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Rodney A. Smolla

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I. *CHAPLINSKY V. NEW HAMPSHIRE*

A. Order and Morality

In 1942, *Chaplinsky v. New Hampshire*,[1] a unanimous Supreme Court in an opinion written by Justice Frank Murphy, upheld the conviction for a Jehovah's Witness named Walter Chaplinksy for violating a New Hampshire statute that read:

* Dean and Roy L. Steinheimer, Jr. Professor of Law, Washington and Lee University School of Law.

1. 315 U.S. 568 (1942).

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.[2]

Chaplinsky became agitated when a City Marshal attempted to quell him while making a speech on the streets of Rochester, New Hampshire.[3] Chaplinsky told the Marshal, "'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'"[4]

In an opinion for the Court affirming Chaplinsky's conviction for speaking these words, Justice Murphy wrote a paragraph that would come to be one of the single most powerful and oft-cited passages in all of American free speech law:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[5]

This is an elegant paragraph, remarkable for its efficiency. I wish to isolate for inspection Justice Murphy's suggestion that there are words "which by their very utterance inflict injury." Simultaneously, I wish to isolate Justice Murphy's theoretical justification that such words may be banished from society because such classes of expression 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."[6]

To the extent that *Chaplinsky* is understood as standing for the proposition that speech tending to incite an immediate breach of peace is not protected by the First Amendment, it was and is an unremarkable opinion,

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2. *Id.* at 569.
3. *Id.*
4. *Id.*
5. *Id.* at 571–72.
6. *Id.*

then and now. To the extent that *Chaplinsky* stands for the broader philosophical proposition that society may in appropriate circumstances curtail expression to deter immediate threats to order, it is equally unremarkable.

What makes *Chaplinsky* quite remarkable however, is the suggestion that there are occasions when *words alone* may inflict injury that society may redress without abridging the guarantees of the First Amendment, including injury to society's *moral* fabric.[7] It is this more profound possibility, that expression may be regulated in the service of both order *and* morality, that continues to vex free speech doctrine and theory, and renders the ongoing interpretation of *Chaplinsky* worth serious investigation.

B. Chaplinksy*'s Staying Power*

The passage from *Chaplinsky* that is under inspection is often cited. In the Supreme Court alone, *Chaplinsky* has been cited in at least 109 opinions,[8] and often the entire passage above, or substantial portions of it, are quoted.[9]

Chaplinsky may be usefully invoked *either* in the service of contracting protection for freedom of speech or in the service of expanding it. *Chaplinsky* was itself a speech-limiting decision, holding that there are categories of speech that may be proscribed without violating the Constitution.[10] It is not surprising, then, to find *Chaplinsky* invoked in judicial decisions defending restrictions on speech, and there are many prominent examples of this usage.[11]

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7. *See id.*

8. These include full opinions of the Court, as well as concurring or dissenting opinions.

9. *See, e.g*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 385 (1974); Terminiello v. City of Chi., 337 U.S. 1, 26 (1949); Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974).

10. *See Chaplinsky*, 315 U.S. at 573 (noting that "[w]e are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of peace").

11. *See, e.g*, Morse v. Frederick, 127 S. Ct. 2618, 2630 (2007) (Thomas, J., concurring) (quoting from the *Chaplinsky* passage in the course of arguing that public school officials should have unfettered power under the First Amendment to punish offensive language by students); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (citing *Chaplinsky* in sustaining authority of school officials to discipline student for sexually suggestive speech); New York v. Ferber, 458 U.S. 747, 754 (1982) (quoting the *Chaplinsky* passage in support of upholding a New York child pornography law); FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (Stevens, J., plurality opinion) (quoting the *Chaplinsky* passage in the course of upholding FCC sanctions against a radio broadcaster for airing comedian George Carlin's infamous "Filthy Words" monologue); Miller v. California, 413 U.S. 15, 20 (1973) (relying on the *Chaplinsky* passage to define limits of constitutionally unprotected obscenity); Roth v. United States, 354 U.S. 476, 485 (1957) (relying on

Yet *Chaplinsky* is also often cited in opinions expanding constitutional protection for freedom of speech.[12] In such cases, *Chaplinsky* is used as a shield instead of a sword. The citation is usually made to underscore the point that while there are certain "well-defined and narrowly limited" classes of speech that receive no constitutional protection, these classes are indeed narrow and limited. Such citations thus serve the purpose of advancing the argument that speech may be limited "this much but no more," so that *Chaplinsky*, while nodded at respectfully, is simultaneously cabined and confined.[13]

And finally, *Chaplinksy* is often cited in judicial opinions in a more neutral or balanced sense, to at once acknowledge pockets of unprotected expression and draw lines demarcating the boundaries of those pockets.[14]

II. WORDS WHICH BY THEIR VERY UTTERANCE INFLICT INJURY

A. A Grammatical Ambiguity

In parsing carefully *Chaplinsky*'s famous passage, a grammatical ambiguity ought to first be conceded. While listing various categories of speech that have traditionally been thought punishable without triggering

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the *Chaplinsky* passage to hold that obscene speech is not protected by the First Amendment); Beauharnais v. Illinois, 343 U.S. 250, 257 (1952) (invoking *Chaplinksy* to uphold an Illinois "criminal libel" law and sustaining a conviction for engaging in racist hate speech).

12. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (analyzing the limits of *Chaplinsky* in striking down an ordinance prohibiting hate speech as impermissible viewpoint and content discrimination); United States v. Eichman, 496 U.S. 310, 315 (1990) (citing *Chaplinsky* while refusing to extend categories of unprotected speech to include flag desecration); Texas v. Johnson, 491 U.S. 397, 409 (1989) (limiting scope of *Chaplinsky* in overturning a conviction for flag burning); Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (citing *Chaplinsky* as permitting proscription of fighting words while refusing to uphold tort liability for infliction of emotional distress arising from a pornographic parody of Reverend Jerry Falwell by Larry Flynt and *Hustler Magazine*); Cohen v. California, 403 U.S. 15, 20 (1971) (limiting *Chaplinsky*'s definition of "fighting words" to face-to-face verbal challenges likely to provoke an instant breach of peace, in the course of reversing a conviction for wearing the words "Fuck the Draft" on a jacket in a Los Angeles courthouse corridor).

13. *See* supra, note 12.

14. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003) (O'Connor, J., plurality opinion) (analyzing and applying *Chaplinsky* to defend the proposition that "true threats" are outside the bounds of constitutional protection, and stating that laws penalizing cross-burning could in certain circumstances be constitutional, while striking down the application of a Virginia law prohibiting cross-burning because a prima facie evidence provision of the law allowed a jury to presume an intent to threaten from the mere act of burning a cross) (Editorial disclosure: the author of this Article, Dean Rod Smolla, was the counsel of record on behalf of the Respondents in the case, presenting argument opposing the constitutionality of the Virginia statute); Denver Area Educ. Telecom. Consortium, Inc., v. Fed. Commc'ns Comm'n, 518 U.S. 727, 740 (1996) (Breyer, J., plurality opinion) (citing *Chaplinksy* in the course of sustaining in part and striking down in part certain regulation of sexually explicit cable television programming); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504–05 (1984) (acknowledging the legitimacy of the *Chaplinsky* categories but establishing the doctrine of "independent appellate review" to police the integrity of the categories and ensure protection of free speech).

"any constitutional problem," the Court mentions "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[15] The end of this list is punctuated by a dash, which is in turn followed by the intriguing explanatory clause being explored here: "—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[16]

It is highly unlikely that this sentence was ever intended to bear the hard doctrinal weight that is sometimes ascribed to it, as if the "list" described in *Chaplinsky* was meant to account for the full universe of unprotected classes of speech. The tenor of the sentence is more off-hand and evocative. The Court says that these words "include" the examples listed, in the open sense of the phrase "include, for example," rather than the closed sense of "include only."

Turning to the explanatory clause of the passage, in which the Court speaks of words "which by their very utterance inflict injury *or* tend to incite an immediate breach of peace,"[17] it is plain that both approaches to the regulation of expression are being invoked, with the word "or" in the middle. It is perhaps not entirely clear whether the Court meant to imply that all of the examples in its list might be deemed to be either words that by their utterance inflict injury, or words that tend to incite an immediate breach of peace, or both.

The most sensible reading of the passage, however, is that the "lewd and obscene," the "profane," and the "libelous" are all being cited as examples of inherently harmful expression—these are the examples of what the Court meant by words "which by their very utterance inflict injury." In contrast, the "insulting" or "fighting" words in the list may be examples of what the Court meant by expression that tends to incite an immediate breach of peace. This is a reasonable understanding of the passage, because normally we do not think of the "profane" or the "lewd and obscene" or the "libelous" as causing a "breach of peace," in the normal sense of causing physical violence or disturbance. The harm is less temporal and more spiritual, more in the nature of injury to good morals than to good order.

B. The Inherently Dangerous Dicta

The passage from *Chaplinksy* that is the particular focus of this article—the notion that there *are* words which by their very utterance inflict

15. *Chaplinsky*, 315 U.S. at 572.
16. *Id.*
17. *See id.* (emphasis added).

injury—was itself arguably dicta.[18] The New Hampshire statute at issue had been given a narrowing construction by the New Hampshire Supreme Court, one that limited its application to words that have a direct tendency to provoke violence by the person to whom the words are addressed.[19]

It was on this basis that the Court in *Chaplinsky* stated that it was "unable to say that the limited scope of the statute *as thus construed* contravenes the Constitutional right of free expression."[20] The Court thus described the law as "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words *likely to cause a breach of the peace.*"[21] Similarly, the Court was willing to acquiesce in the application of this standard to the facts of the case,[22] claiming that "[a]rgument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."[23]

If the phrase "words which by their very utterance inflict injury" was technically dicta, it was, to pun the thought, "inherently dangerous dicta," for the notion that there may be words that are so inherently dangerous that they may be penalized by the government without proof of more has maintained a striking hold, and some might judge inherently dangerous hold, on the future evolution of free speech debate in the United States.

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18. *See* Purtell v. Mason, 527 F.3d 615, 624 (7th Cir. 2008); *see also* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, DUKE L.J. 484, 508–09 (1990) (explaining that "the first prong of *Chaplinsky*'s fighting words definition, words 'which by their very utterance inflict injury,' was dictum"; the Court has subsequently "substantially narrowed *Chaplinsky*'s definition of fighting words by bringing that definition into line with *Chaplinsky*'s actual holding.").

19. *Chaplinsky*, 315 U.S. at 573 ("On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being 'forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.' It was further said: 'The word "offensive" is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including "classical fighting words," words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.'") (citing State v. Brown, 38 A. 731 (1895); State v. McConnell, 47 A. 267 (N.H. 1900)).

20. *Chaplinsky*, 315 U.S. at 573 (emphasis added).

21. *Id.* at 573 (emphasis added).

22. *Id.* at 574 ("Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech.").

23. *Id.*

III. *CHAPLINSKY*'S INFLUENCE OVER TIME

I will take up the three "inherently harmful" categories of speech listed in *Chaplinksy* in ascending order of ongoing vitality, ranking them according to their continued viability in contemporary legal doctrine. I begin with the "profane," which is now essentially largely protected speech under the First Amendment, though there are arenas, such as public schools, public employment, and television and radio broadcasting, where it remains, in some circumstances, punishable.[24] I will then turn to the libelous, which is now partially protected by a matrix of complex First Amendment doctrines, at least when the libel implicates matters of public concern. I will end with the "lewd and the obscene," that part of *Chaplinsky* that continues to have the greatest life.

With regard to all of these categories, it should be confessed at the outset that there is some element of artificiality to the exercise. For it is doubtful that a clean line may ever be drawn between those words that are inherently harmful and those words that are merely potentially harmful. Put another way, there is a bit of contrivance to the notion that some words are unprotected by the First Amendment solely because they "by their very utterance inflict injury," while other words are unprotected by the First Amendment solely because they induce or incite *other* injury, injury that exists in some other time, place, or space, through the intervention of other causal agents (a bullet or a bomb) beyond the *words themselves*.

Thus all of the categories specifically mentioned in *Chaplinsky*, the profane, libelous, obscene, and fighting words, might well be conceptualized not simply as speech that "inflicts injury" in some instant and inherent sense, but words that experience teaches are particularly likely to cause injury, even though that injury cannot be easily measured or quantified. The notion of "presumed damages" in defamation, for example, is not grounded so much in the notion that defamatory words *in themselves* instantly cause injury, as if they were verbal bullets, as in the notion that experience teaches us that the injury exists, even though it is difficult to ascertain and measure.[25]

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24. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (finding that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); 18 U.S.C. § 1464 (2008) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

25. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1983) (plurality opinion); *see infra* notes 118–123 and accompanying text.

Even so, there is a rough and ready line separating legal standards that permit criminal or civil liability to be imposed on expression only when reasonably demanding standards requiring proof of harm, or close connection to potential harm, are satisfied, and legal standards that dispense with such requirements. Those that dispense with such proof, the categories identified in *Chaplinsky*, have always been fascinating objects for study. A central ongoing concern of that study is the extent to which the principled application of First Amendment doctrine should or should not acknowledge their ongoing vitality.

A. The Profane

1. The Two Meanings of Profanity

What is "profane" speech? As a legal term, the word has multiple meanings. A number of its meanings relate to religion, to the sacred, and to God. There are several variant strains of this form of profanity, but they share, as a common linkage, some debasing or degrading or perverse invocation of the holy or divine. The crime of "profanity" in this spiritualistic sense is closely associated with the crimes of "blasphemy" and "sacrilege." The term "profanity" also has a secular meaning, referring simply to vulgar language, ordinary "cussing" or "swearing," which may have no religious meaning whatsoever. Blasphemous profanity is a subset of the broader secularized concept of profanity. All blasphemy is profanity, but not all profanity is blasphemy.[26]

2. Profanity and the Sacred

The overlap of profanity and blasphemy dates back to early colonial laws. The Massachusetts Bay Colony, for example, punished "composing, writing, printing or publishing . . . any filthy, obscene, or profane song, pamphlet, libel or mock sermon, in imitation or in mimicking of preaching, or any other part of divine worship."[27] Typical of the religious strain of profanity in more modern times is a Michigan law, considered in a 2007 case by the United States Court of Appeals for the Sixth Circuit,[28] which defined the crime of "cursing and swearing" in the biblical parlance of taking the name of God in vain, declaring one guilty of a misdemeanor "who shall profanely curse or damn or swear by the name of God, Jesus Christ or the Holy Ghost . . . ."[29] The Ninth Circuit, in a 1931 decision, defined the

26. *See* Oney v. Oklahoma City, 120 F.2d 861, 865 n.12 (10th Cir. 1941).

27. Province of Mass. Bay, c. CV, § 8 (1712), in Mass. Bay Colony Charter & Laws 399 (1814).

28. Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007).

29. *Id.* at 356 (quoting MICH. COMP. LAWS § 750.103 (2007)) ("CURSING AND SWEARING—Any person who has arrived at the age of discretion, who shall profanely curse or damn or swear by

"profane" in similarly ecclesiastical terms, as "[i]rreverent toward God or holy things; speaking or spoken, acting or acted, in manifest or implied contempt of sacred things; blasphemous; as, profane language; profane swearing."[30]

Some decisions narrowed the compass of such profanity to imprecations of divine vengeance, so that "cursing" became more literally to impose a true curse, a spiritual condemnation, a calling forth of the power of the divine to damn the victim at whom the curse was targeted. As an Alabama decision thus explained in 1970, to say "God damn it" was not criminal, but to say "God damn you" was.[31]

The crime of profanity has thus always been closely connected to religious notions of sin. From colonial to modern times, in legislative enactments and judicial interpretations, the profane has been defined as an offense against the sacred.

If profanity and blasphemy were often essentially treated as synonymous, however, the concept of profanity did not remain exclusively cabined to words that insulted the divine or invoked divine vengeance. A second strain of profanity also developed, a broader strain not exclusively limited to expression that was in some sense also blasphemous. This secularized version of profanity perhaps reflected an incipient American judicial intuition that blasphemy should be the business of ecclesiastical tribunals, and profanity the business of secular courts. Under this view the rationale for punishing profanity morphed from punishment for sins against the divine to protection of societal interests in maintaining public morality and peace.[32]

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the name of God, Jesus Christ or the Holy Ghost, shall be guilty of a misdemeanor. No such prosecution shall be sustained unless it shall be commenced within 5 days after the commission of such offense.").

30. Duncan v. United States, 48 F.2d 128, 133 (9th Cir. 1931).

31. Baines v. City of Birmingham, 240 So. 2d 689, 692 (Ala. Crim. App. 1970) ("[T]o constitute profanity an accused must imprecate divine vengeance upon an individual and that while the expression 'God damn you' is considered profanity, 'God damn it' is not. The evidence in this case presented a question for the jury whether the defendant uttered the words 'God damn you' or 'God damn it.'"); Sanford v. State, 44 So. 801 (Miss. 1907) (holding that the statement "Go to hell, you low-down devils," did not violate the statute) ("The language does not violate the statute, since, upon strict construction, which is required of the courts, it lacks any 'imprecation of divine vengeance' and does not 'imply divine condemnation.' There was simply a rude request or order to go to hell, with no necessity to obey, no power to enforce obedience, and no intimation that the irresistible Power had condemned, or was invoked to condemn, them to go to hell.") (citations omitted).

32. *See* Oney v. Oklahoma City, 120 F.2d 861, 865 n.12 (10th Cir. 1941) ("While the ecclesiastical courts punished blasphemy as an offense against God, it was not so viewed by the temporal courts. The latter regarded it as injurious to the essential interests of society, or as tending directly to a breach of the peace, and in the latter sense it was punishable at common law.").

Whether "profanity" is conceived in its religious or its temporal sense, or some amalgam of both, to what extent may it still be punished in American law, consistent with the First Amendment? All attempts to punish profanity as a *spiritual* crime—that is to say, all attempts to punish that strain of profanity that is conterminous with blasphemy—ought now be regarded as blocked by settled understandings of the Religion Clauses. Secular government cannot assume jurisdiction to punish the desecration of the divine through blasphemous *words alone* without engaging in either an unconstitutional establishment of religion or an unconstitutional burdening of its free exercise, or in some circumstances, both.

The seminal statement of this principle in the Supreme Court came in *Joseph Burstyn, Inc. v. Wilson*.[33] The case involved an attempt by the State of New York to block the exhibition of a motion picture, "The Miracle," on grounds that it was "sacrilegious."[34] The New York Court of Appeals interpreted "sacrilegious" as a kind of prohibition on religious libel, insult, or hate speech, explaining that the meaning of the statutory provision was simply "that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule."[35] The Supreme Court struck down the regime, emphasizing that the scheme was a system of prior restraint vesting arbitrary and subjective discretion in New York's censors.[36] The decision, however, was also grounded solidly in the Court's objection to the state presuming to referee among competing religious views, and the concomitant danger that the power of the state would be co-opted by vocal and powerful religious orthodoxies:

> In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. Under such a standard the most careful and tolerant censor would find it virtually

33. 343 U.S. 495 (1952).

34. *Id.* at 497, n.1 (quoting N.Y. EDUC. LAW § 129 (McKinney 1947)). ("The director of the [motion picture] division [of the education department] or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.").

35. *Joseph Burstyn*, 343 U.S. at 504.

36. *Id.* at 504–05.

> impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the "sacrilegious" test, in these or other respects, might raise substantial questions under the First Amendment's guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.[37]

Justice Frankfurter, joined by Justices Jackson and Burton, wrote a concurring opinion in *Joseph Burstyn*. Justice Frankfurter's decision in *Joseph Burstyn* is of special note because he was the author of the Supreme Court's decision in *Beauharnais v. Illinois*,[38] decided the same year as *Joseph Burstyn*. In *Beauharnais*, a unanimous decision, the Court upheld an Illinois "criminal libel" statute, a law we would now describe as "hate speech" legislation, which made criminal the utterance of attacks on racial and ethnic groups.[39] One might well have treated the New York law in context in *Joseph Burstyn* as a simple variant of the law upheld in Illinois, a "religious criminal libel" or "religious hate speech" law instead of a racial libel or hate speech law. Justice Frankfurter, however, saw a fundamental constitutional difference between an attack on a racial group and an attack on religious doctrine. Justice Frankfurter seemed to concede that attacks on religious dogma might by their very utterance inflict injury on the faithful who religiously believe in the doctrine being attacked, but redress for this sort of injury was not legally cognizable.[40] "To criticize or assail religious doctrine may *wound to the quick* those who are attached to the doctrine and profoundly cherish it,"[41] Justice Frankfurter thus conceded. "But to bar such pictorial discussion is to subject non-conformists to the rule of sects."[42]

37. *Id.* (citation omitted).
38. 343 U.S. 250 (1952).
39. See *infra* notes 92–106 and accompanying text.
40. *Joseph Burstyn*, 343 U.S. at 519 (Frankfurter, J., concurring).
41. *Id.* (emphasis added).
42. *Id.*

In *Beauharnais*, Justice Frankfurter would ground the Court's defense of the Illinois race-hate law largely on the theory that race hate may lead to race wars. Yet human experience teaches every bit as powerfully that religious hate may lead to religious wars. Is there any principled difference? If there is, it may rest heavily in the supposition that religious "sacrilege" or "profanity" or "blasphemy" laws are always and inevitably laws that target attacks on *beliefs* and *ideas*. In theory it might be possible to distinguish attacks on Catholicism from attacks on Catholics, attacks on Judaism from attacks on Jews, attacks on Islam from attacks on Muslims. Justice Frankfurter's opinion in *Joseph Burstyn* is best explained in these terms, if one seeks to make sense of it in light of his historically contemporaneous opinion in *Beauharnais*. Justice Frankfurter in *Joseph Burstyn* thus delved deeply into the etymology of the word "sacrilege," explaining that "sacrilege" was originally limited to the stealing or desecration of physical objects or physical places that were sacred, coming from the roots "sacer" (sacred) and "legere" (to steal or pick out).[43] But as early as the time of Cicero, the meaning of the word in popular speech broadened to include any injury or insult to sacred things (as in primitive societies it would be related to the notion of "tabu"), and the term became broadly associated with attacks on the sacred or holy, including dogma and belief as well as physical objects.[44] While Catholic theologians such as Saint Thomas Aquinas adhered to technical distinctions between "sacrilege" as attacks on holy things and "apostasy," "heresy," and "blasphemy" as attacks on religious dogma, and while dictionaries might continue the distinction,[45] neither popular speech nor the sacrilege law of New York had maintained such disciplined usage. Justice Frankfurter thus concluded "that the limits of this definition remain too uncertain to justify constraining the creative efforts of the imagination by fear of pains and penalties imposed by a necessarily subjective censorship."[46]

The decision in *Joseph Burstyn* has been reinforced by the proliferation of cases decided under the Religion Clauses that define the division of jurisdiction between ecclesiastical and religious courts, disqualifying secular courts from adjudicating matters of religious dogma. As the Supreme Court explained in *Employment Division, Department of Human Resources of Oregon v. Smith*,[47] "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[48] Indeed the

43. *Id.* at 520.
44. *Id.* at 521.
45. *Id.* at 521–22 (citing ST. THOMAS AQUINAS, SUMMA THEOLOGICA, part II-II, question 99).
46. *Id.* at 525.
47. 494 U.S. 872 (1990).
48. *Id.* at 887.

recognition of this principle in Supreme Court cases can be traced back long before *Joseph Burstyn*, and long before the evolution of contemporary First Amendment doctrine. In 1872, the Supreme Court decided *Watson v. Jones*,[49] which posed an oft-recurring question in church disputes: who owns the church after a schism in which the members of the church divide into two distinct bodies?[50] When such a dispute arises, ecclesiastical tribunals will often be the first to rule on the question. In *Watson*, the Court held:

> [W]henever the questions of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[51]

The principles announced in *Watson* presaged First Amendment developments, and have now been absorbed into constitutional law as orthodox Establishment and Free Exercise Clause doctrine. As *Watson* elegantly explained, "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[52]

Echoes of this principle may now be heard in the "ecclesiastical abstention" cases, decisions that invoke a kind of "spiritual federalism" principle in which authority over religious controversies are reserved for religious courts.[53] As encapsulated in *Serbian Eastern Orthodox Diocese v. Milivojevich*:[54]

> [W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within

49. 80 U.S. 679 (1871).

50. *See generally id. Watson* was a diversity case decided prior to the incorporation of the First Amendment against the states, and decided prior to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The Court in *Watson* thus used as its rule of decision "general federal law." *Id.*

51. *Id.* at 727.

52. *Id.* at 728.

53. These cases attempt to navigate a line dividing the application of neutral principles of secular law to the adjudication of disputes over issues such as the property ownership of a church, and inquiry into religious theology and doctrine. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); The Md. & Va. Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970); Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

54. 426 U.S. 696 (1976).

> a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.[55]

Applying these various lines of precedent and principle, it is safe to declare dead that small piece of *Chaplinsky* suggesting that the banning of *religious* "profanity" would pose no constitutional problem.[56] To the contrary, a law banning "profane speech" in overtly religious terms is squarely in conflict with modern Religion Clause jurisprudence. Even efforts by states to recast profanity laws originally written in religious vocabulary as secularized, attempting to transform the laws into mere "incitement" or "breach of peace" prohibitions, will not be defensible so long as the statute remains overtly religious.[57]

3. Secular Profanity

If the Religion Clauses have rendered obsolete the criminalizing of religious profanity, has the Speech Clause likewise rendered obsolete the criminalizing of secular profanity? Does modern Speech Clause doctrine permit the government to ban profanity on the theory that the utterance of the words alone, without more, may be penalized? For the most part, the answer is "no." While the government may, if it satisfies rigorous modern

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55. *Id.* at 709 (citing *The Md. & Va. Eldership of the Churches of God*, 396 U.S. at 369 (Brennan, J., concurring)).

56. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

57. In *State v. West*, 263 A.2d 602, 603 (Md. Ct. Spec. App. 1970), for example, a Maryland court struck down a Maryland statute that read:

> If any person, by writing or speaking, shall blaspheme or curse God, or shall write or utter any profane words of and concerning our Saviour Jesus Christ, or of and concerning the Trinity, or any of the persons thereof, he shall on conviction be fined not more than one hundred dollars, or imprisoned not more than six months, or both fined and imprisoned as aforesaid, at the discretion of the court.

Id. at 603 (quoting MD. CODE ANN., art. 27, § 20). The court traced the history of the law to a 1649 enactment of the Colonial legislature entitled "An Act Concerning Religion" which provided for punishment "with Death, and Conviscation of Lands and Goods to the Lord Proprietary" of anyone found guilty of committing "Blasphemy against GOD, or denying the Holy TRINITY, or the Godhead of any of the Three Persons."

Id. The court rejected an attempt by Maryland to imbue the law with a "secular aura." *Id.* The law, the court insisted, "plainly and unequivocally makes it a crime for any person to blaspheme or curse God, whether orally or in writing, or to 'write or utter profane words of and concerning our Saviour Jesus Christ, or of and concerning the Trinity,'" and moreover, "simply and categorically proscribes such utterances under any and all circumstances." *Id.* at 605. On these terms, the court held, the law was flatly unconstitutional. *Id.* ("Patently, the statute was intended to protect and preserve and perpetuate the Christian religion in this State. It obviously was intended to serve and, if allowed to stand, would continue to serve as a mantle of protection by the State to believers in Christian orthodoxy and extend to those individuals the aid, comfort and support of the State. This effort by the State of Maryland to extend its protective cloak to the Christian religion or to any other religion is forbidden by the Establishment and Free Exercise Clauses of the First Amendment.").

doctrinal limitations, proscribe incitement to violence, fighting words that threaten an immediate breach of peace, or true threats, it may not penalize the mere utterance of profanity.[58]

Cohen v. California[59] is the most significant precedent. Paul Cohen wore a jacket in the corridor of a Los Angeles courthouse, with women and children present, bearing the phrase "Fuck the Draft."[60] In an opinion by Justice Harlan, the Supreme Court rejected California's claim that it could use the law to preserve decency and decorum in society by banning public vulgarity and sheltering citizens from offensive language.[61] No longer, the Court made clear, could vulgar words be equated with fighting words as that phrase had been used in *Chaplinsky*.[62] Henceforth, the Court made clear, to qualify as "fighting words" the statements must constitute "a direct personal insult" directed at a specific person.[63]

The analysis in *Cohen* was a direct affront to the "inherently harmful" side of *Chaplinsky*. The Court thus framed the question as whether California could excise

> one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary."[64]

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58. *See infra* notes 86–88, and accompanying text.

59. 403 U.S. 15 (1971).

60. *Id.* at 16.

61. *Id.* at 17.

62. *Id.*

63. *Id.* at 20. ("This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.' No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result." (citations omitted) (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cantwell v. Connecticut, 310 U.S. 296, 309 (1940); Feiner v. New York, 340 U.S. 315 (1951); Terminiello v. Chicago, 337 U.S. 1, (1949)).

64. *Cohen*, 403 U.S. at 22–23.

The Court in *Cohen* rejected both theories.[65] California could not define in advance certain words and declare them inherently likely to provoke a breach of peace; nor could California "cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."[66] The Court could identify no limiting principle to this proposition, for in Justice Harlan's famous quip, "[O]ne man's vulgarity is another's lyric."[67] Most importantly, however, Justice Harlan's analysis in *Cohen*, like Justice Frankfurter's in *Joseph Burstyn*, perceived that permission to censor unsavory words ran perilously close to permission to censor unpopular thoughts.[68] On this basic matter of principle, *Cohen* truly turned *Chaplinsky* on its head. For while *Chaplinsky* approved of the use of banning certain inherently harmful words precisely because their perceived social benefit was low, *Cohen* reversed the computation, stating that the Court could perceive little social benefit to running the risk that suppression of words might be a surrogate for the suppression of ideas.[69]

Before it can be confidently declared that *Chaplinksy*'s approval of laws banning the "profane" is no longer good law, however, several exceptions and complications must be dealt with. In at least three significant arenas, First Amendment doctrine does not bar the government from penalizing profane speech. Public schools may discipline students for using profanity in school.[70] Public employers may, in some circumstances, discipline employees for using profanity on the job.[71] And the Federal Communications Commission may discipline broadcasters for broadcasting profanity on radio and television.[72]

4. Profanity in Schools

In *Tinker v. Des Moines School District*, [73] the Supreme Court held that the First Amendment protected a public school student's wearing of a black armband as a symbol of anti-war protest, announcing that students in public schools do not "shed their constitutional rights to freedom of speech or

65. *Id.* at 23.

66. *Id.* at 25.

67. *Id.*

68. *Id.* at 26 ("Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.").

69. *Id.* ("We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.").

70. *See infra* Part III.A.4–5.

71. *See infra* Part III.A.6.

72. *See infra* Part III.A.7.

73. 393 U.S. 503 (1969).

expression at the schoolhouse gate."[74] Students do, however, shed their rights to use profanity.

In *Bethel School District No. 403 v. Fraser*,[75] Matthew Fraser, a 14-year-old public high school student, delivered a "campaign speech" on behalf of a fellow student, in a school assembly. The speech was filled with sexual metaphors and innuendos.[76] For this ribald oratory, Fraser was suspended by the school principal, under the authority of a school rule declaring that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."[77] Chief Justice Burger wrote the opinion of the Court, holding that Fraser's speech was not protected by the First Amendment.[78] The Court emphasized that the First Amendment "rights of students in public school are not automatically coextensive with the rights of adults in other settings."[79] In a passage that seemed to dilute the test articulated in *Tinker*, the Court stated that a school need not tolerate student speech that is inconsistent with its "basic educational mission."[80]

Describing Fraser's speech as "plainly offensive to both teachers and students," and as "acutely insulting to teenage girl students," the Court observed that the language "could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."[81] While the black armbands in *Tinker* were a form of nondisruptive, passive expression, the Court reasoned, the sexual content of the speech given by Fraser was not.[82] In a critical and entirely sensible distinction, the Court drew the line between the rights of students within schools and classrooms *to espouse unpopular views*, and the quite different problem of curbing socially unacceptable behavior.[83] It is one thing for the teacher or principal to punish the student *merely* because of disagreement with the intellectual or ideological content of a message, and

74. *Id.* at 506.

75. 478 U.S. 675 (1986).

76. Fraser touted his candidate as "a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm." Fraser also praised his candidate as "a man who takes his point and pounds it in. . . . a man who will go to the very end—even the climax, for each and every one of you." *Id.* at 687 (Brennan, J., concurring in the judgment).

77. *Id.* at 678.

78. *See id.* at 685.

79. *Id.* at 682.

80. *Id.* at 685.

81. *Id.* at 683.

82. *See id.* at 680.

83. *Id.* at 681.

quite another to punish the student for vulgarity, sexual innuendo, or other "juvenile" behavior having nothing serious to do with any intellectual or ideological viewpoint. "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms," the Court thus explained, "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[84] The Court quoted the passage from *Chaplinsky* regarding order and morality,[85] and held that the school district was entirely within its authority "to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."[86] "'[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.'"[87]

More recently, in *Morse v. Frederick*,[88] the Supreme Court held that school officials did not violate the First Amendment in disciplining a high school student who unfurled a banner during an event to commemorate the passing of the Olympic Torch relay through Juneau, Alaska, displaying the message: "BONG HiTS 4 JESUS."[89] While this message may not have qualified as "profanity" in the strict sense, and while it would undoubtedly have been fully protected by the First Amendment if the student had displayed the banner in a public forum on the streets, sidewalks, or parks of Juneau outside of school-sponsored activities, the Court in *Morse*, in an opinion by Chief Justice Roberts, held that school officials could discipline the student for displaying the message during a school sponsored event.[90] The school principal could reasonably have interpreted the message as advocating illegal drug use, the Court reasoned, and this was enough to justify the school's action.[91]

5. Profanity in Public Universities

The principles established in decisions such as *Bethel*, *Morse*, and *Hazelwood School District v. Kuhlmeier*,[92] which sustained the power of public school officials to control the content of high school newspapers, are

84. *Id.*

85. *Id.* at 685 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

86. *Bethel*, 478 U.S. at 685–86.

87. *Id.* at 682 (quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring).

88. 127 S. Ct. 2618 (2007). The school principal and school district were represented in the Supreme Court by Kenneth Starr, Duane and Kelly Roberts Dean and Professor of Law, Pepperdine University.

89. *Id.* at 2622, 2629.

90. *Id.* at 2629.

91. *Id.* at 2625.

92. 484 U.S. 260 (1988).

not necessarily limited to elementary and secondary schools. In *Brown v. Li*,[93] a graduate student at the University of California at Santa Barbara, Christopher Brown, had his scientific thesis approved on its academic merits by his thesis committee.[94] After obtaining the approval signatures, he added an "Acknowledgments" section, which he labeled as "Disacknowledgements," and which began: "I would like to offer special *Fuck You's* to the following degenerates for of [sic] being an ever-present hindrance during my graduate career."[95] Brown then identified the Dean and staff of the graduate school, the managers of the library, the former California Governor, Pete Wilson, the Regents of the University of California, and "Science" in general as having been particularly obstructive to his progress toward his graduate degree.[96] Brown later explained that he had not revealed the section to the members of his committee because he feared that they would not approve it.[97] The University, finding out about the "Disacknowledgement," failed Brown. The United States Court of Appeals for the Ninth Circuit held that the University's action did not violate the First Amendment, holding that college and university educators may restrict student speech in curricular matters, "provided . . . the limitation is reasonably related to a legitimate pedagogical purpose."[98] The court relied heavily on *Hazelwood*, and a decision of the United States Court of Appeals for the Sixth Circuit in *Settle v. Dickson County School Board*,[99] for the proposition that:

> "the bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than that assignment and receive credit for it. It is not necessary to try to cram this situation into the framework of constitutional precedent, because there is no constitutional question."[100]

The decision of the Sixth Circuit in *Settle* quite eloquently explained why *the very nature of teaching* requires content-based judgments by

93. 308 F.3d 939 (9th Cir. 2002).
94. *Id.* at 942–43.
95. *Id.* at 943.
96. *Id.*
97. *Id.* at 944.
98. Brown v. Li, 308 F.3d 939, 947 (9th Cir. 2002).
99. 53 F.3d 152 (6th Cir. 1995).
100. *Brown*, 308 F.3d at 949 (quoting *Settle*, 53 F.3d at 158 (Batchhelder, J. concurring)).

teachers, in much the same sense that *the very nature of judging* requires content-based judgments by judges:

> Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.
>
> Like judges, teachers should not punish or reward people on the basis of inadmissible factors—race, religion, gender, political ideology—but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech. Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions—in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech . . . . It is not for us to overrule the teacher's view that the student should learn to write research papers by beginning with a topic other than her own theology.[101]

The Ninth Circuit conceded that there was no clear precedent from the Supreme Court as to whether the deferential *Hazelwood* or *Settle* standards ought to apply at the university level in the same manner that they do in a primary-school or secondary-school environment.[102] When dealing with the speech of college and university students *outside* of curricular and university-sponsored speech, even including such contexts as yearbooks and newspapers, the court suggested the lax *Hazelwood* approach ought not apply.[103]

But academic work, the court held, was different: "The Supreme Court has suggested that core *curricular* speech—that which is an integral part of

101. *Settle*, 53 F.3d at 155–56.
102. *Brown*, 308 F.3d at 939.
103. *Id.*

the classroom-teaching function of an educational institution—differs from students' *extracurricular* speech and that a public educational institution retains discretion to prescribe its curriculum."[104]

The court in *Brown* engaged in illuminating explorations of the extent to which even "viewpoint" judgments in an academic setting may be somewhat insulated from First Amendment challenge by students.[105] Educational assignments, often by their nature, involve a certain form of viewpoint discrimination. Schools may not force a student to *believe* a particular viewpoint, or even to *profess* it, but they may at times, as an appropriate academic exercise, require a student to *recite* it.[106] As the court in *Brown v. Li* recognized, "a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose."[107] For example, "a college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write 'opinions' showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question."[108]

Applying these principles, the court held that it was within the academic purview of the University to determine that Brown's profanity was a sufficiently serious departure from academic norms to warrant the punitive action.[109]

6. Profanity in Government Employment

The body of First Amendment law addressing the free speech rights of government employees is largely defined by the Supreme Court's decisions in *Connick v. Meyers*[110] and *Pickering v. Board of Education.*[111] The standard emanating from these cases employs a balancing test to weigh the free speech rights of public employees against the workplace needs of public employers in efficiently managing the workplace to carry on the public's business.[112] The *Connick/Pickering* standard has evolved into a two-step

104. *Id.* at 950.
105. *Id.* at 939.
106. *Id.* at 953.
107. *Brown*, 308 F.3d 939, 953.
108. *Id.* at 953.
109. *Id.* at 950–53.
110. 461 U.S. 138 (1983).
111. 391 U.S. 563 (1968).
112. *Connick*, 461 U.S. at 150–55; *Pickering*, 391 U.S. at 568.

inquiry.[113] When a public employee complains that he or she has been disciplined or discharged in retaliation for the exercise of free speech rights, a court must first ask whether the employee was speaking "as a citizen" on "a matter of public concern."[114] If the answer is "no," the employee loses the case.[115] If the answer is "yes," the court proceeds to part two of the test, in which it weighs the rights of the employee against the government's justification for limiting the speech.[116] The focus under part two of the test tends to be whether the particular government agency is able to demonstrate that the speech at issue in some palpable sense disrupts or interferes with the agency's functions.[117]

In 2006, the Court in *Garcetti v. Ceballos*[118] further curtailed the free speech rights of government employees by narrowing the scope of prong one of the *Connick/Pickering* test. The Court in *Garcetti* held that in determining whether the speech at issue is speech "as a citizen on . . . matter[s] of public concern," the critical inquiry is whether the speech of a government employee is speech required by the employee's job—speech that falls within the official duties of the employee as part of the job description for the position the employee occupies.[119] If it is, the Court held the employee will be deemed to be speaking "as an employee" and not "as a citizen," and will be deemed subject to the rules and restrictions established by the government in its capacity as an employer.

It is clear that among the rules governmental supervisors may impose is a rule against profanity. As explained in *Waters v. Churchill*,[120] the principle protecting profanity established in *Cohen* does not preclude a public employer from forbidding its employees from engaging in profane speech in the public workplace. In the words of Justice O'Connor in *Waters*, "[W]e have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work."[121] The government, in short, may prohibit its employees from using profanity or abusive language in the workplace, much as any employer.[122] At the same time, however, when the

113. *Connick*, 461 U.S. at 150–55; *Pickering*, 391 U.S. at 568.
114. *Connick*, 461 U.S. at 150–55; *Pickering*, 391 U.S. at 568.
115. *Connick*, 461 U.S. at 150–55; *Pickering*, 391 U.S. at 568.
116. *Connick*, 461 U.S. at 150–55; *Pickering*, 391 U.S. at 568.
117. *Connick*, 461 U.S. at 150–55; *Pickering*, 391 U.S. at 568.
118. 547 U.S. 410 (2006).
119. *Id.* at 422–24.
120. 511 U.S. 661 (1994).
121. *Id.* at 672 (plurality opinion).
122. *See* Martin v. Parrish, 805 F.2d 583, 585 (5th Cir. 1986) (a college instructor's habitual classroom use of profanity was held not to be speech on a matter of public concern); Dambrot v. Cent. Mich. Univ., 839 F. Supp. 477, 488 (E.D. Mich. 1993) (university basketball coach's use of a racial epithet during a team pep talk not protected by First Amendment). In Title VII employment discrimination law, employees may claim that they are victims of discrimination prohibited by Title

employee is speaking on matters of public concern in settings that do not implicate such "workplace values," government officials do not have the freedom under the First Amendment to penalize offensive or vulgar speech merely because of its offensive or vulgar character.[123]

7. Profanity in Broadcasting

The Supreme Court in *FCC v. Pacifica Foundation*,[124] sustained the power of the FCC to police "indecent programming" on radio and television, cracking down on a radio station for broadcasting comedian George Carlin's "Filthy Words" routine. Although the offended listener in *Pacifica* was not in his home at the time of the broadcast, but riding in his car with his son, the Supreme Court placed significant weight on the fact that radio broadcasts permeate the home.[125] "Patently offensive, indecent material presented over the airwaves confronts the citizen," Justice Stevens observed for the Court, "not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[126] While the FCC in recent years has shown some

VII when harassment, such as racial or gender harassment, reaches a level of sufficient intensity to be deemed a "hostile environment." *See* Harris v. Forklift Sys., Inc. 510 U.S. 17 (1993). Courts have generally held that verbal expression in the workplace, such as sexual innuendo or racist insult, if sufficiently intense and prolonged to meet the "hostile environment" standard, constitutes a form of palpable employment discrimination, or "conduct," sufficient to satisfy First Amendment standards. *See* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 (D. Minn. 1993) ("Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance, which create an offensive working environment. That expression is 'swept up' in this proscription does not violate First Amendment principles."). This dividing line in Title VII roughly parallels the line between protected and unprotected speech in the government employment cases, and may be seen as a doctrinal cousin to those cases. As with the government employment cases, the rationale is that the harm caused by offensive speech in the workplace implicates palpable interests over and above the mere capacity of the speech to cause offense, by interfering with operation of the workplace in a direct and concrete sense.

123. Duke v. N. Tex. State Univ., 338 F. Supp. 990, 997 (E.D. Tex. 1971) (The court held that vulgar language used by a faculty member at a public rally on the campus was not grounds for discipline: "The University has approached this matter as if plaintiff, by the mere incantation of the words 'fucks over,' could taint her listeners and the University in some manner, thereby justifying exorcism of this idiom and its user from the environs of the University. Words in and of themselves are not possessed of mystical and magical qualities. Words are to be judged solely by their communicative value, which, in turn, is gauged by the emotive and cognitive content with which the words are capable of being filled. That the use of one word in lieu of another may conform more closely to canons of good taste does not justify severe sanctions against those who use the offending word. To prohibit particular words substantially increases the risk that ideas will also be suppressed in the process.").

124. 438 U.S. 726 (1978).

125. *Id.* at 748.

126. *Id.* (citing Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970)).

willingness to loosen regulation of the economic aspects of broadcast regulation, it has not loosened its grip over "indecent programming."[127] The FCC has come down hard on "shock jocks" such as Howard Stern for use of vulgar and indecent language.[128] Most famously, the FCC took a dim view of the Jackson Super Bowl XXXVIII halftime show "nipplegate" controversy, in which Janet Jackson's bare breast was exposed by Justin Timberlake in a "wardrobe malfunction."[129] Relying on the powers the Supreme Court had granted it in cases such as *Pacifica*, the FCC levied a record $550,000 fine on CBS, for the few seconds in which such "indecent programming" was sent to millions of viewers, before CBS could cut to aerial view of the football stadium.[130] In July 2008, the United States Court of Appeals for the Third Circuit overturned the FCC fine arising from "nipplegate," holding that the FCC acted "arbitrarily and capriciously" in changing its policy, which had previously excused broadcasters from the "fleeting" broadcast of indecent material.[131] The Third Circuit's opinion, however, did not question the ongoing permissibility, as a matter of First Amendment law, of the FCC's strict enforcement of its indecency standards under *Pacifica*.[132]

B. The Libelous

In *Beauharnais v. Illinois*,[133] decided in 1952, the Supreme Court reviewed a criminal conviction arising from the violation of an Illinois "criminal libel" statute that made it a crime to portray "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" which exposed them "to contempt, derision, or obloquy or which is productive of breach of the peace or riots."[134] The defendant, Beauharnais, was president of a racist Chicago organization, the White Circle League.[135] Beauharnais and his group passed out leaflets calling on Chicago's Mayor and City Council "to halt the further encroachment, harassment and invasion of white people, their property,

127. *See* Geoffrey Rosenblat, *Stern Penalties: How the Federal Communications Commission and Congress Look to Crackdown on Indecent Broadcasting*, 13 VILL. SPORTS & ENT. L.J. 167 (2006) (discussing the FCC's response to increased incidents of broadcasted indecent material).

128. *See id.* at 188–93 (discussing the FCC's actions against Howard Stern).

129. *See* CBS Corp. v. FCC, 535 F.3d 167, 172 (3d Cir. 2008) (describing events during the halftime show).

130. *Id.*

131. *Id.*

132. *Id.*

133. 343 U.S. 250 (1952).

134. *Id.* at 251.

135. *Id.* at 252.

neighborhoods and persons, by the Negro."[136] The White Circle League's racist diatribe exhorted "[o]ne million self respecting white people in Chicago to unite," proclaiming: "If persuasion and the need to prevent the white race from becoming mongrelized by the [N]egro will not unite us, then the aggressions, . . . rapes, robberies, knives, guns and marijuana of the [N]egro, surely will."[137]

These leaflets were vicious and evil, to be sure, but could the state of Illinois send someone to jail for them? Beauharnais, in his defense, argued that the First Amendment protected him and his leafleting, and asked that the jury be instructed that he could not be found guilty unless the leaflets were "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."[138] The Illinois court refused to use this "clear and present danger" instruction, and Beauharnais was convicted.[139] In an opinion written by Justice Frankfurter, the United States Supreme Court affirmed the conviction.[140] The opinion of Justice Frankfurter in *Beauharnais* tracked the reasoning of *Chaplinsky*, and along with the obscenity decision five years later in *Roth v. United States*,[141] is a high-water mark of *Chaplinsky*'s influence on First Amendment law.

Beauharnais was decided before the term "hate speech" entered our mass lexicon. Back in 1952 the type of law Illinois had enacted was usually known as "group libel" or "criminal libel."[142] Justice Frankfurter clearly saw this libel targeting a racial or religious group as different in kind from "libel of a political party."[143] A sharp distinction existed, Justice Frankfurter maintained, between restrictions on political speech and restrictions relating to "race, color, creed or religion."[144] These terms, he insisted, had "attained too fixed a meaning to permit political groups to be brought within" their rubric, and for Frankfurter that rubric was apparently outside the protections of the First Amendment.[145] "Of course," he noted, "discussion cannot be denied and the right, as well as the duty, of criticism must not

136. *Id.*at 252–53.

137. *Id.*

138. *Id.* at 253.

139. *Id.*

140. *Id.* at 267.

141. *See id.*; *see also* Roth v. United States, 354 U.S. 476 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

142. *Beauharnais*, 343 U.S. at 253 ("The Illinois Supreme Court tells us that § 244a 'is a form of criminal libel law.'" (quoting People v. Beauharnais, 97 N.E.2d 343, 346 (Ill. 1951))).

143. *Id.* at 263.

144. *Id.* at 263 n.18.

145. *Id.*

be . . . stifled."[146] For Justice Frankfurter, however, there was nothing "political" about this speech, nor did it rise to the level of worthwhile discussion or discourse.[147] "If a statute sought to outlaw libels of political parties," he conceded, "quite different problems not now before us would be raised."[148]

Justice Frankfurter thought that hate speech was closely analogous to civil libel—and that the force of the analogy was not dissipated merely because the slur was aimed at an entire racial group.[149] Justice Frankfurter observed that if a libelous utterance directed at an individual may be punished, "we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State."[150] Justice Frankfurter made an oblique but unmistakable reference to Nazi Germany in his opinion, noting that Illinois did not need to "await the tragic experience of the last three decades"[151] to conclude that laws against racial attacks were necessary to preserve the peace and order of the community. Illinois could thus rightly conclude that purveyors of racial and religious hate "promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community."[152] Illinois did not have to look past its borders to reach these conclusions. Recalling events ranging from the murder in 1837 of the abolitionist Elijah Lovejoy to riots in Cicero in 1951, Justice Frankfurter argued that Illinois might reasonably conclude that racial tensions are exacerbated and more likely to flare into violence when racial messages are tolerated.[153]

Justice Frankfurter also maintained that an individual's human dignity may reasonably be treated as inextricably intertwined with protection for the reputation of the individual's racial or religious group. It was not for the Supreme Court, he said, to deny that the "Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[154]

146. *Id.* at 264.
147. *Id.* at 263 n.18.
148. *Id.*
149. *See id.* at 258.
150. *Id.*
151. *Id.* at 258–59.
152. *Id.* at 259.
153. *Id.*
154. *Id.* at 263.

Beauharnais drew explicit connections between criminal libel and civil libel, equating the two for constitutional purposes, and treating both as among those narrow classes of speech *Chaplinsky* had identified as outside the First Amendment's protection. And indeed, if *Beauharnais* sustained "criminal libel" against constitutional attack, the first two centuries of American law similarly treated civil suits for libel or slander as outside the ken of First Amendment protection, again fitting comfortably into *Chaplinsky*'s formulation that libels are words which by their very utterance inflict injury.[155]

The common law was strongly protective of reputation. Under traditional common-law doctrine in the United States, the plaintiff did not have to prove fault, falsity, or damage.[156] The plaintiff merely had to establish publication by the defendant of a defamatory statement, of and concerning the plaintiff, to a third party.[157] Defamation was a strict liability tort.[158] The plaintiff was not required to plead or prove fault by the defendant.[159] No showing of negligent, reckless, or intentional publication of falsehood was required.[160] Nor was the plaintiff required to prove that the allegedly defamatory statements were false.[161] The onus was instead on the defendant to plead and prove truth as a justification or defense to the libel.[162] Damages were presumed; the law assumed that damages flowed naturally from the defamation.[163]

These rules were the quintessential example of a legal regime recognizing the existence of "words which by their very utterance inflict injury" requiring remedies without additional proof of harm. Justice Holmes captured this orthodoxy in *Peck v. Tribune Co.*,[164] embracing the common-law aphorism that: "Whatever a man publishes he publishes at his peril."[165]

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155. *See supra* notes 1–9 and accompanying text.

156. *See, e.g.*, Wilson v. Scripps-Howard Broad. Co., 642 F.2d 371, 374 (6th Cir. 1981).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *See, e.g.*, Chonich v. Wayne County Cmty. College, 973 F.2d 1271, 1276 (6th Cir. 1992) ("The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.").

164. 214 U.S. 185 (1909).

165. *Id.* at 189 (quoting Lord Mansfield, in Rex v. Loft, 776, 881, 981 Eng. Rep. 914, 916

As Holmes saw it, the reason for this was "plain," residing in the common-law's common-sense presumption that hurtful words cause hurt.

> The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable, if the statements are false or are true only of someone else.[166]

Modern First Amendment developments, however, would overtake both the criminal libel principles of *Beauharnais* and the common-law "super tort" of defamation. The most significant development was the historic opinion of the Supreme Court in *New York Times Co. v. Sullivan*.[167] The rules emanating from *New York Times* and its progeny turned the common law principles on their head, diminishing the protection of reputation in the United States. The balance between protection of reputation and freedom of speech that was struck by the common law was recalibrated, diminishing protection of reputation and concomitantly enhancing protection of freedom of speech. In the *New York Times* case, the Court held that in defamation actions brought by public officials for defamatory speech germane to the official's performance in or fitness for office, the public official plaintiff must demonstrate that the defendant published the defamation with "actual malice," defined as knowledge of falsity or reckless disregard for truth or falsity.[168] In a series of decisions following the *New York Times* decision, the constitutional rules evolved to include "public figures" as among the plaintiffs who must demonstrate actual malice.[169] While there have been hundreds of decisions elaborating on the public figure/private figure dichotomy, this basic division of American defamation law is now relatively settled and stable.[170]

(1774)); *see also* Herbert v. Lando, 441 U.S. 153, 159 n.4 (1979) (repeating Holmes' admonition).

166. *Peck*, 214 U.S. at 189.

167. 376 U.S. 254 (1964).

168. *Id.* at 279–80.

169. The capstone of this evolution came in the 1974 decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The case involved a libel action brought by Elmer Gertz, a well-known Chicago attorney and law professor, against Robert Welch, Inc., the publisher of the monthly magazine *American Opinion*, an organ of the John Birch Society. *Id.* at 326–27. The defendant claimed that Gertz was a public figure and that the magazine was thus entitled to the protection of the *New York Times* actual malice standard. *Id.* at 327–28. The Supreme Court disagreed, holding that Gertz was a private figure, and further holding that in private figure cases, the actual malice standard was not required by the First Amendment. *Id.* at 352. The Court in *Gertz* left it to state courts to develop for themselves the proper standard of liability in suits brought by private plaintiffs, so long as they did not dip below the floor requirement of negligence. *Id.* at 347.

170. The *Gertz* decision recognized two kinds of public figures, the "all purpose" public figure, a category limited to persons of such high prominence that they are deemed public figures for all purposes, and the more common "limited purpose" public figure, those who have become involved

The tort of defamation in the United States has thus been dramatically modified. The changes have been accomplished principally by: (1) requiring proof of fault in all defamation actions in the United States involving "matters of public concern," including proof of, at minimum, negligence in all such private-figure cases and "actual malice" in all such public official and public figure cases;[171] (2) placing the burden of pleading and proving falsity on the plaintiff in all defamation issues involving matters of public concern;[172] (3) modifying the common-law doctrine of "fair comment" to impose a stricter requirement that all defamation actions be predicated on false statements of fact;[173] and (4) modifying rules governing damages.[174]

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in specific public controversies and are public figures for purposes of defamatory statements arising from their involvement in those controversies. *Gertz*, 418 U.S. at 344–45. While American courts have adopted a variety of tests to define limited-purpose public figures, the common denominator among the tests is an emphasis on the existence of a pre-existing public controversy and an examination of the extent to which a plaintiff has voluntarily injected himself or herself into that controversy. *See, e.g.*, Carr v. Forbes, Inc., 259 F.3d 273 (4th Cir. 2001); Contemporary Mission, Inc. v. N.Y. Times Co., 842 F.2d 612, 617 (2d Cir. 1988); Waldbaum v. Fairchild Publ'ns, 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980).

171. To establish actual malice a plaintiff must prove with clear and convincing evidence that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co.*, 376 U.S. at 280. Reckless disregard, in turn, means that the publisher "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). To prove actual malice, therefore, a plaintiff must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 n.30 (1984); *see also* McCoy v. Hearst Corp., 727 P.2d 711 (Cal. 1986). Actual malice is a subjective standard. Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 688 (1989). The critical question is state of mind. Herbert v. Lando, 441 U.S. 153 (1979). Actual malice is not to be equated with common-law malice. *See* Tavoulareas v. Piro, 817 F.2d 762, 795 (D.C. Cir. 1987) ("To recover, plaintiffs cannot ground their claim 'on a showing of intent to inflict harm,' but must, instead, show an 'intent to inflict harm through falsehood.'"); Henry v. Collins, 380 U.S. 356, 357 (1965).

172. In defamation cases in which the alleged defamatory falsehood arises from matters of "public concern," plaintiffs in the United States now have the burden of proving that the allegedly defamatory statements made are false. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). Minor, trivial, technical falsehoods will not support a defamation action. Masson v. New Yorker Magazine, 501 U.S. 496, 516 (1991). Rather, the test is whether the "gist" or the "sting" of the allegedly defamatory statements was different than publication of the literal truth would have been. *Id.* at 517. The defendants are protected from liability for minor or trivial inaccuracies, but may be held liable for statements that deviate in a material way from the truth. *Id.* The concept is a simple one: a charge is not "substantially true" if the average reader would think differently of the plaintiff had the actual facts been presented correctly. *Id.* As the Supreme Court in *Masson* explained: "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* (citing ROBERT SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 138 (1980); Wehling v. Columbia Broad. Sys., 721 F.2d 506, 509 (5th Cir. 1983); RODNEY SMOLLA, LAW OF DEFAMATION § 5.08 (1991)).

173. The "fair comment" privilege, as it was understood at common law, was not an absolute privilege for any opinion or comment, but required that the comment be, as its name suggests, "fair."

These modifications of the common-law tort of defamation are all limited to defamation actions that initially trigger the "coverage" of the First Amendment. That coverage is predicated on a demonstration that the defamatory statements relate to issues "of public concern." The phrase "of public concern" is a term of art in American First Amendment law. It figures most prominently in the government employment cases applying the tests of *Connick v. Meyers*[175] and *Pickering v. Board of Education,*[176] discussed above.[177] The standard was applied by the Supreme Court in the context of defamation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[178] The *Dun & Bradstreet* case involved the credit reporting agency Dun & Bradstreet, which issued an inaccurate credit report about the plaintiff,

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The privilege has been modified in the United States as a result of First Amendment principles. The most important United States Supreme Court precedent on the issue is a case entitled *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), established the principle that a statement that is not reasonably understood by recipients of the communication as a statement of fact is not actionable. This elemental proposition of defamation law in the United States may be expressed under a variety of rubrics. The non-factual statement may be labeled an "opinion," or mere "rhetorical hyperbole," or mere "insult," "verbal abuse," or "epithet." Whatever the label, unless defamatory facts are expressed or are implied, no action for defamation may be maintained. *See, e.g.*, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974) (holding not actionable "lusty and imaginative expression of contempt"). Lower state and federal courts in the United States differ somewhat in the tests they apply to determine whether a statement may be reasonably interpreted as factual. In many American jurisdictions, courts have adopted various multi-factor tests that weigh the totality of circumstances to determine if the statements at issue are actionable. Such decisions often emphasize such factors as (1) the author's choice of words; (2) whether the challenged statement is capable of being objectively characterized as true or false; (3) the context of the challenged statement within the writing or speech as a whole; and (4) the broader social context into which the statement fits. *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). The Supreme Court in *Milkovich* held that these broad multi-factor tests were not required by the First Amendment, which contained no free-standing protection for the expression of statements that are cast as "opinion." 497 U.S. at 19. At the same time, *Milkovich* reinforced the doctrine that the First Amendment does require that defamation actions in the United States be predicated on false statements of fact. *Id.* In the aftermath of *Milkovich*, many American jurisdictions continue to employ multi-factor tests to determine whether defamatory statements are actionable, treating these tests as elaborations on state common-law principles. New York is a prominent example. *See* Immuno A.G. v. Moor-Jankowski, 567 N.E.2d 1270 (N.Y. 1991); 600 W. 115th St. Corp. v. Gutfeld, 603 N.E.2d 930 (N.Y. 1992), *cert. denied*, 508 U.S. 910 (1993). So too, is Illinois. *See* Solaia Tech., LLC v. Specialty Pub. Co., 852 N.E.2d 825, 840 (N.Y. 2006) ("Several considerations aid our analysis: whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content.").

174. First Amendment principles now modify common-law defamation rules in the United States governing damages. In the *Gertz* decision, the Supreme Court banned the award of both common-law presumed damages and punitive damages in all cases involving issues of public concern, unless the plaintiff demonstrates "actual malice." Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (defining actual malice as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not").

175. 461 U.S. 138 (1983).

176. 391 U.S. 563 (1968).

177. *See supra* notes 113–118 and accompanying text.

178. 472 U.S. 749, 761 (1983) (Powell, J., plurality).

Greenmoss Builders, a residential and commercial building contractor.[179] After reviewing the history of constitutional developments, Justice Powell, writing the Court's plurality opinion, stated that the Court had "never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern."[180] Writing that "[w]e have long recognized that not all speech is of equal First Amendment importance," Justice Powell stated that "speech on 'matters of public concern'. . . is 'at the heart of the First Amendment[ ]'"[181] which 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change.'"[182] The plurality opinion in *Dun & Bradstreet* did little to define the phrase "matters of public concern," holding simply that the issue was to be determined by [the expression's] content, form, and context . . . as revealed by the whole record.'"[183] Courts applying the "public concern" formulation thus usually evaluate factors such as the degree to which the defamatory statements were widely disseminated, the extent to which they would be of interest to persons other than the immediate parties, and the extent to which they implicate issues of public policy, art, science, religion, business, and similar topics of broad social and cultural concern.

The "matters of public concern" standard, operating as an "on-off switch" for First Amendment protection, parallels a doctrinal element embedded in the constitutional test for "obscenity" under *Miller v. California*.[184] The *Miller* "obscenity" test requires that speech *not* be classified as obscene if it has serious redeeming "literary, artistic, political, or scientific value."[185] Speech that is not obscene under the *Miller* standard will enjoy First Amendment protection. [186] In this sense, a significant piece of *Chaplinsky* continues to survive. To the extent that the theoretical rationale articulated in *Chaplinsky* for treating some words as outside the ambit of the First Amendment is their lack of any serious claim to being an "essential part of any exposition of ideas,"[187] and the concomitant judgment that they 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

179. *Id.* at 751.

180. *Id.* at 757.

181. *Id.* at 758–59 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)); *see generally Dun & Bradstreet*, 472 U.S. at 759 (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

182. *Dun & Bradstreet*, 472 U.S. at 759.

183. *Dun & Bradstreet*, 472 U.S. at 761 (quoting *Connick*, 461 U.S. at 147–48).

184. 413 U.S. 15 (1973); *see infra* notes 185–88 and accompanying text.

185. *Miller*, 413 U.S. at 24.

186. *Id.*

187. *Chaplinsky*, 315 U.S. at 572.

order and morality,"[188] the "public concern" and "redeeming value" elements of defamation and obscenity law may thus be viewed as incorporating and elaborating upon this standard from *Chaplinsky*.

If *New York Times Co. v. Sullivan*[189] and its progeny dramatically modified that part of *Chaplinsky* that treated all libels as words which by their very utterance inflict injury, narrowing the reach of that side of *Chaplinksy* to the smaller set of "garden variety" defamation actions that do not involve any issues of public concern, an even wider array of modern First Amendment doctrines have effectively overruled the criminal libel principles of *Beauharnais v. Illinois*.[190]

To begin, it is clear that at the very least, the actual malice standard announced in *New York Times* applies to all criminal libel statutes.[191] A second offshoot of the *New York Times* line of cases has been the rejection of "group libel" in the sense of generalized and undifferentiated disparagement of large groups, such as ethnic or racial groups. This is crystallized in the principle that the common-law requirement that defamation be "of and concerning" the specific plaintiff is now understood as a principle of *constitutional* dimension.

In *Rosenblatt v. Baer*,[192] for example, the Supreme Court held that the "of and concerning" component of American libel law is so critical to the balance between protection of reputation and protection of free expression that it must be understood as required by the Constitution itself.[193] The Court in *Rosenblatt* refused to accept as constitutionally sufficient a theory that a cause of action could be maintained against a publication that cast "indiscriminate suspicion" on members of a group who were allegedly responsible for the conduct of a county ski recreation area.[194] The Court in *Rosenblatt* held that this tightly constrained understanding of the "of and concerning" requirement was essential to maintain the integrity of the principles established in *New York Times Co. v. Sullivan*. To allow the jury to equate statements made about a group (such as a government agency) with statements defaming the head of the group (such as the head of the agency) merely on the presumption that to libel one is to libel the other, the Court explained, was "to invite the specter of prosecutions for libel on government, which the Constitution does not tolerate in any form." Such "'a

188. *Id.*

189. 376 U.S. 254 (1964).

190. 343 U.S. 250 (1952).

191. Garrison v. Louisiana, 379 U.S. 64, 67 (1964) (striking down criminal libel law for failing to incorporate the actual malice standard).

192. 383 U.S. 75 (1966).

193. *Id.* at 83.

194. *Id.* ("A theory that the column cast indiscriminate suspicion on the members of the group responsible for the conduct of this governmental operation is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient.").

proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.'"[195] The constitutional stature of the "of and concerning" requirement, and its integral link to the preservation of

195. *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964)). The Court in *Rosenblatt* thus reaffirmed that "[t]here must be evidence showing that the attack was read as specifically directed at the plaintiff." *Rosenblatt*, 383 U.S. at 81. The free speech values animating decisions such as *New York Times Co. v. Sullivan* and *Rosenblatt v. Baer*, which had their origin in the context of criticism of government and government officials, have been extended in their application to protect criticism of individuals and corporations in the private sector on the theory that in a free and democratic society, it is vital to guard freedom of speech on a wide range of subjects, including religion, science, business, the arts, and other fields of human endeavor that comprise modern culture. In American libel law, the most famous explication of this view came in an opinion by Chief Justice Earl Warren in *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967), and its companion decision, *Associated Press v. Walker*, 388 U.S. 130 (1967):

> Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Curtis Publ'g Co., 388 U.S. at 163 (Warren, C.J., concurring); *see also* Milkovich v. Loraine Journal Co., 497 U.S. 1, 14 (1990) (explaining why the Court has extended the constitutional standard "'to protect defamatory criticism of nonpublic persons' who are . . . intimately involved in the resolution of important public questions, or by reason of their fame, shape events in areas of concern to society at large.'" (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 336–37 (1974))); *see also* Gertz v. Robert Welch, Inc. 418 U.S. 323, 338–39 (1974) (explaining high levels of constitutional protection for allegedly libelous speech involving attacks on public figures by emphasizing that public figures invite scrutiny of their actions by virtue of their assumption of prominent roles in society, and have access to channels of communication to counter allegedly defamatory charges made against them); Baumgartner v. United States, 322 U.S. 665, 673–674 (1944) ("One of the prerogatives of American citizenship is the right to criticize public men and measures. . . ."). This notion has been extended in America to include caustic attacks on well-known religious figures. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 51 (striking down verdict against magazine by prominent religious leader Reverend Jerry Falwell, noting that "[t]he sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'"). These values in turn embrace the "of and concerning" requirement extending it, as a matter of American constitutional doctrine, to libels involving persons outside of government. *See, e.g.*, Blatty v. N.Y. Times Co., 728 P.2d 1177, 1182 (Cal. Ct. App. 1987).

freedom of speech, is thus a well-accepted aspect of American defamation law.[196]

Aside from these defamation-related additions to First Amendment doctrine, there is the entire mainstream body of modern First Amendment law that has dramatically tightened the rules of immediacy, intent, and likelihood of harm required to justify restrictions on speech on the theory the speech will lead to violence. This is not truly the "inflict injury" prong of *Chaplinksy*, but more properly understood as that part of *Chaplinksy* linked to genuine "fighting words" and the maintenance of physical (as opposed to moral) order. Even so, the strong body of law expressly limiting the fighting words doctrine to face-to-face confrontations likely to provoke immediate violence, when coupled with the tightened modern First Amendment doctrines governing liability for "incitement"[197] or "true threats,"[198] effectively eviscerates *Beauharnais* as precedent. In *Purtell v. Mason*,[199] for example, the United States Court of Appeals for the Seventh Circuit recently expressed skepticism that the "words which by their very utterance inflict injury" prong of *Chaplinsky* remained alive at all in connection with laws dealing with fighting words or incitement. "Although *Chaplinsky* purported to define fighting words in the alternative—words that 'by their very utterance inflict injury or tend to incite an immediate breach of the peace,'"[200] the court observed, "the statute under challenge in the case had been definitively construed by the state courts to apply *only* to speech falling

196. *See, e.g.*, Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 933, 937 (E.D. Wash. 1992) ("Among the prophylactic rules designed to serve First Amendment values is the threshold requirement that the injured party demonstrate that the defamatory (or as here disparaging) communication was personally directed to him or (as here) to the product."); Isuzu Motors Ltd. v. Consumers Union, Inc., 12 F. Supp. 2d 1035, 1044 (C.D. Cal. 1998) ("In defamation actions, the First Amendment requires the plaintiff to establish that the statement on which the claim is based is 'of and concerning' the plaintiff."); Ferlauoto v. Hamsher, 74 Cal. App. 4th 1394, 1404 (Cal. Ct. App. 1999); (Plaintiff "cannot constitutionally establish liability unless he proves that the contested statements are 'of and concerning,' him either by name or by 'clear implication.'"); Saenz v. Morris, 746 P.2d 159 (N.M. Ct. App. 1987) (discussing constitutional underpinnings of the "of and concerning" requirement); Dong v. Bd. of Trs. of Leland Stanford Univ., 236 Cal. Rptr. 912 (1987) ("In defamation actions the First Amendment requires that the statement on which the claim is based must specifically refer to, or be 'of and concerning,' the plaintiff . . . .") (internal quotations omitted); Blatty v. N.Y. Times Co., 728 P.2d 1177, 1182 (1987) ("In defamation actions the First Amendment also requires that the statement on which the claim is based must specifically refer to, or be 'of and concerning,' the plaintiff in some way. . . . [T]he requirement derives directly and ultimately from the First Amendment.").

197. *See, e.g*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

198. Virginia v. Black, 538 U.S. 343, 359–60 (2003) (holding that "'true threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.").

199. 527 F.3d 615, 624 (7th Cir. 2008).

200. *Id.* at 623.

in the latter category."[201] The court in *Purtell* also asserted that in subsequent decisions the Supreme Court had not breathed life into the "inflict injury" program of *Chaplinsky*, stating that "[i]n later cases, the Court has either dropped the 'inflict-injury' alternative altogether or simply recited the full *Chaplinsky* definition without further reference to any distinction between merely hurtful speech and speech that tends to provoke an immediate breach of the peace."[202] The court thus claimed:

> Although the "inflict-injury" alternative in *Chaplinsky*'s definition of fighting words has never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does *not* have a tendency to provoke an immediate breach of the peace.[203]

The court thus concluded that the theoretical and constitutional policy justification in modern First Amendment jurisprudence for "'plac[ing] fighting words outside the protection of the First Amendment' is not their capacity to inflict emotional injury—many words do that—but their tendency 'to provoke a violent reaction and hence a breach of the peace.'"[204]

Finally, *Beauharnais* is flatly inconsistent with modern First Amendment doctrines restraining content-based and view-point based discrimination, doctrines that have been applied rigorously to protect "hate

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201. *Id.* (internal quotations omitted).

202. *Id.* (citing "*Virginia v. Black*, 538 U.S. 343, 359 (2003) (a cross-burning case decided on threat-doctrine grounds in which the Court quoted the full *Chaplinsky* test but noted *Cohen v. California*'s narrowing of the fighting-words doctrine); *Texas v. Johnson*, 491 U.S. 397, 409, (1989) (in throwing out a flag-burning conviction, the Court dropped the inflict-injury prong of the *Chaplinsky* definition and confined fighting words to those that are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace') (internal quotes omitted); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (describing fighting words as 'those that provoke immediate violence'); *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (quoting full *Chaplinsky* definition but omitting any reference to the inflict-injury prong); *Gooding v. Wilson*, 405 U.S. 518, 524–27 (1972) (same); *Cohen v. California*, 403 U.S. 15, 20 (1971) (modifying definition of fighting words to encompass 'those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction'); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (stating speech is protected 'unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . [;][t]here is no room under our Constitution for a more restrictive view'); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring) ('The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.')") (internal citations omitted).

203. *Purtell*, 527 F.3d 615, 624 (7th Cir. 2008).

204. *Id.* at 624.

speech" of exactly the sort that the Court held unprotected in *Beauharnais*.[205] Thus in *R.A.V. v. City of St. Paul*,[206] the Supreme Court struck down a hate speech ordinance, and along the way severely critiqued any understanding of *Chaplinsky* as creating categories of speech "invisible to the Constitution."[207] And in *Virginia v. Black*,[208] a somewhat splintered array of opinions "split the baby" in a constitutional attack on Virginia's anti-cross-burning law, holding that laws prohibiting cross-burning for the purpose of threatening or intimidating other persons were not *per se* violations of the First Amendment, but that a particular provision of the Virginia law at issue, which created a presumption of an intent to intimidate from the mere fact of cross-burning alone, rendered the application of the statute unconstitutional as to a Ku Klux Klan defendant to whom the presumption had been applied.[209]

In the plurality opinion in *Virginia v. Black*, Justice O'Connor did invoke *Chaplinsky*'s famous passage,[210] but this was followed by the concession that the Court had narrowed the fighting words concept and tightened standards for incitement.[211] In a critical passage, Justice O'Connor's opinion admonished that:

> It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas

205. *See* Beauharnais v. Illinois, 343 U.S. 250, 251–67 (1952).

206. 505 U.S. 377 (1992).

207. *Id.* at 383–84 ("We have sometimes said that these categories of expression are 'not within the area of constitutionally protected speech,' *Roth, supra*, 354 U.S., at 483.; *Beauharnais, supra*, 343 U.S., at 266; *Chaplinsky, supra*, 315 U.S., at 571–572; or that the 'protection of the First Amendment does not extend' to them, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 124 . . . (1989) (internal citations omitted). Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all,' Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 615, n.146. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.").

208. 538 U.S. 343 (2003) (plurality opinion).

209. *See id.* at 347–68.

210. *Id.* at 358.

211. *Id.*

> with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.[212]

The plurality's holding regarding the prima facie evidence provision was a significant limitation on the notion in *Chaplinsky* and *Beauharnais* that certain words may by their very utterance inflict injury, by in effect permitting the government to "brand" certain speech, in a kind of First Amendment variant of a Bill of Attainder, declaring it by name to be a message that presumptively violates the law. This type of advance "branding" was once permitted under our Constitution. It was exactly this method of regulation that drew one of Justice Holmes's great free speech dissents, in *Gitlow v. New York*,[213] in which he argued vociferously against the proposition that the New York legislature could declare in advance that certain utterances constituted, intrinsically, a clear and present danger. In a haunting admonition, Justice Holmes warned: "Every idea is an incitement."[214] This branding device, however, is permitted no longer. The views of Justice Holmes have prevailed over time, and the Supreme Court, in *Black* and other cases, has now rejected the notion that a legislature may determine, in advance and in the abstract, that a certain word, symbol, or phrase is effectively taboo in public discourse, attaching legal penalties to its mere utterance or display.[215]

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212. *Id.* at 366–67 (internal citation omitted). Justice Souter, joined by Justices Kennedy and Ginsburg, took an even stronger free speech position than Justice O'Connor, relying on *R.A.V.* Those three Justices would have struck down the entire Virginia law, and all three convictions, because the law was tainted with the same kinds of viewpoint-based and content-based distinctions that the Court had found constitutionally impermissible in *R.A.V.* *See id.* at 380–87. Justices Scalia and Thomas, apparently defecting from their positions in *R.A.V.*, would have gone well beyond the plurality. Justice Thomas would have been willing to allow a state to attack all cross burnings, and to permit a state to employ a prima facie evidence provision, and would have affirmed all three convictions. *Id.* at 388–400. Justice Scalia wrote primarily to express the view that the prima facie evidence provision is probably a mere permissible inference of the sort that in his view would not violate the First Amendment. *Id.* at 368–80.

213. 268 U.S. 652 (1925).

214. *Id.* at 673 (Holmes, J., dissenting).

215. *See* Landmark Commc'n., Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("This legislative declaration coupled with the stipulated fact that Landmark published the disputed article was regarded by the court as sufficient to justify imposition of criminal sanctions. Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); Cohen v. California, 403 U.S. 15, 26 (1971) ("Finally, and in the same vein, we cannot indulge the facile

If there is an exception to this statement, however, that exception is the one final category recognized in *Chaplinsky* in which it may still be largely plausible to maintain that certain words or images are deemed by their very publication to inflict injury—expression deemed legally obscene.[216]

C. *The Lewd and Obscene*

In *Roth v. United States*,[217] the Supreme Court, in an opinion by Justice Brennan, held that obscenity was not protected by the First Amendment. *Roth* was directly linked to *Chaplinsky*. The Court in *Roth* quoted the famous passage in *Chaplinsky* that included the "lewd and obscene" as among the categories of speech outside the protection of the Constitution.[218] Immediately following the *Chaplinsky* quotation, the Court in *Roth* emphatically and economically declared: "We hold that obscenity is not within the area of constitutionally protected speech or press."[219] *Roth* rested heavily on history, and *Roth* linked the various categories in *Chaplinksy* into a unified whole, treating profanity, libel, and obscenity as legal cousins, all left orphaned by the First Amendment. The Court thus reinforced the declarations it borrowed from *Chaplinsky* with the data that in 1792, when ten of the fourteen states had ratified the Constitution, thirteen of the fourteen states provided for the prosecution of libel,[220] and *every* state "made either blasphemy or profanity, or both, statutory crimes."[221]

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assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."); Herndon v. Lowry, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the Legislature is not unfettered."); Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring) ("This legislative declaration . . . does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution.").

216. *See Chaplinsky*, 315 U.S. at 572.

217. 354 U.S. 476 (1957).

218. *Id.* at 485 (quoting *Chaplinsky*, 315 U.S. at 571–72).

219. *Id.*

220. *Id.* at 482 n.11 (citing Act to Secure the Freedom of the Press (1804), 1 Conn. Pub. Stat. Laws 355 (1808); DEL. CONST. of 1792, art. I, § 5; Ga. Penal Code, Eighth Div., § VIII (1817), Digest of the Laws of Ga. 364 (Prince 1822); Act of 1803, c. 54, II Md. Public General Laws 1096 (Poe 1888); Commonwealth v. Kneeland, 37 Mass. 206, 232 (1838); Act for the Punishment of Certain Crimes Not Capital (1791), 1792 N.H. Laws 253; Act Respecting Libels (1799), N.J. Rev. Laws 411 (1800); People v. Croswell, 3 Johns. 337 (N.Y. 1804); Act of 1803, c. 632, 1821 2 N.C. Laws 999; PA. CONST. 1790, art. IX, § 7; R.I. Code of Laws (1647), Proceedings of the First General Assembly & Code of Laws 44–45 (1647); R.I. CONST., 1842, art. I, § 20; Act of 1804, 1 Laws of Vt. 366 (Tolman 1808); Commonwealth v. Morris, 3 Va. (1 Va. Cas.) 176 (1811).

221. *Id.* at 482–83 n.12 (citing Act for the Punishment of Divers Capital and Other Felonies, 1784 Acts and Laws of Conn. 66, 67; Act Against Drunkenness, Blasphemy, §§ 4–5 (1737), 1 Del. Laws 173, 174 (1797); Act to Regulate Taverns (1786), Digest of the Laws of Ga. 512, 513 (Prince 1822);

Roth was also directly linked to *Beauharnais*.[222] Citing its holding in *Beauharnais*, the Court in *Roth* reasoned that if libel was not protected by the First Amendment, surely obscenity was also not protected.[223] While "[a]t the time of the adoption of the First Amendment," the Court conceded, "obscenity law was not as fully developed as libel law," there was, nonetheless, ample contemporary evidence that obscenity, like libel, was not within the constitutional definition of freedom of speech.[224]

Invoking the values of the "marketplace of ideas" and central relationship of freedom of speech to democratic self-governance, the Court in *Roth* argued that "[t]he 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."[225] Echoing the reasoning of *Chaplinksy*, the Court in *Roth* reasoned that obscenity made no contributions to the marketplace of ideas or the political process:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history

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Act of 1723, c. 16, § 1, Digest of the Laws of Md. 92 (Herty 1799); General Laws and Liberties of Mass. Bay, c. XVIII, § 3 (1646), Mass. Bay Colony Charters & Laws 58 (1814); Act of 1782, c. 8, Rev. Stat. of Mass. 741, § 15 (1836); Act of 1798, c. 33, §§ 1, 3, Rev. Stat. of Mass. 741, § 16 (1836); Act for the Punishment of Certain Crimes Not Capital (1791), N.H. Laws 1792, 252, 256 (1792); Act for the Punishment of Profane Cursing and Swearing (1791), N.H. Laws 1792, 258; Act for Suppressing Vice and Immorality, §§ VIII–IX (1798), N.J. Rev. Laws 329, 331 (1800); Act for Suppressing Immorality, § IV (1788), 2 N.Y. Laws 257, 258 (Jones & Varick 1777–1789); People v. Ruggles, 8 Johns. 290 (N.Y. 1811); Act . . . for the More Effectual Suppression of Vice and Immorality, § III (1741), N.C. Laws 52 (Martin Rev. 1715–1790); Act to Prevent the Grievous Sins of Cursing & Swearing (1700), II Statutes at Large of Pa. 49 (1700–1712); Act for the Prevention of Vice and Immorality, § II (1794), 3 Laws of Pa. 177, 178 (1791–1802); Act to Reform the Penal Laws, §§ 33–34 (1798), R.I. Laws 1798 584, 595; Act for the More Effectual Suppressing of Blasphemy & Prophaneness (1703), Laws of S.C. 4 (Grimke 1790); Act for the Punishment of Certain Capital, and Other High Crimes and Misdemeanors, § 20 (1797), 1 Laws of Vt. 332, 339 (Tolman 1808); Act for the Punishment of Certain Inferior Crimes & Misdemeanors, § 20 (1797), 1 Vt. Laws 352, 361 (Tolman 1808); Act for the Effectual Suppression of Vice, § 1 (1792), Acts of General Assembly of Va. 286 (1794).).

222. Beauharnais v. Illinois, 343 U.S. 250 (1952).

223. *Id.* at 483 (citing *Beauharnais*, 343 U.S. at 266).

224. *Id.* at 483–84 n.13, (citing Act Concerning Crimes and Punishments, § 69 (1821), Stat. Laws of Conn. 109 (1824); Knowles v. State, 3 Day 103 (Conn. 1808); Rev. Stat. of 1835, c. 130, § 10, Rev. Stat. of Mass. 740 (1836); Commonwealth v. Holmes, 17 Mass. 335; Rev. Stat. of 1842, c. 113, § 2, Rev. Stat. of N.H. 221 (1843); Act for Suppressing Vice & Immorality, § XII (1798), N.J. Rev. Laws 329, 331 (1800); Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Pa. 1815).).

225. *Id.* at 484.

> of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[226]

The Court in *Roth* was invited to engage the defense argument that obscenity statutes are forms of thought control. The defendants in *Roth* argued that obscenity laws "punish incitation to impure sexual *thoughts*, not shown to be related to any overt antisocial conduct which is or may be incited in the persons stimulated to such *thoughts*."[227] Rather than directly confront this argument, the Court in *Roth* mechanically avoided it. If obscenity did not fall within the protection of the First Amendment, the Court reasoned, then no showing of "clear and present danger of antisocial conduct"[228] was required, because such First Amendment protections were only activated. Just as no "clear and present danger" was required to ban the libels in *Beauharnais*, no "clear and present danger" was required to ban the obscenity in *Roth*.[229]

Once it was established that "obscenity" was not entitled to any First Amendment protection, the remaining doctrinal task was to define it. The Court would struggle with this process until,[230] in *Miller v. California*,[231] the Court settled on a three-pronged test:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;[232] (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;[233] and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[234]

While *Miller* refined the doctrinal elements of *Roth*, it did not alter *Roth*'s underlying jurisprudence.

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226. *Id.* (footnote omitted).

227. *Id.* at 485–86.

228. *Id.* at 486 (footnote omitted).

229. *Id.* at 486–87 (quoting *Beauharnais*, 343 U.S. at 266) ("'Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.'").

230. *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (1966).

231. Miller v. California, 413 U.S. 15 (1973).

232. *Id.* at 24.

233. *Id.*

234. *Id.*

IV. CONCLUSION

In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984), Justice Stevens concluded:

> Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they "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."[235]

We might usefully conceptualize the history of American free speech debate as a contest between two alternative approaches to free speech regulation, both of which are suggested by language in *Chaplinsky*. One approach, that is reflected in the phrase "words which by their very utterance inflict injury,"[236] suggests that it may be appropriate for society to prohibit and punish certain expression because the expression itself is *inherently* harmful. The words themselves are "bullets" that inflict injury. No extraneous proof of injury, no additional assessment of causation or imminence or likelihood of damage, is required to justify laws that penalize their utterance. Doctrinal formulations such as "clear and present danger" or "directed to the incitement of imminent lawless action and likely to produce such action" or "strict scrutiny" are essentially irrelevant under this approach, for there is no need to connect the offending speech to any external harm. The words *by their utterance* are deemed to inflict injury.

The alternative approach rejects the notion that words may ever be banned on the grounds that they are *intrinsically* harmful. "Sticks and stones may break my bones but words will never hurt me." The second approach instead presumes that all speech is presumptively free speech, and that it is to remain unshackled by government unless the government comes forward with compelling justifications for its abridgments. The naked assertion that the speech is somehow inherently evil will not be credited as such a compelling justification. Under this approach, it is incumbent on the government to defend laws restricting expression by demonstrating that the expression is linked to some extraneous harm, to some palpable invasion of a legally protected societal or individual interest, such as national security or

235. 466 U.S. 485, 504 (1984) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

236. *Chaplinsky*, 315 U.S. at 572.

individual reputation or privacy. In the absence of such a showing, the metaphorical marketplace of ideas, not the fiat of government, should decide the value of speech.

Even under the second approach, protection for speech may wax and wane, depending on what legal doctrines are employed to articulate the required link between the potentially dangerous speech and the ensuing harm. The required link between the speech and the harm may be loose or tight, and the relative looseness or tightness of the link required will tell us whether the protection for freedom of speech is low or high. When the link-rules are loose, protection of speech is diminished. When expression could be punished merely because it had the "bad tendency" to lead to violence, protection was low, and many dissidents and protesters went to jail. When, as under current doctrine, expression may be punished only after tight requirements of intent, immediacy, and likelihood of causation are established, it is far more difficult for the government to punish dissent and protest.

The two approaches to free speech regulation that I have described have coexisted in American law for decades, and are both embedded in the famous passage from *Chaplinsky*.[237] Logically, this coexistence is unobjectionable. It is perfectly tenable to maintain a regime of free speech regulation in which certain utterances are treated as *inherently* harmful, and thus subject to prohibition, while other utterances are treated as *potentially* harmful, and thus subject to prohibition if certain preconditions are met. Such a scheme makes as much logical sense as the bifurcated approach to fault that exists in modern tort law, in which certain activities are subject to strict liability standards, and other activities subject to degrees of fault—typically negligence.

While such a bifurcated regime for free speech regulation may be logically tenable, it is *theoretically* unstable. Tension exists between the theoretical underpinnings and practical applications of the two approaches. The tension arises because the core assumption of the "inherently dangerous" formulation, as so efficiently articulated by *Chaplinsky*, is that government is largely competent to identify those classes of speech that are inherently dangerous, by assessing them to be of such slight value to the pursuit of truth and free exchange of ideas that they may appropriately be banned in the interest of good order and morality. That core assumption is directly at odds with the core assumption of the marketplace theory, which posits that government is largely *incompetent* to make these judgments, and that instead the *best test* of the truth or value of expression is its capacity to gain currency in the marketplace.[238] Moreover, the marketplace theory

237. *See supra* note 5.

238. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting.) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than

soundly rejects the notion that government may enshrine in law society's collective disgust or revulsion for certain speech by banishing such speech from the marketplace. "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 itself offensive or disagreeable."[239]

One of the doctrinal devices that has evolved to mitigate this tension is the doctrine of "independent appellate review," which requires courts to engage in an independent and searching assessment of the application of First Amendment standards to specific facts, so as to assure that the borders of the categorical doctrines are conscientiously policed, and to determine that categories of unprotected expression do not become manipulated so as to undermine the principles of neutrality that are at the core of modern First Amendment law.[240]

American free speech law may never fully resolve this tension. There has, however, been a paradigm shift taking place over the last several decades, a shift away from the inherently dangerous speech formulation as the dominant mode of analysis. The inherently dangerous speech formulation is now the recessive mode, and the marketplace theory the dominant. Moreover, within ambit of the marketplace theory, the linkage

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they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.").

239. Texas v. Johnson, 491 U.S. 397, 414 (1989).

240. *See* Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 504–05 (1984). ("In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. The principle of viewpoint neutrality that underlies the First Amendment itself, see *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972), also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected. See generally *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).") (internal citations omitted).

requirements—the doctrinal rules that express the required connection between the potentially dangerous utterance and the ensuing harm—have tightened. The overall effect of this shifting paradigm is to broaden protection of freedom of speech, at the expense of other societal and individual interests.

The narrative set forth here is not, however, entirely linear or entirely consistent. Law is rarely so neat. Strong "pockets of persistence" remain, in which the inherently dangerous expression mode of thinking continues to dominate, or at least exert a strong gravitational pull. Moreover, adding to the complexity, there are several areas of free speech doctrine in which the two modes are blended. In such instances the overall level of free speech protection is a function of the relative influence of each element in the mix.

This juxtaposition of values in mutual tension is precisely what has given Justice Murphy's famous passage in *Chaplinsky* its rhetorical staying power over time. The *Chaplinsky* passage recognized the competing vision of the national identity as a "marketplace" or a "moral place." As *Chaplinsky* and its subsequent history suggest, perhaps the nation, and our system of free expression, will always partake of both.