SOURCES OF LAW (PART TWO): THE FIRST AMENDMENT AND FREE SPEECH

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The First Amendment protects an incredible amount of speech—and it's often cited as a huge part of why the United States has such open and honest discourse. "Free speech" is a right that many Americans are familiar with and, usually, proud of. But the neo-Nazi protest and its aftermath in Charlottesville left many wondering: Should we have such intensely powerful protections of hateful speech?[1]

In many ways, the neo-Nazi protest typifies what many see as the vitally broad coverage of the First Amendment. That's why the A.C.L.U. chose to defend the group's right to march, despite the obvious rift between the two organizations' ideologies.[2] As Chief Justice Roberts put it in upholding the Westboro Baptist Church's First Amendment protections, "As a Nation we have chosen. . .to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[3]

But what is actually protected? The First Amendment itself reads in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Note that it's a restraint on Congress. That means the government[4] is limited in making speech regulations, but private universities can prohibit or allow whoever they want from speaking on campus grounds.

 The *Sources of Law* project is an examination of the origins and hidden ways that important legal authorities impact our lives without us fully understanding why or how. This project will focus on three areas: Executive Orders, the First Amendment, and insurance.

1 For discussions, see Joseph Goldstein, After Backing Alt-Right in Charlottesville, A.C.L.U. Wrestle With Its Role, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/nyregion/aclu-free-speech-rights-charlottesville-skokie-rally.html; *Radiolab Presents More Perfect Live: The First Amendment in the Digital Age* , RADIOLAB (Sept. 5, 2017) http://www.thegreenespace.org/story/radiolab-presents-more-perfect-live/.

2 ACLU Statement on Charlottesville Violence and Demonstrations, Am. Civil Liberties Union (Aug. 12, 2017) https://www.aclu.org/news/aclu-statement-charlottesville-violence-and-demonstrations.

3 Snyder v. Phelps, 562 U.S. 443, 461 (2011).

4 Including state governments, via the 14th amendment, and public universities.

So what speech can the government limit? "No law" is a little deceptive; there are plenty of constitutional laws that restrict our speech rights. Imagine our free speech rights like a cookie. Of course, we'd like the whole cookie, but bites are taken out for appropriate limitations. This is why companies or individuals can't lie to you to make you buy their product—that would be fraud and courts have found government may restrict and punish that type of speech.

Unsurprisingly, most of what we might normally think of as hate speech is in the protected part of the cookie. Over the years the Supreme Court has heard a variety of cases on things that we might think of as hate speech. And usually, the Supreme Court has protected the speech under the First Amendment. The Westboro Baptist Church protesting a soldier's funeral with repugnant signs is protected.[5] Ku Klux Klan leaders giving speeches about white suppression and possible "revengeance" are protected.[6] Public displays of flag burning are protected.[7] The use of derogatory terms in trademarks is protected.[8]

But the First Amendment is not a golden shield protecting all hurtful or hateful speech from state action.

I. PARALLELS TO HATE SPEECH: INCITEMENT, FIGHTING WORDS, AND TRUE THREATS

To begin, there are several areas that might overlap with hate speech and are not protected. For instance, there isn't a First Amendment right to speech to incite violence. The Supreme Court in Brandenburg v. Ohio explained that there is no right when the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[9] But this is a rather high bar; Brandenburg itself involved Ku Klux Klan members at rallies, making speeches with loose promises to take "revengeance" against the government if it continued to oppress whites—speech found to be protected. Outside the reprehensible context, it makes sense to distinguish speech that teaches a moral duty to resort to violence from speech that prepares a group for violent action that it is about to take.

Similarly, "fighting words" aren't protected under the First Amendment. In Chaplinsky v. New Hampshire, the Court upheld a

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5 Snyder, 562 U.S. at 461.
6 Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).
7 Texas v. Johnson, 491 U.S. 397, 420 (1989).
8 Matal v. Tam, 137 S. Ct. 1744, 1765 (2017).
9 395 U.S. 444 (1969) (emphasis added).

law that prohibited face-to-face words that were "plainly likely to cause a breach of the peace."[10] Like profane or libelous speech, "fighting" words are intended to lead to injury as soon as they're spoken.[11] Any social value of such words "is clearly outweighed" by their contribution to disorder and it is unquestionable that the government can regulate them.[12]

But it's unlikely that the carve out for "fighting words" would allow a state to ban demonstrations, especially not because of the message conveyed in the demonstration. In R.A.V. v. St. Paul, the Court struck down a law that criminalized placing a symbol, object, or graffiti which one knows is likely to lead to alarm, anger, or resentment on the basis of race or religion, such as burning crosses or swastikas.[13] While this type of conduct might seem to fit under unprotected fighting words, the Court explained that "fighting words" as a category is unprotected because it represents a "particularly intolerable (and socially unnecessary) mode of expressing" a particular idea—not the idea itself.[14] In contrast, because the statute at issue in R.A.V. targeted a specific type of language, it did not withstand First Amendment scrutiny.

On the other hand, 11 years later in Virginia v. Black, the Supreme Court suggested that a state could criminalize cross burning carried out with the intent to intimidate as a form of threat (true threats being another area of speech without protection).[15] Given its history of use by Ku Klux Klan members, the court explained that "burning a cross is a particularly virulent form of intimidation" and states should be able to prohibit intimidation "that [is] mostly likely to inspire fear of bodily harm."[16]

The Court was quick to note: Not all forms of cross burning are unprotected, and not all cross burnings can be banned.[17] In fact, Court struck down the Virginia law because it included a jury instruction that the very act of cross burning should be taken as prima facie evidence of intent to intimidate, unconstitutionally prohibiting "statement[s] of ideology, [or] a symbol of group solidarity.[18] "When cross burning is done to threaten, it loses its protection, but otherwise

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10 315 U.S. 568, 573 (1942).
11 Id. at 572.
12 Id.
13 505 U.S. 377, 392 (1992).
14 Id.at 393.
15 Virginia v. Black, 538 U.S. 343, 363 (2003).
16 Id.
17 Id.at 364.
18 Id. at 366.

the Court suggests that it would fall under protected speech.

R.A.V. and Black demonstrate the uncomfortable fit between two different approaches to first amendment jurisprudence. The first approach tries to determine the appropriate level of protection for speech based on the content or form of that speech. This is the approach we have described above with our cookie metaphor. The second approach tries to determine the level of scrutiny to give a law that regulates speech based on how the law is written. Under this latter approach, when the government places so-called "content neutral" restrictions on the time, place, or manner of speech, it will face low or intermediate judicial scrutiny, while when the restriction of speech is triggered by the speech's content, it will face "strict" scrutiny.[19] The higher the level of scrutiny, the more narrowly the law needs to be drawn and the more compelling the reason for regulating the speech in question needs to be.[20]

In R.A.V., the majority held that even within a generally "proscribable" area of speech, content-based restrictions would receive strict scrutiny, unless one of three conditions were met, the most prominent being that the content being targeted was a particularly virulent type of the proscribable speech.[21]

This is, in part, why the R.A.V. court found the St. Paul law unconstitutional: the law targeted pro-Nazi and pro-Klan speech based on its content, when (supposedly) there were plenty of content-neutral ways to prevent people from burning crosses on another person's private property.[22] If all this is a bit confusing, don't worry—how to reconcile these two approaches divided the justices in R.A.V.,[23] and, to a lesser extent, in Black.[24]

II. TIME FOR MORE REGULATION?

Leaving aside the legal implications, what are the arguments for and against tighter restrictions on "hate speech?" First, it should be noted "hate speech" means different things to different people. It could be traditional speech (oral or published) or expressive conduct. It could consist of: words or phrases that disparage particular groups; symbols with historical associations with violence against particular groups; and any or all of the above combined with marching, rallying,

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19 *E.g.* McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014).
20 *See* Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1665 (2015).
21 R.A.V. v. St. Paul, 505 U.S. 377, 388–90 (1992).
22 Id.at 396.
23 *See* id.at 400–02 (White, J., concurring).
24 538 U.S. 343, 367 (2003) (Stevens, J., concurring)

and other use of public space. Arguments for tighter regulation of hate speech often have only one of these specific categories in mind.

For example, Jeremy Waldron would regulate speech that conveys a message about a particular group's inferiority. According to Waldron, such speech reduces the status of members of the maligned group as equal citizens.[25] Waldron argues that this motivation for regulation can be distinguished from protecting people from the feelings of offense that might accompany hate speech, which would be an insufficient reason to regulate.[26] Herbert Marcuse wrote a half century ago that to move from an oppressive to a free and equal society, the government needed to discriminate against certain speech that perpetrated inequalities—not just speech that voiced racial hatred but also speech against expanding social security or health care.[27] Finally, Elie Mystal, arguing on More Perfect's excellent recent debate on this topic,[28] argued that the government should be able to restrict false and dangerous speech, with Charlottesville as his prime example.

The arguments against regulating hateful speech also fall into several broad camps. There are what one might call pure "line-drawing" concerns—i.e. that no line can be drawn, using objective criteria, between hate speech and valuable political speech, for example, on issues like immigration (Justice Stevens makes this point in a review of Waldron's work).[29] There are "line-drawer" concerns that focus less on whether there's an objective line but on the effects of giving government the power to draw such lines—see Glenn Greenwald's review of the applications of hate-speech laws to minority groups around the world.[30] Finally, there is the "argument from effectiveness" that ACLU's National Legal Director David Coles, echoing Justice Brandeis,[31] made in defending his organization's decision to represent white supremacists seeking

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25 Jeremy Waldron, THE HARM IN HATE SPEECH 105–06 (2012). Waldron also wants to focus on more permanent expressions such as the written word or at least recorded speech, because of their ability to remain in the public record. *See* id.at 38.

26 Id.at 105–09.

27 Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 100 (Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse, eds., 1969).

28 *The Hate Debate*, WYNCSTUDIOS (Nov. 6, 2017), https://www.wnycstudios.org/story/hate-debate.

29 John Paul Steven, *Should Hate Speech Be Outlawed?*, N.Y. REV. BOOKS (June 7, 2012), https://www.nybooks.com/articles/2012/06/07/should-hate-speech-be-outlawed/

30 Glenn Greenwald, *In Europe, Hate Speech Laws Are Often Used to Suppress and Punish Left-Wing Viewpoints*, INTERCEPT (Aug. 29, 2017), https://theintercept.com/2017/08/29/in-europe-hate-speech-laws-are-often-used-to-suppress-and-punish-left-wing-viewpoints/.

31 Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

permits—that counter-speech will be more likely to defeat the aims of hate speech than regulation in the long run.[32]

Tighter regulations on hateful speech exist in other countries. Canada criminalizes hate speech[33] and denying the Holocaust can lead to jailtime in various European nations.[34] While Americans often say that our open free speech protections are essential to our democracy, some wonder whether greater restrictions on speech would help reverse the worrying decline in the functioning of our democratic institutions and quality of our civil discourse. As discussed in the first part of this piece, such limits on hateful speech do not entirely lack precedent in the United States, but they would still represent a departure from our existing body of law. We are not the first generation to confront the tension between the harmful effects of some speech and the dangers of greater speech restrictions, and previous thinkers offer some guidance through this thorny problem.

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32 *See* Stevens, *supra* note 29.

33 *See* David Butt, *Canada's Law on Hate Speech Is the Embodiment of Compromise* GLOBE MAIL (May 12, 2018), https://www.theglobeandmail.com/opinion/canadas-law-on-hate-speech-is-the-embodiment-of-compromise/article22520419/.

34 *See* Dan Bilefsky, *EU Adopts Measure Outlawing Holocaust Denial*, N.Y. TIMES (Apr. 19, 2007), https://www.nytimes.com/2007/04/19/world/europe/19iht-eu.4.5359640.html.

FIGURE 1. TYPES OF PROTECTED SPEECH