More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law†

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INTRODUCTION

Words wound.[1] Checks choke.[2] For two hundred years these two absolutes have marked the extreme ends of public opinion and

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[1] Since the outset of American nationhood, lawmakers have recognized the potential peril of words. For example, in 1798, only seven years after the First Amendment was ratified, the Adams administration pressed successfully for the adoption of the Sedition Act of 1798. Although the Act expired in 1801, it was applied in a number of cases.

A number of United States Supreme Court cases address language that causes affront. *See, e.g.*, Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (finding that Cohen's words were "absurd and immature" and "fall well within the sphere of *Chaplinsky*"); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding a conviction for uttering insulting or "fighting words" to a marshal). Among the more celebrated cases was *Collin v. Smith* which struck down a Skokie, Illinois ordinance that prohibited Nazis from marching through a community of Holocaust survivors. 578 F.2d 1197, *cert. denied*, 439 U.S. 916 (1978). The Skokie controversy is the subject of much scholarly analysis. *See, e.g.*, JAMES L. GIBSON, CIVIL LIBERTIES AND NAZIS: THE SKOKIE FREE SPEECH CONTROVERSY (1985); ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE AND THE RISKS OF FREEDOM (1979); Donald A. Downs, *Hate Group Speech, and The First Amendment*, 60 NOTRE DAME L. REV. 629 (1985).

Recently, some important voices within the academic community have called for regulations on "words that wound." *See generally* 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 R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984) [hereinafter MacKinnon, *Not a Moral Issue*]; Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) [hereinafter MacKinnon, *Pornography*]; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Rodney A. Smolla, *Rethinking First Amendment Assumptions about Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990).

[2] *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) ("[T]he only meaning of free speech is

academic debate over the First Amendment's protection of free speech.

While the words of the First Amendment are absolute and the Supreme Court has, on occasion, endorsed this absolutist cast of the Amendment's dictates,[3] few Supreme Court Justices and free speech enthusiasts insist that all communicative efforts[4] are constitutionally protected speech.

Indeed, most persons agree that there must exist a possibility for constitutional regulation of some types of utterances or communicative conduct. So far, however, the Supreme Court's First Amendment jurisprudence reflects both an inability and an unwillingness to come to terms, directly and plainly, with the regulation of content of what a speaker says. With the exception of so-called "low value speech," the Court has shied away from pronouncing the substantive

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that [unorthodox ideas] should be given their chance and have their way."); Abrams v. United States, 250 U.S. 615, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade ideas that the best test of truth is the power of the thought to get itself accepted in the competition of the market."); *see also* New York Times Co. v. Sullivan, 276 U.S. 255, 297 (1964) ("I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government."); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("[T]he remedy to be applied is more speech, not enforced silence."). The absolutist cast of the Constitution's free speech protection has most often prevailed throughout our history. For example, Thomas Jefferson pardoned all who had been convicted under the Sedition Act of 1798 because he viewed the Act as an unconstitutional act of repression. Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON, 1789–1826, at 43 (Andrew A. Lipscomb ed., Mem. ed. 1904).

[3] *See generally* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Texas v. Johnson, 491 U.S. 397 (1989); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Yates v. United States, 354 U.S. 298 (1957).

[4] The Court's sole absolutist, Justice Black, persisted in a literal interpretation of the First Amendment's prohibitions:

> Of course, the decision to provide a constitutional safeguard for [free speech] involves a balancing of conflicting interests. [But] the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights. They appreciated the risks involved and they decided that certain rights should be guaranteed regardless of these risks. Courts have neither the right nor the power [to] make a different evaluation of the importance of the rights granted in the Constitution. . . .

Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960). But Justice Black remained unsympathetic to protection for all communicative efforts, and distinguished between "speech" and "conduct" in determining which communications were within the parameters of the First Amendment. *See, e.g.*, Street v. New York, 394 U.S. 576, 609–10 (1969) (Black, J., dissenting) (state may prohibit flag burning but not derogatory comments about the flag); Amalgamated Food Employees Union Local 500 v. Logan Valley Plaza, Inc., 391 U.S. 308, 333 (1968) (Black, J., dissenting) (picketing is patrolling, not speech, and may be regulated); Cox v. Louisiana, 379 U.S. 559, 576–79 (1965) (Black, J., dissenting) (states' interests may be sufficient to regulate conduct, but not pure speech).

ideas expressed by speech to be utterly without merit, and consequently without protection. In the absence of any basis for evaluating content-based communication, the Court has not even begun the difficult and complex process of setting clear standards for judging content-based restrictions that legislatures might enact.

Under current doctrine, only two kinds of regulations restricting speech will pass the absolutist test of constitutionality applied by the Court. According to this two-level analysis, the Court places in the first category ostensibly content-specific speech regulations.[5] Speech that is of "low value," like obscenity, "fighting words," and, to a lesser extent, defamation and commercial speech, possesses, for the Court, very limited redeeming social value.[6] This speech is seen as clearly outside the limits of core protection of any of the dominant free speech theories espoused by the Court.[7]

Apart from these narrow exceptions, the Supreme Court presumes that speech is of constitutional value, and will be protected, unless it presents a clear and present danger that something sinister or illicit will occur. The Court will only uphold regulations restricting speech in this second category if it deems these regulations to be "content-neutral." These collateral restrictions on speech—the time, place, and manner in which communication occurs—supposedly affect only the incidental aspects of communication. Courts

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[5] Professor Harry Kalven coined this phrase in *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 11. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12–2, at 791–92 (2d ed. 1988). The Court subjects regulations of communicative expression to stringent analysis, unless that expression is of "low value." The Court subjects regulations of non-communicative expression to a balancing test. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–78 (1968). The Court's two-track analysis has not escaped unscathed at the hands of scholarly critics. *See generally* Stanley Fish, *Fraught With Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061 (1993) [hereinafter Fish, *Fraught with Death*]; Stanley Fish, *Jerry Falwell's Mother, Or, What's the Harm?, in* THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO 130–31 (1994) [hereinafter Fish, *Jerry Falwell's Mother*]; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Fred C. Zacharias, *Flow-Charting the First Amendment*, 72 CORNELL L. REV. 936 (1987).

[6] *See generally* Miller v. California, 413 U.S. 15 (1973); Stanley v. Georgia, 394 U.S. 557 (1969); Roth v. United States, 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Commercial speech is afforded somewhat less protection under the First Amendment. *See, e.g.*, City of Cincinnati v. Discovery Network, 113 S. Ct. 1505 (1993); Bolger v. Youngs Drug Prods., 463 U.S. 60 (1983); Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

[7] Such speech does not further the marketplace concept. "There is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 784 (1976) (Rehnquist, J., dissenting). Nor does it further the process-perfectionist ideal. *See infra* note 19 and accompanying text. Nor will it advance concepts of autonomy, inclusion and citizenship. *See infra* notes 25–26 and accompanying text.

have repeatedly upheld collateral regulations under the First Amendment doctrine,[8] even if the underlying legislative reasoning for passing these restrictions was motivated by the desire to restrict some speech based not solely on context but on content as well.

Neither of these two categories, however, addresses the issues underlying restrictions on speech content, a problem which is frequently raised, debated, and discussed.[9] We maintain that there do exist some ideas that simply are too abhorrent to be countenanced.[10] The Court's First Amendment approach only allows a contextual questioning of the intrinsic merit of these notions. The Court, therefore, invalidates any restriction of speech based on content, yet is occasionally forced to accept thinly veiled time/place/manner regulations which are content-based restrictions in disguise. The more this approach is followed, the more absurd the results will be.[11]

A novel jurisprudential basis is needed for determining which categories of speech can be regulated. We propose that international law, through the well-established doctrine of *jus cogens*, provides this basis. *Jus cogens* comprises norms and principles recognized and accepted by the community of nations as a whole. These *jus cogens* norms cannot be displaced even by treaties or practices of individual nations.[12] Our proposition is that if a legislative body should deter-

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[8] *See, e.g.*, Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (upholding an ordinance prohibiting posting of signs on public property); Metromedia, Inc. v. San Diego, 453 U.S. 490, 512 (1981) (upholding restrictions of billboards displaying commercial advertisements as not violative of First Amendment); Lehman v. Shaker Heights, 418 U.S. 298, 302–04 (1974) (holding that authorities have discretion to make reasonable choices concerning type of advertising placed on its vehicles, and to refuse space to political advertisements because a city transit system car is not a First Amendment forum).

[9] *See infra* text accompanying notes 62–82.

[10] *See infra* text accompanying notes 220–66.

[11] It is not difficult to imagine instances in which the Court will be forced by its own line of cases to protect speech, which is by many standards outside of the First Amendment, while upholding time/place/manner regulations with a most chilling effect on free speech. For example, a university ban on distribution of Nazi propaganda through student mailboxes would presumably be struck down as an impermissible viewpoint-based content constraint. *Cf.* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). Yet, a university ban on distribution of unstamped, unofficial communications through student mailboxes would likely be upheld. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981); *see also infra* notes 95–96 and accompanying text.

[12] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]; *see* Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (courts seeking to determine whether a norm of customary international law has attained the status of *jus cogens* must also determine whether the international community recognizes the norm as one "from which no derogation is permitted" (quoting Article 53 of the Vienna Convention)); *see also*

mine to regulate speech which can be controlled under *jus cogens*, the Supreme Court should defer to that legislative judgment.

In this Article, we will first review the Supreme Court's current First Amendment doctrine.[13] We will examine the various categories of protected and unprotected speech, and by doing so uncover the problematic underlying assumptions and often perplexing results of the current all-or-nothing approach.[14] Viewing these deficiencies together, we will then define a set of rigorous requirements any comprehensive new doctrine of content-based regulation will have to fulfill.[15] Finally, we will describe the formal application and substance of the *jus cogens* concept, and analyze and apply a *jus cogens* guided comprehensive new doctrine to a variety of actual and hypothetical First Amendment cases.[16]

I. CURRENT FIRST AMENDMENT DOCTRINE

A. *The Sacredness of Speech: Philosophical Infrastructure*

Scholars have advanced varied theories concerning the values and philosophical tenets underlying the First Amendment's free speech provision. Not surprisingly, their work evinces little consensus.

Some commentators focus upon systemic political values. Professor Levy argues that the catalyst for the promulgation of the First Amendment was not solicitude for individual liberty, but shielding states' rights against national power.[17] Professor Meiklejohn associates free speech with political autonomy: popular self-governance necessarily entails the right to be informed, which necessitates unimpeded access to information concerning political and social issues.[18] Dean Ely espouses a process-perfecting rationale, urging that

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Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua v. United States]. "*Jus cogens* therefore functions rather like a natural law that is so fundamental that states, at least for the time being, cannot avoid its force." Mark W. Janis, AN INTRODUCTION TO INTERNATIONAL LAW 53 (1988). For a general discussion of *jus cogens* principles, see *infra* notes 133–219.

[13] *See infra* text accompanying notes 17–108.

[14] *See infra* text accompanying notes 33–132.

[15] *See infra* text accompanying notes 128–32.

[16] *See infra* text accompanying notes 277–304.

[17] *See generally* LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

[18] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245; *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) (advocating for James Madison's First Amendment model, which protects speech only when used in the cause of civic deliberation); *cf.* Robert Bork, *Neutral Principles and Some First Amendment*

the First Amendment, and the Constitution generally, are intended to secure "broad participation in the processes and distributions of government," necessitating unimpeded, informed popular discussion of a broad range of issues.[19] Professor Blasi asserts that, insofar as the First Amendment sanctions an unimpeded flow of information, some of which is critical of government and those who conduct its operations, any impulse of officials to repress information is restrained.[20]

Dean Bollinger argues that the inherent penchant for human beings to manifest intolerance for differences in others or in their ideas is modulated by the First Amendment's restraint on suppression of distasteful or offensive viewpoints.[21] He further states that this encouragement of tolerance is instrumental in shaping the intellectual character of the nation, and is thus ultimately beneficial to society.[22]

English philosophers John Milton and John Stuart Mill first articulated the concept which evolved in First Amendment jurisprudence as a metaphor for free speech values.[23] The metaphor holds that the quest for truth is promoted not by government fiat, but by free and open exchange. The truth will emerge from this contention of conflicting ideas in the "marketplace of ideas."[24]

Other scholars concentrate their free speech justifications on values stemming from individualism and autonomy. Knowledge and

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Problems, 47 IND. L.J. 1, 26–28 (1971) (First Amendment protection should extend only to speech integrally related to political decision-making, not to literary, artistic, social, or commercial speech).

[19] JOHN HART ELY, DEMOCRACY AND DISTRUST 74, 82, 93–94, 105–66 (1980) [hereinafter DEMOCRACY & DISTRUST].

[20] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

[21] *See generally* LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

[22] *Id.*

[23] *See* JOHN STUART MILL, ON LIBERTY (1859); J. Milton, Areopagitica (1644), *in* 2 COMPLETE PROSE WORKS OF JOHN MILTON 486 *passim* (E. Sirluck ed., 1959). "[T]hough all the winds of doctrine were let loose to play upon earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the words in a free and open encounter." Milton, *supra*, at 561 (footnotes omitted).

[24] *See* Milton, *supra* note 23. The marketplace justification for free speech averts the danger of the government imposing its own truth.

> [The marketplace] theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems. A properly functioning marketplace of ideas, in Holmes' perspective, ultimately assures the proper evolution of society wherever that evolution might lead.

Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (citations omitted) [hereinafter Ingber, *A Legitimizing Myth*].

access to a cornucopia of viewpoints and perspectives are preconditions to attaining self-fulfillment.[25] Finally, some commentators advance communitarianism as the basis for fostering free speech.[26]

The marketplace rationale has engendered severe criticism. It assumes that truth is objectively verifiable and that citizens who control the functioning of the market are informed, rational and intelligent, propositions which themselves are not readily verifiable. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967 & n.8 (1978); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 131–34 (1989). The marketplace basis for protection of communication also disregards the emotive quality that might enhance the power of the speaker's message and render it all the more poignant. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988); Cohen v. California, 403 U.S. 15, 26 (1971) (expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well").

Moreover, even if these assumptions are accurate, the marketplace might not reveal the results of its investigation concerning truth for a very long time. Fish, *Fraught with Death*, *supra* note 5, at 1063–64 ("If the marketplace will render its verdict only at the end of time . . . the resolution of timely matters will be deferred forever.").

> In the long run, true ideas do tend to drive out false ones. The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas . . . . Genocide is an example. One may well be ambivalent as to whether one would want to forbid an attempt to instill a belief in the deliberate and systematic extermination of a national or racial group. . . . Truth may win, and in the long run, it may almost always win, but millions of Jews were deliberately and systematically murdered in a very short period of time. Moreover, before those murders occurred, many individuals must have come "to have false beliefs."

Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979).

Furthermore, the marketplace formulation assumes equal access to the arena for all competing viewpoints. Modern communication is no longer purveyed by leaflets on street corners or at town meetings. Instead, effective access to the marketplace depends upon sophisticated and expensive technology, and an entree into the monopoly of the media. Those who are without power, influence or resources have scant access to the modern communication domain. *See* Baker, *supra*, at 965; Fish, *Fraught with Death*, *supra* note 5, at 1073–74; Ingber, *A Legitimizing Myth*, *supra*, at 5. *See generally* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

Finally, even assuming that truth is objectively verifiable, inequality of access causes further problems. Perspectives that are heard more often are deemed to be "true"; those that are not are assumed to be "false." "Truth in this sense, becomes what the majority hears, leaving little reason to attach much value to such truth or to the marketplace which generates it." Stanley Ingber, *The First Amendment, Intermediate Institutions and a Democratic Personality*, 26 VAL. U. L. REV. 71, 75 (1991) [hereinafter Ingber, *The First Amendment*].

[25] THOMAS EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) ("assuring individual self-fulfillment"). *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); STEVE SHIFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990) (dissent, nonconformity, and iconoclasm should be encouraged by the First Amendment); Baker, *supra* note 24 (individual liberty); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) ("individual self-realization"); David A. J. Richards, *Free Speech and Obscenity Law: Toward A Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[26] EMERSON, *supra* note 25, at 7 ("achieving a more adaptable and hence a more stable

The United States Supreme Court has recognized several distinct rationales for the First Amendment free speech mandate. The Court has insisted that the First Amendment fosters dialogue and debate on issues of public concern, and thus augments civic speech.[27] In numerous cases, the Court refers to the marketplace principle espoused by Milton and Mill as the motivating force for free speech.[28] The Court has acknowledged promotion of autonomy and self-definition through self-expression[29] and cultivation of community[30] as worthy of free speech goals. The Court has also considered a

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community [and thus] maintaining the precarious balance between healthy cleavage and necessary consensus"). *See generally* Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990) (encouraging cultivation of community values); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95 (promoting constructive communitarianism). Concerning the role of community, see generally THOMAS PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

[27] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[T]he profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.").

[28] *E.g.*, Board of Educ. v. Pico, 457 U.S. 853, 866–67 (1982); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537–38 (1980); FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 269–72 (1964).

[29] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring) ("Those who won our independence believed that the final end of the State [is] to make men free to develop their faculties . . . . They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."); *see also* Cohen v. California, 403 U.S. 15, 24 (1971) (Our political system rests upon a "premise of individual dignity and choice.").

[30] *See, e.g.*, Mishkin v. New York, 383 U.S. 502 (1966); Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957). Cases supporting constraints upon free expression evidence the Court's approach of justifying constraints by communitarianism. These cases share a common theme: the speech at issue was deemed *contra bones mores*, in denigration of the community's welfare, morals or good order. Thus, in the earliest of the obscenity cases, the Court's concern was the preservation of community morality.

In the post-World War I incitement cases, the Court determined that Congress has a right to regulate words that create a "clear and present danger." *See* Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Gitlow v. New York, 268 U.S. 652, 667 (1925) ("[A] state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means."). Similarly, defamation was viewed as an outrage against the community, insofar as the honor and reputation of a community member was unjustifiably impugned. *See* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.").

laissez-faire approach to free speech.[31] The majority of the Court has not yet settled upon a defining ideology to justify the veneration it accords to free speech.[32]

B. *Content-Based Restrictions: Contextuality As the Regulatory Touchstone*

The Court's ideological chasm in delineating a free speech rationale is replicated in the Court's First Amendment jurisprudence. The "most exacting scrutiny" applies to content-based speech restrictions.[33] Content-based regulations are presumed to be unconstitutional; validity is found only if "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."[34]

When evaluating the propriety of content-based restrictions on speech, the Court excises some types of utterances from the First Amendment's protective umbrella. These forms of expression "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[35] The Court's approach to content-based regulations is ostensibly categorical.[36]

Viewed from this perspective, *contra bones mores* provides the common denominator that links various First Amendment underpinnings. It might be argued that *contra bones mores* is the most potent, if not the only, basis underlying the Court's First Amendment jurisprudence.

[31] Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibitions of public discourse of an entire topic. [To] allow government the choice of permissible subjects for public debate would be to [allow] government control for the search for political truth."); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

The *laissez-faire* and marketplace approaches are related, yet distinct. The marketplace justification involves connections between the actors in the marketplace. *Laissez-faire* implies no connections between the actors and directs government to leave well enough alone.

[32] EMERSON, *supra* note 25, at 15; Redish, *supra* note 25, at 591. "[I]f you don't provide a rationale for the toleration of a particular form of speech, but simply declare that the Constitution made me do it, you will have characterized the Constitution as an irrational document." Fish, *Jerry Falwell's Mother*, *supra* note 5, at 123.

[33] Texas v. Johnson, 491 U.S. 397, 403 (1988); Widmar v. Vincent, 454 U.S. 263, 276 (1981). *See generally* TRIBE, *supra* note 5, § 12–3, at 798–99.

[34] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[35] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); *see also supra* note 30 (asserting that communitarian values largely account for the Court's First Amendment categorical strategy).

[36] *But see infra* text accompanying notes 109–18. Professor J.M. Balkin maintains that the

These varieties of vulnerable expression, or "low value speech,"[37] include intentional incitement,[38] obscenity,[39] child pornography,[40] defamation,[41] fighting words,[42] and commercial speech.[43] The Court has constructed a series of different standards for each of these less worthwhile varieties of speech to determine first, whether a particular communication is protected or falls into a vulnerable category, and second, if vulnerable, whether any First Amendment protection is merited. Not only do these standards partake more of balancing than of categorical imperatives,[44] but they also focus more on the context of what is said than upon its content.

For example, obscenity, perhaps the quintessential example of valueless expression, purportedly is bereft of communicative value, and can be broadly repressed.[45] Laws directed against obscenity

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Chaplinsky Court's strategy of defining categorical exclusions from that which the Court recognizes as "speech" was an intellectual requisite to establishing democratic pluralism as the basis for the myriad varieties of speech content. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 396–99.

[37] Stone, *supra* note 5, at 195.

[38] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Dennis v. United States, 341 U.S. 494, 544–46 (1951) (Frankfurter, J., concurring).

[39] Miller v. California, 413 U.S. 15, 18–19 (1973).

[40] New York v. Ferber, 458 U.S. 747, 758 (1982).

[41] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[42] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[43] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 752 (1976) (holding that speech that merely proposes a commercial transaction still does not lack all First Amendment protection). Commercial speech was once completely vulnerable to regulation. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). The Burger and Rehnquist Courts have enhanced the respectability afforded to speech that proposes a commercial transaction. The Court evaluates the validity of commercial speech by the same balancing test used to evaluate incidental regulations on otherwise protected communication. *See, e.g.*, Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 340 (1986); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 556, 557 (1980).

[44] Any interpretation of the First Amendment that affords less than full protection to all forms of discourse, despite its content, involves a process of balancing competing social values and considerations. Thus, balancing is an integral part in defining which categories of speech merit lesser protection. What is interesting is that "the Court has steadfastly refused to admit that it balances or to recognize a comprehensive approach which would weigh all the relevant factors." Zacharias, *supra* note 5, at 951; *see also* TRIBE, *supra* note 5, § 12–2, at 792; Redish, *supra* note 25, at 624–25.

[45] In *Roth v. United States*, Justice Brennan opined: "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. 476, 484 (1957). Another justification for categorizing obscene speech as taboo is offered by Professor Schauer, who states that obscenity is specifically designed to evoke an entirely physical effect, and thus is a physical, and not a mental, stimulus—"a pornographic item is in a real sense a sexual surrogate." Fred C. Schauer, *"Speech—Obscenity and Obscenity": An*

restrict neither content nor ideas as such, but instead limit the means of expression, not the underlying attitude expressed.[46] Defamation, the dissemination of false information injurious to reputation, is similarly bereft of communicative value, and can result in civil damages to the person defamed. Some defamatory communications are content-protected when, because of the prominence of the person defamed, the Court determines that unintentional falsehoods contribute to the public debate.[47] Fighting words are not inherently menacing in a constitutional sense, but become so only

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Exercise in the Interpretation of Constitutional Language, 67 GEO. L.J. 899, 926 (1979). The Court's latest formulation distinguishes obscenity from merely distasteful, rough, evocative, or erotic speech—the latter is somewhat protected. Miller v. California, 413 U.S. 15, 21–22 (1973). This is applied, however, without consistent standards. *See id.* The Court requires a finding that the matter at issue is patently offensive, appeals to prurient interests and is bereft of serious scientific, artistic, literary or political value. *See id.*

[46] *See, e.g.*, T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 547 (1979). That the proscription runs against the mode of expression, and not against the underlying communication or attitude, is especially clear in the case of child pornography. Government could not punish an orally stated sexual preference for children. For example, an organization for pedophiles, the North American Man/Boy Love Association (NAMBLA), has achieved notoriety and caused expected controversy. *See, e.g.*, Melinda Henneberger, *How Free Can Teachers' Speech Be*, N.Y. TIMES, Oct. 3, 1993, at § 4, p. 6, col. 4; Joyce Price, *Senators Hold Up U.N. Funding over Ties to Pedophiles*, WASH. TIMES, Jan. 27, 1994, at A3. Mere membership in NAMBLA, however, cannot be the basis for criminal penalties. TRIBE, *supra* note 5, § 12–26, at 1010–15. NAMBLA members' statements concerning their sexual preference is protected speech. Yet, materials depicting children in sexual poses or activities can be criminalized. *See* New York v. Ferber, 458 U.S. 747, 756–58 (1982) ("States are entitled to greater leeway in the regulation of pornographic depictions of children."). Moreover, mere possession of child pornography, even in the privacy of one's own home, can be criminalized, despite the holding of Stanley v. Georgia. 394 U.S. 557 (1969) (concerning possession of adult pornography). *But see* Jacobson v. United States, 112 S. Ct. 1535 (1992) (conviction for receiving child pornography in the mail overturned where defendant, the target of a government "sting" operation, was entrapped into the purchase). The contextual analysis in this instance involves "a heightened sensitivity on the Court's part to the harms that pornographic activity can inflict upon participants in obscene productions, as well as viewers of the resulting materials." TRIBE, *supra* note 5, § 12–16, at 915. This insight regarding the dual nature of harm inflicted by pornography, even if the material itself does not satisfy the Court's definition of obscenity, is the thrust for proposals that link pornography with degradation of women. *See infra* notes 80–81 and accompanying text.

The *contra bones mores* principle is particularly poignant in its application to child pornography. *See supra* note 30. The Court has expanded prohibitions against offensive—yet not obscene—materials to protect children from callous exploitation, and it has also pronounced societal mortification at the indulgence in this type of activity by some members of society. *Id.*

[47] Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342–43, 345 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1963). The Court's present accommodations between free speech rights and an individual's interests in the integrity of his or her reputation lacks coherence and consistent standards. *See generally* TRIBE, *supra* note 5, § 12–12, at 12–13.

when such words "by their very utterance inflict injury or tend to incite a breach of the peace."[48]

Intentional incitement, or subversive advocacy, is a special case illustrating the Court's context-driven approach to appraising the validity of content-based regulations. The Court permits regulation of expression that qualifies as incitement if, as a consequence of the utterance, there exists a likelihood of imminent unlawful conduct, and if the speaker intends this result.[49] *Brandenburg v. Ohio* declares as a general First Amendment tenet that advocacy of even the most alarming notions is absolutely protected against direct criminal prohibition, regardless of dangerousness and intent.[50] Interdiction of ideas or perspectives deemed intrinsically dangerous, and perhaps justifiably so, by government, is forbidden. Context alone provides the gauge for permissible regulation. Proscription is permitted only if proclaimed in a particular context, such as one in which the speech is intended to ignite, or incite, imminent unlawful or violent action, and the probability of success is high.[51] In a sense, the Court's

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[48] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). *Chaplinsky* and its fighting words doctrine, similar to obscenity and defamation, raises many more questions than it answers. For example, Chaplinsky addressed his epithets—"God damned racketeer" and "Fascist"—to a city marshall who had interrupted Chaplinsky's soap box speech. *Id.* at 569. Why should this outburst not be construed as a cry of frustration at the overweening power of government, and therefore as protected political or civic speech? Redish, *supra* note 25, at 626. What of the emotive content of protected First Amendment speech? *See* Cohen v. California, 403 U.S. 15, 18, 25–26 (1971). Could Chaplinsky be convicted for uttering fighting words had he written the same phrases on a poster that he carried while walking the public streets? The fighting words doctrine's distinction between suppressible rough language and protected provocative words—both of which might stir a listener to anger—may operate more to repress "low value" speakers than "low value" speech. *See* Ingber, *A Legitimizing Myth*, *supra* note 24, at 33–34.

It is interesting that since *Chaplinsky*, the Court has not sustained a conviction for uttering fighting words. *See, e.g.*, Plummer v. City of Columbus, 414 U.S. 2, 3 (1973); Brown v. Oklahoma, 408 U.S. 914, 914 (1972); Lewis v. New Orleans, 408 U.S. 913, 913 (1972); Gooding v. Wilson, 405 U.S. 518, 528 (1972). The fighting words doctrine, however, retains technical validity. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543–44 (1992). A number of commentators have criticized the continuing constitutional validity of *Chaplinsky* and called for its modification or elimination. Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for Its Internment*, 106 HARV. L. REV. 1129 (1993).

[49] Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

[50] *Id.* at 447 ("The constitutional guarantees of free speech and free press do not permit a state to forbid or prosecute advocacy of the use of force or of law violation except where such advocacy is directed to creating or producing imminent lawless action and is likely to create or produce such action.").

[51] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982) (conviction reversed because emotionally charged rhetoric of speaker did not incite violence); Hess v.

formulation of the incitement doctrine is the equivalent of Holmes' shout of "Fire!" in a crowded theater.[52] Here, the false shout is to the nation, causing hazards to arise in dangerously incendiary contexts.

The Court's continuing obliviousness to communicative content is manifested in *R.A.V. v. City of St. Paul*.[53] In *R.A.V.*, a cross was set afire on the lawn of a black family.[54] A juvenile was prosecuted under an ordinance directed at racially motivated criminal acts that involved knowingly placing a sign or symbol on private property that arouses "anger, resentment or alarm in others on the basis of race, color, creed, religion or gender."[55] The Minnesota Supreme Court, in reversing dismissal of the charges, placed a limiting gloss on the ordinance by construing it to prohibit only fighting words, within the contours of *Chaplinsky v. New Hampshire*,[56] or intentional incitement.[57] The Supreme Court invalidated the ordinance unanimously, but it split on rationale. Five Justices, in an opinion authored by Justice Scalia, found the ordinance fatally flawed in its selection of a subcategory of fighting words for condemnation.[58] Context, stated Justice Scalia, is not determinative; rather, government cannot choose to outlaw some fighting words messages without prohibiting all messages within that category.[59] Thus, a majority of the Court has

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Indiana, 414 U.S. 105, 108–09 (1973) (disorderly conduct conviction of a demonstrator reversed because statements evidenced no imminence of danger). *See generally* Ingber, *A Legitimizing Myth*, *supra* note 24, at 17–22; Hans Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970); Staughton Lynd, Comment, *Brandenburg v. Ohio: A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151 (1975).

[52] Schenck v. United States, 249 U.S. 47, 52 (1919).

[53] 112 S. Ct. 2538 (1992).

[54] *Id.* at 2541.

[55] *Id.* (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)).

[56] *See supra* note 1.

[57] *In re* Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn. 1991).

[58] R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2442–43 (1992).

[59] *Id.* Four Justices found the ordinance over broad in its focus on the "hurt feelings, offense, or resentment" caused by expressive activity. *Id.* Justice Stevens' opinion suggested, however, that a narrowly drawn ordinance might pass their scrutiny, and reiterated that prohibited speech must be contextually assessed. *See id.* at 2561 (Stevens, J., concurring) ("The meaning of any expression and the legitimacy of its regulation can only be determined in context.").

An interesting colloquy developed between Justice Scalia and the concurring Justices, who charged that the majority's reasoning jeopardized Title VII hostile work environment claims. *Id.* at 2557–58 (White, J., concurring). Justice Scalia's retort was that *R.A.V.* left these laws unaffected because they are "directed at conduct rather than speech." *Id.* at 2546. The Court, however, has recognized the invalidity of the speech/conduct distinction as a basis for assess-

declared that legislatures cannot look at the content of messages that fall within the Court's vulnerable categories, such as fighting words and intentional incitement.

First Amendment jurisprudence concerning content-based constraints on speech demonstrates that the Court avoids direct contact with content as if it were a hot iron.[60] The words themselves, and the ideas they communicate, are simply not the determinative factor examined by the Court in appraising content-based regulations. Instead, the Court cushions the necessity to judge or evaluate content by focusing on the context in which the communication occurs.[61]

C. *Content-Neutral Restrictions: Latitude and Balance as the Regulatory Standard*

If regulations affect discourse that the Court categorizes as entitled to the full force of First Amendment protection, the restraints must be content-neutral, or independent of the nature of the message communicated. Non-vulnerable speech can be regulated only indirectly; generally, only the collateral effects of speech, or the time, place or manner in which speech is purveyed, can be regulated.[62] This species of viewpoint-neutral regulation might be characterized as a regulation of how speech is disseminated. Before discussing these time, place and manner speech restrictions, however, two

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ing the validity of speech regulation. *See generally* Cohen v. California, 403 U.S. 15 (1971); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968). Justice Scalia's earlier concurrence in Barnes v. Glen Theatre, 501 U.S. 572 (1991), which stated his position that a public indecency statute regulates conduct, not speech, and therefore, is impregnable against a First Amendment assault, indicates that perhaps Justice Scalia would return to the speech/conduct distinction, which was previously disregarded as a fallacious analytic tool. *See infra* notes 92–96 and accompanying text. For criticisms of the *R.A.V.* decision, see generally Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992); Thomas H. Moore, *R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech*, 71 N.C. L. REV. 1252 (1993); Philip Weinberg, *R.A.V. and Mitchell: Making Hate Crime A Trivial Pursuit*, 25 CONN. L. REV. 299 (1993); Michael S. Degan, Note, *"Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws*, 26 CREIGHTON L. REV. 1109 (1993).

[60] Commentators are similarly wary of touching the hot iron of content. *See, e.g.*, Sheldon L. Leader, *Free Speech and the Advocacy of Illegal Action in Law and Political Theory*, 82 COLUM. L. REV. 412 (1982); Fred Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983); Wellington, *supra* note 24; Zacharias, *supra* note 5.

[61] *See infra* text accompanying notes 109–32.

[62] *See* Stone, *supra* note 5. *See generally* TRIBE, *supra* note 5, §§ 12–23 to 12–25, at 977–1010.

other varieties of content-neutral regulation should be considered: restrictions premised upon who the speaker is, and restrictions based upon the effect of the speaker's message upon the recipient.

1. Identity of the Speaker

Within the confines of several narrow principles, the issue of who disseminates speech occasionally provides a basis for regulation, despite the content of the message disseminated. Who may have a voicebox and thus speak under the First Amendment? Government cannot compel an individual to transmit a message or an ideology that is odious to that person.[63] Yet, if government provides a medium by which some speakers are permitted to purvey their messages, government must furnish an equal voicebox to others.[64]

2. Effect Upon the Recipient

Generally, the effect of incendiary speech upon the recipient is repudiated as a permissible basis for regulation.[65] Audience impact

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[63] Wooley v. Maynard, 430 U.S. 705, 714–17 (1977) (government cannot demand that an individual's motor vehicle bear a license plate embossed with the state motto, "Live Free or Die"); West Virginia v. Barnette, 319 U.S. 624, 642 (1943) (government cannot compel school children to participate in a flag salute ceremony); *see also* Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 22 (1989) (criticizing Wooley as compelling New Hampshire citizens to publicly declare their position by allowing the option to display the state motto).

[64] Board of Educ. of Westside Community Schs. v. Mergens, 496 U.S. 226, 246–47 (1990); Widmar v. Vincent, 454 U.S. 263, 270–75 (1981); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 94–102 (1972); *see also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537–38 (1980) (corporate speech); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784–86 (1978) (corporate political speech). *See generally* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

A related principle is that although government cannot oblige the media to broadcast or communicate particular messages, broadcast media can be the subject of a variety of regulations in order to foster the First Amendment's goal of informing the public. *See, e.g.*, Turner Broadcasting Sys., Inc. v. FCC, 62 U.S.L.W. 4647, 4652–55 (U.S. June 28, 1994); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386–92 (1969); *see also* Jeffrey A. Levinson, *An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office*, 72 B.U. L. REV. 143 (1992); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993).

[65] The Court has protected several speakers who attempt to communicate diatribes that provoked and offended their audiences. *E.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) (reversing conviction for inciting breach of peace, where speaker goaded his turbulent audience with race-baiting speech and labelled them "slimy scum," "snakes," and "bedbugs"); Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing conviction for inciting breach of peace, where Jehovah's Witness played phonograph record that venomously attacked Roman Catholics). The civil rights struggles of the 1960s gave rise to a number of cases in which demonstrators were exonerated for purveying messages unwelcome to their audiences. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536 (1965);

is too ephemeral or subjective as a regulatory basis, provides no standards to guide a speaker's communicative efforts, and ultimately relies upon the discretion of local officials on the scene as the litmus test for regulation. The Court demands that the discretion of law enforcement officers in the hostile-audience context must be unyieldingly cabined. Although "silencing the speaker is certainly preferable to a blood bath,"[66] it is incumbent upon authorities to make all reasonable efforts to curb the crowd and to conserve the speaker's right to proceed.[67]

In contrast to these "heckler's veto"[68] cases, the Court has acknowledged a limited right to peace and respite from the turmoil that often accompanies robust exercise of speech rights. The freedom to communicate also entails the freedom to decline to listen, or to

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Edwards v. South Carolina, 372 U.S. 229 (1963). *See generally* HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965); TRIBE, *supra* note 5, § 12–10, at 849–56; Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Stone, *supra* note 5, at 207–17.

The anomaly is Feiner v. New York, 340 U.S. 315 (1951). In *Feiner*, the Court upheld the conviction of a speaker who denounced President Truman as a "bum," referred to the American Legion as "a Nazi Gestapo," gave the impression that he intended to instigate the black members of the audience against the white members, and ignored an order from police to cease. *Id.* The Court stated:

> It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.

Id. at 321. In light of other precedent, however, *Feiner* may be construed narrowly as a deference to police judgments concerning imminent violence.

The archetypal case is Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). In *Collin*, a representative of the American Nazi Party sought a permit to march through the Village of Skokie, a town inhabited largely by Jewish residents, many of whom were survivors of the Nazi World War II genocide operations. *Id.* at 1199. The Nazis won the right to march in Skokie, but ultimately declined to do so. *See* Lee Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617 (1982); Donald A. Downs, *Hate Group Speech, and The First Amendment*, 60 NOTRE DAME L. REV. 629 (1985); David Goldberger, *The First Amendment Under Attack by its Friends*, 29 MERCER L. REV. 761 (1978). Stanley Ingber argues: "The Nazi's expression is allowed precisely because officials anticipate that the marketplace will reject it out of hand. In contrast, if government official had perceived the Nazi march as seriously threatening to influence decisions and behavior, they might well have forbidden the march." Ingber, *A Legitimizing Myth*, *supra* note 24, at 21–22 (citations omitted).

[66] TRIBE, *supra* note 5, § 12–10, at 853.

[67] *Id.* § 12–10, at 855; *see also* Owen Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416–17 (1986). Recall also Justice Harlan's directive in *Cohen v. California* that those affronted by unwelcome messages while in public should simply avert their gaze, and by extension, close their ears. 403 U.S. 15, 21 (1971).

[68] This phrase was coined by Professor Harry Kalven in his book, THE NEGRO AND THE FIRST AMENDMENT. *See* KALVEN, *supra* note 65, at 140–45.

remain unreceptive to others' messages.[69] When a speaker is before a captive audience—that is, an audience with no means to escape the communication—that is apathetic or antagonistic to the speaker's communication, the audience's right to respite outweighs the speaker's right to reach the captive audience.[70] Two factors appear essential: first, that the audience be captive, divested of any opportunity to evade the unwanted communication by averting their eyes or closing their ears; and second, that the disagreeable communication intrude into the captives' home.[71]

A modern analogue to these cases where the speaker's communication has a substantial impact upon the audience has developed over the past decade. Words are not necessarily innocuous; mere words can perpetrate grievous harm upon listeners, especially upon an audience characterized by a history of oppression and therefore acutely vulnerable to racist, ethnic, or sexist attacks.[72] In recognition

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[69] *See* Cohen v. California, 403 U.S. 15, 21 (1971).

[70] "To enforce freedom of speech in disregard of others would be harsh and arbitrary in itself." Kovacs v. Cooper, 336 U.S. 77, 88 (1949) (upholding constitutionality of ordinance prohibiting use of sound trucks on public streets).

[71] *See* Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (upholding post office order requiring mailer to remove addressees' name from mailing list upon request). In *Rowan*, Justice Burger declared:

> [T]he right of every person "to be let alone" must be placed in the scales with the rights of others to communicate. In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. . . . If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.

397 U.S. at 736, 738. The Court has reiterated that speakers' rights to communicate must defer to captives' rights to tranquility in several cases. *See* Frisby v. Schultz, 487 U.S. 474, 484–85 (1988); FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978); *see also* Stone, *supra* note 5, at 280. *See generally* Charles L. Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953); Sean M. Selegue, Note, *Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment*, 79 CAL. L. REV. 919 (1991) (positing the argument that the captive audience doctrine provides the foundation for protection of a personal "civility zone").

In the context of the *R.A.V.* case, the captive audience approach might have provided a way to resolve the dilemma of protecting the violated family from the ignominy from being compelled to endure the odious message thrust upon them. *See supra* text accompanying notes 57–60. So long as narrowly drafted, a statute embodying this approach might provide a strategy for dealing with the majority's aversion to content-specific prohibitions.

[72] For a discussion of racist affronts, see generally Delgado, *supra* note 1. The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted. Such language injures the dignity and self-regard of the person to whom it is

of this fact, commentators have promulgated a myriad of regulations to repress certain varieties of speech. These proposals take the form of regulatory codes that restrict certain speech and expressive activities.[73] In contrast to the Court's wholly contextual approach, these proposals do take account of the content of speech, and conclude that words constituting "hate speech"—at least in the context of vulnerable audiences—are virtually bereft of intellectual, social or communitarian value.

One type of proposed regulation focuses primarily upon offensive or hate speech—that speech which expresses hatred or disdain toward members of racial, religious, or other groups—on college and university campuses. The objective is to regulate not only because of the ostensibly inherent uselessness or problematic intellectual quality of the ideas expressed, but also because such speech menaces and intimidates those to whom it is addressed.[74] Hate speech regulations assess the effect of a communication upon the listener;

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addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood. Not only does the listener learn and internalize the messages contained in racial insults, these messages color our society's institutions and are transmitted to succeeding generations. *Id.* at 135 (citations omitted); *see also* Lawrence, *supra* note 1; Matsuda, *supra* note 1; Smolla, *supra* note 1.

Professors Catharine A. MacKinnon and Andrea Dworkin are the most eloquent spokespersons concerning the injury inflicted by sexist slurs. *See generally* ANDREA DWORKIN, MEN POSSESSING WOMEN (1981); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) 127–213 [hereinafter MACKINNON, FEMINISM UNMODIFIED]; CATHARINE A. MACKINNON, ONLY WORDS (1993); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1 (1985); MacKinnon, *Not a Moral Issue*, *supra* note 1; MacKinnon, *Pornography*, *supra* note 1; Catharine A. MacKinnon, *Reflections on Sex Equality under the Law*, 100 YALE L.J. 1281 (1991).

[73] *See infra* notes 74–78.

[74] Mary E. Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1038 (1993); Lawrence, *supra* note 1. Professor Delgado writes poignantly of the wounds inflicted upon us all by tolerance of racist insults and epithets.

> [R]acist speech is different because it is the means by which society constructs a stigma-picture of disfavored groups. It is tacitly coordinated by its speakers in a broad design, each act of which seems harmless, but which, in combination with others, crushes the spirits of its victims while creating culture at odds with our national values.

Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. REV. 343, 387 (1991); *see also* Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL. 81 (1991); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993). "From a libertarian perspective, any content-based regulation of speech is disfavored, but from an egalitarian perspective, the curtailment of racist speech may seem as necessary as the desegregation of lunch counters to dismantle the social structure of racial hierarchy." Kathleen M. Sullivan, *Supreme Court Foreward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 44 (1992).

regulation is contingent upon the degree of slight, offense, or terror inflicted upon those who hear the hateful message.

Initially, proponents of campus regulatory codes met with a measure of success. Impelled by an escalating number of reported racial incidents on campuses across the country,[75] a number of colleges and universities enacted varying forms of regulations that restrain hate speech.[76] Not surprisingly, these campus codes have met with resistance from both courts[77] and commentators.[78]

There is yet another remedy for speech that vilifies persons based on race: an independent tort action for damages accruing from racial insults. Professor Delgado has constructed a cause of action for racial denigration that would permit recovery of damages upon demonstration of intentional debasement of a plaintiff on the basis of race.[79]

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[75] *See* Delgado, *supra* note 1; Lawrence, *supra* note 1; Matsuda, *supra* note 1; *see also* sources cited *supra* note 71.

[76] For example, Wisconsin, Michigan and Stanford have enacted regulations that restrain harassment and other forms of hate speech. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 624–29 (outlining regulations); *see also* Lauri A. Ebel, *University Anti-Discrimination Codes v. Free Speech*, 23 N.M. L. REV. 169, 171–85 (1993) (describing campus provisions); Ann Marie Ruegsegger Highsmith, *When He Hollers, Do We Have to Let Him Go?*, 27 BEVERLY HILLS B. ASS'N J. 1,6 (Winter 1993) (discussing various forms of hateful conduct including: face-to-face verbal confrontations, shouts, publicly displayed messages, telephone calls, letters, E-mail messages, cartoons, jokes, parodies, graffiti, symbols, themes for social functions, and defacement of posters and displays); Moore, *supra* note 59, at 1255 nn.12–18 (indicating that many colleges and universities have hate speech codes).

[77] Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (invalidating University of Michigan prohibition against hate speech and stigmatization on grounds of overbreadth and vagueness). Although the university averred that its policy did not apply in the classroom context, the court stressed that it might encompass, or inhibit, classroom discussions. *Id.* at 864–66; *see also* UWM Post, Inc. v. Board of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991).

[78] Many commentators oppose the trend towards regulatory prohibitions against campus speech or expressive activities. *See* Gerald Gunther and Charles Lawrence, *Good Speech, Bad Speech—Should Universities Restrict Expression That is Racist or Otherwise Denigrating? No*, 24 STAN. LAW. 7, 41 (Spring 1990); Strossen, *supra* note 76 (criticizing broad antiracist campus speech codes); *see also* Joseph W. Bellacosa, *The Regulation of Hate Speech by Academe vs. The Idea of a University: A Classic Oxymoron?*, 67 ST. JOHN'S L. REV. 1 (1993); Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); Karst, *supra* note 26; Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865 (1993); David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of Offensive Speech*, 79 CAL. L. REV. 825 (1991); Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991).

[79] Delgado, *supra* note 1. The ultimate fate of the racial affront cause of action has become doubtful in the wake of the Court's decision in *Hustler Magazine v. Falwell*, in which the Court rejected "outrageousness" as a standard for tort liability in the context of public debate about

A distinct type of regulatory proposal assails pornography as gender-based discrimination because of its utterly devastating effect upon women. Professors MacKinnon and Dworkin contend that pornography denigrates women, fosters aggressive acts against women, perpetuates unacceptable stereotypes concerning women and their societal roles, and contributes to women's social inequality and lingering subordination.[80] To combat these injuries, Professors MacKinnon and Dworkin promote model municipal ordinances which would furnish civil remedies against the production and dissemination of pornographic material.[81]

Although well-intentioned, these hate speech and anti-pornography proposals mimic the Court's contextual methodology concerning content-based constraints. These proposals do glimpse at the content of the speech itself. It is, however, largely context—the speaker's intended effect of the speech upon the listener—that is the regulatory touchstone.[82]

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public figures. 485 U.S. 46, 55–57 (1988). The case involved a caricature of Reverend Jerry Falwell, portraying him as having committed incest with his mother in an outhouse. *Id.* at 48. The case is powerfully criticized by Professor Fish. *See* Fish, *Jerry Falwell's Mother*, *supra* note 5.

[80] Catharine A. MacKinnon, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED, *supra* note 72, at 163, 180–81. A number of commentators have analyzed studies that link pornography with violence or oppression against women. Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737; Cass Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589. *But see* Karst, *supra* note 26, at 136–42; Nadine Strossen, *The Convergences of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. Rev. 201 (1987) (reviewing WOMEN AGAINST CENSORSHIP (V. Burstyn ed., 1985)).

[81] An anti-pornography ordinance drafted by Professors MacKinnon and Dworkin was passed by the Minneapolis City Council on December 30, 1983, but was vetoed as over broad by Mayor Donald Fraser within a week. *See* Michael Gershel, *Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis As If Women Mattered*, 11 WM. MITCHELL L. REV. 39, 43–44, 119–25 (1985) (reprinting the text of the proposed Minneapolis ordinance as an appendix). A similar ordinance was enacted in Indianapolis, but was promptly struck down on First Amendment grounds. American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). Massachusetts is considering a similar statute, the proposed Act to Protect the Civil Rights of Women and Children. *See* John F. Wirenius, *Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech, and the First Amendment*, 20 FORDHAM URB. L.J. 27, 41 n.46 (1992) (discussing the proposed act H.B. 5194, Mass. 177th General Court, 1992 Sess. 2). In a recent criminal case, the Supreme Court of Canada relied upon arguments similar to those promulgated by Professors MacKinnon and Dworkin to hold that pornography denigrates and harms women, and thus violates the principle of equality. Butler v. The Queen, 1 S.C.R. 452 (1992). *See generally* Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEMINISM 123 (1992).

[82] These audience-protective endeavors are problematic. *See infra* note 118 and accompanying text. Audience-protective measures were imperilled by the Court's recent opinion in

3. Time/Place/Manner Restrictions

The most significant content-neutral restrictions are those which purport to regulate only the non-communicative aspects of speech. These incidental regulations focus entirely upon the collateral aspects of speech: the time, place, or manner in which communication occurs.[83] This regulatory category encompasses a broad range of communicative expression, such as parades, marches, and demonstrations,[84] sound amplification,[85] picketing,[86] disseminating leaflets,[87] in-person or postal distribution of literature,[88] solicitation,[89] posting of signs,[90] and symbolic activity.[91] The Court has adopted a balancing

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R.A.V. v. City of St. Paul, insofar as each regulatory proposal relies on content-based viewpoint discrimination in order to eradicate the perceived evil. *See supra* text accompanying notes 57–60.

[83] The nature of the forum—public, limited public, or non-public—in which speech occurs significantly affects the permissible degree of regulation. *See, e.g.*, United States v. Kokinda, 497 U.S. 720 (1990); Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985); United States Postal Serv. v. Greenburgh Civil Ass'ns, 453 U.S. 114 (1981); Greer v. Spock, 424 U.S. 828 (1976). In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, the Court articulated a tripartite test for analyzing speech restrictions on government property, and held that in a traditional public forum, such as a street or a park, government cannot close the forum to expressive activities, but can regulate only minimally to ensure order. 460 U.S. 37, 45–46 (1983). In a limited public forum such as a university student center or a state fairground, however, government can close the place to expressive activities. *Id.* at 47. In a private forum, such as a hospital or a military post, government can impose any reasonable restriction on expressive activities that is not tantamount to viewpoint discrimination. *See id.* at 46–50. Most commentators criticize the Court's forum analysis. *See, e.g.*, Lee Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979 (1990); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109 (1986); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984); Barbara S. Gaal, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 STAN. L. REV. 121 (1982); Harry Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1; Richard B. Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739 (1991).

[84] Greer v. Spock, 424 U.S. 828 (1976) (political campaigning on federal military reserve); Bachellar v. Maryland, 397 U.S. 564 (1970) (demonstration protesting Vietnam War); Adderly v. Florida, 385 U.S. 39 (1966) (demonstration on non-public jail driveway).

[85] Ward v. Rock Against Racism, 491 U.S. 781 (1989); Kovacs v. Cooper, 336 U.S. 77 (1949).

[86] Carey v. Brown, 447 U.S. 455 (1980); Grayned v. Rockford, 408 U.S. 104 (1972); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Cox v. Louisiana, 379 U.S. 536 (1965).

[87] Schneider v. State, 308 U.S. 147 (1939).

[88] United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); Talley v. California, 362 U.S. 60 (1960); Martin v. Struthers, 319 U.S. 141 (1943).

[89] Schaumburg v. Citizens for Better Env't, 444 U.S. 620 (1980); Breard v. Alexandria, 341 U.S. 622 (1951).

[90] City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

[91] Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Tinker v. Des Moines

test to measure the propriety of time/place/manner restrictions; the extent to which communicative activity is actually constrained is weighed against the significance of the "values, interests or rights served" by enforcing the constraint.[92] Thus, striking the balance, the Court decreed that because litter does not pose an overwhelming societal problem, government cannot ban all leafletting in order to safeguard against it.[93] But because peace and quiet enjoyment are significant societal interests that government can choose to safeguard, the Court authorized government to outlaw sound enhancement in order to avoid intrusion into public and residential areas.[94]

By balancing factors that purport to disregard the substance of the regulated speaker's message, these time/place/manner restrictions obviate the necessity to examine content. But, although supposedly content-neutral, time/place/manner regulations are not necessarily conducive to robust communication and broad dissemination of ideas. Government intervention into the time, location and mode of communication through incidental regulations can harbor severe implications for the speaker who is regulated.[95] Moreover, a survey of the Court's time/place/manner cases suggests that the Court finds it easier to uphold a collateral speech regulation if the Court is in disagreement with, or is unappreciative of, the speaker's communicative content.[96]

Indep. Sch. Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968); *see also infra* text accompanying notes 97–108.

[92] TRIBE, *supra* note 5, § 12–23, at 979.

[93] Schneider v. State, 308 U.S. 147, 162 (1939).

[94] Ward v. Rock Against Racism, 491 U.S. 781, 791–92 (1989); Kovacs v. Cooper, 336 U.S. 77, 89 (1949).

[95] For example, a statute that forbids all billboard displays in deference to community aesthetics has markedly more severe consequences for potential billboard communicators than a statute that bans display of Nazi propaganda on billboards. Stone, *supra* note 5, at 197. A school regulation that abolishes a student publication restrains student speech rights unequivocally; a school regulation prohibiting publication of hate speech leaves many avenues for interchange. Altering the time for the communication can significantly diminish the audience available to hear the message. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978). Curtailing access to a place for distribution or solicitation can curtail the ability of a speaker to disseminate a message or solicit for a cause. *See generally* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). Prohibiting use of a particular mode of communication is justifiable even if it might diminish the speaker's ability to contact an audience. *See* Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989); Kovacs v. Cooper, 336 U.S. 77, 88–89 (1949); *see also* DEMOCRACY & DISTRUST, *supra* note 19, at 110–11.

[96] Many collateral speech constraints, although premised upon content neutrality, manage to, in fact, silence opponents, outsiders, and iconoclasts. *See, e.g.*, Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841 (1984) (holding that federal statute

4. The Anomaly of Symbolic Speech

Speech can be disseminated by the use of symbols.[97] Symbolic speech is distinct from verbal speech only insofar as the actor uses physical action to communicate the message, rather than utterances or written words. The Court has repeatedly recognized that symbolic speech is speech, not action that falls outside the ambit of the First Amendment's protection, and that its import is as communicative as that of oral language.[98] As Dean Ely properly observed:

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denying financial aid to male students not registered for draft applied to draft protestor); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (holding that anti-camping rule applied to protestors seeking to highlight plight of homeless by sleeping in symbolic tents erected in a park across street from White House); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (holding that restriction of distribution and sale of literature and solicitation of donations at state fair to assigned booths within fairgrounds applied to Krishnas); FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that FCC "channelling" of broadcast message to wee morning hours applied to George Carlin's "Seven Dirty Words" monologue); United States v. O'Brien, 391 U.S. 367 (1968) (holding that federal regulation requiring non-destruction of draft cards applied to Vietnam War protestor). Professor Ingber asserts that both the present conception of the marketplace and the tenor of the Court's decisions are skewed towards maintenance and support of entrenched societal interests. *See generally* Ingber, *A Legitimizing Myth*, *supra* note 24.

The Court has supplemented its traditional two-track analysis in cases involving commercial speech and cases involving non-obscene, offensive speech. The latter class of cases involve government restrictions on the time, place, or manner in which communicative activities occur because the activities implicate an offensive or sexually explicit message. This regulatory departure from content-neutrality is justified by the Court on two grounds. The Court may justify regulations that serve a non-discriminatory objective. *See, e.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–50 (1986) (preserving quality of community life); FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978) (protecting children from vulgar language); Young v. American Mini Theaters, Inc., 427 U.S. 50, 68–70 (1976) (protecting against transients, prostitutes, or increased crime). The Court may also regulate sexually-explicit expression on the grounds that it has less value than other forms of protected speech. *See, e.g.*, American Mini Theatres, 427 U.S. 50, 70 (1976) ("Few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."). *See generally* TRIBE, *supra* note 5, § 12–18, at 934–44. The Court does not deal directly with content and permits oblique regulation under the guise of collateral regulations that curtail offensive speech.

[97] Symbolic speech derives its poignancy as a communicative mode through tacit recognition of emblems; the "right brain" characteristic of "seeing" them intuitively and all at once: textures, shapes, patterns, spatial relationships, metaphors. Karst, *supra* note 26, at 102; *see also* Texas v. Johnson, 491 U.S. 397 (1989) (American flag burned to protest federal governmental policies); United States v. O'Brien, 391 U.S. 367 (1968) (draft card burned to protest the war in Vietnam); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil held in a segregated library).

[98] *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969); United States v. O'Brien, 391 U.S. 367 (1968).

> But burning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct. Attempts to determine which element "predominates" will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected.[99]

Analysis of restrictions on symbolic speech tracks the two-tier regulatory scheme that the Court has promulgated. Permissibility of symbolic speech regulation is dependent upon whether the regulation aims at the communicative impact of the speech, or at the incidental effects of the speech. A protestor can burn a flag to communicate a belief or a strongly-held conviction, but cannot burn that flag on an airplane, in a hospital, or in violation of a fire safety law.

The distinctive analysis that characterizes the two-level methodology is most often confused when symbols are used to communicate, so that both rationale and results are often problematic. The decisive factor is the Court's perception of the governmental objective underlying the challenged regulation.[100] For example, *United States v. O'Brien*[101] is characterized as a time/place/manner case, as is *Clark v. Community for Creative Non-violence*,[102] thus validating the challenged regulations. Preserving the physical integrity of a draft card

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[99] John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495; *see also* Fish, *Jerry Falwell's Mother*, *supra* note 5, at 122–23. Professor Harry Kalven observed that:

> [all] speech is necessarily 'speech plus.' If it is oral, it is noise and may interrupt someone else; if it is written, it may be litter. Indeed this is why the leaflet cases were an appropriate model; they involved speech with collateral consequences that invited regulation. But the leaflets were not simply litter; they were litter with ideas.

Kalven, *supra* note 83, at 23.

[100] TRIBE, *supra* note 5, § 12–23, at 983.

[101] 391 U.S. 367 (1968).

[102] 468 U.S. 288 (1984). In this case, the Court sustained refusal of permission for homeless persons to sleep in tents in LaFayette Park as part of a protest against homelessness, holding that the Park Service's anti-camping regulations were reasonable collateral restrictions. *Id.* at 295. The majority rejected the Court of Appeals view that the interests of the demonstrators in powerfully depicting the circumstances of the homeless and of the Park Service in preservation of parks could be accommodated by containing the size, duration, or frequency of the demonstration. *Id.* at 299. Instead, the Court held that so long as the challenged regulations were reasonable, government is under no compulsion to consider or adopt less restrictive rules. *Id.* at 297.

and affirming anti-camping regulations allegedly affect only the noncommunicative aspects of symbolic speech, and are legitimate incidental regulations. *Johnson v. Texas*[103] and *Tinker v. Des Moines*,[104] however, are depicted as content cases. Quelling a symbolic speaker whose message is disfavored implicates communicative impact, and constitutes an invalid intervention into content.

The Court's approach to symbolic speech cases appears to partake in sleight-of-hand analysis. What is "content" regulation, and what is peripheral regulation of the use of symbols, and by what means does the Court discern the underlying governmental purpose?[105] Is it so clear that the government was not intent upon stifling the mounting wave of protest against the Vietnam War in *O'Brien*,[106] or removing the sole effective communicative means available to the disadvantaged who sought to "speak" through their symbolic protest in *Clark*?[107] Finally, and most significantly, whether assessing purportedly neutral or supposedly content-based regulations, the Court does not evaluate, or even consider, the substance of the symbolic speaker's message.[108]

II. PROBLEMS WITH CURRENT DOCTRINE

This curt overview of current First Amendment jurisprudence demonstrates that the Court's free speech doctrine concerning pur-

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> As Justice Marshall pointed out in [his dissent in] *Clark v. Committee for Creative Non-Violence*, most regulators, although not opposed to free speech as an abstract proposition, nevertheless like a quiet life. For this reason, they have no incentives to increase access any more than is constitutionally required. And if the Constitution requires less and less, then access will diminish accordingly. The result is that the groups who most need inexpensive or free access (usually the groups most on the outs) are the ones who end up bearing the brunt of content-neutral regulation.

Balkin, *supra* note 36, at 397 (citations omitted). *See generally* C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations*, 78 NW. U. L. REV. 937 (1983); David Goldberger, *Judicial Scrutiny in Public Forum Cases: Misplaced Trust in the Judgment of Public Officials*, 32 BUFF. L. REV. 175 (1983); Redish, *supra* note 25; Stone, *supra* note 5.

[103] 491 U.S. 397 (1989).

[104] 393 U.S. 503 (1969).

[105] As Professor Gunther asks, "Should the central question be what was aimed at or what was hit?" GERALD GUNTHER, CONSTITUTIONAL LAW 1225 (12th ed. 1992).

[106] *See generally* United States v. O'Brien, 391 U.S. 367 (1968) (affirming district court decision that burning draft card violated 50 U.S.C. § 462(b)).

[107] 468 U.S. 288, 313–14 (1984) (Marshall, J., dissenting). These are generally difficult questions, not amenable to answers that are easy or obvious. *See id.* at n.14; *see also* Stone, *supra* note 5.

[108] Suppose, for example, that Johnson had burned a Palestine Liberation Flag in order to communicate a message derogatory of Arab peoples, or an Israeli flag in order to trumpet

ported "content-based" regulation is constitutionally problematic. Utterances deemed to be inherently "low value"—obscenity, child pornography, defamation, fighting words and commercial speech—are so classified without ascertainable standards.[109]

Moreover, the Court's categorization of intentional incitement as "dangerous" speech is also problematic. The Court's opinions ostensibly espouse vertical regulation, with the permissibility of restrictions dependent upon the Court's assessment of the intrinsic worthiness of particular types of utterances. But, in fact, the Court evaluates the merits, and therefore the permissibility, of speech more by its context than by its content. The Court does not hone in on what the speaker tries to express, but, rather, on the context in which the speaker tries to communicate.[110] Appropriateness of geography, not of ideas, is the deciding factor.

The Court's reliance upon intentional incitement as the regulatory talisman is flawed in at least two respects.[111] On the one hand, it is over-inclusive. All speech intends to incite.[112] Why permit the Damoclean sword of interdiction to fall upon the speaker at the very juncture of the message's forcefulness, the moment when its persuasive potency is at its zenith?[113] On the other hand, it is under-inclusive. Why permit the provocative speech at all, if that which it champions is unthinkable and unacceptable?[114] The Court rejects an examination of the intrinsic worthiness or hideousness of the ideas expressed. Forms of expression that justifiably might be classified as inherently dangerous cannot be regulated, despite contrary reasonable legislative judgments, unless uttered in an ignitable context.

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the superiority of the Aryan Brotherhood. Given a context similar to that which obtained in Texas v. Johnson, 491 U.S. 397 (1989), would the Court's result be different?

[109] *See supra* text accompanying notes 37–60.

[110] The Court's *Brandenburg* formulation places great emphasis on context, and on surmises about future harm. *See* Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645; Ingber, *A Legitimizing Myth*, *supra* note 24, at 17–22; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603, 637–41 (1990); *see also* William Cohen, *A Look Back at Cohen v. California*, 34 UCLA L. REV. 1595, 1602–03 (1987) (arguing that *Cohen* settled the principle that permissibility of profane or offensive speech is wholly dependent upon context in which it is uttered).

[111] *See generally* Ingber, *A Legitimizing Myth*, *supra* note 24, at 17–18; Leader, *supra* note 60.

[112] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("[An idea] offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.").

[113] Or, in Justice Holmes' incomparable language, at the very point where "[e]loquence may set fire to reason." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *see also* Thomas Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 437 (1980); Fish, *Fraught with Death*, *supra* note 5, at 1075–80.

[114] *See* Leader, *supra* note 60, at 418; *see also infra* text accompanying notes 119–32.

In terms of purportedly content-neutral restrictions on communication, focusing on the identity of persons who disseminate speech provides no solution because this approach does not address the core issue of whether the disseminator's ideas are in some way impermissible or intolerable. A legislature is powerless to suppress messages that advocate genocide, for example, unless the speaker uses a bullhorn,[115] pickets on a military post,[116] broadcasts over the airwaves during prime time,[117] or is otherwise subject to incidental regulations.

Similarly, focusing on the effect of speech on the recipient is both problematic and overly repressive, and thus affords no solution to the essential difficulty of what speech can permissibly be regulated. The impact is difficult to measure with any degree of objectivity or accuracy. Moreover, this form of attempted regulation reflects both overbreadth and vagueness. It is over broad because it necessitates the suppression of—and robust debate concerning—religious, ethnic or race-based ideas or non-obscene pornography generally, ideas that are albeit unpopular or offensive to some, but not without intellectual or social value in other instances. It is vague because no codes can be drawn so precisely that a speaker will be relatively assured in distinguishing forbidden from permitted speech in these areas. The difficulty of ascertaining and measuring the repercussions of communication upon the audience, even if intentional, is formidable, as is the problem of stifling dialogue, even where words intentionally uttered wound, offend or denigrate.

Regulating only the collateral effects of speech likewise does not address the core issue. The Court's incidental, or time/place/manner regulations, determinedly evade the problem of looking at the content of speech and deciding whether it could legitimately be regulated. Collateral constraints might provide a more draconian impediment to speech than content-based regulations.[118]

III. THE CORE FIRST AMENDMENT DILEMMA

The Court's formulation of permissible grounds for First Amendment regulation—both purportedly content-based and incidental—begs the critical, central questions underlying First Amendment

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[115] *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989); Kovacs v. Cooper, 336 U.S. 77 (1949).

[116] *See* Greer v. Spock, 424 U.S. 828 (1976).

[117] *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

[118] *See* sources cited *supra* notes 95 and 96.

jurisprudence of permissible regulation: sometimes speech regulation simply must take account of content. Some ideas—such as genocide, slavery, and aggressive warfare—are so menacing and intolerable that a free society might resolve, within the confines of the First Amendment, that it can endure neither their propagation nor their advocacy. "There is no such thing as a false idea," opined Justice Powell in *Gertz v. Robert Welch, Inc.*[119] But false ideas do exist, and have existed throughout the history of humanity, and these false ideas—genocide, slavery, aggressive warfare—inflict grievous, agonizing destruction upon real people.[120] As Professor Bickel asserted so eloquently, the First Amendment is premised upon a conviction that speech does have consequences.[121] Were it true in a real world sense that "words don't matter, that they make nothing happen and are too trivial to bother with," then impediments could be dictated at will by those in power or those in the majority, for the constraints would similarly be bereft of significance.[122] Yet, if speech is of some moment, and must be tolerated at any cost, then some speech retains a terrifying capacity for brutal harm. If the mere advocacy of ideas as hideous as genocide, slavery, or aggressive warfare is inconsequential, then proscribing them inflicts no loss. But, "[i]f in the long run the belief, let us say, in genocide is destined to be accepted by the dominant forces in the community, the only meaning of free speech is that it should be given its chance and have its way. Do we believe that? Do we accept it?"[123] If we do, can we, as a society, maintain any pretense of discriminating judgment or morality?

The mere utterance of speech as offensive as genocide, slavery, or aggressive warfare is a public injury, and unleashes a societal harm far beyond that inflicted by trespass, malicious mischief, or some

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[119] 418 U.S. 323, 339 (1974).

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> This is where the idea that there is no such thing as a false idea (and therefore no such thing as a true idea, like the idea that women are full-fledged human beings or the idea that Jews shouldn't be killed) gets you; it prevents you, as a matter of principle, from inquiring into the real world of consequences of allowing certain forms of so-called speech to flourish. Behind the principle (that there is no such thing as a false idea) lies a vision of human life as something lived largely in the head. . . . First Amendment jurisprudence works only if you assume that mental activities, even when they emerge into speech, remain safely quarantined in the cortex and do not spill over into the real world, where they can inflict harm.

Fish, *Jerry Falwell's Mother*, *supra* note 5, at 125.

[121] ALEXANDER BICKEL, THE MORALITY OF CONSENT 70–71 (1975).

[122] *Id.* at 71.

[123] *Id.* at 72.

analogous crime.[124] Does the First Amendment really empower the most malevolent among us to spew offensive aspersions against innocent others, who have no power to respond but in kind?

The market model as a foundational principle for First Amendment jurisprudence disregards the overpowering influence of emotional or irrational appeals.[125] The revered marketplace of ideas metaphor simply disregards the fact that, although truth might prevail in the long run, many persons might suffer terrible injury, or even death, in the interim.[126] "Should not the reasons which lead us to permit the advocacy also lead us to permit the result? Or, if we are not willing to accept the result, why should we permit its advocacy?"[127]

On rare occasions, the palliative for harmful communications is not more speech.[128] Instead, the only salve is provided by absolute prohibition.

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[124] *See* sources cited *supra* notes 72 and 74; *see also* sources cited *infra* note 128. These affrontive messages are also a private terror to the person against whom it is addressed:

> When a cross is burned in the yard of an African American family, it is not enough simply to charge a perpetrator with criminal damage to property or with terroristic threats, as these charges do not address the actual harm caused by biased hatred.

Tom Foley, *Hate Crimes: An Analysis of the View from Above*, 18 WM. MITCHELL L. REV. 903, 921 (1992); *see also* Moore, *supra* note 59.

[125] Baker, *supra* note 24, at 976.

[126] *See supra* note 24 (discussing marketplace's flaws as a defining rationale).

[127] Leader, *supra* note 60, at 420.

[128] *See* Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (acknowledging that unredressed emotional and mental harm would result to Jewish residents from Nazi march through their neighborhood); American Bookseller Ass'n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1975), *aff'd*, 475 U.S. 1001 (1976) (conceding that some forms of verbal assaults that influence cultural development, such as racial bigotry and anti-semitism, cannot be "answerable by more speech"; however, finding no power under present First Amendment jurisprudence to condemn even the most offensively noxious of messages); *see also* Delgado, *supra* note 1, at 146–47; Kenneth Lasson, *Racial Defamation and Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 46–47 (1985).

An unyielding First Amendment doctrine, devoid of morals, produces a populace bereft and incapable of moral judgment. Fish, *Fraught with Death*, *supra* note 5, at 1082–83. The argument that affrontive speech should be combatted only with more words does not command credence in other countries. Instead, most countries, excepting a few nations such as Israel and South Africa, view regulation of hate speech as a useful adjunct to measures designed to eradicate discrimination. *See* Jean Stefancic and Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 742 (1993) (analyzing collection of conference papers from the first international conference on hate speech and freedom of expression); Colloquium, *The James McCormick Mitchell Lecture: Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337 (1988–89).

Restrictions on racist speech enacted in other countries serve as constraints against the very

We refuse to flinch from content-based regulation, and instead tackle the crux of this First Amendment issue. Some speech is dangerous because it articulates ideas that are intolerable in a free and tolerant society. The question then becomes: on what basis could permissible standards for legislative regulation be designed?

Of course, the regulation of speech based upon content presages the perils of narrowing societal debate, silencing minorities, and eliminating unwanted opposition. It is imperative that any speech constraint premised upon content shield opponents, outsiders, and iconoclasts from de facto silencing.[129] Also, intolerable or dangerous speech must be differentiated cautiously from speech which is merely offensive or not accepted. We acknowledge these provisos, and thus restrict our proposal to its narrowest boundaries. In fact, our approach might ultimately be more protective of speech. It encompasses only messages confined within narrowly-defined categories, and suggests that other messages be afforded the highest degree of protection. Given the First Amendment goal of promoting the broadest possible exchange of views, while taking into account that speech, like actions, can be dangerous or harmful to society's well-being, we draw the permissible legislative regulatory lines most circumspectly.

We propose neither a balancing test, typical of the Supreme Court's First Amendment jurisprudence, nor a sliding scale that calibrates the intersection of several factors. Instead, we propose an absolutist approach. Speech that falls within certain specified, albeit narrow, confines can be regulated because of its content, regardless of its context. But whether such speech is actually prohibited by legislation remains within legislative prerogative.

We propose several essential requirements for content regulation:

(1) There must be an overwhelmingly broad consensus concerning which categories of substantive messages entail ideas that are wholly intolerable, and thus, could be regulated.

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minority groups they were intended to protect. Stefancic and Delgado, *supra* at 742; Strossen, *supra* note 76, at 556. This experience is not universal, and is not borne out in more progressive societies. Stefancic and Delgado, *supra* at 742. Moreover, the messages we seek to restrict—advocacy of genocide, slavery, aggressive warfare—remain intolerably malevolent, regardless of the identity of the disseminator. *Cf.* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (upholding statute enhancing penalty for crime committed upon a victim intentionally selected by the perpetrator on grounds of race, religion, color, disability, sexual orientation, national origin, or ancestry).

[129] *See generally* Ingber, *A Legitimizing Myth*, *supra* note 24; Karst, *supra* note 26 (recognizing that First Amendment jurisprudence often operates to exclude those not in mainstream of American life, and to quell their communication).

(2) This consensus must be multi-national in its reach, broader than the perspective of any one nation. It must avoid embodiment of chauvinistic national interests or sentiments, so that changing attitudes in one nation will not alter the definitional landscape concerning what is offensive.

(3) This consensus must also be multi-cultural in scope, to circumvent problems of exchange of ideas across cultures, and to avoid any designation of cultural imperialism. Multi-culturalism is an important consideration within cultures as well. Drawing these lines nationally by majority reflex is unacceptable, because unwanted speech is usually counter-majoritarian by its nature. Regulation of speech by insular, unpopular, or disaffected minority groups can be neither the objective nor the consequence.

(4) This consensus, broadly and overwhelmingly, is behavioral in character. In other words, people must feel bound by the dictates of this consensus, and adhere their conduct to it. Thus, it is from verifiable behavior of persons across the community of nations that the *jus cogens* principle is gleaned.

These qualifications should mollify the objection that even the smallest step on the road toward speech regulation or restriction begins an inevitable landslide that ends only in full-blown tyranny. This "slippery slope" objection to any proposed First Amendment regulatory categorization disregards two essential facts. First, the Court has delineated a number of categories within which regulation of communicative behavior is sanctioned.[130] Second, the "slippery slope" protest presumes that once the regulatory road is traversed, "there is nothing in place, no underbrush to stop the slide; but in any complexly organized society there will always be countervalues to invoke and invested persons to invoke them."[131] The antidote to trepidations expressed by slippery slope proponents is cautious categorization and principled line-drawing. The clarity and constriction of the categorization provides a principled stopping place.[132]

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[130] *See supra* notes 33–61 and accompanying text.

[131] Fish, *Jerry Falwell's Mother*, *supra* note 5, at 130.

[132] *See* Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283, 300–01. Dean Ely has declared:

> One doesn't have to be much of a lawyer to recognize that even the clearest verbal formula can be manipulated. But it's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing. An "unprotected messages"

IV. *JUS COGENS* AS A SUBSTANTIVE DOCTRINE

We propose the international law principle of *jus cogens* as a potential basis for regulating speech content. Our claim is not that *jus cogens* is directly applicable, and peremptory, in courts of the United States.[133] Instead, our submission is more modest: that *jus cogens* be adopted as a constitutional interpretive device. Should a legislature choose to enact an otherwise properly drawn content-based regulation of speech that is consistent with *jus cogens*, the Court should defer to that legislative judgment.[134]

Jus cogens incorporates the multi-cultural and multi-national consensus that we assert is essential. Referred to as "peremptory norms of international law," *jus cogens* contains international law rules that are binding upon every nation.

The concept of *jus cogens* is linked to the conception of international law as envisioned by its founding father, Dutch jurist Hugo Grotius, in 1625.[135] Grotius theorized that nations were not conducting their affairs in chaos, devoid of any underlying universal principles.[136] Grotius was convinced that without such binding rules of international conduct—a "common law among nations that binds them"—interactions between nations would be impossible.[137] Grotius

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approach cannot guarantee liberty—nothing can—but it's the surest hedge against judicial capitulation that humans have available.

DEMOCRACY & DISTRUST, *supra* note 19, at 112; *see also* Ely, *supra* note 99, at 1500–51. Stefancic and Delgado discuss the experience of progressive Western nations like Germany, Denmark, Canada, France, and the Netherlands, where limited content-based restrictions on speech have eroded neither fundamental protections of free expression nor public confidence in the importance of free speech. *See* Stefancic and Delgado, *supra* note 128, at 742.

[133] U.S. CONST. art. VI. Article VI grants to treaties, but not customary international law, a status equivalent to federal statutes. *Id.* For a discussion of the force of a treaty as binding law when it conflicts with a federal statute see Eric G. Reeves, Note, *United States v. Javino: Reconsidering the Relationship of Customary International Law to Domestic Law*, 50 WASH. & LEE L. REV. 877, 880–82 (1993). But customary international law is considered federal common law, which is viewed as supreme over laws of the states. RESTATEMENT (THIRD) ON FOREIGN RELATIONS § 111 cmt. d, nn. 2, 3 [hereinafter RESTATEMENT (THIRD)].

[134] It is immaterial which jurisprudential basis for speech protection is adopted. *See supra* text accompanying notes 17–32. A narrowly-drawn statute that reaches only advocacy of conduct condemned by the community of nations should satisfy any premise for speech protection.

[135] *Cf.* Richard Falk, *The Grotian Quest, in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 36 (Richard Falk, et. al. eds, 1985); H. Lauterpacht, *The Grotian Tradition in International Law*, 1946 BRIT. Y.B. INT'L L. 1, *reprinted in id.* at 10; Cornelius F. Murphy, *The Grotian Vision of World Order*, 76 A.J.I.L. 477 (1982).

[136] Murphy, *supra* note 135, at 480–81.

[137] Manfred Lachs, *The Grotian Heritage, the International Community and Changing Dimen-*

traced these norms to natural law principles, and envisioned these principles functioning as a "set of mutual links," tying nations together.[138]

Since Grotius, many jurists and writers have accepted and reaffirmed the principle of such binding international law norms, giving various reasons for the necessity of *jus cogens*.[139] Vattel and Wolff extended Grotius' application of natural law to international principles.[140] Others based *jus cogens* on the private law principle prohibiting contracts *contra bones more*.[141] Scheuner, Lachs, and later Verdross advanced a theory of *jus cogens* based on "a set of principles which exist in the interest of the international community as a whole."[142]

In 1935, Verdross was the first to advance a coherent view of the relationship between *jus cogens* and other sources of international law.[143] Verdross suggested that the concept of *jus cogens* would be consistent only if international treaties violating *jus cogens* norms

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sions in International Law, in INTERNATIONAL LAW AND THE GROTIAN HERITAGE 198, 200 (T.M.C. Asser Instituut ed., 1985).

[138] Murphy, *supra* note 135, at 480.

[139] DR. JOSEPH JURT, ZWINGENDES VÖLKERRECHT (1933); Aziza M. Fahmi, *Peremptory Norms as General Rules of International Law*, 22 ÖZöR 383 (1971); Sir Gerald Fitzmaurice, *The General Principle of International Law Considered from the Standpoint of the Rule of Law*, 2 R.C.A.D.I. 92 (1957); Dr. Hermann Mosler, *Ius Cogens und Völkerrecht*, 9 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 25 (1968); Miaia de la Muela, *"Jus Cogens" y "Jus Dispositivum" en derecho international publico*, HOMENAJE A LEGAZ Y LCAMBRA I. II (1960); Takeshi Minagawa, *Jus Cogens in Public International Law*, 6 HITOTSUBASHI J. OF LAW & POL., 16 (1968); Hanspeter Neuhold, *The 1968 Session of the United Nations Conference of the Law of Treaties*, 19 ÖZöR 59 (1969); Vladimir Paul, *The Legal Consequences of Conflict between a Treaty and an Imperative Norm of General International Law (jus cogens)*, 21 ÖZöR (1971); Ulrich Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law*, ZAöRV 28, 29 (1969); Dr. Michael Schweitzer, *Ius cogens im Völkerrecht*, ARCHIV FÜR VÖLKERRECHT 15 (1971); L.M. Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L. Q. 47 (1970).

[140] Emer De Vattel, *Le droit Des Gens*, OU PRINCIPES DE LA LOI NATURELLE APPLIQUÉS À LA CONDUIT ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS, introduction, §§ 8–9 (1758); Christian Wolff, *Jus gentium methodo scientifica pertractatum*, PROLEGOMENA §§ 4–5 (1764).

[141] *See, e.g.*, DR. HEFFTER, DAS EUROPÄISCHE VÖLKERRECHT DER GEGENWART AUF DEN BISHERIGEN GRUNDLAGEN 188 (6th ed. 1873); DR. HERMANN MOSLER, DIE FRAGE DES VERHÄLTNISSES VON SOUVERÄNITÄT UND VÖLKERGEMEINSCHAFT 66 (1937); DR. ERNST SAUER, GRUNDLEHRE DES VÖLKERRECHTS 172 (3d ed. 1955); DR. LEO STRISOWER, DER KRIEG UND DIE VÖLKERRECHTSORDNUNG 114 (1919); ALFRED VON VERDROSS, *ANFECHTBARE UND NICHTIGE STAATSVERTRÄGE*, ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 15, 289 (1935).

[142] Manfred Lachs, *The Law of Treaties, in* RECEUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM 391, 399 (1968); *see also* Scheuner, *supra* note 139, at 520; Alfred Von Verdross, *Forbidden Treaties in International Law*, 31 A.J.I.L. 571, 572–73 (1937).

[143] Verdross, *supra* note 142, at 571 n.3.

would be void.[144] Thus, Verdross' conception of *jus cogens* creates in essence yet another layer of international law above and beyond treaty law and customary international law.

Based on this theory, Marek, Fauchille, Scelle, Menzel, and Quadri, among others, defined systems of hierarchy in international law.[145] *Jus cogens* could then be characterized as having the effect of an international "constitution."[146] International law violating such peremptory norms is void, as are national laws that violate the national constitution.

In 1945, the concept of *jus cogens* was applied and extended in the Nuremberg trial of war criminals.[147] The Allied Court not only concluded that Germany had violated peremptory norms of international law, but also extended the concept of *jus cogens* from the realm of states to the level of the individual.[148] Since Nuremberg, *jus cogens* prohibits not only states from engaging in certain conduct, but also holds individuals accountable for conduct that violates *jus cogens.*[149] This acceptance of peremptory norms of international law is the significant legacy of the Nuremberg trials, and since Nuremberg, *jus cogens* has become a widely accepted principle.[150]

In 1969, *jus cogens* was incorporated into the Vienna Convention on the Law of Treaties.[151] According to experts from a variety of

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[144] *Id.* at 574.

[145] Paul Fauchille, *Traité de Droit International Public*, TOME I, TROISIÉME PARTIE 300 (1926); Krystyan Marek, *Contributes à l'Etudes du Jus Cogens en Droit International*, RECUEIL D'ETUDES DE DROIT INTERNATIONAL EN HOMMAGES À PAUL GUGENHEIM 445 (1968); Georges Scelle, *Précis de Droit des Gens*, PRINCIPES ET SYSTHÉMATIQUE I 312 (1932); *cf.* DR. HERMANN MOSLER, IUS COGENS IM VÖLKERRECHT 38 (disputing a strict hierarchy and calls for *jus cogens* to be seen as an "overriding" principle within the same level of international law).

[146] Some have used precisely this expression. *See* DR. GEORG DAHM, VÖLKERRECHT 13 (1958); A. Von der Heydte, *Die Erscheinungsformen des zwischenstaatlichen Rechts; jus cogens and jus dispositivum*, ZEITSCHRIFT FÜR VÖLKERRECHT 16, 462 (1932).

[147] Steven Fogelson, Note, *The Nuremberg Legacy: An Unfilled Promise*, 63 S. CAL. L. REV. 833, 868 (1990).

[148] *See Charter of the International Military Tribunal, in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1946) at 11 [hereinafter *Charter of the International Military Tribunal*]. *See generally* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1 (1982).

[149] Fogelson, *supra* note 147, at 868–870; *see also Charter of the International Military Tribunal, supra* note 148, arts. 7, 8.

[150] Fogelson, *supra* note 147, at 883.

[151] Vienna Convention, *supra* note 12, art. 53. The Vienna Convention was signed and ratified by 48 nations. During the drafting process, 43 out of 44 nations commented positively on the proposed Ius Cogens regulation. *Comments by Governments, ILC Reports on 2nd part of its 17th Session and on its 18th Session*, General Assembly, 21st Sess., Official Records, Supp. No. 9 (A/6309/Rev.1), Annex.

legal, political and cultural backgrounds, the issue of whether *jus cogens* is accepted is now settled.[152]

The Vienna Convention defines *jus cogens* as follows: "[A] norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[153] In Article 53, paying tribute to Verdross, the Vienna Convention declares treaties that contradict *jus cogens* to be void.[154] Pursuant to Article 64, a contradictory *jus cogens* norm can retroactively invalidate an existing international treaty.[155]

The definition in the Vienna Convention can be seen both as merely a declaratory statement and as a normative instance. Thus, by writing a definition of *jus cogens* into black letter treaty law, the Vienna Convention resolved the discussion of whether *jus cogens* is a natural law concept, or whether it first must be positively defined to exist.[156] Whether the origin of *jus cogens* is natural law or a treaty, the result is the same: *jus cogens* is accepted, established, and binding.[157]

For several decades now, the official United States position has remained consistent with this conclusion. Although not a Member State of the Vienna Convention, the United States has based its argument on the validity of *jus cogens* in both national[158] and inter-

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[152] For the Socialist view, see generally John N. Hazard, *Peremptory Norms: Jus Cogens*, 78 A.J.I.L. 248 (1984) (reviewing L.A. ALEKSIDZE, SOME THEORETICAL PROBLEMS OF INTERNATIONAL LAW (1982)). For the view from a non-aligned country, see generally Alfred P. Rubin, Book Review, 81 A.J.I.L. 254 (1987) (reviewing RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE (1981)). For a western view, see W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 120 (B.G. Ramcharan ed., 1985). For a general treatise of *jus cogens*, see Stanislaw E. Helsinki, Book Review, 84 A.J.I.L. 779 (1990) (reviewing LAURI HANNIKAINEN, PEREMPTORY NORMS IN INTERNATIONAL LAW (*JUS COGENS*) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988)).

[153] Vienna Convention, *supra* note 12, art. 53. For the U.S. view, see *infra* text accompanying notes 158–60.

[154] "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Vienna Convention, *supra* note 12, art. 53.

[155] *Id.* Article 64 provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.*

[156] But, even the guardian of legal positivism, Hans Kelsen, has agreed that treaties violating peremptory norms of international law are void. HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 322–23 (1st ed. 1952).

[157] For further references, see Gordon A. Christenson, *The World Court and Jus Cogens*, *in Appraisals of Nicaragua v. United States*, 81 A.J.I.L. 93, 95 & n.8 (1987).

[158] Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that deliberate torture

national court proceedings.[159] That the *Restatement (Third) of Foreign Relations Law* includes a reference to *jus cogens* similar to that contained in the Vienna Convention reinforces the United States' endorsement of this principle.[160]

Although the concept *jus cogens* is well-established, some issues concerning its creation and content are complex, and its precise parameters might not be easy to discern. To begin with, the creation of *jus cogens* evolves slowly over time.[161] The initial impetus might derive from a multilateral treaty or a rule of international customary law. If such a rule has over time become recognized as binding by "the international community of States as a whole," it is considered to be *jus cogens.*[162] Once a rule is considered to be a peremptory norm of international law, it is binding for all states regardless of whether they were original parties to the treaty from which the new peremptory norms had been taken, or whether they adhered to this rule as part of international customary law. Once established, even nations which originally objected to the creation of such a peremptory norm are bound by it. From peremptory norms of international law, no derogation, explicit or implicit, is possible.[163]

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perpetrated under color of official authority violates universally accepted norms of international law, regardless of nationality of parties); *cf.* Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981) (holding that terrorist act by P.L.O., a non-state actor, was not violation of universally accepted norms of international law), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). The Supreme Court has so far not stated its position on *jus cogens.* For some indications of the importance of international law, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 453 (1964) (White, J., dissenting).

[159] *See* Nicaragua v. United States, *supra* note 12 at § 190. "The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a 'universal norm,' a 'universal international law,' a 'universally recognized principle of international law,' and a 'principle of jus cogens.'" *Id.*

[160] *See* RESTATEMENT (THIRD), *supra* note 133, § 331(2) cmt. e.

[161] *Cf.* North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.), 1969 I.C.J. 3, 42 § 73 (Feb. 20) (holding that norms can be created "even without the passage of any considerable period of time"); *see also id.* at 244 (Sorensen, J., dissenting).

[162] Vienna Convention, *supra* note 12, art. 53.

[163] *See* Siderman de Blake v. Republic of Arg., 965 F.2d 699, 717,718 (9th Cir. 1992); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); Filartiga v. Peña-Irala, 630 F.2d 876, 880–81 (2d Cir. 1980).

The German Constitutional Court has specifically invoked and affirmed the principle of *jus cogens.* BVerGE 441, 448 (1965). Only a few elementary legal mandates may be considered to be rules of customary international law which cannot be stipulated away by treaty. The quality of such peremptory norms may be attributed only to legal rules firmly rooted in the legal conviction of the community of nations and indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community.

The degree of universal acceptance by states required to create a peremptory norm of international law is not entirely clear. Certainly, the phrase "the international community of States as a whole"[164] envisions endorsement by an overwhelming majority of states. On the other hand, the standard for acceptance cannot demand unanimity; to do so would relegate the concept of *jus cogens* to a set of tautologies. It is probably accurate to state that a handful of objectors cannot obstruct the establishment of a *jus cogens* rule.

Given the distinctive nature of *jus cogens* as a dynamic concept, no absolutely exact, concise list of *jus cogens* rules can exist. In order to determine what does, or does not, constitute a rule of *jus cogens*, a number of different kinds of indicators must be examined.

One such indicator is the existence of multi-lateral international treaties and agreements regulating certain conduct. More than 160 nations have agreed to bind themselves to international norms by signing and ratifying the United Nations Charter. Even the handful of non-Member States have pledged, at least in part, to abide by the Charter's terms.[165] The core purpose and goal of the United Nations Charter, the prohibition of the use of force, has consequently been seen as a peremptory norm of international law.[166]

Other indicators are decisions of the International Court of Justice (ICJ) and other international adjudicative bodies. In the case of *Barcelona Traction*,[167] the ICJ delineated a category of absolute and unqualified rights.[168] The ICJ affirmed this stance in the case of *Nicaragua v. United States*,[169] addressing the Charter's prohibition against the use of force.[170] The ICJ ruled that Article I's declaration against the use of force—the primary purpose and essential goal of the UN Charter—is part of *jus cogens*.[171] The ICJ further stated that

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[164] Vienna Convention, *supra* note 12, art. 53.

[165] Note, for example, the willingness of neutral Switzerland, not a UN member, to participate in international peace-keeping missions, sponsored, administered and commanded by the United Nations. *See Swiss Soldiers to Join UN Peacekeepers*, DETROIT FREE PRESS, June 11, 1993, at 4A (Switzerland's decision to muster a battalion for use as UN peacekeepers); *see also* Christopher J. Sabec, Note, *The Security Council Comes of Age: An Analysis of the International Legal Response to the Iraqi Invasion of Kuwait*, 21 GA. J. INT'L & COMP. L. 63, 66 n.10 (1991).

[166] *See* Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 4, 33–34, §§ 33–35 (Feb. 5) [hereinafter Barcelona Traction].

[167] *Id.* at 4.

[168] *Id.*

[169] Nicaragua v. United States, *supra* note 12.

[170] *Id.*

[171] *Id.*

Article 2(4),[172] which concretely defines and prohibits the use of force, has also become a rule of customary international law.[173]

Other *jus cogens* indicators include repeated unanimous UN General Assembly declarations, declared state practices, and the opinions of leading international jurists. These varied indicators share a common purpose: to discern whether, and to what extent, a rule of international law has become peremptory.

This approach of factoring in numerous indicators in order to determine the content of *jus cogens* seems complex, difficult and trying.[174] The evolution of *jus cogens* rights is, undoubtedly, cautious and protracted.[175] But if *jus cogens* is seen as a global consensus about inter- and intra-societal rules, such awkwardness is necessary. The global social fabric cannot be altered abruptly. Overwhelming acceptance requires widespread consensus, but different nations and cultures, each unique in history and character, have little in common. Consensus among them can be the smallest common denominator.

Consequently, it is not surprising that a definitive list of *jus cogens* prohibitions is difficult to construct.[176] It is probably best to categorize *jus cogens* rules on the basis of whether their peremptory character is overwhelmingly accepted, substantially undisputed, or somewhat controversial. To be sure, the uncertainty of whether some rules are subsumed within *jus cogens* does not affect the validity of the concept of peremptory norms itself. Disputes focus only upon the extent that a particular rule holds *jus cogens* stature.[177]

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[172] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2(4), ¶ 4.

[173] *Id. See generally* Christenson, *supra* note 157. "[T]hey are obligations *erga omnes.* Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression. . . ." Barcelona Traction, *supra* note 166, §§ 33–35, at 33–34.

[174] *Accord* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts,* 54 U. CIN. L. REV. 367 (1985).

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> We must conclude (and we should do so without hesitation) that there exists an international *jus cogens,* that its identification may not always be easy and will certainly be a slow process, but that where it is infringed the treaty [sic], or the provision in question, is null and void . . . .

F. A. Mann, *The Doctrine of Jus Cogens in International Law, in* FESTSCHRIFT FÜR ULRICH SCHEUNER 398, 402 (1973).

[176] *See, e.g.,* Marjorie M. Whiteman, *Jus Cogens in International Law, With Projected List,* 7 GA. J. INT'L & COMP. L. 609 (1977).

[177] Our position is that only those practices or conduct that are clearly recognized and accepted as within *jus cogens* can be a basis for content-based regulations.

A. *"Core" Areas of* Jus Cogens[178]

Very little of the substance of these *jus cogens* rules is controversial.[179] Core rules of peremptory character are overwhelmingly accepted and undisputed throughout the world. They form the backbone of what is a global, multi-cultural, multi-national consensus of prohibitive conduct.

1. Piracy

The centuries-old interdiction of piracy falls into this category. The prohibition of piracy includes the right of every nation to apprehend, detain and try a pirate.[180] When the Framers of the U.S. Constitution decided to include the prohibition of piracy, they were paying tribute to this universally accepted peremptory rule of international law.[181]

2. Slavery

The prohibition against slavery remained on the agenda of international bodies for most of this century. In the 1920's, the League of Nations initiated a convention prohibiting slavery.[182] Together with its subsequent protocols and amendments,[183] the convention formed a basis for an overwhelming consensus among nations that slavery is a prohibited act under *jus cogens.* The interdiction of slavery was cited as one of the prime examples of peremptory norms of international law by the nations partaking in the drafting process of the Vienna Convention, second only to genocide.[184] This unanim-

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[178] Richard B. Lillich, *The Constitution and International Human Rights,* 83 A.J.I.L. 851, 858 (1989).

[179] The RESTATEMENT (THIRD) lists, in addition to genocide, the following crimes as *jus cogens*: slavery and slave trade, murder or the disappearance of individuals, torture or other cruel, inhuman or degrading treatment, punishment, prolonged arbitrary detention, and systematic racial discrimination. RESTATEMENT (THIRD), *supra* note 133, §§ 702(a)-(f).

[180] This rule can be seen as the antecedent of an international criminal law. *See generally* JERZY SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES 118–20 (1974); *Essays on Piracy: Symposium on Piracy in Contemporary National and International Law,* 21 CAL. W. INT'L. L.J. 104 (1990); Fahmi, *supra* note 139, at 392; Georg Schwarzenberger, *International Jus Cogens?,* 43 TEX. L. REV. 455, 476 (1965).

[181] *See* U.S. CONST. art. I, § 8, cl. 10. Article I § 8 relegates to Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.*

[182] *See* sources cited *infra* notes 231–32.

[183] *See infra* note 232.

[184] *See* SZTUCKI, *supra* note 180, at 120.

ity is reflected in the writings of international legal experts,[185] as well as in the decisions of the ICJ.[186]

3. Genocide

A more recently-acknowledged *jus cogens* rule is the prohibition of genocide. The mass extermination of a people on grounds of race, religion, or ethnic origin was first held violative of binding norms of international law by the Nuremberg tribunal. German Nazi leaders were tried and convicted not because they transgressed national precepts, but because they violated mandatory international law.[187] The Genocide Convention of 1948[188] was the first decisive step by the nations of the world to condemn and outlaw this abhorrent crime on a global scale. Over one hundred nations have since signed and ratified the Convention.[189] Unquestionably, the prohibition of genocide has become a universally accepted peremptory norm.[190]

The ICJ has explicitly reiterated the peremptory character of the prohibition of genocide. In its Advisory Opinion on Reservations to the Genocide Convention, the ICJ stated that the principles forming the basis of the Convention are principles recognized by civilized nations as binding on nations even without any conventional obligation.[191] Reaffirming that stance in its *Barcelona Traction* decision, the ICJ declared that the prohibition of genocide is an obligation

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[185] *See* HEINRICH BERNHARD REIMANN, IUS COGENS IM VÖLKERRECHT 102 (1971); SZTUCKI, *supra* note 180, at 114–16; Mann, *supra* note 175, at 405; Scheuner, *supra* note 139, at 526–27.

[186] *See* Barcelona Traction, *supra* note 166, §§ 33–35, at 33–34.

[187] *The Charter of the International Military Tribunal*, *supra* note 148, defined three groups of charges to be brought against the Nazi leaders: Crimes Against Peace, War Crimes and Crimes Against Humanity. *Id.*; *see also* Fogelson, *supra* note 147, at 845–848.

[188] Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[189] One might argue that genocide does not violate *jus cogens*, because if it did, then the Convention would be superfluous. But this argument overlooks the fact that the creation of *jus cogens* is a process and does not happen abruptly. By 1948 a large majority of nations viewed genocide as violative of international law. This was the reason for the Convention. Since that time, the number of countries renouncing genocide, acceding to the Convention and constitutionally prohibiting such practice has dramatically grown from being a large majority to representing the international community as a whole. The Convention, then, was both an important stepping stone and an indicator for the later emerging *jus cogens* rule.

[190] *See generally* Louis R. Beres, *Genocide, Law and Power Politics*, 10 WHITTIER L. REV. 329 (1988); Yoram Dinstein, *International Criminal Law*, 20 ISRAEL L. REV. 206 (1985); Fogelson, *supra* note 147; Comment, *The United States and the 1948 Genocide Convention*, 16 HARV. INT'L L.J. 683 (1975).

[191] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28); *see also* Paul, *supra* note 139, at 25.

erga omnes.[192] When in the course of drafting the Vienna Convention on the Law of Treaties, nations listed possible *jus cogens* prohibitions, the prohibition of genocide was ranked by more nations as the prime example of a peremptory norm than any other *jus cogens* principle.[193]

4. Systematic Racial Discrimination

"Systematic racial discrimination" is apartheid by another name.[194] The United Nations has repeatedly condemned apartheid. Various United Nations Conventions have outlawed it.[195] The United Nations General Assembly has targeted nations which racially discriminate on a structural basis.[196] For decades, the Republic of South Africa has subsumed under this definition. The economic, political, and cultural sanctions imposed on South Africa by overwhelming votes of the United Nations General Assembly and the United Nations Security Council[197]—a consequence of South Africa's blatant disregard for peremptory norms of international law—are characteristic examples of how violations of *jus cogens* can have substantial international repercussions.[198]

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[192] Barcelona Traction, *supra* note 166, §§ 33–35, at 33–34; *see also* Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714–17 (9th Cir. 1992).

[193] *See* REIMANN, *supra* note 185, at 102; SZTUCKI, *supra* note 180, at 120; Paul, *supra* note 139, at 25.

[194] For leading experts enumerating racial discrimination as a core *jus cogens* prohibition, see REIMANN, *supra* note 185, at 102; SZTUCKI, *supra* note 180, at 120; Fahmi, *supra* note 139, at 392; Mann, *supra* note 175, at 405; *see also* Barcelona Traction, *supra* note 166, §§ 33–35, at 33–34.

[195] *See, e.g.*, International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 13 I.L.M. 50 (1974); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 3, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352, 355, (1966) [hereinafter Convention on Racial Discrimination].

[196] G.A. Res. 89, U.N. GAOR, 45th Sess., 68th plen. mtg., at 1, U.N. Doc. A/Res/45/89 (1991) (status of the International Convention on the Elimination of All Forms of Racial Discrimination); G.A. Res. 90, U.N. GAOR, 45th Sess., 68th plen. mtg., at 1, U.N. Doc. A/Res/45/90 (1991) (status of the International Convention on the Suppression and Punishment of the Crime of Apartheid); G.A. Res. 248, U.N. GAOR, 45th Sess., 72nd plen. mtg., at 8, ¶14–15, U.N. Doc. A/Res/45/248 (1991) ("Given the priority attached to activities against apartheid," the committee decides to establish posts in the Center Against Apartheid); G.A. Res. 176, U.N. GAOR, 45th Sess., 70th plen. mtg., at 1–7, U.N. Doc. A/Res/45/176 (1991) (policies of apartheid and international efforts to eradicate it).

[197] *See, e.g.*, S.C. Res. 418, U.N. SCOR, 32nd Sess., 2046th mtg., at 1, U.N. Doc. S/Res/418 (1977); S.C. Res. 417, U.N. SCOR, 32nd Sess., 2045th mtg. at 1, U.N. Doc. S/Res/417 (1977); S.C. Res. 282, U.N. SCOR, 25th Sess., 1549th mtg., at 1, U.N. Doc. S/Res/282 (1970); S.C. Res. 191, U.N. SCOR, 19th Sess., 1135th mtg., at 1, U.N. Doc. S/5773 (1964); S.C. Res. 182, U.N. SCOR, 18th Sess., 1078th mtg., at 1, U.N. Doc. S/5471 (1963).

[198] For a United States reaction, see generally *American Bar Association Report to the House*

5. Aggressive Warfare

Virtually all nations around the world have signed the United Nations Charter. In Article 53 of the Charter, the United Nations is explicitly empowered to ensure peace,[199] even among non-Member States.[200]

Consequently, commentators suggested early on that the central aim of the United Nations, the prohibition of the use of force, most bluntly and potently exemplified by aggressive warfare,[201] is prohibited not only by the Charter itself, but also by a peremptory norm of international law. As such, it is binding even upon non-Member States.[202] The ICJ has explicitly affirmed this view in its *Barcelona Traction* decision,[203] and implicitly in its *Nicaragua v. United States* decision.[204]

B. *Largely Undisputed* Jus Cogens *Rules*

1. Terrorism

The prohibition of terrorism is repeatedly referred to as another *jus cogens* principle.[205] Some commentators, however, take the position that terrorism is implied within existing *jus cogens* prohibitions. For example, Judge De Arechaga has characterized the hijacking of

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of Delegates Section of Individual Rights and Responsibilities Standing Committee on World Order Under Law, 28 How. L.J. 653 (1985) (including remarks and declarations made by President Ronald Reagan and Undersecretary of State Lawrence Eagleburger). The American Law Institute adhered to this definition of systematic racial discrimination, but also extended it to include systematic discriminations based on religion. RESTATEMENT (THIRD), *supra* note 133, § 702 cmt. j, n.8.

[199] U.N. CHARTER art. 2(4), ¶ 4 provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[200] U.N. CHARTER art. 2(6) provides: "The Organization shall insure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."

[201] The prohibition of the use of force is the abiding principle underlying the United Nations enunciated in Article 1 of its Charter. *See* U.N. CHARTER art. 1. For the text of Article 1(1), see *infra* note 242.

[202] *See, e.g.*, REIMANN, *supra* note 185, at 102; SCHEUNER, *supra* note 139, at 527; Mann, *supra* note 175, at 405.

[203] Barcelona Traction, *supra* note 166, §§ 33–35.

[204] 1986 I.C.J. 14.

[205] Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Caused by Terrorist Activity*, 26 AM. U. L. REV. 217, 306–07 (1977); *see also* sources cited *infra* note 229.

airplanes by terrorists as a form of piracy.[206] But certainly, many varieties of terrorist activities cannot be subsumed under other existing *jus cogens* norms, and terrorism comprises a *jus cogens* principle of consequence.[207]

2. Torture

Bodily integrity and human dignity are at the core of *jus cogens* norms.[208] Multilateral treaties have outlawed the practice of torture regionally as well as globally.[209] There seems to be a well-established consensus among the scores of nations that feel bound by these conventions, ICJ rulings, and academic commentaries, that the prohibition of torture has attained the stature of *jus cogens.*[210]

C. *Disputed* Jus Cogens *Rules*

A growing number of commentators have argued that the scope of the prohibition of racial discrimination should be broadened to entail not only structural systemic discrimination, but non-systemic incidents of discrimination based on race, as well as structural systemic discrimination based upon religion[211] or sex.[212] Indeed, the United Nations Charter, binding upon more than 160 nations, explicitly includes in its statement of purpose "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinctions as to race, sex, language or religion."[213] There have not yet emerged sufficient structural indicators, however, to suggest that these forms of discrimination have become *jus cogens* norms.

The list of *jus cogens* norms is not static. It is growing steadily to embody more of the basic and fundamental human rights. While

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[206] Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 1, 9, 64–67 (1978).

[207] For example, bombing, kidnapping, and random shooting of hostages are terroristic acts not characterizable by other *jus cogens* rules.

[208] *See* Scheuner, *supra* note 139, at 526–27.

[209] *See* sources cited *infra* at notes 251–52.

[210] For the ICJ view, see Barcelona Traction, *supra* note 166, §§ 33–35. For commentators supporting this view, see, e.g., SZTUCKI, *supra* note 180, at 118–20; Scheuner, *supra* note 139, at 526.

[211] *See generally* Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GAOR, Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981).

[212] *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR, Supp. No. 46, at 194, U.N. Doc. A/34/830.

[213] U.N. CHARTER art. 1(3); *see also id.* arts. 55–56.

for some nascent rights, the necessary overwhelming global consensus is not yet attainable, some regional adjudicative bodies have expanded on the idea of a regional *jus cogens*.[214] We, however, have deliberately restricted our focus to globally and unequivocally accepted norms of peremptory character.

Regardless of the scope of established peremptory norms, four essential principles are apparent. First, *jus cogens* exists and is a globally accepted and acknowledged concept of binding international law. Second, *jus cogens* norms are superior to all other norms of international law and may not be subrogated. Third, the list of *jus cogens* norms is not, and may never be, finite or complete: *jus cogens* is constantly, but slowly, growing in depth and scope. Fourth, and most significant, a considerable set of undisputed *jus cogens* norms—which are, by definition, a representation of a global, multicultural, multi-national consensus of rights and duties—are readily identifiable.

V. *JUS COGENS* AS A REGULATORY TOUCHSTONE

Jus cogens norms represent a global consensus that certain forms of behavior are unequivocally intolerable. This global consensus commends *jus cogens* norms as the touchstone for identifying types of speech that are amenable to content-based regulation. When a speaker advocates behavior so horrifying that its dubious value is undeniably outweighed by the peril to social structure and order, a legislature should be entitled to prohibit the communication.

The types of conduct that *jus cogens* prohibits are not broad-ranging. Thus, *jus cogens*-based content regulation does not stifle meaningful debate. By narrowing the parameters for restrictions to that which is the common denominator among the community of nations, regulation avoids the creeping, ever-present danger of cultural imperialism, as well as the impulsive, ultimately devastating reflexes that characterize national majoritarianism.

As international law cannot force a sovereign nation to change or adapt its domestic legal regime, a *jus cogens*-based interpretation of

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[214] Another contested *jus cogens* principle is the prohibition against executing minors. *See* 1986–1987 Annual Report of The Inter-American Commission on Human Rights, OAS/Ser.L/VII.71, Doc.9 (1987) (execution of a minor violates regional *jus cogens*); Viktor Mayer-Schönberger, *Crossing the River of No Return: International Restrictions on the Death Penalty and the Execution of Charles Coleman*, 43 OKLA. L. REV. 677, 679 (1990); *cf.* Donald T. Fox, *Inter-American Commission on Human Rights Finds United States in Violation*, 82 A.J.I.L. 601 (1988).

the First Amendment would not obligate our legislatures to enact content-restricted laws. Instead, this system would demarcate the area in which legislatures are permitted to do so. It is not incumbent upon a legislature to enact any interdicting statutes. *Jus cogens* does not alter or supplant the First Amendment, but instead functions as an interpretive tool.

A. *Structure for Constitutional Analysis*

We advance a First Amendment interpretation that would permit a legislature to prohibit and punish speech that intentionally advocates perpetration of actions or behaviors forbidden by governing *jus cogens* norms.[215] In order to pass constitutional scrutiny, *jus cogens*-based legislative enactments that purport to regulate the content of messages must be clear and precisely drawn.[216] In proposing that advocacy itself may be regulated, we are cognizant that language is often ambiguous, and that intent is often difficult to discern. Thus, the framework we submit for constructing *jus cogens*-based regulatory statutes takes account of ambiguity, and relentlessly applies the principle of *in dubio pro reo*—any doubts must be resolved in favor of permitting the questioned speech.

A regulatory statute should include three elements: (1) the content of the message must fall under a *jus cogens* prohibited category; (2) the message must advocate conduct; and (3) the speaker must intend to provoke the conduct advocated.

Attempts to regulate speech and speech-related activities will survive constitutional scrutiny only if satisfaction of each of these elements is not ambiguous. If any requirement is ambiguous, the clarity of the message as an intentional advocacy of *jus cogens* prohibited conduct must be assessed from the viewpoint of a reasonable person who has observed the communicative instance.[217] If a reasonable

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[215] In proposing *jus cogens* as a tool that might be useful in interpreting the permissibility of content-based restrictions on speech, we do not address the regulatory forms that legislatures might consider. We assume that legislatures would adopt regulatory means such as the types of damages available in tort law or the fines and imprisonment available in criminal law.

[216] *See generally* Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. Rockford, 408 U.S. 104 (1972).

[217] It is commonplace for legal norms to incorporate a reasonable person standard. *See generally* Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) (reasonable person standard in Title VII "hostile work environment" cases); Michigan v. Chesternut, 486 U.S. 567 (1988) (reasonable person standard concerning scope of Fourth Amendment protection). Application of constitutional norms occasionally incorporate community standards. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973).

person would view the communicative endeavor as intentionally advocating *jus cogens* prohibited conduct, a *prima facie* case that the communication is amenable to regulation is established. The speaker would be permitted, but not required, to refute the *prima facie* proof.[218] If the reasonable person assessment, however, yields an ambiguous answer concerning any of the requisite elements, the communication does not clearly enough fulfill the necessary constitutional requirements to permit regulation. Thus, when coupled with the advocacy and intent requirements, this necessity for scrutinizing the content of ambiguous messages from the perspective of a reasonable observer provides a standard that satisfies the constitutional requisites of notice, precision and clarity.[219] We now apply this requisite of unambiguousness to an analysis of proposed elements of a regulatory statute.

B. *Proposed Requisite Statutory Elements*

1. Does *Jus Cogens* Prohibit the Communication?

The content of the message must be deciphered. Only if the message bespeaks conduct encompassed by a *jus cogens* prohibited category is restriction permissible. *Jus cogens* norms are of two discernible varieties. Some outlawed activities require the importuning of government; others are forbidden regardless of whether the speaker urges structural change of governmental policy or entreats individuals to accomplish the prohibited end. We first discuss the latter category of *jus cogens* prohibited conduct.

a. *Advocacy of Action Regardless of Systemic Involvement.*

i. Genocide

Perhaps the quintessential example of a governing *jus cogens* norm is the universally recognized interdiction of genocide, defined as the

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[218] *See* County Court of Ulster County v. Allen, 442 U.S. 140 (1979). The speaker can counter the *prima facie* case by demonstrating that an element is not satisfied. The speaker could show that a reasonable person would not construe the communication as entailing conduct that is prohibited by *jus cogens*. *See infra* text accompanying notes 220–66. The speaker could also show that the communication was not advocacy because it is an opinion or belief, or because a reasonable observer would not construe it as advocacy. *See infra* text accompanying notes 267–71. The speaker might also show a lack of intent to bring about *jus cogens* prohibited conduct because the message is an historical, scientific or artistic expression, or for some other reason. *See infra* text accompanying notes 272–75.

[219] *See* Parker v. Levy, 417 U.S. 733 (1974); *see also* TRIBE, *supra* note 5, § 12–31, at 1033–35.

systematic destruction of a people on grounds of national, ethnic, racial or religious identification.[220] When undertaken with an "intent to destroy, in whole or in part," an identified group,[221] genocidal acts encompass a variety of outlawed behaviors—killing, causing serious physical or mental harm, and inflicting destructive conditions upon members of the targeted group, as well as forcible transfer of children and preventing births.[222] Culpability extends to individuals as well as government officials.[223]

Genocide is the archetypal false idea.[224] In modern times, genocidal spasms have ruthlessly and meaninglessly exterminated tens of millions of innocent persons.[225] Legislatures must be entitled to

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[220] The Nuremberg Tribunal was the first court to hold that genocide violated binding norms of international law. *See* 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1946) 411, 465–66. Over one hundred nations, including the United States, have signed and ratified the Genocide Convention, *supra* note 188.

The community of nations has repeatedly affirmed an absolute interdiction of genocide. Article 15 of the Universal Declaration of Human Rights professes a conviction in the existence and identity of nationalities. G.A. Res. 217A, U.N. Doc. A/810, at art. 15 (1948) [hereinafter Declaration of Human Rights]; *see also* The Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973); The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *entered into force* Nov. 11, 1970, 754 U.N.T.S. 73; International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, art. 6(3) (1967) [hereinafter Covenant on Civil and Political Rights]. *See generally* Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña Irala*, 22 HARV. INT'L. L.J. 53, 91–92 (1981).

[221] Genocide Convention, *supra* note 188, art. 2.

[222] *Id.* Article III of the Genocide Convention proscribes not only conduct that constitutes intentional extermination of a targeted group, but also conspiracy, direct and public incitement, attempt, and complicity. *Id.*, art. 3.

[223] A nation violates customary international law if it practices, encourages or condones genocide, if it fails to criminalize such acts, if it fails to punish those guilty of these acts, and if it fails to extradite persons accused of such acts. Genocide Convention, *supra* note 188, arts. 3–5; *see also* RESTATEMENT (THIRD), *supra* note 133, § 702 cmt. d.

The 1948 Genocide Convention was the first human rights agreement concluded under the auspices of the United Nations. Almost 40 years later, the United States ratified the Genocide Convention and enacted implementing legislation. The federal statute includes a provision that criminalizes incitement to commit genocide. In *Brandenburg v. Ohio*, the Supreme Court declared advocacy, even advocacy of monstrous activity, to be constitutionally protected speech unless it "is directed to inciting or producing imminent lawless action and is likely to produce such action." 395 U.S. 444, 447 (1968). In discussing the statutory crime of incitement, the legislative history directs that this provision should be construed as consistent with the *Brandenburg* incitement formulation. Our proposal differs from this statutory incitement provision, and from *Brandenburg*, in several respects. *See infra* notes 268–71 and accompanying text.

[224] *See supra* text accompanying notes 119–23.

[225] *See, e.g.*, Pub. L. 95–435 § 5(a), 92 Stat. 1052 (1978), *reprinted in* 22 U.S.C. § 2151 (notes) (1982) (1978 tribunal massacres in Uganda); Bosnia & Herzegovina v. Yugoslavia (Serbia and

prohibit and punish those who advocate recurrence of this abhorrent crime.

But even the monstrous potential for societal injury inherent in genocide cannot be a basis for unduly restraining speech. Only messages whose content is identified as unambiguously advocating a genocidal act can be statutorily proscribed, such as calling for the death, decimation or massive deportation of members of a national, ethnic, racial or religious group. Patently ethnic or racial slurs, without more, do not constitute a genocidal act, nor do ethnic, racist or religious-based epithets or insults. Where the content of the message is ambiguous,[226] its significance as an exhortation of genocidal acts must be scrutinized from the perspective of a reasonable person viewing or hearing the communication.

ii. Piracy

The centuries-old interdiction of piracy is a *jus cogens* rule of peremptory character that is undisputed among the community of

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Montenegro), 1993 ICJ Rep. 470, *reprinted in* 87 A.J.I.L. 505 (1993) (systematic ravaging of Muslim inhabitants of Bosnia-Herzegovina by Serbians); Judgment of the International Military Tribunal, *supra* note 220 (decimation of European Jewry and Gypsies by Nazis); 134 Cong. Rec. S15,425 (1988) [§ 102(a)(1)–(3)] (destruction of Kurds by Iraqis); R. WRIGHT, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 35 (1948)(1915 massacre of Armenians by Turks); Roger S. Clark, *Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor*, 8 OHIO N.U. L. REV. 321 (1981) (murder of people of East Timor); Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82 (1989) (autogenocide demonstrated by the slaughter of Cambodians by fellow Cambodians); Michelle Leighton Schwartz, Symposium, *Earth Rights and Responsibilities: Human Rights and Environmental Protection: International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355 (1993) (extermination of the Yanomani Indians by Brazilians); Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992); Rennard Strickland, *Genocide at Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713 (1986) (systematic decimation of Native Americans); Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (1991) (extermination of native people of Indios Tribe by Guatemalans); Laurence S. Eastwood, Jr., Note, *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299, 309–13 (1993) (murder of East Pakistani people by Pakistanis in the Bangladesh War).

[226] *See* discussion *infra* text accompanying note 300. Unfortunately, incidents communicating unambiguous messages, especially on college campuses are all too common. *See* Delgado, *supra* note 1, at 135 n.12; Lawrence, *supra* note 1, at 431; Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295 (1990); *Wrong Message from Academe*, TIME, Apr. 6, 1987, at 57 (African-American academic counselor finds message urging death to members of her race scratched on an office door).

nations. The traditional parameters of the crime of piracy encompass depredation on the high seas, which involve murder, kidnapping and robbery.[227] Although piracy in this confined formulation still exists in some parts of the world,[228] this classic form of piracy provides scant basis for concern in contemporary American society. Whether the substantive delineation of piracy should be expanded to include attacks by terrorists or insurgents upon passenger ships, airplanes, buses, automobiles, or other transportation modes is a subject of vigorous debate and disagreement.[229] The *jus cogens* piracy prohibition may be evolving from its classic, narrow application to a broader ban that includes terrorism levelled at passenger ships and other vehicles. Until the outcome of this evolution yields clearly expanded parameters of the *jus cogens* prohibition against piracy, only those communications that unambiguously and intentionally advocate piracy, as traditionally and narrowly defined, could be the subject of legislative prohibition.

iii. Slavery

The practice of slavery is emblematic of the evolving character of international law. The slave trade, once protected by the law of nations,[230] was eventually enveloped by *jus cogens* prohibitions.[231] The

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[227] Dr. Barry Hart Dubner, *Piracy in Contemporary National and International Law*, 21 CAL. W. INT'L L.J. 139 (1990–91). *See generally* Patricia W. Birnie, *Piracy, Past, Present and Future*, 11 MARINE POL'Y 163 (1987); Stanley Morrison, *A Collection of Piracy Laws of Various Countries*, 26 A.J.I.L. 887 (1932).

[228] Attacks on vessels persist in many parts of the world: in the Philip Strait between Indonesia and Singapore, off the coast of West Africa, and in Southeast Asian waters. Eric Ellen, *Contemporary Piracy*, 21 CAL. W. INT'L L.J. 123 (1991).

[229] Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 A.J.I.L. 269 (1988); Samuel P. Menefee, *The New "Jamaica Discipline:" Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127 (1990); John E. Noyes, *An Introduction to the International Law of Piracy*, 21 CAL. W. INT'L L.J. 105 (1990); Alfred P. Rubin, *Revising the Law of "Piracy,"* 21 CAL. W. INT'L L.J. 129 (1990); George R. Constantinople, Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L L. 723 (1986).

Piracy is outlawed by federal statute, 18 U.S.C. §§ 1651–61, as is aircraft piracy, 49 U.S.C. § 1472(*i*). *See also* 18 U.S.C. §§ 1991 et seq. (boarding train to commit crime); 18 U.S.C. § 2271 (conspiracy to destroy sea vessels); 18 U.S.C. § 2119 (carjacking).

[230] *See* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795). For an account of the interplay between the slave trade, the expansion of federal power, and the role of the judiciary, see Barbara Holden-Smith, *Lords of Lash, Loom and Law: Justice Story, Slavery and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086 (1993).

[231] Slavery is proscribed by the Constitution, U.S. Const. amend. XIII, § 1. The vestiges of servitude can be statutorily condemned by Congress. Civil Rights Cases, 109 U.S. 3, 20 (1883).

crux of slavery is expressed in the Slavery Convention of 1926, which refers to "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[232] At present, involuntary servitude might be considered subsumed by *jus cogens* interdictions against systemic race discrimination, where government sanctioning of maltreatment of individuals on racial grounds occurs,[233] or against genocide, where persons are subjected to destructive conditions on grounds of national origin, race or religion, regardless of the involvement of government.[234]

The initial emphasis upon chattel slavery, however, is in the process of being enlarged to include debt bondage.[235] Development of this prohibition against slavery might someday encompass extreme forms of economic exploitation, coupled with domination over the abused person.[236] As with piracy, the ambit of involuntary servitude

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Under the auspices of federal statutory law, 42 U.S.C. § 1981, Congress has continued to expand the scope of civil rights legislation. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

A number of conventions prohibit slavery and slave-trading on an international scale. Supplementary Convention of the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 3 U.S.T. 3201, 266 U.N.T.S. 3; Protocol Amending the Slavery Convention, Dec. 7, 1953, 1 U.S.T. 479, 182 U.N.T.S. 51; Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 [hereinafter Slavery Convention]; *see also* Covenant on Civil and Political Rights, *supra* note 220, art. 8; Declaration of Human Rights, *supra* note 220, art. 4.

[232] Slavery Convention, *supra* note 231, art. 1. In addition to the ignoble American experience of slavery, *see* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), slavery has existed in other places in recent times. *See, e.g.*, Joao Marcello De Araujo, *Symposium on the Teaching of International Criminal Law, International Crimes in Brazilian Domestic Law*, 1 TOURO J. TRANSNAT'L L. 353 (1990) (Brazilian slavery prior to 1826, and current Brazilian law prohibiting white slavery); Carol Weisbrod, Symposium, *Human Rights in Theory and Practice: A Time of Change and Development in Central and Eastern Europe, Minorities and Diversities: The "Remarkable Experiment" of the League of Nations*, 8 CONN. J. INT'L L. 359, 393 n.134 (1993) (Rumanians enslaved gypsies until 1848). *See generally* CARL. N. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES (1971); PETER KOLCHIN, UNFREE LABOR: AMERICAN SLAVERY AND RUSSIAN SERFDOM (1987). In modern times, white slavery has affected immigration policy and federal statutory policy. *See, e.g.*, 18 U.S.C. § 2421; Caminetti v. United States, 242 U.S. 470 (1917); Hoke v. United States, 227 U.S. 308 (1913); MARK THOMAS CONNELLY, THE RESPONSE TO PROSTITUTION IN THE PROGRESSIVE ERA, 47–66 (1980); Lan Cao, *Illegal Traffic in Women*, 96 YALE L.J. 1297 (1987).

[233] *See infra* text accompanying notes 257–66.

[234] *See supra* text accompanying notes 220–26.

[235] *See* Protocol Amending the Slavery Convention, *supra* note 231.

[236] Alien Tort Claims Act, 28 U.S.C. § 1350. Commentators have long urged that the definition of involuntary servitude be expanded to encompass extreme economic or psychological coercion. *See, e.g.*, Sydney Brodie, *The Federally-Secured Right To Be Free from Bondage*, 40 GEO. L.J. 367 (1952); Harry H. Shapiro, *Involuntary Servitude: The Need for a More Flexible Approach*, 19 RUTGERS L. REV. 65 (1964); John M. Cook, Note, *Involuntary Servitude: Modern Conditions Addressed in United States v. Musry*, 34 CATH. U.L. REV. 153 (1984). The Supreme Court recently restricted this expansion, holding that involuntary servitude entails use or threat of

prohibitions, and of statutes banning intentional advocacy of such conduct, is restricted to the traditional, narrow definition of bondage.

iv. Terrorism

Terrorism, the scourge of the post-modern world, entails an overarching purpose to intimidate a population or a government into acceding to the terrorists' demands.[237] Although the transgression of terrorism does not necessitate systemic governmental involvement, a distinct political objective or purpose, albeit long-range, must impel the terroristic acts.[238] Thus, under our proposal, a legislature could outlaw advocacy of lawlessness or violence that is aimed at coercing a government to capitulate to demands for political changes.[239]

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physical injury or restraint, or of law or legal process. United States v. Kozminski, 487 U.S. 931 (1988), criticized in Kenneth T. Koonce Jr., Note, *United States v. Kozminski: On the Threshold of Involuntary Servitude*, 16 PEPP. L. REV. 689 (1989).

[237] European Convention on Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. No. 90, 15 I.L.M. 1272 (1976); Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S No. 8413. Professor L.C. Green offers the following definition for international terrorism:

> [A]n act of violence, or the threat thereof, exercised by an actor in order to bring pressure upon or secure concessions from a state or an institution or other establishment through the medium of some victim, and this need not be an individual, who is completely disassociated by nationality from the quarrel between the actor and the entity from whom the concession is being sought. There must, in fact, be some cross frontier aspect to the incident.

L.C. Green, *Terrorism and the Law*, 30 CHITTY'S L.J. 107, 198 (1982); *see also* Orrin G. Hatch, *Fighting Back Against Terrorism: When, Where, and How?*, 13 OHIO N.U. L. REV. 5 (1986) ("Terrorism is war upon the rule of law and upon pluralistic democratic society. . . . Terrorism is barbarism pure and simple. It is wanton and willful criminal violence aimed primarily at innocent civilians or internationally protected persons (such as diplomats or high, government officials).").

[238] "Bluntly put, the target of the modern terrorist is the Western legal system and its human rights underpinnings." David F. Forte, *Terror and Terrorism: There Is a Difference*, 13 OHIO N.U. L. REV. 39, 42 (1986); *see also* John Tagliabue, *Ship Carrying 400 Siezed, Hijackers Demand Release of 50 Palestinians in Israel*, N.Y. TIMES, Oct. 8, 1985, at A1, col. 6 (attack by gunmen purportedly with Palestine Liberation Organization connections upon the Achille Lauro cruise liner in international waters); Nora Boustany, *Guerillas in Lebanon Kill 9 Israeli Soldiers in Retaliatory Raids*, THE WASH. POST, Aug. 20, 1993, at A25 (Hezbollah acknowledges responsibility for attacks on Israeli troops); Ray Moseley, *IRA Bombing Shakes Faith in London Police*, CHI. TRIB., April 26, 1993, at News-2 (IRA bombing of London's financial district). *See generally* Kerry Ann Gurovitsch, *Legal Obstacles to Combatting International State-Sponsored Terrorism*, 10 HOUS. J. INT'L L. 159 (1987); Loiuse Rene Beres, Note, *Terrorism and International Law*, 3 FLA. J. INT'L L. 291 (1988).

[239] The case of Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854 (S.D.N.Y. 1990)

Terrorism, as a discrete *jus cogens* prohibited crime, necessarily excludes undifferentiated urban violence.[240] Generally, urban rioting is more accurately characterized as an unleashing of pent-up rage or a directionless destruction, as opposed to exhortation with a view towards attainment of a distinct political objective.[241]

b. *Advocacy of Systemic Action or Involvement*

i. Aggressive Warfare

Extinguishment of aggressive warfare was one of the essential goals that impelled the community of nations to join together to create the United Nations.[242] The United Nations Charter obligates

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prompted the United States to adopt the Antiterrorism Act of 1990 (ATA). 18 U.S.C. §§ 2331, 2333–38 (1991). The ATA defines international terrorism as any criminal act occurring outside the United States with apparent intent to intimidate or coerce a civilian population, to influence governmental policy, or to affect governmental conduct by assassination or kidnapping. *Id.* Victims and their families are afforded a civil cause of action, with treble damages available. *Id. See generally* Jennifer A. Rosenfeld, Note, *The Antiterrorism Act of 1990: Bringing International Terrorists to Justice the American Way*, 15 SUFFOLK TRANSNAT'L L.J. 726 (1992).

[240] Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) presents an easy case. In *Hess*, the defendant stated during a demonstration, "We'll take the f——— street later [or again]." *Id.* at 107. The defendant's conviction for disorderly conduct was reversed because the statement was directed to no person in particular, and no imminence of violence was demonstrated. *Id.* at 108. Under our proposal, the same result would be obtained. No restriction of this statement would be permissible because the statement does not qualify as terrorism, or under any other form of behavior prohibited by *jus cogens.*

[241] The politically-motivated, ongoing terroristic activities of the Irish Republican Army or the Palestine Liberation Organization are easily characterized as the *jus cogens* variety of terrorism. *See* Scott Anderson, *Making A Killing: The High Cost of Peace in Northern Ireland*, HARPER'S, Feb. 1994, at 45; David Hoffman, *Israelis Kill Fugitive, Wound Gazan Boy, 13 Soldiers Fire From Moving Army Truck*, WASH. POST, Feb. 4, 1994, at A25 (PLO terrorism). Compare the undifferentiated violence that occurred in the aftermath of the initial Rodney King verdict in Los Angeles. *See* Janice Castro, *A Jarring Verdict, an Angry Spasm; Acquittals in the King-Beating Trial Spark Disbelief, Rage and Rioting*, TIME, May 11, 1992, at 10; David Haldane, *King Case Aftermath: A City in Crisis*, L.A. TIMES, May 2, 1992, at A33; Mark Lucey & Shawn Hubler, *Rioters Set Fires, Loot Stores; 4 Reported Dead*, L.A. TIMES, April 30, 1992, at A1. Although arguably motivated by government actions perceived by the urban rioters to be discriminatory or indifferent, such violence is not so much focused upon attainment of a distinct political objective, as it is a venting of accumulated rage with no other perceivable goal.

If, in specific cases, urban violence could be characterized as terrorism—as where the rioters seek repeal or enactment of particular legislation, as opposed to perpetrating indiscriminate violence—permissibility of regulation depends upon the exhortative quality of the expression advocating it, and the speaker's intent in communicating it. *See infra* text accompanying notes 274–81.

[242] U.N. CHARTER art. 1(1) states the purposes of the United Nations. First among these is:

nations to resolve their differences peacefully,[243] and to forego either the aggressive use of force or its threat "against the territorial integrity or political independence of any state."[244] This commitment, as indicated by the ICJ, has assumed the status of a *jus cogens* peremptory norm.[245]

As a *jus cogens* concept, however, this undertaking of nations to repress the aggressive use of force does not include the right of nations, acting both collectively and individually, to exercise self-defense.[246] Self-defense might legitimately entail an anticipatory strike.[247]

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment of settlement of international disputes or situations which might lead to a breach of the peace. . . .

U.N. CHARTER art. 1(1); *see also* Nicholas Rostow, *The International Use of Force after the Cold War*, 32 HARV. INT'L L.J. 411 (1991) ("[P]revention of war is the first goal of the United Nations.").

[243] "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2(3).

[244] *Id.*, art. 2(4). The United Nations adopted a definition of aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State." Definition of Aggression Resolution, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31), U.N. Doc. A/9631 (1974).

[245] Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); *see also supra* text accompanying notes 170–72.

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> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51. According to the traditional reading of Article 51, self-defense is an inherent right that can be exercised at the option of each nation without prior consultation with the Security Council. "[C]ustomary international law of necessity and proportionality would dictate the degree of permissible force." Rostow, *supra* note 242, at 416; *see also* James F. Gravelle, *The Falklands (Malvinas) Islands: An International Law Analysis of the Dispute Between Argentina and Great Britain*, 107 MIL. L. REV. 5, 68 (1985). Critics maintain, however, that while Article 51 does not preclude the exercise of the inherent right to self-defense, the Security Council should ultimately decide whether a particular act of aggression or threat to peace is a defensive response, and what measures, if any, should be taken. Rostow, *supra* note 242, at 417–18.

[247] There is no consensus concerning requisite conditions in order for a preemptive attack

Jus cogens also does not inhibit some kinds of intervention by one nation into the internal affairs of another.[248] In order to fall under

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claimed to be anticipatory self-defense to be lawful under the U.N. Charter. Early writings emphasized the condition precedent of an "armed attack" required by Article 51 to justify the use of force in self-defense. P. JESSUP, A MODERN LAW OF NATIONS 165–66 (1948); Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29 (1951). Recently, however, commentators note that weapons of mass destruction are possessed by many nations, and assert a broader reading of Article 51, one that would permit appropriate uses of anticipatory self-defense. Jeffrey Allen McCredie, *The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?*, 19 CASE W. RES. J. INT'L L. 215 (1987); Don Wallace, Jr., *International Law and the Use of Force: Reflections on the Need for Reform*, 19 INT'L LAW. 259 (1985); Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187 (1984). W. Thomas Mallison and Sally V. Mallison state that "international law requires a state invoking anticipatory self-defense to go through a process of deliberation resulting in the choice of lawful, that is, proportional means of responding" to a looming coercion or imminent threat thereof. W. Thomas Mallison & Sally V. Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417, 422 (1982). They provide several examples, including the October 22, 1962 decision of President John F. Kennedy to establish a limited naval blockade or quarantine-interdiction as the method to prevent the introduction of additional missiles in Cuba and to induce removal of those present. *Id.* at 423.

[248] Although a doctrine of questionable legitimacy, intervention might be permissible, at least under certain limited circumstances. For example, where the intervenor's intent clearly is not to exert "dictatorial interference," but instead to implement "an indispensable corrective to gross violations of human rights" occurring against their own or foreign nationals in a foreign country, intervention might be legitimate. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 167 (1950), *quoted in* Louis R. Beres, *Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America*, 14 DENV. J. INT'L L. & POL'Y 76, 78, 81 (1985). On the other hand, invitation of the government of the state into which the intervention occurs might validate the incursion. *Id.* at 81.

Favorable commentators include Richard B. Lillich, *Humanitarian Intervention, in* Law and Civil War in the Modern World 229, 230 (J. Moore ed., 1974); I. OPPENHEIM, INTERNATIONAL LAW 312 (H. Lauterpacht ed., 8th ed. 1955). The majority of commentators, however, take the position that no right of intervention on "humanitarian" grounds exists. Ian Brownlie, *Humanitarian Intervention, in* Law and Civil War in the Modern World 217, 218–19 (J. Moore ed., 1974); H. Scott Fairley, *State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box*, 10 GA. J. INT'L & COMP. L. 29, 63 (1980); Jean-Pierre L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations, in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139, 144–45 (R. Lillich ed., 1973); Jean-Pierre Fonteyne, *The Customary International Law Doctrine of Humanitarian Interventions: Its Customary Validity Under the U.N. Charter*, 17 COMP. JURID. REV. 27 (1980); Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT'L L.J. 621 (1986).

An important General Assembly resolution, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970) states an irrevocable opposition to intervention. "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." *Id.* at 123.

a *jus cogens* prohibition, aggressive warfare must involve systematic state policy, whether articulate or inarticulate. The existence of a systematic policy must be objectively verifiable.[249] Advocacy of systematic governmental policy of aggressive warfare can be legislatively prohibited.[250] Again, where doubt intrudes into the determination of whether the content of a message falls within a *jus cogens* prohibition, no restriction of the message is permissible.

ii. Torture

Torture, like genocide and slavery, mocks the dignity, distinctiveness and humanity of an individual. But unlike genocide and slavery, torture violates customary international law only when perpetrated by or at the behest of government officials. Torture, the intentional infliction of severe physical or emotional suffering "by or at the

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[249] Despite the existence of the estimable goals articulated in the United Nations Charter, however, states' use of transboundary force remains a reality. *See* W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171, 198 (1988). There are situations, such as self-defense and intervention, where national use of force might be legitimate. Professor Schachter articulates five circumstances justifying a nation's use of unilateral force outside its own territory:

> (1) When it has been subjected to an armed attack on its territory, vessels or military forces;
> (2) When the imminence of an attack is so clear and the danger so great that the necessity of self-defense is "instant and overwhelming;"
> (3) When another state that has been subjected to an unlawful armed attack by a third state requests armed assistance in repelling that attack;
> (4) When a third state has unlawfully intervened with armed force on one side of an internal conflict and the other side has requested counter intervention in response to the illegal intervention; or
> (5) When its nationals in a foreign country are in imminent peril of death or grave injury and the territorial sovereign is unable or unwilling to protect them.

Oscar Schachter, *The Lawful Resort to Unilateral Use of Force*, 10 YALE J. INT'L L. 291 (1985).

Limitations upon nations' exercise of force is a derogation of sovereignty, and in all likelihood, will be narrowly construed. Eugene V. Rostow, *The Legality of the International Use of Force by and from States*, 10 YALE J. INT'L L. 286, 289 (1985).

[250] A recent example of unjustifiable aggression in violation of Article 2(4) is the Argentine invasion of the Falklands (Malvinas) Islands. "While states had used force in their international relations between 1945 and 1982, rarely had a state forcibly attempted to extend its national frontiers by incorporating a territory whose inhabitants bore so little ethnic relation to the expanding state and who so fervently opposed annexation." Levitin, *supra* note 248, at 639; *see also* Gravelle, *supra* note 246, at 66–69. Levitin concedes, however, that "international law often weighs least in situations where international society most wants it to weigh heavily—the situations involving use of force." Levitin, *supra* note 248, at 622.

instigation of a government official,"[251] is denounced in a number of international agreements.[252]

Torture is also condemned in a number of Federal Court Appeals opinions. In *Filartiga v. Peña Irala*, the United States Court of Appeals for the Second Circuit held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[253] The court in *Filartiga* implicitly acknowledged the validity of *jus cogens* doctrine.[254] In *Siderman de Blake v. Republic of Argentina*, the Court of Appeals for the Ninth Circuit explicitly acknowledged that a readily identifiable body of binding international human rights law exists, and that it conclusively censures torture.[255]

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> [T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected if having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by, or at the instigation of or with the consent or acquiescence of, a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/46 (1984), art. 1(1) [hereinafter Convention Against Torture].

[252] Convention Against Torture, *supra* note 251; American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Series No. 36, OAS OFF. REC. OEA/Ser.I/XVI/ 1.1, DOC. 65, REV.1, CORR.1, art. 5; International Convention on Civil and Political Rights, *supra* note 220, art. 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221; Declaration of Human Rights, *supra* note 220, art. 5. *See generally* John Kidd, *Torture and International Law: A Note on Recent Developments*, 15 U. OF QUEENSLAND L.J. 228 (1989); Barry M. Klayman, *The Definition of Torture in International Law*, 51 TEMP. L.Q. 449 (1978); Eric Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269 (1978).

[253] 630 F.2d 876, 880 (2d Cir. 1980). In *Filartiga*, two Paraguayan citizens living in the United States, a father and sister of a young man tortured to death by a Paraguayan police chief, who was also temporarily living in the United States, brought a wrongful death suit in federal court under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350. *Id.* The trial judge dismissed for lack of federal jurisdiction, but the Court of Appeals held that the ATCA allowed a cause of action for violation of peremptory norms of international law, and recognized that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties." *Id.* at 878; *see also* RESTATEMENT (THIRD), *supra* note 133, § 702 cmt. g.

[254] *See generally* 630 F.2d at 880.

[255] 965 F.2d 699 (9th Cir. 1992). The *Siderman* court surveyed judicial authorities, such as Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); Tel-Oren v. Libyan Arab Republic,

Jus cogens condemns officially perpetrated or sanctioned behavior only when two behavioral components are present: imposition of physical or emotional pain to a degree that is harsh, extreme and brutal; and an official or officially condoned purpose to coerce, intimidate, punish or discriminate. Advocacy that urges the institution of corporal punishment in public schools clearly does not fulfill the first element, whereas advocacy that cattle prods or whips be adopted as the instruments of academic corporal punishment might do so.[256]

iii. Systemic Race Discrimination

A government's official, systematic denigration of certain of its citizens solely on grounds of their race or ethnic origin inflicts an intolerable indignity upon the human rights and fundamental free-

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726 F.2d 774 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); Filartiga v. Peña Irala, 630 F.2d 876 (2d Cir. 1980). The court also looked to the RESTATEMENT (THIRD) § 702(d), *supra* note 133, and the Convention Against Torture, *supra* note 251, and declared:

> In light of the unanimous view of these authoritative voices, it would be unthinkable to conclude other than that acts of official torture violate customary international law. And while not all customary international law carries with it the force of a *jus cogens* norm, the prohibition against official torture has attained that status. . . .

Id. at 717.

> The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate. To subject a person to such horrors is to commit one of the most egregious violations of the personal security and dignity of a human being. That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. . . . Under international law, any state that engages in official torture violates *jus cogens*.

965 F.2d at 715, 717 (citations omitted); *see also In re* Estate of Ferdinand E. Marcos Litig., 978 F.2d 493, 500 (9th Cir. 1992) (holding that court had jurisdiction under ATCA because official torture violated *jus cogens*); Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988). *See generally* The Alien Tort Claims Act, 28 U.S.C. § 1350; Fogelson, *supra* note 147, at 886–88; T.M., Comment, *The Alien Tort Statute: United States Jurisdiction Over Acts of Torture Committed Abroad*, 23 WM. & MARY L. REV. 103 (1981); Lisa A. Rickard, Note, *Filartiga v. Peña Irala: A New Forum for Violations of International Human Rights*, 30 AM. U. L. REV. 807 (1981).

[256] The European Court of Human Rights has held that as a disciplinary measure used against school children, corporal punishment does constitute "inhuman or degrading treatment or punishment," and is thus prohibited by the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 252, art. 3. Campbell & Cosans v. United Kingdom, 4 UHRR 293 (1982).

doms of those so oppressed. That race discrimination[257] is also censured by *jus cogens* principles is evidenced by adoption of numerous international conventions and United Nations resolutions, such as the International Convention on the Elimination of All Forms of Racial Discrimination,[258] the International Covenant on Civil and Political Rights,[259] and the International Convention on the Suppression and Punishment of the Crime of *Apartheid.*[260] Thus, under our proposal, advocacy of a systemic governmental policy of race discrimination can be legislatively prohibited, where the challenged acts or practices are systemic, coherent, invidious, and instrumental.

(a). *Systemic Acts or Practices*

International law only forbids discrimination that is systemic. Like advocacy of aggressive warfare, discrimination must involve an articulated or non-articulated, systemic state policy. The existence of a discriminatory policy must be objectively verifiable.

(b). *Coherent Policy or Practice*

Prohibited discrimination must be coherent, meaning that discriminatory instances must be marked by a policy or consistent practice of discrimination on the basis of race or other similarly forbidden grounds.[261] Random or isolated occurrences are not in-

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[257] We use the phrase "race discrimination" as inclusive of all forms of discrimination based on "race, color, descent, or national or ethnic origin." Convention on Racial Discrimination, *supra* note 195, art. 1(1). Anti-Semitism considered "racial discrimination" within the meaning of the Convention. Egon Schwelb, *International Convention on The Elimination of all Forms of Racial Discrimination*, 15 INT'L & COMP. L. Q. 996, 1014–15 (1966). Article 1(1) forbids conduct "which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." *Id.*, art. 1(1).

[258] Convention on Racial Discrimination, *supra* note 195, art. 2, ¶ 1. *See generally* Thomas Buergenthal, *Implementing the UN Racial Convention*, 12 TEX. INT'L L.J. 187 (1977); Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 A.J.I.L. 283 (1985); Karl J. Partsch, *Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights*, 14 TEX. INT'L L.J. 191 (1979).

[259] Covenant on Civil and Political Rights, *supra* note 220, art. 20(2). The United States recently ratified this Covenant. 1993 U.S. Dept. of State, Treaties in Force 343 (entered into force, Sept. 8, 1992). The United States Senate, however, expressly stated a reservation to Article 20(2), which prohibits advocacy of racism and war propaganda, on First Amendment grounds. S.Res. 103–35, 103th Cong., 2d Sess. (1993) (enacted).

[260] G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30 U.N. Doc. A/9030 (1974) [hereinafter Apartheid Convention]; *see also* Declaration of Human Rights, *supra* note 220, art. 2.

[261] The Convention on Racial Discrimination obligates states to refrain from engaging in racially discriminatory acts or practices, and from sponsoring, defending or supporting racial

cluded. "Racial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy, e.g., apartheid in the Republic of South Africa." Occasional practices of racial discrimination by officials would not violate *jus cogens*, but might violate "numerous provisions in international covenants or conventions to which the state might be a party."[262]

(c). *Invidiousness of Purpose*

Discrimination must be invidious, or characterized by a purpose to inflict harm to violate *jus cogens*.[263] This requirement of governmental willfulness in engaging in discriminatory practices is the essence of systemic race discrimination. *Jus cogens* clearly outlaws practices such as segregation of schools, parks, or other public places to exclude minorities. Affirmative action provisions, however, are not invidious.[264] Thus, the *jus cogens* prohibition should be interpreted to permit narrow affirmative action provisions.

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discrimination. Convention on Racial Discrimination, *supra* note 195, art. 2(1). States are also obliged to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating race discrimination. *Id.*

[262] RESTATEMENT (THIRD), *supra* note 133, § 702 cmt. i.

[263] *See, e.g.*, Convention on Racial Discrimination, *supra* note 195, art. 1, ¶ 1; Covenant on Civil and Political Rights, *supra* note 220, art. 20(2); Apartheid Convention, *supra* note 260, at 75. This construction of the *jus cogens* prohibition is consonant with Supreme Court precedent interpreting the Equal Protection provision, U.S. CONST. amend. XIV, cl. 1, which requires proof of purpose or intent. *See generally* McClesky v. Kemp, 481 U.S. 279 (1987); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

The consequences of governmental acts and practices can be used to reveal intent. Arlington Heights, 429 U.S. at 265–68. But the appropriate interpretation of the *jus cogens* prohibition is to require a showing of purpose in governmental practice.

[264] Convention on Racial Discrimination exempts affirmative action measures. Convention on Racial Discrimination, *supra* note 195, art. 1(4). Article 1(4) provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Id. According to American constitutional law, affirmative action provisions are within the parameters of the Equal Protection Clause so long as they are required to satisfy the compelling governmental goal of remedying past discrimination and are not broader than necessary to meet this objective. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498–506 (1989).

A difficulty arises when members of traditionally oppressed minority groups advocate segregation: is this still invidious?[265] Arguably, any government act or practice that is motivated by the remedial concerns that characterize affirmative action is not invidious. A governmental measure is not invidious if it is not enacted with an intent to inflict harm upon an identifiable group. To be sure, the parameters of affirmative action remain somewhat unclear. The principle of *in dubio pro reo* provides guidance concerning permissible regulation: if there is doubt concerning the presence of willfulness underlying a government enactment that discriminates based on race, international law norms cannot regulate advocacy concerning that enactment.

(d). *Instrumentality of Acts or Practices*

Discrimination must be instrumental, insofar as it compels both systemic and systematic action that operates to segregate the races, for international law to forbid it. Opinions, epithets and scapegoating are excluded.[266]

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[265] For example, does advocacy by persons such as W.E.B. DuBois, Paul Robeson, Martin Luther King, Jr. and Malcolm X towards organizing the African-American community, to the exclusion of whites, for the benefit, protection and solidarity of the minority group members constitute invidiousness? *See* DERRICK BELL, AND WE ARE NOT SAVED 222 n.9 (1987). Is advocacy on behalf of African-American nationalism or African-American mass exodus from America, in the vein of Bishop Henry McNeil Turner, Martin Delaney, Henry Bibb, or Marcus Garvey, a manifestation of invidiousness? *Id.* at 181. Does advocating for institution of single-race and gender public schools in the African-American community in order to nurture racial pride and identity in young African-American men partake of purposeful discrimination?

In *Garrett v. Board of Educ. of the School Dist. of Detroit*, the judge enjoined the creation of gender-based schools and held that a Detroit plan to create such schools violated both federal and state Equal Protection provisions that outlaw gender-based discrimination. 775 F. Supp. 1004 (E.D. Mich., 1991). Commentators have criticized this decision. *See generally, e.g.*, Miriam Paula Gladden, *The Constitutionality of African-American Male Schools and Programs*, 24 COLUM. HUM. RTS. L. REV. 239 (1993); Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992); Christopher Steskal, Note, *Creating Space for Racial Difference: The Case for African-American Schools*, 27 HARV. C.R.-C.L. L. REV. 187 (1992).

The Supreme Court has declared that all official race-based classifications will be strictly scrutinized, and will be upheld only if essential to fulfill a compelling governmental objective and if carefully confined to that end. City of Richmond v. J.A. Croson Co., 488 U.S. 469 *passim* (1989). Thus, the legitimacy of minority advocacy for official differentiation among racial groups is dependent upon the existence of a compelling governmental objective underlying the proposed course of action. As decisions rendered by a national judicial body, however, United States Supreme Court pronouncements are not authoritative in construing the scope of *jus cogens*. For purposes of our proposal, any doubts concerning the validity of the cause for which the speaker advocates are resolved by disallowing regulation.

[266] For example, opinions that members of one race are inferior, or that members of another race are taking all available jobs, are excluded as opinionated remarks.

2. Is the Communication Advocative?

The second integral inquiry is an assessment of the tenor and intensity with which the speaker delivers the message. This element is fulfilled only if the message is advocative. We define "to advocate" as: to urge in favor of or to maintain the rectitude of pursuing a cause or proposal.

Advocacy entails two separate elements: the speaker must harbor the intent to advocate, meaning that the speaker must urge or exhort with the purpose of persuading those who observe the communication; and a reasonable person must perceive the communication as advocative, as communicated with a purpose to urge, exhort or persuade. The advocacy need not be addressed to specific persons. Thus, the publication and circulation of a newspaper article or a radio broadcast might be an encouragement or endeavor to persuade to murder or to terrorize, although not addressed to any person in particular.

Advocacy must be delimited to communications that entreat or exhort. Messages that merely state the speaker's opinion or belief are excluded.[267] What we propose to prohibit is language advocating, urging or exhorting the accomplishment of consequences forbidden under *jus cogens* norms. We recognize that our construction of this element is antithetical to the Supreme Court's *Brandenburg* doctrine,[268] in which the Court opined that advocacy, without more—even advocacy of heinous, potentially destructive activity—is constitutionally protected speech unless it "is directed to inciting or producing imminent lawless action and is likely to produce such action."[269]

Our proposal departs from *Brandenburg* in two respects. First, although the speaker must advocate with the intent to bring about the prohibited conduct,[270] namely those actions proscribed by *jus cogens*, we eliminate the factor of imminence. So long as the speaker's aim is ultimately to provoke conduct prohibited by *jus cogens*, the public damage inflicted by the advocacy is tangible, regardless of whether the injury is immediately experienced, or takes the form of an incendiary time bomb.[271] Second, for similar reasons, we elimi-

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[267] *See, e.g.*, STRAFGESETZBUCH [StGB] § 86 (F.R.G.). "Advocacy" will be difficult to distinguish from opinion or belief in some contexts, especially when the message is uttered in the heat of debate or argument. If the resolution of this inquiry remains ambiguous, then this element is not satisfied and no restriction is permissible.

[268] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[269] *Id.* at 447.

[270] *See supra* text accompanying notes 224–26.

[271] *See supra* text accompanying notes 120–28.

nate the factor of likelihood of occurrence. A public address, radio broadcast, or newspaper editorial that intentionally advocates decimation or enslavement of a people on grounds of identification with national, ethnic, racial or religious characteristics, or deadly terrorist attacks on innocent persons, or torture of dissidents, is an unendurable affront to the individual rights of liberty, equality, dignity, and life that are the constitutional due of each individual. This form of advocacy signals a threatened abandonment of values that accord these characteristics to each person, and is a perilous, cataclysmic threat to the very essence of society.

3. Is There an Intent to Provoke the Conduct Advocated?

In the criminal law, both *actus reus* and a culpable *mens rea* are essential elements.[272] We propose that the requisite intent element be specific intent to provoke, albeit over the long run, the behavior advocated.[273] The required scienter, if ambiguous, can be inferred from surrounding circumstances.[274]

Expressions fairly characterized as artistic or scientific endeavors, as historical accounts, as research or education in an academic context, as reporting about incidents or current events, or as discus-

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[272] United States v. Apfelbaum, 445 U.S. 115 (1980). It must be demonstrated that the speaker performed the *actus reus*, or actually communicated the message. As a defense, the speaker may raise a lack of capability to perform this physical act voluntarily, such as unconsciousness or severe intoxication. Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 392 U.S. 514 (1968); Fulcher v. State, 633 P.2d 142 (Wyo. 1981); *see also* Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191 (1990).

[273]

> A person acts purposely with respect to a material element of an offense when:
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> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result . . . .

MODEL PENAL CODE § 2.02(2)(a).

[274] WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.5, at 317–18 (2d ed. 1986). *See generally* Ronald J. Allen & Lee Ann DeGrazia, *The Constitutional Requirement of Proof Beyond a Reasonable Doubt in Criminal cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 AM. CRIM. L. REV. 1 (1982).

The prior speech of the perpetrator can be considered in determining intent. Wisconsin v. Mitchell, 113 S. Ct. 2194, 2201–02 (1993). In *Mitchell*, the Court upheld an enhancement of defendant's sentence for an aggravated battery and theft conviction under a state statute that increased the severity of the penalty when the victim was chosen on grounds of race, religion, color, disability, sexual orientation, national origin or ancestry. *Id.* The Court rejected defendant's argument that the statute was overbroad, stating that "the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property" is "simply too speculative a hypothesis to support" an overbreadth claim. *Id.*

sion or debate of abstract philosophy or doctrine, generally cannot be construed as intentional. Even if advocative, these communicative forms ordinarily evince no intent to bring about the conduct discussed.[275]

VI. A *JUS COGENS* GUIDE TO CONTENT-BASED RESTRICTIONS

In order to demonstrate the actual results of our suggested approach, we posit the existence of a hypothetical content-based statute that restricts speech within the permissible limits of *jus cogens*-based regulation. Further, we assume that the Supreme Court has stamped its imprimatur upon our suggested *jus cogens*-based approach. Under our proposal, the Supreme Court would test the hypothetical statutory regulation against a *jus cogens*-guided First Amendment interpretation.

We consider various examples—some "easy" and some "hard" cases. We have selected both actual and hypothetical examples to explore the substance and scope of each of the three elements of the approach we propose. In addition, we will take a case and slightly alter the facts to expose the relationship between concrete facts and outcome under the proposed statute.

The first case we pose is a variation of events that ensued in May, 1977 in the small village of Skokie, Illinois.[276] Assume that a Nazi party contingent marches through the Village of Skokie, in which several thousands of Holocaust survivors live. They march in full Nazi regalia and, most significantly, carry signs proclaiming the *leitmotif* of the march: the extermination of all Jewish people. Afterwards the city council is informed of the Nazi march and takes action under its new city ordinance. The council bases its decision on a set of rules which regulates free speech within narrow *jus cogens* limits and permits the council to prohibit marches if the objective of the march is contrary to a *jus cogens* rule.

The first question a reviewing court asks in such a case is whether the anticipated communications fall within one of the narrowly construed *jus cogens* categories of speech that can be regulated. In this case, the sole purpose for the march, and the core of the communication, is to call for the intentional massacre of an entire

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[275] If any doubt exists concerning the characterization of a communication as an artistic, scientific or historical message, or as research or education in an academic context, as reporting about incidents or current events, or as discussion or debate of abstract philosophy or doctrine, then the intent requirement is not fulfilled, and regulation is not permissible.

[276] *See supra* notes 65, 128; *see also infra* note 284.

people. Unambiguously, this case represents an instance of genocide, a *jus cogens* category of prohibited conduct.

The next question is whether calling for genocide is a form of advocacy. Advocacy is exhortation to pursue a cause, and requires fulfillment of two separate components: (a) the intent to advocate; and (b) the presence of a communicative act that is unambiguously advocative in nature. Clearly, the march was intended by the Nazis to communicate their goals and to advocate actively for pursuit of these goals. No other conclusion comports with common sense. Thus, the advocacy was intentional. Moreover, the communicative act—carrying the banners depicting the motto, marching in full regalia—was one of an advocative nature. Anyone watching the Nazis and reading their signs, without question, would have perceived this behavior as exhortative. Consequently, the Nazi march fulfills the requirement of advocacy.

The third question focuses upon the intent of the actor to ultimately bring about the objective for which the actor advocates. Certainly, the Nazi party, conceiving itself as the true heir to Hitler's legacy, also intends the advocated action to take place. The requirement of intent is fulfilled.

Because all three questions are answered in the affirmative, the Nazi march constitutes an act of communication which—according to our proposal—can be regulated. A reviewing court will uphold the city council's decision.[277]

In another, assume that a fundamentalist Arab leader, domiciled in New York, advocates that Muslims rise up and bomb United States government offices in order to coerce the United States government into changing its policy vis-a-vis Israel. This is terrorism, the attempt to intimidate a government into granting demands. The advocacy of terrorism can be regulated.[278] Similarly, an animal rights activist's advocacy for the bombing of medical research institutes around the country until Congress outlaws animal testing can be restricted.

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[277] A city council may also outlaw advocacy for genocide and systematic racism by a self-styled American Nazi group in the city's park. *See, e.g.*, Rockwell v. Morris, 10 N.Y.2d 721 (1961).

[278] The example of British author Salman Rushdie comes to mind, but this case is somewhat complicated, and does not fall within any recognized *jus cogens* category. Rushdie published an artistically acclaimed novel, THE SATANIC VERSES (1988), which was deemed blasphemous by some Muslim sects. The spiritual ruler of Iran, the Ayatollah Khomeini, issued a decree declaring that Muslims were obliged to put Rushdie to death. Although government-initiated, no attempt to extract concessions from a government is involved in this case. The Ayatollah's edict, although reprehensible, is not terroristic. *See* Daniel Pipe, *Whodunit? Conspiracy Theories and Middle Eastern Politics*, ATLANTIC MONTHLY, May 1989, at 18; Michael Walzer, *The Sins of Salman: The Do's and Don't of Blasphemy*, THE NEW REPUBLIC, Apr. 10, 1989, at 13.

Not all *jus cogens* categories, however, focus on private action. Some require that the action be systemic, government-enforced, or at least government-condoned. Let us assume, for example, that a movement in California advocates that all Hispanic Americans be confined in special fenced-in camps.[279] Advocacy and intent, we stipulate, are clear and unambiguous in this case. This plan smacks of a summons to racial discrimination. The message urging sequestration of an entire group of people based on race or ethnicity in the equivalent of concentration camps is, without any doubt, advocacy for systemic, state-administered, coherent and invidious racial discrimination.[280] Consequently, the communicative actions of the movement can be regulated. Similarly, a United States branch of the South African white supremacist "Afrikaaner National Bewegung," with its advocacy of apartheid and strict government-enforced racial segregation, could be regulated.

Advocacy of conduct or practices outlawed by *jus cogens* recurs with some regularity, and legislatures have attempted repeatedly to restrict this speech by using the only tool available to them: the enactment of rigid time, place, and manner regulations. Superficially, such regulations are content-neutral. Supposedly, these neutral restrictions place an equivalent burden on all putative speakers. But courts have had little difficulty in many cases unearthing not only a content-based rationale, but also a blatant tendency toward uneven application of the regulation.[281]

In *Ku Klux Klan v. Martin Luther King, Jr. Worshippers*,[282] a city ordinance required permits for marches on public property. For a number of years, the Ku Klux Klan (KKK) had staged a "Homecoming" parade in the City of Pulaski, Tennessee on or around January 13, the holiday commemorating Dr. Martin Luther King, Jr. In 1989, the director of the county Chamber of Commerce secured parade permits for January 12, 13, 14, and 15. On October 23, the national director of the KKK informed the city council that his organization

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[279] *See also* Koremastu v. United States, 323 U.S. 214 (1944) (sustaining an order compelling Americans of Japanese descent to be confined in special camps, surrounded by barbed wire and watch towers).

[280] For a definition of systematic race discrimination, see *supra* text accompanying notes 257–66. This type of advocacy, it could be argued, is also a form of genocide, the definition of which includes actions that inflict destructive conditions upon a people on grounds of national, ethnic, racial or religious identification. *See supra* sources cited at note 225.

[281] For a discussion of veiled time, place and manner regulations, see *supra* notes 95–96 and accompanying text.

[282] 735 F. Supp. 745 (M.D. Tenn. 1990).

intended to hold its traditional "Homecoming" event on January 13, 1990.

The city council, within two weeks, passed an amendment to the city ordinance that regulated parades. The amendment restricted parades, marches and similar events to a maximum of one per month and allocated the required parade permits on a first-come, first-served basis. It also prohibited marches of more than 250 persons and prohibited marchers from wearing masks and disguises. A subsequent request by the KKK for parade permits on January 13 and January 20 was rejected, based on the new amendment. The city council's response was that only one permit per month was allowed, and that this permit had already been issued to the Chamber of Commerce for the month of January.

The city council tried to regulate the speech of the KKK by amending its permit ordinance. The legislators knew that KKK rallies, with attendant patently offensive messages, would occur again. Legislators wanted to act, not simply wait for the incident to recur. Current First Amendment doctrine, however, tied their hands. Instead, they had to resort to the blunt knife of overbroad, purportedly neutral time, place and manner restrictions.

This is but one example of many where legislatures, bereft of the ability to regulate speech based on content, have had to resort to facially neutral time, place, and manner regulations. Courts, for the most part, as in this case, have understood that the underlying legislative motivation was to regulate content, and under current First Amendment doctrine have invalidated these ordinances.[283]

Under our approach, however, the city council would not be compelled to resort to facially neutral time, place, and manner regulations to restrict overtly offensive, racially-charged speech. An ordinance narrowly regulating speech that advocates systemic racial discrimination is preferable because it would be less broad and less restrictive of speech.

The message and the intent of the KKK rally, if not ostensibly clear, is readily discernable by examining the long segregationist history of the KKK. The Klan selected the location and the day of its planned march to advocate for its objectives—reimposition of racial segregation and systemic, coherent discrimination. Such speech is within the relevant *jus cogens* category and accordingly can be regulated.

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[283] *Id.* at 749–52.

Our suggested approach would effectively deliver to legislatures a usable tool for narrow and precise content-based restrictions. A First Amendment interpretation guided by *jus cogens* would enable Pulaski, validly and successfully, to regulate Klan rallies. This would also allow a variety of other regulations: the Skokie city council could regulate the Nazis' march through a genocide survivor's neighborhood,[284] Forsyth County could regulate parades by the Nationalist Movement,[285] and Arkansas could forestall attempts by the KKK to partake in a "Sponsor-A-Highway" program.[286]

Uttering racial slurs alone, however, cannot provide a basis for regulation. For example, a judge who refers to African-Americans, in camera, in racially offensive terms is absolutely detestable.[287] But such epithets do not fall within the category of systemic, coherent racial discrimination. The use of these words, without more, simply does not communicate an advocacy to impose or bring about a state-controlled or state-condoned system of racial segregation.

The constricted reach of our approach might be disillusioning for some. But our approach is not, and ought not be, a fail-safe test to separate good ideas from detestable ones. We do not want the exchange of ideas to be unduly limited or restricted by attempts to differentiate what is noble from what is despicable. We simply contend that some ideas are too false, too outrageous, too damaging to merit First Amendment protection. The supremacist's call for a segregated country based on apartheid is such an idea; the irresponsible mumbling of non-coherent racial slurs by a judge in chambers is not.

But what if it is suggested that Mark Twain's incomparable book, *Tom Sawyer*, should be regulated—taken off school library shelves—because it portrays slavery and thus implicitly advocates slavery, or at least systemic racial discrimination?[288] Even if one assumes that Twain's story implicitly falls under any of the *jus cogens* categories, the case is easily decided when answering questions of "advocacy"

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[284] Collin v. Smith, 447 F. Supp. 676 (N.D. Ill. 1978) (holding restrictions of racist speech on content-based grounds constitutionally problematic under existing First Amendment doctrine), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *cert. denied*, 439 U.S. 916 (1978); *see also* Village of Skokie v. National Socialist Party of America, 373 N.E. 2d 21, 25 (Ill. 1978) (holding that display of swastikas by peaceful demonstrators cannot be banned for the exclusive reason that the swastika might provoke others to violence).

[285] Forsyth County, Ga. v. The Nationalist Movement, 112 S. Ct. 2395 (1992).

[286] Knights of Ku Klux Klan v. Arkansas State Highway and Transp. Dep't, 807 F. Supp. 1427 (W.D. Ark. 1992).

[287] *See In re* Stevens, 31 Cal. 3d 403 (1982).

[288] Over the years, there were more than a few attempts to remove *Tom Sawyer* from library

and "intent." First, in his book Mark Twain does not urge his readers to maintain slavery or perpetuate racial discrimination. The book is a work of description, not of advocacy. Secondly, Mark Twain had no discernable intent whatsoever to bring about slavery. Any attempts to ban *Tom Sawyer* from school libraries premised upon *jus cogens*-based speech regulations will be held to violate the First Amendment.[289]

This example demonstrates vividly that our suggested approach will not create vast new areas of content-based speech regulation; rather, outside the narrowly tailored confines of possible restrictions, our proposal will actually reinforce and strengthen free speech.

Let us briefly focus again upon the questions of advocacy and intent. Our approach affords the same absolute First Amendment protection to *Tom Sawyer* as it would provide to a theatre play on Adolf Eichmann and the "final solution,"[290] or a screening of Nazi film maker Leni Riefenstahl's Third Reich Opuses.[291] When a message, even one falling within *jus cogens* categories, lacks either advocacy or intent, it is protected speech.

The situation is slightly more complex where the speaker solicits violence to achieve a certain goal against a certain group of people "by any means necessary."[292] One can argue that such a message—wielding the capacity for violence to intimidate the population into granting one's demands—is a call for terrorism. But does "by any

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circulation. *See, e.g., Expansion of Censorship in Schools Decried,* CHI. TRIB., Sept. 2, 1993, at 2; Dennis McLellan, *Banned Books Display Focus on the Perils of Censorship,* L.A. TIMES, Oct. 29, 1988, pt. IX, at 3; Mary Otto, *School Content Challenges Rise: One Side Criticizes Censorship; the Other Praises Judgment,* DET. FREE PRESS, Sept. 2, 1993, at 2A; *Religious Right Waging Campaign to Censor Books, Group Charges,* BOSTON GLOBE, Sept. 2, 1993, at Nat'l-17; Jack Smith, *Censorious Right Has It All Wrong,* L.A. TIMES, Nov. 1, 1993, at 1E; Michael Tackett, *Twain Country Dilemma: Read Racist Words or ban,* CHI. TRIB., Feb. 14, 1992, at 22.

[289] We do not advocate broad removal of books or other communicative materials from the collective knowledge. Assume, for example, that the book targeted for removal does express advocacy of conduct or practices that *jus cogens* forbids, and evinces an intent to bring about the prohibited conduct. The inquiry would then focus upon the advocative quality and intent of the actions of the person placing the book in popular circulation, e.g., the librarian or the teacher. Viewing the book as an artistic, philosophical, or historical work would insulate it from regulation. *See infra* notes 296, 297, 304 and accompanying text.

[290] *See, e.g.,* the play by Heinar Kippardt, *Bruder Eichmann* (1983).

[291] For an autobiographical account of Frau Riefenstahl's Third Reich masterpieces, see LENI RIEFENSTAHL, A MEMOIR (1993).

[292] "Our objective is complete freedom, complete justice, complete equality, by any means necessary. That never changes. Complete and immediate recognition and respect as human beings, that doesn't change. That is what all of us want." Malcolm X, Address at the Audubon (New York, Dec. 20, 1964), *in* MALCOLM X SPEAKS 115, 116 (George Breitman ed., 1965).

means necessary" actually constitute advocacy of terrorism? The phrase is ambiguous.

In cases of ambiguity, we summon the reasonable person standard. The question then becomes: does a reasonable person understand this message to convey advocacy of terrorism? A reasonable person will take into account the entire content of the message as well as the context in which the words are stated in order to distill from these considerations additional details sufficient to answer the question: what is this message? If the answer remains ambiguous, the speech is protected and cannot be regulated.

The requirement of intent is most serviceable in artistic, scientific or instructional contexts. A teacher of a social history class is not restricted from reading pro-slavery texts to a class when discussing the Civil War.[293] But outside these instances, advocacy generally corroborates intent.[294]

Requiring the reasonable person to examine factual details and contextual circumstances is a complex endeavor. We are aware of this fact. Regulations of free speech based on content must be drawn as narrowly as possible. Restrictions must be grounded on clear and reasonable bases. Whenever any doubt persists, the balance must tip in favor of absolute speech protection.

An example may be taken from current news. Gary Lauck, an American propagandist, referred to as the "Nazi from Nebraska,"[295] operates from a post office box in Lincoln, Nebraska to send out a steady stream of books, pamphlets, and stickers that are racially charged. The stickers, for example, display messages like "Fight crime . . . deport niggers," "Don't buy Jewish!" or "We're back." He also sells tapes of Hitler's speeches. Could any of these activities be regulated by a content-based speech code?

The initial inquiry is whether Lauck's actions fall within any of the *jus cogens* categories. The evidence is not entirely conclusive. The "Fight crime . . ." sticker can be seen as advocating racial discrimination: the message calls for systemic action and is a coherent policy with the purpose to inflict harm. The sticker "We're back"

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[293] A similar example is the inclusion of Nazi books in a political history course to aid in the study of this period.

[294] For example, a person kidnapped and then forced to read a statement advocating terrorism, as well as someone being under the severe influence of alcohol or drugs, would clearly lack sufficient intent. For a discussion of the intent requirement, see *supra* notes 273–76.

[295] *See* Karen Springer & Theresa Waldrop, *A Farm Belt Führer Stirs Up the Skinheads*, NEWSWEEK, Nov. 15, 1993, at 38.

can be seen as Lauck's attempt to communicate the Nazis' return. The message that Nazis are resurrected as a political force irrevocably incorporates the message that genocide is back because Nazism is inherently and irreversibly linked to the most appalling and horrifying genocide in the history of humankind. Thus, the sticker's central idea is within the parameters of the genocide category.

The question remains, however, whether this message is advocating genocide. "We're back" is on its face a statement of fact, not of advocacy. One would have to look more closely at details to discern with less ambiguity whether the sticker can be understood by a reasonable person as advocating genocide. One would have to examine the contextual facts, such as who displays the sticker, when, how, and in what context, in order to further illuminate the two components of advocacy. These components include: the intent to advocate, and whether a reasonable person would consider the communication advocacy.

The third sticker "Don't buy Jewish!" cannot, in our view, be subsumed under any *jus cogens* category without unduly straining its limits. The sticker does not advocate the extermination of a people. Nor does it advocate for state-supported, systemic, coherent, racial discrimination. It does not call for implementation of any illegal or terroristic actions.[296]

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[296] An interesting case in point is NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), in which a boycott against white-owned businesses was launched by black citizens in an effort to secure compliance by civic and business leaders with demands for practices that accorded with principles of equality and justice. *Id.* at 889. The Court found no basis for monetary relief for the white merchants arising from losses incurred as a result of the boycott, or from non-violent picketing. *Id.* at 921. Persons who committed individual acts of violence or intimidation during the course of the boycott could be held liable for resulting damages. *Id.* at 926.

One of the boycott organizers, Charles Evers, made a number of speeches to encourage continued participation. *Id.* at 898. He ostensibly stated that boycott violators "would be 'disciplined'" and declared: "[i]f we catch any of you going into them racist stores, we're gonna break your damn neck." NAACP v. Claiborne Hardware Co., 458 U.S. at 902. The Court conceded that Evers' speeches were delivered in an impassioned context, and "might have been understood as inviting an unlawful form of discipline or, at least to create a fear of violence whether or not improper discipline was specifically intended." *Id.* at 927. Because no acts of violence occurred in the wake of Evers' exhortations, Evers did not transcend the bounds of Brandenburg v. Ohio, 395 U.S. 444 (1969).

Whether our approach would yield a similar result depends upon an assessment of Evers' intent. Evers does not advocate state-sanctioned race discrimination. But his words might be construed as advocacy of terrorism, and might reasonably be so perceived by the listeners. Whether Evers' speeches would run afoul of a properly-drawn statute would depend upon whether his words connote an intent to provoke violence or a hyperbolic warning to his audience.

The sale of tapes containing infamous Nazi speeches advocating the extermination of the Jewish people is certainly within the genocide category. It is likely that Lauck is communicating his message through the speeches of Hitler. Lauck's message is advocated with more zeal, more force, and more conviction than Lauck himself could do.

The question then becomes whether the tapes do more than communicate the speeches, or whether they implicitly present a form of advocacy. To clarify this issue, one must use the reasonable person standard and ask whether someone sending out Hitler's speeches is pursuing more than the dissemination of the historical facts, and instead is encouraging genocide and Nazism. It is conceivable that a reasonable person could assume that Lauck is using the tape sale as a thinly veiled advocacy and allow his action to be regulated.

The outcome would be different, however, if the Hitler tapes were shown in a teaching context as part of a history or communications class. The communication would still fall under a *jus cogens* category and the speech contained on the tape would fulfill the requirement of being advocative. The intent of the teacher both to advocate for genocide and to ultimately bring about genocide, however, would be lacking. Such speech in a purely academic or teaching context could never be regulated, because the required two aspects of intent would be absent.[297]

The result then is that some of Lauck's communication—the tape sale, at least one sticker, maybe another—can be regulated in accordance with our *jus cogens* proposal, while other parts of his message are protected speech. The reasonable person standard is a useful tool in cases in which the questions of our proposed approach do not yield simple, unambiguous answers. The Lauck example is a case in point.

The standard is particularly useful in the area of symbolic speech, where revealing the underlying message sometimes requires a process more complicated and more subtle. There is no need to open Pandora's box and determine which symbols are speech and which

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[297] For all practical purposes, both aspects of intent will be absent. In very rare circumstances, however, the teacher might have the intent to advocate, even if the intent to bring about the advocated action is lacking. This would be the case if the teacher advocates as part of a simulation on propaganda and genocide, in order to get the message across that genocide is abhorrent and illegal. For an illustrative example, see *The Wave*, ABC-TV, October 4, 1981. But even such simulations, because of the absence of one decisive element of intent, cannot be restricted under our suggested approach.

are not. On the contrary, we categorize the content of the message and the intent of the actions by the reasonable person standard.

If, for example, a Nazi movement would silently march through a predominantly Jewish town in full Nazi regalia, wearing armbands replete with the Nazi swastika, the judgment of the reasonable person would determine whether this action amounted to symbolic advocacy of Nazi policy, including genocide and mass racial discrimination. In this case, we think it a straightforward process for a reasonable person to link swastikas and brown uniforms to Nazism, and Nazism to genocide.

The situation would be somewhat less clear, however, if the marchers were wearing no swastikas, but just brown uniforms. The marchers could very well remove themselves from these narrow *jus cogens* categories by reducing the communicative component of their symbolic action through foregoing display of the swastika—a highly communicative symbol. By doing so they would also substantially reduce the desired communicative impact attendant to their action.

If the message becomes so attenuated that it becomes ambiguous to a reasonable person, then the statement would be outside the regulatory scope of our suggested *jus cogens* approach. Actions that do not communicate a clear message cannot be regulated. The reasonable person standard determines whether a symbolic action is ambiguous or intentional and advocative.

In *R.A.V. v. St. Paul*,[298] a group of young people assembled a cross made from broken chair legs and burned that cross in the yard of a black family. The teenagers were charged under St.Paul's Bias-Motivated Crime Ordinance.

Upon reviewing this case, the Supreme Court assumed that the cross burning had a communicative component.[299] The initial inquiry in this case, and in cases factually similar to *R.A.V.*, should be whether the message communicated by crossburning falls within one of the *jus cogens* categories, such as systemic racial discrimination.[300] Whenever the communicative content of a message is ambiguous, the reasonable person standard provides additional insight

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[298] 112 S. Ct. 2538 (1992).

[299] *See id.* at 2566–71 (Stevens, J. concurring) (arguing that type of communication addressed by St. Paul ordinance is wholly proscribable and could be regulated by narrower, properly-drawn statute).

[300] If the answer is not plain and clear, the reasonable person standard is activated. The question then becomes: does a reasonable person see the burning of a cross outside the house of a black family as an unambiguous message calling for systemic racial discrimination?

into determining whether the speech conveys a message within a *jus cogens* category.[301]

After resolving this initial issue, the elements of advocacy and intent must be explored. A final example illuminates the problem in ambiguity of intent. Suppose that two white college students, after a heated discussion with a black colleague about the racial and cultural origins of the composer Ludwig van Beethoven, affix a poster to that black student's dormitory room door depicting Beethoven as black. The white students contend that they meant to prove Beethoven's whiteness; the black student is certain that his colleagues intended to insult him.[302]

Again, the reasonable person test might provide insight regarding communicative intent. Using our approach we are not confined to decide between the parties' two polar views on what actually was communicated. Instead, attention would shift to a reasonable person witnessing the event. We then would ask whether such a bystander would have unambiguously understood the caricature to call for systemic racial discrimination. It takes little imagination to see that the answer would be negative. Consequently, we do not consider such a caricature to be regulative speech, based on a *jus cogens* approach.[303]

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[301] One example of a highly ambiguous symbol is the Confederate flag, which white southerners perceive as emblematic of their Dixie culture and heritage. African-Americans often perceive this flag as advocating a return to slavery. A recent example reveals this dual symbolism of the Confederate flag. A long-standing group, the Daughters of the Confederacy, requested the United States Senate's approval of a design patent for their use of an insignia that included the Confederate flag. The design patent had been renewed on previous occasions, evoking little Senate attention. In February 1993, however, Senator Carol Moseley-Braun launched a campaign to deny renewal of the patent on grounds that the Confederate flag is a living symbol of slavery and racism to millions of African-Americans. Senator Moseley-Braun prevailed, and the patent was denied. Jacob Weisberg, *Making the Senate Floor a Focus for Matters of Conscience*, L.A. TIMES, Oct. 31, 1993, at 3. The debate over the Confederate flag persists, as is evidenced by the recent controversy over whether the Confederate emblem should be removed from the Georgia state flag. An African-American civil rights leader declared that "[t]he flag is the Confederate swastika," and "signifies racism, white supremacy and separation . . . [and] shows the rest of the world the problems Georgia still has and the unfinished business of the civil-rights movement." Tom Watson, *Old Fight Over Ga. Flag Moves to New Field*, USA TODAY, Jan. 26, 1994, at 3A. A supporter of the Confederate symbol asserted that "[t]hese symbols serve as a memorial and reminder of the people who died fighting for independence . . . ." *Id*; *see also* Jerry Schwartz, *While Confederate Flag Waves, Protesters March*, N.Y. TIMES, Jan. 31, 1994, at B6, col. 3; Ronald Smothers, *Board Bans Georgia Flag at Atlanta Stadium*, N.Y. TIMES, Feb. 24, 1994, at A8, col. 4.

[302] *See* Lawrence, *supra* note 1, at 433.

[303] A similar example occurred recently at the University of Pennsylvania. There, a student was disciplined for shouting at a boisterous group of African-American women who were

Thus far, we have explicated our approach with various examples of both actual and hypothetical cases. We now will scrutinize a hypothetical example and will demonstrate, simply by slightly altering the facts, how factual modifications can determine the result of our approach. Assume, for example, that the Supreme Court has adapted the *jus cogens* approach. Assume further that the Aryan Movement, a white supremacist organization, has devised an "action plan" for the coming year. They have conceived several actions, termed "manifestations," to disseminate the movement's message. Before they implement their plan, they consult with their legal counsel for advice.

The first operation they plan is a rally in New Orleans calling for all American white people to stop interrelating with or marrying people of other races. Counsel, after examining the *jus cogens* category of racial discrimination, advises the Aryan Movement that such a rally would not constitute advocacy of systemic, state-enforced racial discrimination, because they only are calling for people to voluntarily stop interrelating with other races. Counsel concludes that the courts might find this idea of voluntary segregation to be detestable, but, nevertheless, still protected by the First Amendment.

The second manifestation is a march through a village wearing full Nazi regalia, including swastikas, and singing Nazi songs. The members of the Aryan Movement want to hold the rally in a predominantly Jewish town because the group's members want attention. If this march turns out to be illegal or restricted, they would accept marching in any town in the Midwest.

Counsel first states that the *jus cogens* approach does not regulate or limit speech *per se*. This approach merely carves out a narrow, unprotected area of speech based on the speech content. Cities and states are free to decide whether, how much, and how they want to regulate such unprotected speech.

A Nazi march with uniforms, symbols, and songs would fall within such an unprotected area. Nazi symbols have become inextricably linked with genocide. Under the reasonable person standard, such

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disturbing his study time. He referred to the women as "water buffaloes." Christopher Heredia, *When "Enlightened People" Make Racist Remarks*, L.A. TIMES, May 27, 1993, at View-2E; Dale Russakoff, *Penn Women Drop Racial Charge: Five Say "Water Buffalo" Is Slur, But Question Fairness of Hearing*, WASH. POST, May 25, 1993, at A3; Dale Russakoff & Mary Jordan, *At Penn, the Word Divides as Easily as the Sword*, WASH. POST, May 15, 1993, at A1. At worst, use of this epithet is somewhat rude. In no way, however, can this comment be construed as advocating genocide, racial discrimination, or any other *jus cogens*-prohibited conduct. Thus, under our approach, no disciplinary action would be permitted and the student's speech would be protected.

actions would fall under a *jus cogens* category, regardless of geographic location. Cities everywhere are free to regulate such speech. The Aryan Movement cannot be sure anywhere in the United States that their planned march will not be regulated.

The Aryan Movement also plans to call an open-air symposium on segregation, at which they will read aloud segregationist literature. The Movement organizers hope this manifestation will fall outside the category of regulated speech because they will not be advocating openly for segregation but will objectively discuss its pros and cons. Without the advocacy component the organizers assume that their message will not fall within the narrow category of speech vulnerable to regulation.

Counsel, however, challenges their assumption that this "symposium" eludes the advocacy element.[304] Counsel, instead, applies the reasonable person standard and concludes that a reasonable person might not accept the proposition that the Aryan Movement merely seeks to debate segregation, but instead conclude that the Movement intends to advocate segregation under a thinly-veiled disguise. Counsel, therefore, would advise the organizers that this "symposium" may be regulated.

CONCLUSION

The past fifteen years have witnessed the persistence of intolerable, assaultive messages and ingenious strategies to combat transmission of these messages.[305] We do not embrace the particular approaches promulgated thus far for regulating speech content.[306] Rather, we urge that the time is ripe for reassessment of First Amendment jurisprudence.[307] It is no longer sufficient to rely upon the

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[304] Recall that the reasonable person standard applies to resolve ambiguity concerning satisfaction of any of the three requisite elements: *jus cogens* categorization, advocacy, and intent. *See supra* text accompanying notes 272–78.

[305] *See supra* sources cited at notes 1, 71–75, and 77–79. *See generally* SUNSTEIN, *supra* note 18; Fish, *Fraught with Death*, *supra* note 5; Fish, *Jerry Falwell's Mother*, *supra* note 5.

[306] The regulatory approaches primarily focus on protecting the audience. This raises difficulties of overbreadth—because too much speech might be suppressed, and vagueness—because the speaker might know what speech would affront the listener. *See supra* text accompanying notes 110–114.

[307] The metaphor of a propitious moment for formulating a new constitutional perspective is attributable to Professor Ackerman, who writes of "constitutional moments," interludes of great change in American political history, each a fundamental alteration of constitutional course. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). He identifies three such moments: the period surrounding the founding of the Constitution, which worked changes in sovereignty; the post-Civil War period, which effected changes in the ideal of equality and national government; and the New Deal era, which

metaphorical marketplace of ideas to demonstrate conclusively that notions as heinous as genocide, terrorism, slavery, and aggressive warfare are spurious. If twentieth century history teaches us nothing else, it enlightens us to the fact that untold millions of persons can suffer terribly, and even lose their lives, while the marketplace debates the ideologies that persecute them.

The mere utterance of messages as damaging as those that advocate genocide, terrorism, slavery or aggressive warfare is a public injury, for if heeded, these utterances imperil the liberty, equality, dignity, and right to life to which each person is constitutionally entitled. Thus, they pose the potential for abdication of basic societal values.

Are explosive, outrageous, despicable words advocating genocide, terrorism, or slavery inconsequential as a motivating societal force?[308]

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resulted in the establishment of the legitimacy of the activist welfare state. In each case, states Professor Ackerman, the resulting transformation involved a change in the character of the Constitution. *Id.* at 1050–57; *see also* BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 285–88 (1991); *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

> While gradual adaption is an important part of the story, the Constitution cannot be understood without recognizing that Americans have, time and again, successfully repudiated large chunks of their past, and transformed their higher law to express deep changes in their political identities. Perhaps these changes do not seem radical. . . . But, when judged by any other standard, they were hardly incremental. If a label will clarify matters, American history has been punctuated by successful exercises in revolutionary reform, in which the protagonists struggled over basic questions of principle with ramifying implications to large areas of American life.

Bruce A. Ackerman, *Constitutional Politics, Constitutional Law*, 99 YALE L.J. 453, 474 (1989). *See generally* BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

[308] *See, e.g.*, Khalid Abdul Mohammad, Nation of Islam National Spokesman at Kean College, NJ, Nov. 29, 1993, *reprinted in* N.Y. TIMES, Jan. 16, 1994, at 11.

> We don't owe the white man nothin' in South Africa. . . . [W]e kill everything white that ain't right . . . in South Africa. We kill the women, we kill the children, we kill the babies. We kill the blind, we kill the crippled . . . we kill 'em all. . . . Goddamit, and when you get through killing 'em all, go to the goddam graveyard and dig up the grave and kill 'em, goddam, again. 'Cause they didn't die hard enough. They didn't die hard enough. And if you've killed them all and you don't have the strength to dig 'em up, then take your gun and shoot in the goddam grave. Kill 'em again. Kill 'em again, 'cause they didn't die hard enough.

Id. In this speech, Khalid Abdul Mohammad also advocated for the killing of gays, called the Pope "that cracker" and questioned his sexual identification, made demeaning references to black social commentators, and labeled Jews the "blood suckers of the black nation." *Id.*

On February 2, 1994, the United States Senate, by a vote of 97–0, passed a resolution condemning this speech, calling it "false, anti-Semitic, racist, divisive, repugnant and a disservice to all Americans." 139 Cong. Rec. S634 (Feb. 2, 1994); *see also* Kevin Merida, *Failure to Repudiate Sen. Hollings Puzzles Black Lawmakers*, WASH. POST, Feb. 5, 1994, at A7.

If so, then regulating this speech under well-defined, contained circumstances is similarly inconsequential. Yet if, as a society, we both revere and value speech as an actuating force, then collectively we must also respect its potential to effect potentially devastating consequences. We argue in this Article that the sheer power of speech as a motivating force commands a new approach to First Amendment analysis—one that takes account of content, in order to manifest our respect for the power of speech, while tenaciously safeguarding fundamental societal values.

Restriction of speech that importunes on behalf of a substantive menace that is condemned by the community of nations under the auspices of *jus cogens* is a discretionary option available to the legislature. We propose a test that in no way reconstructs the First Amendment; instead, our proposal measures the constitutionality of legislation enacted under the auspices of *jus cogens* prohibitions. We urge only that *jus cogens* be imported into constitutional analysis as an interpretive tool.

We insist that the legislative prerogative to forbid speech that falls within the constricted categories of *jus cogens* comply with our proposed formulation. A narrowly-drawn statute that fulfills our suggested elemental requirements—intentional advocacy of conduct declared intolerable by *jus cogens* principles, coupled with rigorous rejection of regulation when any ambiguity inheres in the scrutiny of these elements—should survive First Amendment probing.