbal reactions to political expression.

Contrary to the above analysis, the majority opinion in *R.A.V.* condemns as viewpoint discrimination any regulatory regime that prohibits racial insults without imposing comparable restrictions on insults directed at persons engaged in racist behavior. According to Justice Scalia's interpretation of such hate speech codes, the state has no constitutional authority "to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *R.A.V.* 112 S. Ct. at 2548. One may share Scalia's aversion to viewpoint discrimination, however, without accepting his contention that the hate speech regulations at issue in *R.A.V.*, or those discussed in this Article, involve discrimination of this kind. Indeed, Scalia's failure to recognize that many hate speech codes are *not* viewpoint discriminatory in the very context that he describes reflects a critical weakness of his analysis in the *R.A.V.* decision.

Insults directed at a person's race and insults directed at a person's bigoted beliefs simply do not reflect opposing positions on a debate continuum. Rather, they are distinct subjects of discourse. The former expression is directed at an individual's ethnic background, the latter is directed at an individual's political and social opinions. Tolerance and bigotry may be competing viewpoints and it would constitute impermissible viewpoint discrimination to prohibit insults directed at a person preaching racial harmony while permitting insults to be directed at a person promoting bigotry. But there is no comparable sense in which ethnic insults constitute one side of an argument and criticisms of bigotry constitute the opposing viewpoint. A rule that prohibits insults based on the victims race while permitting insults based on the victim's political beliefs is viewpoint neutral if it applies to all races and all political beliefs. It does involve content discrimination, but content distinctions within a category of unprotected speech can be justified far more easily than viewpoint discrimination.

Indeed, if it is understood in this way, a content discriminatory rule prohibiting racial insults while tolerating harshly critical speech directed at a speaker's political opponents arguably affirms basic first amendment principles more than it undermines them. Hurtful, critical speech directed at the clearly mutable characteristic of the listener's political beliefs and conduct serves the primary first amendment value of using speech to persuade the listener to change his attitudes and behavior. A university committed to free speech values might reasonably try to avoid suppressing such persuasive speech, even when it is expressed at some moderate level of intemperance, out of fear of chilling vigorous debate.

Nor can this risk be mitigated by restricting the application of the regulation to insulting expression that serves no legitimate purpose. The inherent vagueness and chilling quality of that amendment cannot cure the vagueness and chilling effect of the underlying restrictions.<sup>119</sup> Ultimately, unless an anti-harassment regulation can identify harassing expression by its content to some extent, it will be difficult to draft a university code that is not unreasonably vague in its language and unreasonably broad in its effect.<sup>120</sup>

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Abusive speech directed at a person's race, ethnicity, color, or gender, on the other hand, constitutes uniquely valueless fighting words for first amendment purposes because the victim is targeted and abused on account of her immutable characteristics that she cannot change. The speaker's only objective is to achieve self-gratification by causing harm, a goal that surely rests at the very lowest level of the purposes that the First Amendment serves to the extent that it is recognized as a first amendment value at all.

<sup>119</sup> See *supra* notes 73-75 and accompanying text.

<sup>120</sup> The *R.A.V.* opinion does suggest one other type of hate speech regulation that might be consistent with first amendment guarantees, "a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause)." *R.A.V.*, 112 S. Ct. at 2548. While this vague language is susceptible to multiple interpretations, it is difficult to understand how any regulation focused on groups, not the content of speech, can bridge the gap between the goals of hate speech regulations and the reasoning of *R.A.V.*

One possible reading of this part of the *R.A.V.* opinion suggests that the Court would approve a hate speech ordinance patterned after conventional hate crimes statutes, *see, e.g., Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). Such a law would only punish, or enhance the punishment for, the expression of fighting words whenever the speaker selects the person to whom the fighting words are addressed on account of that person's race or ethnic background.

A hate speech regulation of this kind would effectively serve the objective of suppressing hate speech, but it would fundamentally undermine the holding of *R.A.V.* Since in almost all cases, prosecutors and courts could only establish that the victim of fighting words had been selected for abuse on account of his race by examining the specific words that the speaker expressed, this group focused regulation would end up prohibiting the same speech in the same circumstances as the law struck down in *R.A.V.* It is difficult to believe that the majority in *R.A.V.* intended to permit, or would accept, this facile circumvention of the first amendment principles that they so aggressively endorsed throughout the opinion.

Alternatively, the Court may have been thinking about laws that do not focus on the reason why fighting words are directed at a particular victim, but that focus more simply and exclusively on the identity of the victim himself. Thus, a hate speech regulation, compatible with first amendment guarantees, would prohibit anyone from directing fighting words of any kind at a specific class of victims, African-Americans, or the elderly, for example. The problem with this approach is that it allows states to protect only those groups that might be the victims of fighting words that are *not* defined by suspect classifications.

A law prohibiting only those fighting words directed at African-Americans, for example, employs a racial classification. Accordingly, it will be reviewed under strict scrutiny and almost certainly struck down as a violation of the Equal Protection Clause.

As a last alternative, a university might adopt more formal and less content based anti-harassment requirements. Verbal harassment might only be prohibited once the victim has explicitly indicated that he does not wish to receive any further communications from the speaker, or some more egregious invasion of privacy may be required than provoking someone into the display of deeply personal emotions. Each factor identified above as relevant to a multi-factor constitutional analysis may be interpreted and applied in a way that provides more protection to the abusive speaker and less protection to his target. This approach maximizes first amendment values at the cost of substantially limiting the utility of the regulation. By analogy, many telephone harassment statutes would be unconstitutional under this framework and a significant part of what is currently recognized as telephone harassment could no longer be constitutionally punished.<sup>121</sup>

Given the unprecedented and ambiguous nature of the *R.A.V.* decision, it is impossible to give university officials any real confidence that a particular hate speech/harassment regulation will withstand constitutional challenge. All that can be said with assurance is that the analytic formula described in the *R.A.V.* opinion creates a realm of constitutional uncertainty that seems out of touch with many commonly accepted real world restrictions on expressive activity. If *R.A.V.* is read broadly, far less controversial speech restrictions than hate speech statutes are now in jeopardy.

The problem of targeted abusive speech directed at specific victims can only be resolved through a multi-factor analysis. This issue cannot be adequately addressed by invoking basic first amendment doctrine prohibiting content discrimination.<sup>122</sup> The argument that all abusive speech

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Moreover, there is no way to generalize this regulation while maintaining its specific focus. A law that protects both blacks and whites or men and women from fighting words protects everyone. It is simply a cumbersome way to ban all fighting words.

Thus, under this alternative interpretation of the group protection exception to the holding of *R.A.V.*, states might successfully prohibit fighting words directed at gays, the mentally retarded, the elderly, and the poor because none of these groups are defined by suspect classifications under current equal protection doctrine. The use of age or wealth classification in a fighting words prohibition, for example, will receive highly deferential, minimum rationality review. Laws protecting African-Americans, Hispanics, Asians, or women against fighting words, on the other hand, would receive some form of rigorous review and be struck down as unconstitutional, despite the obvious fact that the members of these latter groups may be most in need of the protection that hate speech regulations provide.

<sup>121</sup> Many telephone harassment statutes are not restricted to calls to the victim's home. See *supra* note 66. Many statutes are also not content neutral and describe the kinds of calls that are prohibited. See *supra* note 75.

<sup>122</sup> The non-content based variables of location, repetition, and the refusal to honor requests to end the expressive activity are all relevant factors to consider. Any rule based exclusively on such factors, however, must suffer from one of two defects. Either it will

must be permitted unless it falls within a traditional category of unprotected speech—fighting words or obscenity—is similarly unacceptable.<sup>123</sup> These categorical principles simply do not provide an effective framework for evaluating the regulation of verbal harassment. If the R.A.V. decision is inconsistent with this analysis, it must be marginally modified to accommodate reasonable regulatory restrictions on this kind of speech.

Similarly, it is not enough to insist that locational privacy interests alone are of sufficient importance to justify restrictions on abusive speech. Affirming the exclusive primacy of privacy in this regard, among all the personal interests that may be injured by targeted hate speech, cannot be defended as a self evident truth or as an essential pre-condition of democratic self government or personal dignity. Other value choices are possible and need to be considered and comparatively evaluated. Indeed, the very idea of privacy itself includes a range of interests deserving of respect that extends beyond the protection of the locational sanctuary of the home.

There is no alternative to a multi-factor analysis. If verbal harassment is to be coherently defined and regulated, speech has to be evaluated as to its content, its purpose, its impact, and in terms of the circumstances in which it occurs. The First Amendment is not weakened if courts forthrightly engage in this undertaking. Indeed, the converse is the case. If courts and commentators refuse to engage in the balancing of competing values that is required to resolve the problem of hate speech harassment, they cannot persuasively defend their conclusions on this issue as an impartial and consistent application of first amendment doctrine.

#### IV. CONCLUSION

Targeted, abusive expression in the form of harassment is currently restricted by most states in particular circumstances. If those restrictions are carefully drafted, they are commonly and correctly upheld against constitutional challenge. Courts have considerable difficulty, however, in explaining why the prohibition of telephone harassment, for example, is consistent with first amendment guarantees.

I suggest that there is a principled basis for upholding these restrictions on speech, but it involves a complex, multi-factor analysis. To uphold the

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tolerate too much hurtful and purposeless speech in an effort to provide sufficient opportunity for legitimate, critical expression, or it will restrict speech too much, sacrificing opportunities for legitimate critical expression in order to provide adequate protection against abusive verbal harassment. *See supra* notes 59-92 and accompanying text.

<sup>123</sup> *See supra* notes 14-17, 19-21, 32, 57-58 and accompanying text.

prohibition of targeted expressive conduct as harassment, courts must determine that the speech at issue is of a uniquely low value, that it causes significant harm, and that it violates the autonomy interests of the victim. Uniquely low value speech includes expression that serves no purpose other than to inflict unreasonable harm.

The determination that a violation of personal autonomy has occurred, in turn, requires an analysis of two overlapping factors. For a speaker's interference with personal autonomy interests to be of sufficient value to outweigh freedom of speech, it must involve the deliberate subjugation of the victim's right not to hear what the speaker has to say and a substantial invasion of the victim's privacy. Invasions of privacy occur when targeted, abusive speech<sup>124</sup> intrudes into "private" locations, such as one's home, or when it compels an individual to expose deeply felt, "private" feelings in a public setting.

Taken together and on balance, these factors justify the prohibition of various forms of harassment. One such act of sanctionable harassment involves the deliberate use of racial epithets by one student to insult another on a college campus.

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<sup>124</sup> The requirement that only "targeted abusive speech" may be restricted eliminates any concerns that we may deprive other individuals of the right to decide whether they want to hear what the speaker has to say by protecting the harassed victim of unwanted expression.