"TELL YOUR FAGGOT FRIEND HE OWES ME $500 FOR MY BROKEN HAND": THOUGHTS ON A SUBSTANTIVE EQUALITY THEORY OF FREE SPEECH*

Shannon Gilreath **

INTRODUCTION

> *There is a misery of the body and a misery of the mind, and if stars, whenever we looked at them, poured nectar into our mouths, and the grass became bread, we would still be sad. We live in a system that manufactures sorrow, spilling it out of its mill, the waters of sorrow, ocean, storm, and we drown down, dead, too soon.*
>
> *—Julian Beck, The Life of the Theatre*[1]

* The title of this Article is taken from the actual words of the murderer of a young Gay man, Sean Kennedy, spoken to one of Kennedy's friends, only minutes after the murder. For a fuller description of the crime, see *infra* notes 124–25 and accompanying text.

** © 2008 University Fellow in Law and Professor for Interdisciplinary Study, Wake Forest University School of Law, North Carolina. My thanks are due to a number of colleagues and friends who contributed to this paper, principally friends and colleagues who participated in this Symposium, but also Professors Richard Delgado, Michael Curtis, Wendy Parker, Ann Scales, Wilson Parker, Sid Shapiro, Luellen Curry, Miki Felsenburg, Arthur Leonard, and Ron Wright. My perspective in this piece is also informed by the earlier theorizing of scholars critical of an absolutist view of free speech, especially Richard Delgado and Jean Stefancic, who, as well as any scholars I know, manage to integrate an understanding of the real-life hurt of stigmatized people with a boundless imagination of what America might be like if everyone mattered. I am also indebted to the work of Catharine MacKinnon and the late Andrea Dworkin. The MacKinnon/Dworkin work centers on pornography's harms to women, but it naturally and inevitably transcends that important, but discrete, arena because of the link that the groups, in addition to women, which I specify as "identity groups" for purposes of the following theory, share: a history of acute sexualization by their oppressors. Women, of course, have been sexualized by men, but Blacks have been sexualized in the sense that lynchings were deemed necessary to protect the virtue of the white woman from sexually predatory Black males. Jews, too, have been portrayed as oversexed and predatory. Gays and Lesbians have been so thoroughly sexualized at the hands of their oppressors that it is nearly impossible to talk about them as people without referencing their homo*sexual* acts.

I am appreciative of the tireless efforts of my excellent student research assistants, Ben Prevas, J.D. Koesters, and Jamie Filliben, and of Wake Forest's law librarians, especially Ellen Makaravage and Jason Sowards.

This Article is about what I term "anti-identity" speech and its effects on its targets. Its targets are almost always minorities who are unpopular because of certain inescapable identifying traits.[2] They are always traditionally marginalized and systematically disadvantaged peoples. Because this Article focuses on the rights of victims and not obsessively on the rights of their oppressors, as most free speech commentary does, it is not a discussion of free speech as it relates to "justice"; any conversation about justice in an American legal system that is, in effect, broken for identity minorities reduces to a conversation about the administration of injustice.[3] Rather, this Article is a consideration of free speech as it relates to freedom.[4] For the purpose of this discussion, I intend my comments to be relevant to all identity groups, but I will predominately examine the topic through the lens of the Gay[5] experience—because it has been my experience.

Any examination of anti-identity speech through the lens of Gay experience must necessarily come to terms with the fact that our attackers usually deny us the existential status they concede to their other victims. They do not even imagine that our situation could be existentialist.[6] And, of course, this assertion is part of their anti-identity speech campaign against us.[7] The anti-identity attacks

1. JULIAN BECK, THE LIFE OF THE THEATRE: THE RELATION OF THE ARTIST TO THE STRUGGLE OF THE PEOPLE 1 (1972).

2. For purposes of this Article, I define an "identity group" as a minority group historically discriminated against and systematically disadvantaged on the basis of the identity traits of race, ethnicity and religion, sex, and sexual identity.

3. It is more than a little ironic that participating in a symposium on equality and speech obligated me to write about free speech from the perspective of Gay people, for whom speech has not been equal and certainly has not been free. Indeed, the idea that speech in this country is "free" or "equal" for any minority group may be the greatest liberal hoax of history.

4. This point is explicated more fully in SHANNON GILREATH, SEXUAL POLITICS: THE GAY PERSON IN AMERICAN TODAY 127–28 (2006) [hereinafter GILREATH, SEXUAL POLITICS].

5. My convention in this Article is to capitalize the words "Gay," "Lesbian," and "Black." I do this in recognition of the fact that these categorical labels often describe far more than the mere implication of biological essence. By this I mean that "Gay" and "Black" often bespeak a cultural, social, and political identity of shared experience that "white" and "straight" do not. For purposes of economy in this Article, "Gay" will sometimes be used alone when referring to "Gay" and "Lesbian," but in all cases is meant to encompass both "Gay" and "Lesbian."

6. For a general discussion, see GILREATH, SEXUAL POLITICS, *supra* note 4, at 49–50. *See also* Michael W. McConnell, *What Would It Mean to Have a 'First Amendment' for Sexual Orientation?*, *in* SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE 252 (Saul M. Olyan & Martha C. Nussbaum eds., 1998).

7. The exception may be the Catholic Church. The Church's categorization of Gays as "inherently disordered" does concede an element of existentiality. The Church's treatment of Gays, however, does not indicate that

against us are all the more insidious because the speech intersects with assertions of religious belief. These interests converge to render the speech off limits, regardless of its effects on its targets. This view has been so insidious that it has also infected the "liberal" academy.[8] Apparently, only the powerful, through the religions they have created for themselves, have the uniquely "American" capacity to determine their own destinies. Thus, the speech of the homophobe becomes like the life of his victim: bitter and unanswerable.

The operational vehicle for my discussion here is the Ninth Circuit's recent decision in *Harper v. Poway Unified School District*,[9] upholding a high school's ban of a student's T-shirt with a degrading message about homosexuality. Judge Reinhardt, writing for the panel majority, held that degrading messages about the identity of certain minority groups could be constitutionally proscribed in the public grade-school setting by applying the first prong of the analysis set forth in *Tinker v. Des Moines Independent Community School District*,[10] which held that speech that "impinges on the rights of other students" may be constitutionally proscribed.[11] To my knowledge, this is the first time any court has actually applied this particular prong of the *Tinker* analysis, as opposed to the more familiar "substantial disruption" prong.[12]

---

this conceded existentiality matters.

8. Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

9. 445 F.3d 1166 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007). In 2004, Tyler Chase Harper, a sophomore at Poway High School, wore a T-shirt to school, which read, "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back. *Id.* at 1171. The next day, presumably to avoid the fashion *faux pas* of being seen in the same outfit twice, Mr. Harper wore a shirt, which read, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED." *Id.* Apparently, Harper wore the shirts in protest to the recently orchestrated "Day of Silence," by which Gay students and their allies drew attention to the inequality faced by American Gays and Lesbians. *Id.*

On the second day, a teacher asked Harper to remove the shirt, and he refused. He was then sent to the principal's office. *Id.* at 1172. He again refused to remove the shirt and indicated that he wanted to be suspended. *Id.* He was required to stay in the principal's office for the remainder of the day, but was not suspended or disciplined in any other way. *Id*. at 1173.

Harper and the Alliance Defense Fund filed suit in the U.S. District Court for the Southern District of California. Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006). The appellate decision in the case is discussed in detail in this Article at Part I, *infra*.

10. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

11. *Harper*, 445 F.3d at 1177–78 (quoting *Tinker*, 393 U.S. at 509).

12. *Harper* quotes the Tenth Circuit's ruling in *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000), that the display of the Confederate flag might "interfere with the rights of other students to be secure

Judge Reinhardt's opinion is, of course, not without controversy. It was met by a withering dissent from Judge Kozinski and by criticism from well-known legal scholars.[13] In this article, I explain why, considering the First Amendment and the free speech norm, along with the Fourteenth Amendment and the equality norm, Judge Reinhardt's decision is correct.

Harper raises the usual questions about the limits of free speech for public school students, but it also raises taboo questions about the parameters of the free-speech norm itself. Moreover, it marks a rare case in which judges are willing to talk about speech in a social context and to consider the *real* harm to the targets of anti-identity speech. *Harper* is a judicial look at such speech through the lens of "minority experience"—in this case, the Gay experience. In that respect, the decision is remarkable for the broader questions it raises. Indeed, the compassionate among us, conscious of human experience, find ourselves asking these questions over and over, as derivatives of the darkest aspects of human history:

- How could Americans espoused to the view that "all men are created equal" subjugate a race into slavery, transforming people into chattel to be beaten and prodded and worked for profit without so much as a nod to their dignity?
- How could Christians of the Dark Ages be convinced that women were witches, resulting in the burning (and other horrendous) deaths of more than nine million women?[14]
- How could the German populace—with less or more knowledge depending on one's historical perspective—watch as their government ghettoized Jews and pulled down synagogues, melting stars of David into golden lamps eventually to be shaded by the human skin of some of the six million Jews murdered by the Nazis?[15]
- How could some human beings be convinced of the rectitude of slamming passenger jets into office buildings heavily populated with civilians?[16]

The incredulous reader will say that these atrocities could not be committed by Americans today. Perhaps not. But contemporary America has its targets and its victims. What we cannot match in

and let alone." *Id.* at 1178 (quoting *West*, 206 F.3d at 1366). But the *West* court actually interpreted the "rights of other students" as coextensive with "material and substantial disruption of school discipline." *West,* 206 F.3d at 1366.

13. *See, e.g.,* Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/archives/archive_2006_04_16-2006_04_22.shtml#1145577196 (Apr. 20, 2006, 19:53 EDT) (being entitled *Sorry Your Viewpoint is Excluded from First Amendment Protection*).

14. ANDREA DWORKIN, WOMAN HATING 129–30 (1974).

15. MAX I. DIMONT, JEWS, GOD, AND HISTORY 373 (2004).

16. The reference here is, of course, to the 9/11 disaster.

historical magnitude we make up for in tenacity. It is the *how* and *why* of it that puzzles us.

Harper provides for us the beginning of a partial answer, which is to say simply this: words matter. Language matters. These scenarios have in common a systematic dehumanization of the target effectuated by language. Of course, this did not happen in a blinding flash, but more as creeping twilight. First, there was innuendo set buzzing by the powerful. Then, there was targeted propaganda. Mere *words* devolved into physical violence. First, the victims were robbed of their humanity—that is essential—and, finally, they were robbed of their lives.

Harper did not involve the second step of the process; it did not involve the actual destruction of the Gay victim by physical violence, only his conceptual destruction. But *Harper* is a discrete look at the wider *how* and *why* of the second step. *Harper* also raises the question of what we may do, consistent with our free-speech norm, when the victim's well-being is threatened by *mere* words unaccompanied by immediate physical violence.

I will also address a closely related case, *Nuxoll* ex rel. *Nuxoll v. Indian Prairie School District No. 204*,[17] which involved similar facts and a similar concession as to the operation of the *Tinker* test on student anti-Gay speech, although, as we will see, with a very different analysis and outcome. *Harper* and *Nuxoll* are aimed at the problem of anti-identity speech as it is manifested in schools, where its targets are at their most vulnerable and in the greatest need of protection; but my concerns about anti-identity, anti-equality speech certainly are not confined to the school setting.[18] In that regard, cases like *Harper* and *Nuxoll* are important because, while at first blush they appear to be discrete situations with discrete solutions, they inevitably raise discomforting questions about speech—particularly so-called "hate speech"—in general. Thus, the arguments presented here are relevant to numerous situations in which the conceptual liquidation of the person is effectuated by

17. 523 F.3d 668 (7th Cir. 2008). The lower court decision, as *Zamecnik v. Indian Prairie School District*, cited *Harper* approvingly. Zamecnik v. Indian Prairie Sch. Dist. No. 204, No. 07-C-1586, 2007 WL 4569720, at *4 (N.D. Ill. Dec. 21, 2007) *rev'd sub nom.* Nuxoll *ex rel* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668 (7th Cir. 2008). In *Nuxoll*, Judge Posner drops any reference to *Harper*.

18. As a matter of practicality, grappling with anti-identity speech in schools is an efficient starting point. It is in school that this speech and its purveyors are at their most pernicious and harmful. Students, who are still constructing their views of self and of the world and who, at least in the grade school (K-12) setting, are unable to escape from damaging speech targeting their personhood, are particularly vulnerable. The setting also presents, because of the Supreme Court's decision in *Tinker* (and related cases), the best opportunity for the regulation of anti-identity speech. Consequently, it may present the best instructional model for developing arguments against anti-identity speech on other planes.

speech or expression that then finds refuge in the free speech clause of the First Amendment. As such, my arguments are relevant to anti-harassment, anti-bullying, and anti-hate speech laws. Harassing, bullying, and hate-filled speech are problematic on whatever plane and, indeed, may be constitutionally regulable on any plane.

I. THE CASES AND THEIR THEORIES

Method organizes the apprehension of truth.
—Catharine A. MacKinnon[19]

A. Harper v. Poway Unified School District *(9th Cir. 2006)*

1. The Majority

Judge Reinhardt's *Harper* opinion begins with the question to be decided: may a public high school prohibit students from wearing T-shirts with messages that *condemn* and *denigrate* other students on the basis of their sexual orientation?[20] A series of altercations had already occurred at the Poway High School so that the substantial disruption necessary to regulate speech consistent with *Tinker* was, arguably, established.[21] But the court did not pursue this usual method of student-speech analysis. Instead, the court relied on the first of the two *Tinker* prongs, permitting schools to prohibit speech that "'intrudes upon . . . the rights of other students'" or "'colli[des] with the rights of other students to be secure and to be let alone.'"[22]

Because students in K-12 schools are "discovering who and what they are," they are often insecure. Generally, they are vulnerable to cruel, inhuman, and prejudiced treatment by others."[23] On that basis, Judge Reinhardt concluded: "[W]hile Harper's shirt embodies the very sort of political speech that would be afforded First Amendment protection outside of the public school setting,[24] his rights in the case before us must be determined 'in light of

19. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE: 106 (1989).

20. *Harper,* 445 F. 3d at 1170 (emphasis added).

21. *Id.* at 1171. This was the course the district court took in dismissing Harper's suit. *Id.* at 1175. School officials recalled that these physical altercations were, specifically, the results of "anti-homosexual" speech. *Id.* at 1171. Some members of the community, presumably parents, had called the school threatening to do "something about" the school's "condoning" of the "Day of Silence" organized by the Gay-Straight Student Alliance. *Id.* at 1172–73 n.7.

22. *Id.* at 1175 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (alteration in original).

23. *Id.* at 1176.

24. *Id.* This is a point that I in no way concede in this Article.

[those] special characteristics.'"[25] Thus:

> Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses. . . . Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society . . . [an interest] perhaps most important "when persons are 'powerless to avoid' it."[26]

The majority further held:

> Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn. The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development.[27]

The majority went on to cite studies and statistical data that supported the court's finding that Gay youth subjected to anti-identity speech suffer actual harm as a result of assaultive speech.[28] Directly engaging Judge Kozinski's dissent, the majority shows an intellectual courage often missing from judicial opinions regarding Gay rights: "Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong. To say that homosexuality is shameful is to say, necessarily, that gays and lesbians are shameful."[29]

Troubling for the dissent and other objectors is the distinction that the majority draws between anti-identity assaults and other expressions of political viewpoint. The court notes the stark difference between speech campaigns that strike at the core, existential characteristic by which a person is defined into a lesser caste and speech that may, for example, insult a person's political

25. *Id*. (quoting *Tinker*, 393 U.S. at 506) (alteration in original).
26. *Id.* at 1178 (quoting Hill v. Colorado, 530 U.S. 730, 716 (2000)).
27. *Id.* at 1178–79 (footnote omitted).
28. *Id.* at 1179.
29. *Id.* at 1181. Sadly, it is an intellectual courage also missing from a great deal of academic literature. I make precisely the majority's argument in an elaborated form in Shannon Gilreath, *Some Penetrating Observations on the Fifth Anniversary of* Lawrence v. Texas: *Privacy, Dominance, and Substantive Equality Theory*, 30 WOMEN'S RTS. L. REP. (forthcoming Spring 2009), (manuscript at 20–23, [hereinafter Gilreath, *Penetrating Observations*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161247).

affiliation.[30]

Perhaps more troubling for the defenders of a "free" speech system built on the premise of securing speech rights for powerful people who already have them, as our system is, is the majority's pointed distinction between "a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic[,] and political status."[31] Thus, as the dissent notes, the majority's theory of restriction does not encompass speech aimed at discrediting the preferred status of Christians or whites.[32] The pointed judicial recognition of a theory that distinguishes between the powerful and the powerless must sound like a dirge to the believers in a system that allows for anti-identity saturation propaganda aimed at marginalized people, but provides no basis for those marginalized to gain an equal voice.

2. The Dissent

Judge Kozinki dissented. He disagreed with the majority's holding that Tyler Chase Harper's T-shirt intruded on the rights of Gay students in any substantial way. Judge Kozinski first characterized the message as a normal part of "ordinary . . . discourse in high school corridors and lunch rooms."[33] Judge Kozinski took issue with the majority's formula because, he said, it amounted to viewpoint discrimination:

> Given the history of violent confrontation between those who support the Day of Silence and those who oppose it, the school authorities may have been justified in banning the subject altogether by denying both sides permission to express their views during the school day. . . . I find it far more problematic—and more than a little ironic—to try to solve the problem of violent confrontations by gagging only those who oppose the Day of Silence and the point of view it represents.[34]

30. The court gave the example of "T-shirts proclaiming, 'Young Republicans Suck' or 'Young Democrats Suck' . . . . 'Similarly, T-shirts that denigrate the President, his administration, or his policies, or otherwise invite political disagreement or debate, including debates over the war in Iraq,' would not fall within the 'rights of others' *Tinker* prong." *Id.* at 1182. As the majority observed in a footnote, "[A]nti-war T-shirts . . . constitute neither an attack on the basis of a student's core identifying characteristic nor on the basis of his minority status." *Harper*, 445 F.3d at 1182 n.27.

31. *Id.* at 1183 n.28.

32. *Id.* Although, as the majority rightly noted, the second prong of *Tinker*, the "substantial disruption" prong, is still operable and may supply some relief in those circumstances. *Id.*

33. *Id.* at 1194 (Kozinski, J., dissenting).

34. *Id.* at 1197 (Kozinski, J., dissenting). This studied judicial inability to distinguish between the powerful and the powerless reminds me of James Baldwin's observation that:

Judge Kozinski also insisted Harper's "Homosexuality is Shameful" message amounted only to casual offense and that, "'[t]he mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.'"[35] Kozinski goes on to refute the majority's characterization of "anti-identity" speech as that speech that targets a person based on a core identifying characteristic related to the person's minority status. "What makes a minority?" Kozinski effectively asked.[36]

> [D]o we look to the national community, the state, the locality or the school? In a school that has 60 percent black students and 40 percent white students, will the school be able to ban T-shirts with anti-black racist messages but not those with anti-white racist messages, or vice versa?
>
> . . . If the Pope speaks out against gay marriage, can gay students wear to school T-shirts saying "Catholics Are Bigots," or will they be demeaning the core characteristic of a religious minority?[37]

"The fundamental problem with the majority's approach," he concluded, "is that it has no anchor anywhere in the record or in the law."[38]

B. Nuxoll v. Indian Prairie School District *(7th Cir. 2008)*

The *Nuxoll* case also involves the limits of anti-Gay speech in public schools. Also in response to the Day of Silence, Alexander Nuxoll, a high school student, wanted to wear a T-shirt bearing the words "Be Happy, Not Gay," but was prohibited from doing so by a school policy forbidding the making of derogatory comments referring to the race, ethnicity, religion, gender, sexual orientation, or disability of another student.[39] Writing for the panel, Judge

---

> The powerless, by definition, can never . . . make the world pay for what they feel or fear except by the suicidal endeavor which makes them fanatics or revolutionaries, or both; whereas, those in power can be urbane and charming and invite you to those which they know you will never own. The powerless must do their own dirty work. The powerful have it done for them.

JAMES BALDWIN, NO NAME IN THE STREET 93–94 (1972).

In a legal world where we pretend that there is no distinction between the powerful and powerless, the powerful have their dirty work done by laws and judges.

35. *Harper*, 445 F.3d at 1200 n.10 (Kozinski, J., dissenting) (quoting Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264–65 (3d Cir. 2002)).

36. *Id.* at 1201.

37. *Id.*

38. *Id.*

39. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 670 (7th Cir. 2008).

Richard Posner granted Nuxoll's request for a preliminary injunction against the policy as applied to his T-shirt.[40] Posner, however, asserted that such a policy is sound if the restricted comments are sufficiently derogatory to interfere with the educational purpose of the school.[41] Posner's theory is distinguishable from that of the Ninth Circuit in *Harper*, which was a theory specifically grounded in the rights of students to be free from assaultive speech in school. Judge Posner is not terribly interested in anyone's identity or subordination; he believes the constitutional focus more properly rests on the rights of the school itself to maintain an orderly learning environment:

> [W]e cannot accept the defendants' argument that the rule is valid because all it does is protect the "rights" of the students against whom derogatory comments are directed. Of course a school can—often it must—protect students from the invasion of their legal rights by other students. But people do not have a legal right to prevent criticism of their beliefs or for that matter their way of life. . . .
>
> The school is on stronger ground in arguing that the rule strikes a reasonable balance between the competing interests—free speech and ordered learning—at stake in the case.[42]

Posner's shift is important here, because it is a shift in focus away from equality rights to institutional rights. Nevertheless, the realities of the lives of Gay youth are important to vindicate this institutional interest. In *Nuxoll*, Judge Posner cited a number of studies demonstrating that Gay youth subjected to anti-identity speech face real psychological harm that may affect their performance in school.[43] He took this information and transmuted it from the universe of power and caste (the focus of the *Harper* court) back to the universe of substantial disruption—the watchwords of institutional stability: "[I]f there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech."[44]

"So," Posner continued, "[Nuxoll] is not entitled to a preliminary injunction against the rule."[45] That is, Nuxoll is not entitled to a preliminary injunction that would allow him to make *any* negative

40. *Id.* at 676.
41. *Id.*
42. *Id.* at 672.
43. *Id.* at 671.
44. *Id.* at 674.
45. *Id.* at 675.

comments about homosexuals that stop short of fighting words. But, with respect to his "Be Happy, Not Gay" message, Posner granted him his injunction.[46] Why? The "why" for Posner is that forbidding the message, "don't be gay," stretches the school's policy "too far."[47] By Posner's thinking, "don't be gay" is not derogatory enough;[48] it is only "tepidly negative."[49] "Be Happy, Not Gay," even in a context of hostility to Gays that Posner explicitly recognizes, cannot be expected to have the sort of negative effect on Gay students necessary to create the requisite substantial disruption to the institutional interest he believes the school's policy justifiably safeguards.[50] Any evidence that the message "don't be gay" may have this negative psychological effect is, for Posner, "highly speculative."[51]

46. *Id.* at 676.

47. *Id.* at 675.

48. *Id.* at 676. Protection of anti-Gay speech is often accomplished through the clever lie that the speech is not targeting Gay people, only homosexual *acts*. Plaintiff Nuxoll and the powerful anti-Gay interests litigating for him are careful to acknowledge that a school could regulate the use of individuated attacks crossing the threshold of "fighting words." The plaintiff purports to comment only that "homosexual *behavior* is contrary to the teachings of the bible, damaging to the participants and society at large, and does not lead to happiness." *Id.* at 678–79 (Rovner, J., concurring) (emphasis added). This is a clever characterization of the attack at issue, but it is not reality. Judge Rovner, although ultimately she does not care, is quite clear on this fallacy:

> My brothers also wonder whether this slogan is actually derogatory, noting that it is a play on the words "happy" and "gay." That it is a play on words does not change its ultimate meaning, however. Nuxoll tells us that he intends the slogan to convey the message that "homosexual behavior is contrary to the teachings of the bible, damaging to the participants and society at large, and does not lead to happiness." Throughout his brief, he claims to be criticizing homosexual "conduct" and "behavior" although his four-word polemic "Be Happy, Not Gay" does little to convey this message and instead seems to attach homosexual identity. Nonetheless, the statement is clearly intended to derogate homosexuals.

Id. at 678–79 (Rovner, J., concurring) (citation omitted).

Of course, it is. As the concurrence also points out, Nuxoll's T-shirt slogan is a double play-on-words, because the word "gay," formerly "happy," now "homosexual," has been transformed into a general insult. Nevertheless, the concurrence continues, "I suspect that similar uses of the word 'gay' abound in the halls of Neuqua Valley High School and virtually every other high school in the United States without causing any substantial interruption to the educational process." *Id.* at 679.

I wonder how many Gay student testimonies informed that conclusion.

49. *Id.* at 676.

50. *Id.*

51. *Id.*

II. SUBSTANTIVE EQUALITY THEORY

> *For freedom is always relative to power, and the kind of freedom which at any moment it is most urgent to affirm depends on the nature of the power which is prevalent and established.*
>
> *—R. H. Tawney, Equality*[52]

While I am in principal agreement with the *Harper* majority, I have some disagreement with the majority's theory. For the rest of this Article to be coherent, it is necessary at this point to leap ahead a bit intellectually and articulate exactly what restrictions on speech I see as permissible—even necessary. The rest of the Article is my effort to explain the "why" and "how" of the theory I now articulate. My theory of speech is one grounded in substantive equality, a grounding that, in turn, raises prickly questions about hierarchy and power. Equality in this country cannot be understood, in any substantive way, apart from an understanding of power and how power operates to create and then to maintain a caste system where there are identifiable oppressor and oppressed classes.[53] An understanding of free speech that is informed by a commitment to substantive equality necessarily also must confront power hierarchy.

In a system of free speech committed to equality, it is entirely consistent with a commitment to free speech to draw a distinction between speech that has as its aim genuine political debate and discussion and speech that has as its aim the silence and demoralization of others. In this, the Ninth Circuit and I are in agreement. I think it is important, however, to set out the exact basis for this distinction. The Ninth Circuit understandably grounded its opinion on *Tinker*.[54] Free of the judicial restraints that defined the parameters of the Ninth Circuit's opinion in *Harper*, I believe there are more substantial constitutional reasons to draw a distinction between speech that encourages political debate and

52. R. H. TAWNEY, EQUALITY 167 (4th ed., rev. 1964).

53. This theory, most fully articulated in Gilreath, *Penetrating Observations*, *supra* note 29, at 14–15, has been central to my work from the start, from Shannon Gilreath, *Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent*, 25 T. JEFFERSON L. REV. 559 (2003), through GILREATH, SEXUAL POLITICS, *supra* note 4, and through this Article.

54. I do not explore in detail the cases, beginning with *Tinker*, in which the Supreme Court has formulated special tests by which to adjudicate free speech claims involving public-school youth. For purposes of my discussion, I assume that the reader has a basic familiarity with the Court's school-speech theory. For a thorough rehearsal of the Court's school-speech jurisprudence, see Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431 (2009) [hereinafter Curtis, *Be Careful*].

speech that demoralizes and silences. Indeed, there is a powerful argument that the government has a constitutional obligation to ensure the equal dignity and equal participation of historically disenfranchised people and to protect them from speech which effectuates subordination.

Everyone knows that the First Amendment protects—along with other things—freedom of speech. What is less clear is exactly what the framers of that provision were protecting. The Constitution, from the point of view of its powerful framers, was a means to the end of securing the power they already had. The "have-nots" were left in the same position they were in before the Constitution. In myriad ways, the speech of the Founders depended upon the silence they imposed on the people they conspired to render legally invisible.[55] Meanwhile, the powerful came up with a clever analogy to describe a system of free speech that focuses on the right of powerful people to remain powerful, at the expense of the victims of that power, in terms only the powerful understand. The "Marketplace of Ideas"[56] recalls power, property, and money. It says

55. There's no denying that the Constitution originally valued Black people as three-fifths of a person and that many of the Founders considered Blacks part of the "property" that they pointedly sought to secure by the Constitution's very letter.

Beyond this, when many of us consider the constitutive mind that gave us the Constitution, we see only our stark absence (or the absence of those like us). There certainly were no women among the Framers, although there were men who owned women, effectively, as chattel property. There probably were some Gay men among the Framers, but certainly none who could admit they were so. Whatever else they were, we can say that our founding fathers were presumptively straight, a standard for citizenship that hasn't changed much down to this minute.

Despite what I discuss here as the Founders' failings, there is some evidence that even they did not intend an inviolate right of speech that would shield egregious personal attacks. Benjamin Franklin remarked of the free speech clause of the Pennsylvania Constitution: "[I]f it means liberty to calumniate another, there ought to be some limit." ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 17 (1941). There also is evidence that the Founders viewed free speech, operating appropriately, as operating on an understanding of power and oppression. In correspondence with the inhabitants of Quebec, in 1774, the Continental Congress explained:

> The last right we shall mention regards the freedom of the press. The importance of this consists, besides advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiment on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs.

Id.

56. For a discussion of the "Marketplace of Ideas" theory, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he 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

nothing of whole segments of the population it excludes—women: men's property then, undervalued and underpaid now; African-Americans: slaves then, disproportionately poor and disenfranchised now; Gay people: totally invisible then, only marginally more visible now. In many cases, these people cannot afford the "marketplace" of the powerful. The price is simply too high. And the powerful make certain, by laws they make and judges they appoint, that the price point rarely moves.

The marketplace of ideas analogy assumes, either implicitly or explicitly, that there are no false ideas, only ideas to be picked or chosen, much in the same way that one would select apples at a market. There may be good or bad apples, better or worse apples, but no "false" apples. In the marketplace of ideas, there are good apples (fairness and civility, civic respect, and political correctness) and there are bad apples (bigotry, hate, malevolence). Presumably, the consumer may choose freely and, presumably, he will, more often than not, choose the good apples, eventually marginalizing the purveyor of bad apples or driving him from the market altogether. The analogy is flawed in several important respects. First, the analogy does not account for the monopolist as he appears in the marketplace of ideas—and he does, indeed, exist in this metaphorical marketplace, too. The very purpose of anti-identity speech is to monopolize the debate to the exclusion of the targeted group. So, a better analogy would be a market where no Blacks or Gays or women were allowed to shop; when they try to enter, they are driven away by vicious, dehumanizing verbal attacks. When the attackers see that the law offers no response, their next attack is more vicious and likely physical.

Also, it is obvious, perhaps too obvious to be said, that ideas are not apples. There *are* false ideas. In the American democratic order, we have determined that the equality of every person is a paramount principle[57]—perhaps the ultimate principle of ordered liberty. Equality is a fundamental right of every citizen. Thus, expression that is targeted to undermine equality, to subjugate an individual or group purely because of group identity, and to exclude the victim from meaningful, equal citizenship is—constitutionally speaking—false.[58]

The Fourteenth Amendment marked a seismic shift in the

carried out.").

57. U.S. CONST. amend. XIV, § 1.

58. Of course, in the speech context, although not explicitly in an anti-equality speech context, the Supreme Court has held: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974). The Court's cavalier overlay of bourgeois capitalism on free speech continues to undermine equality when it contends with speech.

ground on which First Amendment tradition rests. With the addition of the Fourteenth Amendment, the Constitution, for the first time, guaranteed equality—facially, at least. A constitutional commitment to equality, if it means anything at all, must at least mean that certain people cannot be forced into a caste system, into an existence as second-class citizens, because powerful people regard them as somehow less valuable.

The exercise of equality—its meaningful exercise, at least—depends on speech, both the right to speak—a positive right to your own voice (a right I have explored elsewhere[59])—and the negative right to be free from speech that dehumanizes you. Congruent with this negative right, U.S. law has evolved to see some types of speech, once permitted, subsequently prohibited, such as a sign reading, "No Blacks Served Here,"[60] or the words of a boss, "Fuck me or you're fired."[61] Indeed, the law no longer categorizes such speech in terms of "speech" at all, although it certainly does constitute speech. Instead, we now label these words by reference to what they *do*: discrimination. There is a paradigm shift in these situations from the realm of *words only* to the realm of *action*—speech as action. In these cases, the courts have weighed the competing rights of the speaker with those of the people affected by such speech and have held that the equality rights involved were more important than the right to unfettered speech. The development of laws prohibiting sexual harassment in the workplace (in order to effectuate some equality between the sexes) is an example of considering speech for what action it constitutes.[62]

In these situations, we are not concerned with viewpoint or the attendant ramifications of viewpoint discrimination. Really, what more forceful articulation of a point of view is there than "No Blacks Served Here" or "Fuck me or you're fired"? One sends the unmistakable message that Blacks are inferior, while the other sends the same message about women: Blacks are unfit for service with whites and women are fit only to serve as fuck dolls. We do not inquire whether a policy that prohibits "Fuck me or you're fired" but permits women to petition for equal pay for equal work is "viewpoint neutral," precisely because the viewpoint expressed by "Fuck me or

59. Shannon Gilreath, *Sexually Speaking: "Don't Ask, Don't Tell" and the First Amendment After* Lawrence v. Texas, 14 DUKE J. GENDER L. & POL'Y 953 (2007).

60. *E.g.*, Blow v. North Carolina, 379 U.S. 684, 684–85 (1965) (finding that a restaurant serving "whites only" violated the Civil Rights Act of 1964).

61. Stockett v. Tolin, 791 F. Supp. 1536, 1543 (S.D. Fla. 1992).

62. Despite the widespread acceptance of these legal improvements, some scholars continue to insist that even these concessions to equality are unconstitutional. *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1797 (1992). Such protestations, however, proceed from a theory that privileges the right to speak over the right to equality—a posture I, obviously, do not adopt.

you're fired" is only restricted incidentally to the regulation of discriminatory conduct. Put another way, we do not restrict such speech in the workplace for what it says—at least not only for what it says—but rather for what it does (which is to harass women out of the workplace or, at least, to condition their participation on their sexual submission to male bosses). The law of speech, informed by the law of equality, has evolved to deal with these harmful actions in reasonable ways. Nevertheless, similar speech, which we might colloquially define as "hate speech," but which I prefer to define as "anti-identity" speech,[63] in the parlance of the *Harper* court, or perhaps as "anti-equality speech," targeting traditionally marginalized groups, still abounds.

In most of these cases, the courts have held that the right of the Nazi,[64] the Klansman,[65] the pornographer,[66] or the homophobe[67] to "speak" outweighs the equality interests of the targets of such speech.[68] In these cases, equality and speech are treated as trains departing from separate stations and on separate tracks. In reality, however, the two are on a collision course. The great interpretive challenge is to reconcile the two commitments, recognizing that they represent competing interests in some instances and complementary interests in others. When the two commitments do collide, equality should prevail as the subsequent and preeminent principle of liberty.

Consequently, a theory of free speech consistent with equality begins here: speech that has as its aim or effect the subordination and second-class status of historically disenfranchised minorities offends equality and can be restricted in reasonable ways. In such discrete instances, the speech is analyzed and regulated on the basis of harm, not viewpoint. The speech is restricted for what it does—erode equality—not for what it says. To put it another way, equality provides the compelling state interest for restrictions of anti-

63. Anti-identity speech, as a method of categorization, is broader than "hate speech." Anti-identity speech does not require the use of individualized insults or epithets and can be delivered quite effectively and aggressively with a smile and a soft voice. To understand the nuance, one must think of James Dobson, not David Duke.

64. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978) (striking down a Village of Skokie, Illinois ordinance making it a misdemeanor to disseminate any material—including "public display of markings and clothing of symbolic significance"—promoting and inciting racial or religious hatred). In *Collin*, Skokie leaders wanted to use this ordinance to prohibit Nazis from demonstrating in Skokie, a town with a large population of Jewish Holocaust survivors. *Id.*

65. Brandenburg v. Ohio, 395 U.S. 444 (1969).

66. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) (invalidating a law that would have given women a sex-discrimination remedy against pornography).

67. *See*, *e.g.*, Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001).

68. That is *if* the equality interest has been seriously considered at all.

identity, or anti-equality, speech.

A theory thus articulated requires a conceptualization of the end product of anti-identity speech as actual harm—something more than "hurt feelings, offense, or resentment."[69] It also requires a showing that restrictions are related in constitutionally significant ways to the defense of equality. This calls into question a number of popular myths anchoring the absolutist view of free speech, as well as demands their answer through a realistic look at the interrelation of language, history, and context. The next section of this Article takes up this important discussion.

III. SPEECH AND HARM

[C]ruelty is an idea in practice.

—Antonin Artaud, Collected Works[70]

Gay people in the United States have fewer rights than do barnyard animals in Sweden.

—Richard Mohr, Gays/Justice[71]

When historians write our history books, when they write down the lives of those great people who have created our past and shaped our destinies, when they write of their lives and loves and deaths, they have the enviable advantage, in most instances, of having never known their subjects. They have not seen the twinkle of life and promise in their eyes; they have not heard their voices, known their habits, watched the corners of their mouths crinkle into a smile, or held their hands in moments despairing of hope. In short, they have not known what makes their subjects so inexorably, ineluctably human. Their stories can be written methodically, incrementally—scientifically.

It is an entirely different and terrifying matter to know the people about whom and for whom one writes.[72] It is an entirely different and entirely terrifying matter to confront the death, not of some specter in the dusty annals of history, but of a young man gone too soon, often under abhorrent circumstances and, worst of all, for no good reason. It makes history, of which these dead people are now also a part, all the more personal and the more urgent. The history of free speech in this country is not one that has included the people about whom I write. And the present, etiolated by its place

69. *See infra* note 279 and accompanying text.

70. ANTONIN ARTAUD, COLLECTED WORKS 1 (1968).

71. RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW 5 (1988).

72. Gay people have been totally sexualized by our oppressors, and we have sexualized politics by bucking traditional heterosupremacist norms. Consequently, for Gays, the personal is political. This author's experience has been no exception.

in history's shadow, has no room for them either. Free speech, as it is determined by those powerful people who decide what the First Amendment means for the rest of us, is about protecting the "rights" of the Nazis, the Klansman, the misogynists, and the gay bashers. It has nothing—nothing at all—to do with the victim. Comfort and security are the prerogative of the powerful; harm is somebody else's reality.

For a discussion of anti-identity speech to be meaningful, there must be a realization that speech, in certain discrete circumstances, equates to actual harm. This realization made the *Harper* majority's theory possible; the failure to realize this same concept of speech as harm on Judge Kozinski's part animated his dissent. Judge Posner, by contrast, recognized that speech can be harm, but then obfuscated that harm by transferring it to the institution of the school, ignoring entirely the real-life aspects of the situation before him.

Conceptualizing speech as harm—understanding that words do not operate in a vacuum—is of paramount importance to any equalitarian theory of speech that matters. Words do not operate in a vacuum but rather are inevitably plugged into a social context. That context is often determinative of when words are words *only* and when they move beyond *mere words* to constitute actions—dehumanization, degradation, and subjugation. As this section of this Article demonstrates, social context is inseparable from power hierarchy that everywhere operates in and through that same context.

A. Subordination Through Language: The Parable of Coleridge Jackson.

> *Coleridge Jackson had nothing to fear. He weighed sixty pounds more than his sons and one hundred pounds more than his wife. His neighbors knew he wouldn't take tea for the fever; and the gents at the pool hall walked gently in his presence. So everybody used to wonder why Coleridge would come home, take off his shoes, hang up his coat, and beat the water and the will out of his puny little family. Everybody wondered, even Coleridge wondered, the next day or even later that same night. Everybody wondered except Coleridge's weaselly little sack of bones white boss, with his envious little eyes. He knew; he always knew. And when people told him about Coleridge's family—about the black eyes, the bruised faces, the broken bones—how that scrawny man laughed. And the next day he treated Coleridge nicely—like Coleridge had just done him the biggest favor. But then, right after lunch, he'd start in on Coleridge again: "Hey, come here, Sambo. Can't you work any faster? Who on earth needs a lazy nigger?" But Coleridge would just stand there, not*

> *saying a word, his eyes sliding away, lurking at something somewhere else.*[73]

Coleridge Jackson is a story about the power of language to effect what it describes. What it describes, in the case of Coleridge Jackson and countless other marginalized and stigmatized people, is the process of dehumanization. Dehumanization is the transformation of someone first into some*thing* and finally into no*thing*.

The question, "Who on earth needs a lazy nigger?," spoken by a white bigot and given a certain veracity by institutional scaffolding, becomes internalized, becomes internecine. The oppressed person begins to wonder if he, indeed, may be that thing that his oppressors say he is. Dehumanization is a very effective means of changing someone into nothing because it ensures that the messages one hears from *others* about oneself eventually become the messages one hears from oneself about oneself, and that is all the more damaging. It has happened this way to the Black man—the finely sinuous proliferation of the myth that he is desperate and dangerous—until, finally, even the Reverend Jesse Jackson is heard to proclaim his relief at discovering the footsteps heard in a darkened alley belonged to a white man.[74]

Dehumanization is real, and it happens most often to stigmatized people. It is real life for them. It is a life by which they are transformed into a target. The language of dehumanization does not necessarily betray physical violence, yet it inhabits it. This language—what I call "anti-identity" speech—while paradigmatically cruel, is not always overtly violent. But there is real cruelty that does not have in it overt violence.[75]

Cruelty happens to the marginalized in our society on a daily basis. Perhaps no group in this country experiences this as "ordinary" more than Gays and Lesbians. When one thinks about the everyday lives of Gay and Lesbian people, particularly Gay and Lesbian youth, it is hard not to think of those lives as an exercise in cruelty—at least, that is, if one is taking an honest look. Professor

73. This parable of Coleridge Jackson is adapted by the author from the poem *Coleridge Jackson*, by Maya Angelou. For a script of the original, see MAYA ANGELOU, *Coleridge Jackson*, *in* THE COMPLETE COLLECTED POEMS OF MAYA ANGELOU 234, 234–36 (1994).

74. In a November 29, 1993 article in the *Chicago Sun-Times*, Jackson is quoted as saying, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery, . . . [t]hen look around and see somebody white and feel relieved." Mary A. Johnson, *Crime: New Frontier/ /Jesse Jackson Calls it Top Civil-Rights Issue*, CHI. SUN-TIMES, Nov. 29, 1993, at A4.

75. *See* Author, *Pornography Happens*, *in* ANDREA DWORKIN, LIFE AND DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN 129 (1997).

Mari Matsuda notes that, "[t]he places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live."[76] For me, as a Gay writer, the glaring omission from her list is my own people—Gay and Lesbian people. But it is not striking that Gay people have been omitted from this list; they are almost always omitted from protection, almost offhandedly, even by those people who, if they thought about it, would likely include them. This sort of omission is exactly the reason that Gay people present the archetypal class for explaining the need for reasonable regulation of anti-identity speech.

B. Evidence

A response to anti-identity speech must assume, of course, that the targets of the speech matter. And, for a great many people, Gays and Lesbians and the other minorities usually targeted for their identities simply do not matter. Consider the following:

- 97% of students in public high schools report regularly hearing homophobic remarks by their peers.[77]
- The typical high school student hears anti-Gay slurs more than twenty-five times a day.[78]
- 53% of students report hearing homophobic comments made by school staff.[79]
- 80% of Gay and Lesbian youth report severe social isolation.[80]
- 78% of school administrators say they know of no Lesbian or Gay students in their schools; yet, astoundingly, 94% of them claim they feel their schools are safe places for these young people.[81]
- 26% of adolescent Gay men report having to leave home as a result of conflicts with their families over their sexual orientation.[82]
- 19% of Gay men and 25% of Lesbians report suffering physical violence at the hands of family members as a result of their sexual orientation.[83]
- 42% of homeless youth self-identify as Gay or Lesbian.[84]

76. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2322 (1989).

77. This and the following statistics on Gay youth are taken from SHANNON GILREATH, SEXUAL IDENTITY LAW IN CONTEXT: CASES AND MATERIALS 125 (2007).

78. *Id.*

79. *Id.* at 126.

80. *Id.* at 125.

81. *Id.* at 126.

82. *Id.*

83. *Id.*

84. *Id.* at 127.

- 15% of Lesbian, Gay, and Bisexual youth have been injured so badly in a physical attack at school that they have had to seek the services of a doctor or nurse.[85]
- 30% of Gay and bisexual adolescent males attempt suicide at least once.[86]
- Gay and Lesbian youth represent 30% of all completed teen suicide. Extrapolation shows that this means a successful suicide attempt by a Gay teen in this country every five hours and forty-eight minutes.[87]

We have to push beyond the shock of these facts and accept that we are looking at ordinary life for real people. For them, the hurt is more than something astonishing on the page of a law review. For them, the hurt and the harm are ordinary. This harm is what Judge Reinhart recognized in *Harper*.

The harm of anti-identity messages is obviously not unique to Gay people, nor is it even at its most well-documented when targeted at Gay people. Since race and race theory are the preferred, more comfortable paradigms of the academy, scholars who study these things have focused on the harms of racist speech. Their findings are telling. Children as young as three are conscious of race and racism, and they make value judgments about race and their own racial identities based on the speech they hear.[88] I have

85. *Id.*
86. *Id.*
87. *Id.* at 128.
88. RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 94–95 (2004) [hereinafter DELGADO & STEFANCIC, WORDS THAT WOUND]. Psychologist Kenneth Clark has noted that "'Human beings . . . whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth.'" RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 5 (1997) [hereinafter DELGADO & STEFANCIC, MUST WE DEFEND NAZIS?] (quoting KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 63–64 (1965)). As to the effects of racial labeling, Professors Delgado and Stefancic record:

> [A]t a young age, minority children exhibit self-hatred because of their color, and majority children learn to associate dark skin with undesirability and ugliness. When presented with otherwise identical dolls, a black child preferred the light-skinned one as a friend; she said that the dark-skinned one looked dirty or "not nice." Another child hated her skin color so intensely that she "vigorously lathered her arms and face with soap in an effort to wash away the dirt." She told the experimenter, "This morning I scrubbed and scrubbed and it came almost white." When asked about making a little girl out of clay, a black child said that her group should use the white clay rather than the brown "because it will make a better girl." When asked to describe dolls which had the physical characteristics of black people, young children chose adjectives such as "rough, funny, stupid, silly, smelly, stinky, dirty." Three-fourths of a group of four-year-old black

written about the effects of anti-identity speech and the anti-identity culture that pervades many of our schools, specifically as that speech and culture affects Gay and Lesbian youth.[89] As the foregoing data attest, the results are quite devastating.

Indeed, a report commissioned by the American Association of University Women Educational Foundation shows that the most damaging, shameful epithet (from the perspective of damaged, stigmatized school youth themselves) is that of Gay or Lesbian.[90] The homophobic slur has driven avowed heterosexual youth to suicide.[91]

> children favored white play companions; over half felt themselves inferior to whites. Some engaged in denial or falsification.

Id. at 8 (citing MARY ELLEN GOODMAN, RACE AWARENESS IN YOUNG CHILDREN 36–60 (1964)). The paternalistic arguments that speech authoritarians most often employ—let the insult roll off or talk back—are hardly options for most minority youth. As Delgado and Stefancic note: "'A child who finds himself rejected and attacked . . . is not likely to develop dignity and poise. . . . On the contrary he develops defenses. Like a dwarf in a world of menacing giants, he cannot fight on equal terms.'" *Id.* at 10 (quoting GORDON W. ALLPORT, THE NATURE OF PREJUDICE 139 (1954)). It is worth noting that young Larry King "talked back," and it got him killed. *See infra* notes 127–30 and accompanying text.

89. *See* Shannon Gilreath, *Outing Sponge Bob: The Mis-Education of America's Gay Youth*, QUEER DAY, Feb. 21, 2005.

90. AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 20 (June 1993).

91. Deborah Locke, *Youth's Intolerance of 'Different' Can Destroy Lives*, ST. PAUL PIONEER PRESS, Jan. 2, 1997, at 4A.

The word "Gay" does not have this power over youth alone. In 2000, Danny Overstreet, a Gay man, was murdered in Roanoke, Virginia by an assailant who was "allegedly driven to murder by the trauma he suffered by simply having the last name 'Gay.'" Shannon Gilreath, *A Climate of Violence Against Gay People*, RALEIGH NEWS & OBSERVER, May 28, 2008, at 9A [hereinafter Gilreath, *A Climate of Violence*]. Six others were seriously injured in Ronald Gay's shooting spree outside a Gay bar. *Id.*

A sort of *Twilight Zone* converse of people who do not believe that the word "Gay" can be stigmatizing are those people, either obtuse or incredibly stupid, who fail to see how "faggot" can be offensive (to say the least) to Gays. For example, Pittsburgh Steelers linebacker Joey Porter called opponent Kellen Winslow, Jr. a "fag" after a contentious game in 2006. Ed Bouchette, *Steelers Notebook: Porter apologizes but not to Winslow*, PITTSBURGH POST-GAZETTE, Dec. 13, 2006, *available at* http://www.post-gazette.com/pg/06347/745642-66.stm. After his homophobic remarks drew fire, Porter "apologized" by calling his use of the epithet a "poor choice of words" and rationalizing that "how we used that word freely, me growing up using it, I didn't think nothing [sic] of it like that. . . . I apologize to anyone I offended on it [sic]." Despite being inarticulate, Porter wasn't completely oblivious: he did realize that "fag" was offensive, and he intended it to be—at least to Kellen Winslow. He summed up: "I didn't mean to offend nobody [sic] but Kellen Winslow. Pretty much, that's it about that." *Id.*

I found the most interesting report on the incident to come from journalist Keith Boykin, who wrote on his website that Porter had "*accused* opponent Kellen Winslow, Jr. of being a 'fag.'" (emphasis added). As an out Gay man himself, Boykin's description of Porter's homophobic slur as an accusation,

The experience of Gay youth targeted by anti-identity speech is nicely articulated by Michelangelo Signorile, who has written of his personal experiences growing up in New York.[92] Signorile's experience presents a classic case of name-calling escalating to violence. He explains how verbal harassment changed him from a happy, extroverted boy into, first, a subdued, quiet youth, then into a belligerent bully.[93]

He writes:

> [B]y the third or fourth grade things began to change: Suddenly, the boys were calling me a faggot. My happy nature grew more subdued.
>
> . . .
>
> My personality development was stunted and deformed. I had been a bubbly, smart kid when I entered school, but now I was defensive and belligerent. Whereas I might have developed into one of those kids who was funny, irrepressible and well liked, instead I was a "faggot," laughed at and ostracized. All my time and energy were consumed with trying to prove I wasn't this horrible thing, this sissy-faggot-queer.
>
> . . .
>
> Every day was hell, and I began to dread going to school. I did everything I could to avoid being noticed. I stayed quiet and tried not to answer questions. I didn't even laugh at jokes.
>
> . . .
>
> I was literally afraid for my safety, so I lived with the shame.[94]

In another passage, Signorile explains how the verbal assaults escalated into violence: "Sometimes they would gang up on me and beat me up."[95] As is often the result of a persistent campaign of dehumanization, Signorile eventually internalized the abuse he suffered at the hands of his peers:

---

as though actually being a "fag" connotes something normatively immoral as opposed to a homophobe's verbal practice of homophobia, is particularly telling. *See* Keith Boykin, *Steelers Player Calls Opponent a Fag*, Dec. 9, 2006, http://www.keithboykin.com/arch/2006/12/09/steelers_player (last visited Apr. 21, 2009).

92. MICHELANGELO SIGNORILE, QUEER IN AMERICA: SEX, THE MEDIA, AND THE CLOSETS OF POWER (2003).

93. *Id.* at 23.

94. *Id.* at 23–25.

95. *Id.* at 25.

> All the years of name-calling had taken their toll: I hated myself. Why, I began to ask myself over and over, do I want to live any longer? Why do I want to go through any more of this? I contemplated suicide. Over and over I'd go through the scenarios: Take all the pills in the medicine cabinet. Jump off the Staten Island Ferry into the harbor. Run into oncoming traffic. Slit my wrists.[96]

Signorile's self-hating also led him to other dangerous behavior patterns. He experimented with drugs and, while still a young teen, had sex with adults as old as three times his age.[97] Eventually, he, too, began to harass others and resorted to "bashing queers" in an effort to destroy the part of himself he most hated (or to prove, to himself and others, that he was not this hated thing).[98] Testament to the sheer effectiveness of anti-identity messages is the fact that Signorile was so horrified and "ashamed" (exactly what Tyler Harper suggested Gays should be) that he did not reveal his anguish to anyone who did not already know—not even his parents.[99]

Signorile survived his ordeal. Sadly, many Gay youth do not. If you think that Signorile's account is merely anecdotal or too individualized, ample research backs up his account as far from unique or counterfactual.[100]

Numerous studies have shown a direct correlation between perceived homosexuality in youth and suicidality, with bullying, shaming, and peer ostracization mediating this relationship.[101] A 2005 study by the University of Pittsburgh School of Social Work, revealed that, in addition to a greater likelihood of bullying, Gay adolescents are more likely than heterosexual youth to be threatened or injured with a weapon at school and to miss school due to feeling unsafe.[102] The same study found a direct relationship to suicide among Gay youth.[103]

Another study shows that Gay youth who are subject to verbal harassment and isolation from peers and family members are "two to three times more likely to attempt suicide than their heterosexual peers and may account for 30% of suicides among youth annually."[104]

96. *Id.* at 31 (emphasis omitted).
97. *Id.* at 26, 32.
98. *Id.* at 23, 31.
99. *Id.* at 24–25.
100. Cases also reflect this. *See*, *e.g.*, Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000).
101. *See infra* notes 103–13 and accompanying text.
102. Mark S. Friedman et al., *The Impact of Gender-Role Nonconforming Behavior, Bullying, and Social Support on Suicidality Among Gay Male Youth*, 38 J. ADOLESCENT HEALTH 621, 621 (2006).
103. *Id.*
104. Robert Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents*, 101 PEDIATRICS 895, 895 (1998).

The same study recounts

> [t]hat 45% of the gay men and 20% of the lesbians surveyed were victims of verbal and physical assaults in secondary schools[, that 54% of school counselors] agreed that students often degrade fellow students whom they discover are homosexual, and that 67% strongly agreed that homosexual students are more likely than others to feel isolated and rejected.[105] . . . 28% of homosexual youth were dropping out of secondary school because of discomfort and fear.[106]

Additionally, Gay youth experiencing isolation and degradation persisted in other patterns of high-risk behavior, including risky sex, exposing them to higher probabilities of HIV infection.[107] This study reinforces that "speech" did not usually stop there, with 32.7% of Gay youth being threatened with a weapon at school, compared to just 7.1% of straight youth; 68.1% of Gay youth involved in physical altercations, compared to 37.6% of straight youth; 25.1% missing school out of fear, compared to 5.1% of straight youth, and 35.3% attempting suicide, compared to 9.9% of straight youth.[108]

In addition to being more likely to be victimized, the psychological consequences of victimization may be more severe for Gay youth. In addition to suicidality, Gay youth evidence "substantially more health risk behavior" than their straight counterparts and are more likely to smoke and use alcohol and drugs.[109] Another study directly links the "debilitating effects of growing up in a homophobic society" to increased suicide attempts, running away from home, and school truancy.[110] Additionally, one study reported the average GPA of harassed Gay youth at "half a grade lower than students experiencing less harassment (2.6 versus

105. *Id*. at 895–96.
106. *Id.* at 896.
107. *Id.*
108. *Id.* at 898. Figures vary for the percentage of Lesbian and Gay youths who have attempted suicide, but all published reports have suggested disproportionately high rates among Gay youth. *See* PAUL GIBSON, U.S. DEP'T OF HEALTH & HUMAN SERVS., GAY MALE AND LESBIAN YOUTH SUICIDE 110–42 (1989) (reporting a 35% suicide rate); Scott L. Hershberger & Anthony R. D'Augelli, *The Impact of Victimization on the Mental Health and Suicidality of Lesbian, Gay, and Bisexual Youths*, DEVELOPMENTAL PSYCHOL., Jan. 1995, at 64–74 (reporting 42%); A.D. Martin & E.S. Hetrick, *The Stigmatization of the Gay and Lesbian Adolescent*, J. HOMOSEXUALITY, 1988, at 163, 172 (reporting 21%). The statistics should be compared to corresponding rates among straight youth, which range from 8% to 13%. *See* Hershberger & D'Augelli, *supra*, at 66.
109. Daniel E. Bontempo & Anthony R. D'Augelli, *Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior*, 30 J. ADOLESCENT HEALTH 364, 371 (2002).
110. Rich C. Savin-Williams, *Verbal and Physical Abuse as Stressors in the Lives of Lesbian, Gay Male, and Bisexual Youths: Associations with School Problems, Running Away, Substance Abuse, Prostitution, and Suicide*, 62 J. CONSULTING & CLINICAL PSYCHOL. 261, 262, 266 (1994).

3.1)."[111] The same students studied were more likely to report that they did not plan to go to college.[112]

As to Judge Posner's contention that the slogan "Be Happy, Not Gay" could not be adequately established as anti-Gay, Posner needed only to ask school students themselves. While 75.4% of students report hearing easily identifiable derogatory remarks, such as "faggot" or "dyke" in schools, nearly nine out of ten (89.2%) report "frequently or often" hearing "that's so gay" and its equivalents; and perhaps more importantly, *contra* Posner, they report understanding it to mean "stupid or worthless."[113]

There are also physical consequences to the victims of anti-identity speech that do not result from the battery that often eventuates from the speech. For example, I recently attended a huge, uppity fundraising affair for a national Gay rights organization. As I walked from my hotel to the meeting, a group of Christian psychotics were on the street corners with microphones and nauseating signs prescribing the death penalty for homosexuals. Now, I am used to saying unpopular things, and I am used to serious academic disagreements, but I have never felt more invaded or violated than I did as I walked by this tiny cadre spewing its venom. My muscles tightened, heart raced, fists clinched, lips pressed tight. I felt humiliation and impotent fury all at once. It was real stress. Later I thought what it must be like for the millions of Gays and Lesbians, people of color, and women for whom this sort of dehumanization is a daily affair. It is no wonder that the number-one killer of women, particularly African-American women, is heart disease, no doubt occasioned by high stress levels.[114] It is no wonder that Gays commit suicide at disproportionately alarming rates. Stress kills. The anti-identity climate that academics call "the marketplace of ideas" kills.

In addition, Professors Richard Delgado and Jean Stefancic point out that the damages of hate speech go beyond psychic and physical injury alone. Delgado and Stefancic posit that hate speech produces tangible economic harms as well.[115] Surely, what they say is true. Imagine having to focus on your professional and economic

111. GLSEN, *GLSEN's 2005 National School Climate Survey Sheds New Light on Experiences of Lesbian, Gay, Bisexual and Transgender (LGBT) Students*, Apr. 26, 2006, http://www.glsen.org/cgi-bin/iowa/all/library/record/1927.html?state=research (last visited Apr. 21, 2009).

112. *Id.* ("Overall, [gay] students were twice as likely as the general population of students to report they were not planning to pursue any post secondary education.").

113. *Id.*

114. AM. HEART ASS'N, FACTS ABOUT WOMEN AND CARDIOVASCULAR DISEASES (2007), http://www.americanheart.org/presenter.jhtml?identifier=2876; AM. HEART ASS'N, EDUCATION ABOUT HEART DISEASE IS CRUCIAL FOR AFRICAN AMERICAN WOMEN (2007), http://www.americanheart.org/presenter.jhtml?identifier=2222.

115. DELGADO & STEFANCIC, WORDS THAT WOUND, *supra* note 88, at 15.

development in an environment that constantly enforces your nothingness, where the speech of the bigot is unfettered and where, essentially, no legal recourse shields you from the bigot's most resilient impulses to degrade and dehumanize you. Gays and Lesbians in this country do not have to imagine that state of being—they have lived it and continue to live it.[116]

And, of course, physical violence is often overt. The well-publicized case of Matthew Shepard is notorious.[117] Matthew Shepard was somebody's son, somebody's family, somebody's friend. You know his story. On the night of October 6, 1998, he was lashed to a crude fence in rural Wyoming, beaten into a coma with the handle of a pistol and left there to die. He finally did—five days later. The passerby who found him said that his body was so crumpled and small against the great Wyoming landscape that he was mistaken for a scarecrow that had slipped loose from its pole. His face had been beaten beyond recognition. In fact, his face was so crusted with blood that the only skin visible was in two vertical lines down his face—where his tears had washed away the blood.[118]

The only thing unique about what happened to Matt Shepard is that the media seemed to care.[119] Mostly, violence and killing of Gays and Lesbians goes unreported (at least, not reported on), and the killing and the victims remain invisible. In Texas, between 1993 and 1995, eight Gay men were systematically stalked, terrorized, and murdered by teenage boys.[120] The real-world effects of anti-identity speech are evident in these killings. For example, an Oregon man who murdered two Lesbians execution style said, "I have no compassion for lesbians, or bisexual or . . . gay men. I can't deal with it."[121] In another incident, a reporter challenged a group of teen boys who confessed they were looking to beat up "faggots."[122]

116. Title VII and Title IX do not offer specific protection to Gays and Lesbians as Gays and Lesbians. Even the meager victories, like *Oncale*, offer little hope. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII as long as that harassment is motivated by genuine sexual desire or by an antipathy toward the presence of the targeted sex in the workplace by a member of the same sex).

117. Howard Chua-Eoan, *That's Not a Scarecrow*, TIME, Oct. 19, 1998.

118. *Id.*

119. Matt Shepard's death is particularly poignant for me because Shepard (had he lived) and I both turned thirty-one years old during the year in which I wrote this Article. 2008 also happens to mark the tenth anniversary of Matt's death, but the ten years without Matt Shepard haven't seen much change. Violence against Gays and Lesbians remains rampant, and Gays and Lesbians remain unprotected by federal hate crimes legislation.

120. H.G. Bissinger, *The Killing Trail*, VANITY FAIR, Feb. 1995, at 80–89, 142–45.

121. Charles Burress, *Confessed Stockton Slayer Tells Motive*, S.F. CHRON., Aug. 22, 1996, at A5.

122. *Eight Teenagers Arrested in Weekend Assault on Gay Men*, L.A. TIMES, Apr. 16, 1996, at B4.

One boy replied that faggots were not really human and that it was like "smashing pumpkins on Halloween."[123]

More recently, in May 2007, twenty-year-old Sean Kennedy was murdered in Greenville, S.C. by a young man who called him "faggot" while punching him so hard that he broke every bone in Sean's face.[124] Sean fell to the pavement; the impact caused his brain to separate from his brain stem, killing him. Shortly after driving away, Sean's killer left a message on the cell phone of one of Sean's friends: "Tell your faggot friend that when he wakes up he owes me $500 for my broken hand."[125]

In February 2008, eighth-grader Lawrence "Larry" King was murdered by a fellow student, Brandon McInerney, in a California middle school.[126] Larry was labeled "Gay" by fellow students and subjected to a pattern of verbal abuse and taunts. Larry fought back against his assailants by taunting them right back, openly flirting with them.[127] Fourteen-year-old McInerney ended things when he shot Larry in the back of the head during a class.[128] In both the Kennedy and King cases, a pattern of assaultive speech preceded the killings.[129]

Rape, the weapon just short of murder, is also employed. In one case, a twelve-year-old boy was attacked and raped three nights in a row by four other sixth-graders and two older boys at a school-sponsored camp.[130] Teachers ignored much of the anti-Gay speech and Gay-baiting that preceded the attack.[131] Social workers noted that anti-Gay rhetoric often devolves into physical violence when it goes unchecked.[132] "Recently, a woman reported that she was brutally raped at her home in Charlotte, [North Carolina]."[133] "[T]he woman, who chose not to disclose her identity to the one local TV station . . . that covered the crime, said she was a Lesbian and that while brutalizing her, her attacker made it clear that he was raping her *because* she was a Lesbian."[134] These are but a few examples of

123. *Id.*

124. *See* Gilreath, *A Climate of Violence*, *supra* note 91, at 9A; Steven Petrow, *They Shoot Gays, Don't They?* INDEP. WKLY., June 25, 2008.

125. *Id*; *see also* Petrow, *supra* note 124.

126. Rebecca Cathcart, *Boy's Killing, Labeled a Hate Crime, Stuns a Town*, N.Y. TIMES, Feb. 23, 2008, at A11.

127. Greg Risling, *Shooting of Gay Student Sparks Outcry*, USA TODAY, Mar. 28, 2008.

128. *See* Petrow, *supra* note 124.

129. *Id.*

130. Erin Van Bronkhorst, *Study: Gay Kids Being Raped in Schools*, BAY WINDOWS, Sept. 7, 1995.

131. *Id.*

132. Joyce Hunter & Robert Schaecher, *Gay and Lesbian Adolescents*, *in* ENCYCLOPEDIA OF SOCIAL WORK 1055, 1058 (Richard L. Edwards et al. eds., 19th ed. 1995).

133. Gilreath, *A Climate of Violence*, *supra* note 91.

134. *Id.* (emphasis added).

the inseparability of words and violence.

At this point in my discussion, it is necessary for me to anticipate a critical subversion of my theory. Critics will say that neither Harper's speech nor that of Nuxoll represents anti-identity speech, with a requisite connection to harm, as I have defined it. Neither Harper nor Nuxoll resorted to the usual epithets: faggot, dyke, etc. So, do the messages at issue, "Homosexuality is Shameful" and "Be Happy, Not Gay," constitute anti-identity speech that is harm, or are they words only, without harm? Judge Posner believed Nuxoll's message was only the latter—at least, he held that Nuxoll's message did not meet the threshold for regulation. He reached this conclusion despite plaintiff Nuxoll's testimony that he *intended* the slogan as a derogatory commentary.[135] Posner held that "Not Gay" is only "tepidly negative," not "demeaning."[136]

> [I]t is highly speculative that allowing the plaintiff to wear a T-shirt that says "Be Happy, Not Gay" would have even a slight tendency to provoke [harassment of gay students, which was already documented at the school], or for that matter to poison the educational atmosphere. Speculation that it might is, under the ruling precedents, and on the scanty record compiled thus far in the litigation, too thin a reed on which to hang a prohibition of the exercise of a student's free speech.[137]

I believe both messages constitute anti-identity speech as harm in the ways that I have articulated. Both messages could be aggrandized into political speech, but they are not. Neither message is deliberative debate on the good or ill of a political choice; rather, the messages are targeted anti-identity speech constituting a coercive proclamation of the inequality of an identifiable minority group. Mari Matsuda rightly identifies this type of speech as "cold" hate speech.[138] It is not the evident name-calling, epithet-filled hate speech we often think of. But it is just as damaging. In fact, I believe it is, in many cases, more damaging. Its dressed-down, almost-civil tone makes it less recognizable, less shocking, and thereby more insidious. In this way, it is reminiscent of "cold" forms of anti-Semitic speech: the Holocaust lie literature[139] or the various conspiracy theories about Jews surreptitiously buying control of the

135. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 676 (7th Cir. 2008).

136. *Id.*

137. *Id.*

138. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2366 (1989). Patricia Williams calls it "spirit murder." *See* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing and the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

139. Matsuda, *supra* note 76, at 2366–67.

government,[140] for example. In so far as the targeted groups are concerned, of course, there is little difference in effect; but in so far as the majority of listeners is concerned, the "cold" hate speech is more effective. Anti-identity speech that appears as a civic warning or political observation is less alarming to people than explicit attack and serves to desensitize audiences to more obvious attacks that inevitably come later.[141] These are the messages that must take root before there can be swastikas or burning crosses—or blatant incitements to murder. They create the foundation.

This was a method used extremely effectively by the Nazis during their rise to and consolidation of power. The Nazi experience demonstrates that effective anti-identity propaganda can take many forms. In fact, Judge Posner's disposition of the phrase "Not Gay" reminded me of a much earlier decision by another court that could not quite bring itself to recognize the power of language in light of the social context in which the language operated, or to interpret the law in light of facts as they really existed.

In the 1920s, Joseph Goebbels, later Hitler's official propaganda minister, organized an anti-Jew campaign in the very effective form of cartoons.[142] The cartoons focused on one character, a Jewish police officer. The man derisively nicknamed "Isidor"[143] was caricatured, in among other atrocious ways, with his neck in a crude noose. The caption read: "For him too, Ash Wednesday will come."[144] The cartoons became the vehicle by which the Nazis imparted all manner of nefarious characteristics to Germany's Jewish citizens. The police official on whom "Isidor" was based sued Goebbels to stop the publication of the libelous cartoons.[145] Goebbels, his lawyers making full use of all the available "democratic" protections of free speech—after all, such "democratic" protections are always available to the powerful—got Goebbels acquitted.[146]

The appellate court upheld the acquittal reasoning that the word Jew was equivalent to the word Protestant or Catholic. Surely one could not be sued for libeling another by calling him a Protestant or a Catholic.[147] "[H]ow could there be injury from calling a Jew a Jew?"

This pre-Nazi court was guilty of the same error that many U.S.

140. *Id.*

141. Posner implicitly recognizes this in *Nuxoll*. *See Nuxoll*, 523 F.3d at 672.

142. 1 SAUL FRIEDLANDER, NAZI GERMANY AND THE JEWS 104 (1997).

143. *Id.* The police official on whom *Isidor* was based was actually Dr. Bernard Weiss. See generally *id.* for more on this story and similar episodes. *See also* ANDREA DWORKIN, *The Power of Words*, *in* LETTERS FROM A WAR ZONE: WRITINGS, 1976–1989, at 27, 27–28 (1993).

144. DWORKIN, *supra* note 143, at 28.

145. *Id.*

146. *Id.*

147. *Id.*

courts commit today—the error Judge Posner commits in *Nuxoll*: they are guilty of theorizing free speech in a way that completely divorces it from social reality. Had there been no history of rampant prejudice and discrimination against Jews, the pronouncement by the German court would have made sense. But in the world of 1920s Germany, and in the twenty-first century world we live in now, theorizing free speech in this way—divorced from context—puts it on a completely different plane—an inhuman plane—like a tornado that never touches the ground. Goebbels understood that language was not divorced from its social context, but the court did not. Goebbels used anti-identity language to construct genocide, and he used democratic notions of free speech to shield genocide. The courts did nothing to stop him.

Speech authoritarians have convinced the courts that the same studiously blinkered approach is necessary for a robust free speech system in the United States. The problem with this idea is that it does not work. It does not result in free or even free-*er* speech. Language can be used to illuminate and to educate—to promote understanding. But language can also be used to perpetuate ignorance and inequality and to coerce others not to rebel. That is how language is predominately used against Gays and Lesbians today. Language is used against the target group as a weapon to provoke fear and hatred. We are told that this speech is nevertheless worthy of protection because it is about ideas, part of the great "marketplace of ideas." But this speech from the bargain basement of the marketplace of ideas[148] is not about the discussion of an idea. Its very objective is to monopolize the discussion and to close the debate. Judge Posner's *Nuxoll* decision is made all the more deplorable because he *does* recognize the cause behind the litigation.[149] Presumably, he does not believe—or cannot understand—the cause to conceptually liquidate Gays to be as dangerous as it really is. The desensitization that anti-identity speech accomplishes works to protect it even with the likes of federal appellate judges, whom one may assume are as far removed from the reality of public school hallways as is possible. Distance, in this case, is not critical distance.

148. The "bargain basement of the marketplace of ideas" is the useful coinage of Evelina Giobbe. Evelina Giobbe, *The Bargain Basement in the Marketplace of Ideas, in* THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 58, 58–60 (Laura Lederer & Richard Delgado eds., 1995).

149. My chief disagreement with Judge Posner stems from my belief that legal principles ought to have some grounding in reality. Posner apparently believes that reality should be theorized to fit principles.

C. Analogy: Der Stürmer *Politics of Anti-Identity Speech (Speech as Action)*

> *The attempt to split bias from violence has been this society's most enduring and fatal rationalization.*
>
> *—Patricia Williams, Sprit-murdering the Messenger*[150]

> *Without words . . . not one Jew would have been gassed.*
>
> *—Andrea Dworkin, Scapegoat*[151]

A chief medium for the Nazi's anti-Jew campaign was *Der Stürmer*, a cheap newspaper published by Julius Streicher, a Nazi party member from Nuremburg, Franconia.[152] Streicher was merciless and relentless and quite productive in his campaign against the Jews. *Der Stürmer*, especially immediately prior to Nazi control, was the most read and widely circulated paper in Germany.[153] *Der Stürmer*, while it certainly had its disgusting and utterly pornographic side, also contained what might be called—in the parlance of contemporary free speech discourse—political viewpoint. This is undeniably true, in so far as every utterance expresses a viewpoint. But what is most salient for purposes of my discussion here is that *Der Stürmer* and its copycat rags were important propaganda machines in the dissemination by saturation of the particular anti-Jew *viewpoint* that defined Nazi fascism. *Der Stürmer* is the acme of viewpoint as saturation propaganda, and of propaganda as action. Streicher was a confidant of Adolf Hitler, and reportedly had an enormous influence on Hitler's thinking. "*Der Führer* [was] always greatly quickened in his anti-Jewish feeling by contact with the notorious Julius Streicher."[154]

The comparisons I draw in this portion of the essay will be criticized. There is always shock when one takes the horror of something that happened and is well-documented historically and then analogizes to what is happening now in striking parallels but is perhaps less obvious because there is no historical spotlight.[155]

150. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 61 (1991).

151. ANDREA DWORKIN, SCAPEGOAT: THE JEWS, ISRAEL, AND WOMEN'S LIBERATION 149 (2000) [hereinafter DWORKIN, SCAPEGOAT].

152. *Id.* at 150.

153. LOUIS W. BONDY, RACKETEERS OF HATRED: JULIUS STREICHER AND THE JEW-BAITERS' INTERNATIONAL 45 (1946).

154. *Id.* at 31.

155. After the Holocaust, women writers like Sylvia Plath, Muriel Rukeyser, and Andrea Dworkin made connections in their work between what Nazi society had done to the Jews and what they felt their own society was doing to women. Their work was repeatedly denounced as disrespectful, in the least. My analogy of what anti-Gay religionists are doing to Gays in this country with what anti-Semites did to Jews in Nazi Germany will surely receive the same reaction, perhaps because people who are not experiencing it cannot see it at work. What was once "hyperbole" has more than once become "history" with the passage of time. Those of us whose observations are based in reality see things quite differently, and the crossover from Jews to Gays is easy enough.

Nevertheless, the analogy is important because it deflates the erroneous classification of coercion and incitement to hatred as permissible "viewpoint" under the First Amendment. Supposed viewpoint neutrality is a constant refrain of free speech absolutism. Writing in response to the *Harper* decision, Professor Eugene Volokh articulates the absolutist case perfectly.[156] Professor Volokh, like Judge Posner in *Nuxoll*, confuses what he sees as the casual insult of Harper's message, something he calls "viewpoint," with what is, in reality, saturation propaganda. What I show by this comparison is that there are instances in which words are not words only. As Louis Bondy noted in his study of Nazi Jew-baiting, concluded just after World War II and while Julius Streicher awaited his trial for war crimes:

> It seems . . . necessary to be well acquainted with the methods by which the Nazis tried to spread their doctrines. . . . 'It cannot happen here' is too easy an attitude to take up. . . . [A]ll those who wish to see human liberties preserved will have to be on their guard against any recurrence of the events of the last decade.[157]

Every Gay person knows that Bondy was prescient in this, for he has seen the shape of the wrath Bondy chronicles and bares witness in intimate, personal ways to its devastating consequences.

The Nazi regime depended on saturation propaganda to motivate, coerce, terrorize, and proselytize. Many people who experienced the worst of both physical and verbal violence at the hands of the Nazis specifically prayed for an end to the latter. David Rubinowicz, twelve years old, wrote this in his diary: "When the village constable had put [an advertisement accusing Jews of deceit in business dealings] up, some people came along, and their laughter gave me a headache from the shame that the Jews suffer nowadays. God give that this shame may soon cease."[158] The anti-Gay campaign in this country, currently still slightly more constrained by law than was Nazi fascism, operates in parallel ways. Messages like those at issue in *Harper*, therefore, must be understood in context.

By focusing on Harper's "shameful" message in this discussion, I do so only as a reference point. I do not mean to suggest that this is the worst kind of message, from a standpoint of sheer vitriol, which Gay people encounter—far from it. But by concentrating on

Professor Alexander Tsesis offers a lucid look at the centrality of language and speech to the success of the Nazi anti-Jew campaign in ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 11–27 (2002).

156. Volokh, *supra* note 13.

157. BONDY, *supra* note 153, at 253.

158. DAVID RUBINOWICZ, THE DIARY OF DAVID RUBINOWICZ 43 (Derek Bowman trans., 1982).

Harper's message I do mean to suggest that this message and its abundant variants *are* harmful. In fact, they may be more insidious in nature and degree than more emotionally shocking variants, like "faggot." The point of the message, of course, is to shame the Gay person who encounters it, to degrade and to demoralize. The purveyors of hate messages are usually upfront about this particular goal.[159] But a corresponding and equally effective purpose is to shame those who might associate with the Gay person. This is a page right out of the *Stürmer* playbook.

The readers of *Der Stürmer* were not, of course, principally Jewish, although some Jews read it in an attempt to stay informed of the anti-Semitic tidal wave it portended. Mostly, though, *Der Stürmer*'s readers were the suggestible masses, perhaps already disposed to anti-Semitic thought to one degree or another, for whom there was, aside from Jew-inspired counter demonstration tainted by its very association with Jews to start with, little counterweight. Streicher published messages not only demonizing the Jews but also demonizing those who might give the Jews some sympathy. "We know that there are still people who pity the Jew. They are not worthy of living in [Nuremburg] nor are they worthy of belonging to this city nor are they worthy of belonging to this nation of which you are a proud part. . . ."[160]

Harper's message that homosexuality is "shameful" and that those who are sympathetic are "condemned" is evocative of exactly the same sort of feeling. *Der Stürmer* also printed letters shaming community members who were known to do business or otherwise associate with Jews. One representative letter chastised a certain Johann Jacob, a member of the Nazi party, because he had, in a public place, called Jews "friends."[161] In addition to Jacob's name, even the date of his "offense" was printed.[162] Another article attacked a priest for refusing to accommodate the Nazi gospel of hate and, instead, defending Jews.[163]

Der Stürmer advocated direct social boycott of Jews and their supporters. It was a particularly effective campaign. There is a clever revisionist myth of history that ordinary Germans would not have supported the Holocaust had they known what was actually happening.[164] But history unrevised suggests that the same ordinary people, had Germany come out on the winning side of the war, would have done nothing about the Holocaust, if not support it.[165] The campaign against Gays under the guise of political debate

159. *See* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 670 (7th Cir. 2008).
160. BONDY, *supra* note 153, at 37.
161. *Id.* at 51.
162. *Id.*
163. *Id.* at 52.
164. For a discussion of this idea, see TSESIS, *supra* note 155, at 26.
165. Klaus Saur, the son of Nazi leader Karl Saur, had an argument with

about social policy accomplishes the same end.

Despite Judge Posner's protest that children cannot possibly affect society in such a way as to render their speech important,[166] the methodology of *Der Stürmer* shows otherwise. It shows exactly how messages like Harper's, carried by young people, are effective—essentially effective—in any propaganda campaign. As early as July, 1924, *Der Stürmer* advocated for the expulsion of Jewish children from schools because "grown-up Germans could not be expected to perceive in the Jew a person of alien race if they had been forced in their childhood to accept the Jew as their playmate."[167]

Streicher understood as well as James Dobson does that, "[t]hose who control what young people are taught, and what they experience, what they see, hear, think, and believe will determine the future course of the nation."[168] This is precisely the concern that animates messages by people like Harper, the religious zealots who prod them along, and the powerful organized interests, like the Alliance Defense Fund, who defend anti-equality speech each time it is challenged. If young people are deprived of messages like Harper's in schools where a substantial part of their mental and emotional personalities are formed they may stop believing that Gays are aliens whose "father was the devil."[169]

As even Judge Posner recognizes, the real goal of the anti-Gay initiative is not only the elimination of pro-Gay speech in schools, but the unfettered insinuation of anti-Gay messages at all levels.[170] Such was the case with *Der Stürmer*. Streicher's ambition was not confined to having pro-Jew sentiment banished from schools, but also that anti-Jew messages should pervade the schools. As *Der Stürmer* testifies: "[O]ften we wish we could have with us in the class room the people who still fail to understand the mean and

---

his mother after World War II, described in detail by his younger brother:

> It was between Klaus and my mother. They had seen a discussion on television about the war and a Jewish person had been interviewed. My mother had said a typical German expression, "That is one that should have gone to the gas chambers." And my brother was furious and told her it was stupid to say such things. And she was really shocked that he was so angry. "It's just an expression, it doesn't mean anything," she told him. . . . Klaus was firm with her. "Those stupid sentences are what eventually led to the types of things that happened in the war,' he told her."

DWORKIN, SCAPEGOAT, *supra* note 151 at 143.

166. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 671 (7th Cir. 2008) ("The contribution that kids can make to the marketplace of ideas and opinions is modest . . . .").

167. BONDY, *supra* note 153, at 52.

168. Shannon Gilreath, *First Amendments*, NEW HUMANIST, May/June 2005 at 10–11 (quoting James Dobson).

169. BONDY, *supra* note 153, at 52.

170. *Nuxoll*, 523 F.3d at 672.

shameful deeds of the Jew."[171] Underneath this particular letter was the printed motto: "[T]he Jew is wagging his venomous tongue, that's why he would be sent to Dachau concentration camp."[172] Young people, who are extraordinarily impressionable, were receptive. Students in Pomerania sent a letter to *Der Stürmer* extolling anti-Jew plays they performed each Saturday. "We can hardly wait until it is Saturday again," they chirped.[173] Streicher's publishing company also produced school books for young people to reinforce Nazi ideology in the classroom, containing graphs and explanations of "racial types" and "racial pollution," an eerie parallel to similar efforts by anti-Gay fundamentalist forces in the United States.[174] The Nazis understood then what radical Islamists know now, but Posner apparently does not: children used as suicide bombers are every bit as effective as adult suicide bombers—perhaps more so.

I admit that it is difficult for us to imagine how all of this could happen on such a raw and obvious level. It took, of course, the complicity of the people, but it is also a testament to what people can be conditioned to accept given enough time and effort, especially when that effort is itself dressed up by its perpetrators as the endangered, embattled ideology—another tactic employed by anti-Gay propagandists.[175] Would we be shocked to read a poem for children: "A devil walks through our lands, he is Gay, well known to us, a murderer, polluter, and terrorist. Corrupt he must even the young, he wants all people to die, don't ever have anything to do with Gays, then you will be glad and happy."[176] Replace Gay with Jew and you have exactly the kind of poem that was officially approved for use by children in the Nazi era.[177] One wonders if the children, or certainly the parents, did not register shock at such words. It seems not. The systematic corruption of their minds against the Jew desensitized them even to such blatant attacks. One wonders if it began with something as simple as "Be Aryan, Not Jewish." Judge Posner seemed to realize a similarly sinister mission on the part of the Alliance Defense Fund and its allies, but he, like the Weimar court, did nothing to stop it.[178]

171. BONDY, *supra* note 153, at 53.
172. *Id.*
173. *Id.*
174. *Id.* at 54.
175. The idea that "moral values" or "conservative values," or whatever referent one wants to use for a fundamentalist Christian worldview, are somehow under siege by a menacing Gay agenda is so prevalent that it needs no citation. On the liberal affection for giving subordinating ideologies equal time in the name of "balance," see Jose Gabilondo, *When God Hates: How Liberal Guilt Lets the New Right Get Away with Murder*, 44 WAKE FOREST L. REV. 617 (2009).
176. BONDY, *supra* note 153, at 54.
177. *Id.* at 55.
178. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668,

Another explicit parallel exists between *Der Stürmer* and anti-identity T-shirts. Streicher was not content to let anti-Jew sentiments be uttered and dissipate (if such a thing is possible); he wanted them to be ever-present for a compelled audience. To that end, Streicher and Nazi officials orchestrated showcases (or *Stürmerkasten*) to carry *Der Stürmer's* message beyond those who would willingly subscribe. Whole issues of *Der Stürmer* were displayed behind glass for all to see, usually constructed along important thoroughfares, where few could avoid them.[179] Anti-identity T-shirts serve the same purpose. An anti-identity utterance is sent out and may be confined by time or place. The T-shirt, by contrast, is ever-present with its damaging message ever-ready. No one who sits in the classroom or walks down the hall can escape it. The Jews of Nazi Germany were powerless to offer any but the same advice Judge Kozinski now glibly offers gay youth: avoid it; try not to look.[180] As in the anti-Gay campaign, in the Nazi regime, language was a primary weapon:

> The quantity and intensity of verbal violence, which included the widespread posting of signs (which Germans and Jews saw daily) that forbade Jews' physical and social existence among Germans . . . should be seen as an assault in its own right, having been intended to produce profound damage—emotional, psychological, and social. . . . The wounds that people suffer by having to listen [or view] publicly . . . to such vituperation and by not being able to respond—can be as bad as the humiliation of a public beating.[181]

An important point to keep in mind in the analogy between *Der Stürmer* and "Homosexuality is Shameful" is that these messages do not operate in isolation. They are immediately part of the social context in which they exist. Everything in life is part of it; we cannot compartmentalize away the stuff we do not like. This was my chief criticism of the Weimar court's handling of Dr. Weiss's libel suit. There, indeed, may be no harm in calling a Jew a Jew in certain social contexts; Weimar Germany was not such a context.

Anti-identity messages aimed at Gays necessarily operate in social context too. In that sense, Harper's message of shame and reproach does not operate in the abstract, as speech trapped in some space-time continuum. Instead, it is immediately plugged in to a social and political context charged with hate for homosexuality and homosexuals. The pervasive anti-equality climate faced by Gays in this country makes the institutionalization of a message like

671 (7th Cir. 2008).

179. *See, e.g.*, BONDY, *supra* note 153.

180. *Id.* at 46.

181. DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 126 (1996).

Harper's in an environment in which exposure to the message is compelled even more insidious. This knowledge is exactly why Julius Streicher wanted *Der Stürmer* in public schools, and it is exactly why the Alliance Defense Fund wants "Homosexuality is Shameful" in public schools. As both Streicher, speaking for a group-hating right then, and James Dobson, speaking for a group-hating right now, noted: appropriately indoctrinated youth make good adult warriors.[182]

Adult messages are compelling evidence of the verity of the theory. Indeed, the parallels between anti-Semitic speech of the *Der Stürmer* variety and anti-Gay speech now are overwhelming—not obvious only to those who do not wish to see. The idea that anti-identity prejudice facing Gays and Lesbians is so outside the mainstream that it can be ignored is balderdash. Anti-identity speech labeling Gays as the maniacal "other" abounds and finds the receptive ear of many public policymakers. Julius Streicher wrote: "[T]he wire-pullers behind every disaster that has overtaken the people is the eternal Jew."[183] In the wildly popular Nazi propaganda film, *The Eternal Jew*, it is asserted: "At the beginning of the twentieth century, the Jews sit at the junction of the world financial markets. They are an international power. Although only one percent of the world's population, with the help of their capital, they terrorize the world stock exchanges, world opinion, and world politics."[184] Compare that to the testimony before Congress of Robert Knight, leader of the right-wing Family Research Council, an unabashedly bigoted group given primetime by Congress. Knight asserts: "Homosexuals display political control far beyond their numbers. A tiny fraction of the population (about one percent), homosexuals have one of the largest and fastest growing Political Action Committees in the country (the Human Rights Campaign) and give millions of dollars to candidates . . . ."[185] Like Jews, Gays are a threat because we are supposedly better educated, have better jobs, and make more money than other people.[186]

182. *See supra* notes 167–69 and accompanying text.

183. BONDY, *supra* note 153, at 39.

184. THE HOLOCAUST HISTORY PROJECT, STILL IMAGES FROM DER EWIGE JEW (1998), http://www.holocaust-history.org/der-ewige-jude/stills.shtml (last visited Apr. 21, 2009) (quoting from the film THE ETERNAL JEW (Deutsche Film Gesellschaft 1940)).

185. *Employment Non-Discrimination Act of 1994: Hearing on S. 2238 Before the S. Comm. on Labor and Human Resources*, 103d Cong. 93 (1994) [hereinafter *Hearing*] (statement of Robert Knight, Family Research Council).

186. *Compare* THE HOLOCAUST HISTORY PROJECT, *supra* note 184 ("Fifty-two out of every 100 doctors were Jews. Of every 100 merchants, 60 were Jews. The average wealth of Germans was 810 marks; the average wealth of Jews 10,000 marks."), *with Hearing*, *supra* note 185, at 93 (statement of Robert Knight, Family Research Council) ("[H]omosexuals have higher than average per-capita annual incomes . . . are more likely to hold college degrees . . . [and are more likely to] have professional or managerial positions . . . .").

And these are not merely the rants of wackos on the periphery of political power. They are the official speech of political leaders (perhaps no less wacko). For example, Oklahoma representative Sally Kern recently addressed a Republican group with a speech asserting, "[homosexuality is] the biggest threat our nation has, even more than terrorism or Islam."[187] Moreover, she noted that, "the homosexual agenda is destroying the nation"; "no society that has totally embraced homosexuality has lasted for more than, you know, a few decades"; and "what's happening now is they're going after, in schools, two-year-olds."[188] The parallel between these assertions and those of Streicher towards Jews is chilling. Like Kern, Streicher was insistent that "the Jew was the root of all political, social, and economic evil in Germany and in the whole world. Parallel to this theme was the patent insistence that this evil must be feared, hated and eventually destroyed."[189] Similar heterosexist hallucinations permeate U.S. courts, right up to the level of the nation's highest Court.[190]

A common *Der Stürmer* tactic is to libel Gays by repeating what Gays themselves have allegedly said, even when the perpetrators of the anti-equality speech know that the imputed remarks are neither accurate nor accurately attributed. It is like one supremely-deceptive election-year ad that never stops circulating. Streicher was a master at this. He reprinted *The Protocols of the Learned Elders of Zion* as if they were true.[191] This "secret plan of a cabal of Jews to control the world"[192] was actually the creation of the secret police of the Russian Czar to whip up a pogrom against Russian Jews.[193] Streicher used it to whip up the ultimate pogrom: the Holocaust. The anti-Gay camp are also masters at such deception. In my home state of North Carolina, Mary Francis Forrester,[194] the

187. *Kern: Gays Biggest Threat to Nation, Killed 100,000*, ON TOP, Oct. 10, 2008, http://www.ontopmag.com/article.aspx?id=2522&MediaType=1&Category=26 (last visited Apr. 21, 2009).

188. *Homophobic Official May Have Gay Son*, DALLAS VOICE, Mar. 13, 2008, http://www.dallasvoice.com/artman/publish/printer_8341.php (last visited Apr. 21, 2009). Kern's remarks were secretly recorded by the Gay and Lesbian Victory Fund and leaked to various media.

189. WILLIAM P. VARGA, THE NUMBER ONE NAZI JEW-BAITER: A POLITICAL BIOGRAPHY OF JULIUS STREICHER, HITLER'S CHIEF ANTI-SEMITIC PROPAGANDIST 94 (1981).

190. Justice Scalia's anti-Gay dissent in *Romer v. Evans* echoes anti-Jew propaganda when he describes efforts to strip Gays of anti-discrimination protections as "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority . . . ." Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

191. DWORKIN, SCAPEGOAT, *supra* note 151, at 149.

192. *Id.*

193. *Id.*

194. Forrester is also the former director of Concerned Women for America of North Carolina and currently serves as its legislative liaison and media coordinator. *See* CONCERNED WOMEN FOR AMERICA OF NORTH CAROLINA,

wife of State Senator James Forrester,[195] recently wrote an opinion piece for the right-wing Christian Action League website, in which she opened with a quotation from the February 15, 1987 issue of the now-defunct *Gay Community News*:[196]

> We shall sodomize your sons. . . . We shall seduce them in your schools, in your dormitories, in your gymnasiums, in your locker rooms . . . in your youth groups. . . . Your sons shall become our minions and do our bidding. . . . They will come to crave and adore us. All laws banning homosexual activity will be revoked. Instead legislation shall be passed which engenders love between men. Our writers and artists will make love between men fashionable. . . . We shall raise private armies . . . to defeat you. The family unit will be abolished. Perfect boys will be conceived and grown in the genetic laboratory. . . . All churches who condemn us will be closed. Our only gods are handsome young men. All males who insist on remaining stupidly heterosexual will be tried in homosexual courts of justice and will become invisible men. Tremble, hetero swine, when we appear before you without our masks.[197]

Forrester's selective excerpt conveniently leaves out the beginning (remember: context is everything) of the essay she quotes. Michael Swift, the essay's author, begins: "[t]his essay is an outré, madness, a tragic, cruel fantasy, an eruption of inner rage, on how the oppressed desperately dream of being the oppressor."[198]

The fact that what she cites as proof of a "revolutionary" homosexual agenda is actually a literary exercise—high satire—is nowhere mentioned. Forrester's editorial is filled will other calculated inaccuracies. For instance, she writes: "[d]id you know that the average life span of a homosexual is 39 years as opposed to 78 for heterosexual women and 76 for heterosexual men?"[199] But as journalist Matt Comer explains, Forrester draws these numbers

Spring 2008, at 5, *available at* http://states.cwfa.org/images/content/spring08ncnews.pdf.

195. Senator Forrester is the sponsor of a state constitutional amendment, which he reintroduces each legislative session, to ban Gay marriage and to bar legal recognition of contractual relationships between Gays which might approximate marriage. *See* S. 13, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), *available at* http://ncleg.net/sessions/2007/bills/senate/pdf/s13v1.pdf.

196. Forrester inaccurately dates the piece to 1986. *See* Matt Comer, *Wife of N.C. State Senator Pens Hate-Filled Op-Ed*, Mar. 13, 2008, http://www.interstateq.com/archives/2621.

197. *Id*. (quoting Michael Swift, GAY COMMUNITY NEWS, Feb. 15, 1987).

198. *Id.* Again, Forrester misattributes the piece to "Mark" Swift. But as journalist Matt Comer points out, even this may have been a pen name. *Id*.

199. Jim Burroway, *Certified Cameronite: Mary Frances Forrester*, BOX TURTLE BULL., Mar. 17, 2008, http://www.boxturtlebulletin.com/2008/03/17/1647. This same misinformation, echoing Nazi propaganda that Jews were physically inferior to Aryans, was also part of Sally Kern's speech. *Id.*

from discredited studies, methodologically flawed, looking at the life spans of men with AIDS.[200] While these studies have been discredited even as to their relations to the effects of AIDS, Forrester, in typical right-wing fashion, conflates all Gay men with men living with AIDS.[201] Also echoing *Der Stürmer*, Forrester notes that "societies that condoned homosexual behavior did not survive past one generation."[202] This statement is easily exposed as factually inaccurate in antiquity and modernity.

D. Religion as Culture War[203]

> *In doing this I am following an inner call and moral obligation.*
>
> *—Julius Streicher 1934*[204]

It cannot (should not, at least) escape observation that Forrester's and Representative Kern's assertions and Harper's and Nuxoll's[205] messages are linked directly to a pervasive religious paranoia that fuels anti-identity rhetoric and worse.[206] Religion was

200. The studies in question are by Paul Cameron, whose so-called "scientific" studies were reported by the Southern Poverty Law Center in 2005 to be "echoes [of] Nazi Germany." *See Report: Anti-Gay Movement Gains Momentum*, SPLC REPORT, June, 2005, http://www.splcenter.org/center/splcreprt/artocle.jsp?aid=152. The SPLC was too generous. Cameron's accounts are not merely "echoes"; he is, in fact, one of Nazi Germany's greatest revisionists.

201. *See* Comer, *supra* note 196.

202. *Id.*

203. The term "Culture War" here is an allusion to Justice Scalia's dissent from *Romer v. Evans* (in which the Court struck down as a violation of equal protection a Colorado constitutional amendment that repealed all state and municipal antidiscrimination protections for LGBT people (and for LGBT people *only*)), in which he begins with his famous *Kulturkampf* reference. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). I've always found this reference by a famously Catholic judge to be exceedingly odd. The word means literally "culture struggle" or "culture war." But it refers to a particular episode in German history: the German government's suppression of the Roman Catholic Church (for refusal to go along with Bismarck's nationalistic policies). Church suppression of this kind would violate the religion clauses of the First Amendment and, presumably, Scalia, as a Catholic, would want the federal government to step in if such suppression took place at the state level.

204. *See* BONDY, *supra* note 153.

205. Harper's message was explicitly religious, and at least the *Nuxoll* concurrence believed Nuxoll's message to be religious, defending it by finding that "[t]here is a significant difference between expressing one's religiously-based disapproval of homosexuality and targeting LGBT students for harassment. Though probably offensive to most LGBT students, the former is not likely by itself to create a hostile environment." *See* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 679 (7th Cir. 2008) (Rovner, J. concurring). The fact that both teens were represented by the Alliance Defense Fund is solid evidence that their messages were part of a larger religious initiative.

206. The examples I cite at this point in the discussion are just that, merely

also a weapon in Julius Streicher's arsenal. Streicher argued: "To my mind, a good German is a good Christian. Instead of continuing a system which divides Christian children and teaches them different religious beliefs, we should unite our teaching and our educational goals. Let them all learn together that our worst enemy is the Jew."[207]

Echoing (in fact, predating) Harper and Kern, Pat Robertson exhorts: "Homosexuality is an abomination. The practices of those people is [sic] appalling. It is a pathology."[208] And Robertson all but coined the sentiment that Judge Posner could not bring himself to label anti-Gay when Robertson decreed that "The term gay is the most serious misuse of the English language. They're not gay, they're very, very depressed and miserable."[209] Warning that hurricanes could hit Orlando, Florida because of Gay events held there, Robertson laid bare the eerie *Der Stürmer* link between anti-Gay and anti-Semitic hate, "the acceptance of homosexuality is the last step in the decline of *Gentile* civilization."[210] The religious warfare is not merely implicit. Robertson has warned, "[Gays seek] to destroy all Christians."[211] Likewise, Jerry Falwell warned that "the homosexual steamroller will literally crush all decent men, women, and children who get in its way . . . and our nation will pay a terrible price!"[212] Streicher blamed the Jews for the World Wars and for calamities of his day.[213] Both Robertson and Falwell blamed Gays for the terrorist attacks on the World Trade Center, and Robertson blamed Gays for the fact that Hurricane Katrina

examples, and the actual recitation of such libelous claims could go on *ad infinitem*. My stellar research assistants filled three large three-ring binders with claims about Gays ranging from inflated incomes to the routine consumption of blood. As in Nazi anti-Semitism, a predominating theme in right-wing Christian anti-Gay rhetoric is that Gays are degenerate and depraved; that they are child molesters (committing as much as 80% of all child molestations by one libelous report); are sexually depraved; and want to undermine home and family. Such assertions chillingly recall the Blood Libel used for centuries to instigate pogroms against Europe's Jews and, eventually, the Holocaust itself. The essence of the Blood Libel, a myth with obscure origins in the Dark Ages, is that Jews must be feared and ultimately destroyed because they lure children to their destruction. So, too, for Gays.

207. VARGA, *supra* note 189, at 109.

208. *700 Club* (Christian Broadcasting Network television broadcast June 6, 1988) (quote available at http://gainesvillehumanists.org/patr.htm).

209. *The Religious Right and Anti-Gay Speech: Messengers of Love or Purveyors of Hate?*, *available at* http://www.wiredstrategies.com/robertson.html [hereinafter *Religious Right*].

210. *Id.* (quoting Pat Robertson from Time magazine, Oct. 26, 1998) (emphasis added).

211. PEOPLE FOR THE AM. WAY, HOSTILE CLIMATE 9 (1997)

212. *Id.* at 15.

213. THE HOLOCAUST HISTORY PROJECT, *Short Essay: Who Was Julius Streicher?*, http://www.holocaust-history.org/short-essays/julius-streicher.shtml (last visited Apr. 21, 2009) (indicating that Streicher reported that the Jews had murdered the King of Yugoslavia (whose murderer was not Jewish)).

destroyed much of New Orleans.[214] Powerful religious leaders use their clout to sway elections, too. Jerry Falwell publicly denounced former Vice President Al Gore for "endors[ing] deviant homosexual behavior . . . attempting to glorify and legitimize perversion."[215] Senator John McCain, who had publicly denounced Jerry Falwell, who declared "God Hates Homosexuality" in the 2004 election, made highly publicized amends with the televangelist in the run-up to the 2008 election.[216] McCain received the endorsement of another anti-Gay mastermind, televangelist John Hagee, in the 2008 race.[217]

Gary Bauer, who heads the right-wing Family Research Council has warned that "involvement in homosexuality can kill you."[218] The anti-Gay speech that everyone from the ACLU to the Alliance Defense Fund is defending certainly can. Benjamin Matthew Williams, the thirty-one-year-old white supremacist who entered the home of a Gay couple in Northern California and shot them to death in their bed, defended his actions by asserting, "I'm not guilty of murder. I'm guilty of obeying the laws of the creator."[219] Like young Tyler Harper, Williams believes that God has condemned homosexuals. Williams also believes that the biblically-endorsed punishment for the "sin" of homosexuality is death. It is more than merely trivial that the staunchest opposition to laws curbing anti-Gay rhetoric in other democracies comes from religious groups.[220] In the United States, also, powerful religious interest groups, like the Alliance Defense Fund, are the staunchest defenders of anti-equality speech, especially speech attacking Gays, in schools and elsewhere.[221] Whatever else may remain of the "Wall of Separation,"

214. *Rev. Falwell Blamed for Terrorist Attacks*: *Partial Transcript of Comments from the September 13, 2001 Telecast of 700 Club*, http://www.actupny.org/YELL/falwell.html (last visited Apr. 21, 2009); Posting of Dan Savage to Slog News and Arts Blog of the Stranger, http://slog.thestranger.com (Sept. 13, 2005, 10:51 PDT).

215. *Religious Right*, *supra* note 209.

216. Libby Quaid, *McCain's Sharp Tongue: an Achilles Heel?*, HUFFINGTON POST, Feb. 16, 2008, http://www.huffingtonpost.com/2008/02/16/mccains-sharp-tongue-an_n_87012.html.

217. Posting of Max Blumenthal to The Nation: State of Change Blog, http://www.thenation.com/blogs/campaignmatters (June 2, 2008, 6:50 EST). Among other things, Hagee has said that the Anti-Christ "will be a homosexual Jew." *Id.*

218. Candace Chellew, *Esqueertology: Gay Christians' Right to Hope*, http://www.whosoever.org/v3i4/hope.html (last visited Apr. 21, 2009) (quoting Gary Bauer).

219. Mike Hudson, *"Anti-gay Violence Frequent Across the Nation, Activists Say*, ROANOKE TIMES, Sept. 30, 2000, *available at* http://rtonline1.roanoke.com/rt_specials/shooting/story19.html.

220. Richard Roth & Ruth Gledhill, *Inciting Hatred Against Gays Could Lead to 7 Years in Prison*, TIMES (London), Oct. 9, 2007, at 2.

221. Alliance Defense Fund News Center, *ADF Attorneys Appeal Poway "T-Shirt" Case to U.S. Supreme Court*, Oct. 27, 2006, http://www.alliancedefensefund.org/news/story.aspx?cid=3902 (noting that ADF

there is no separation in this.[222]

The Nazis proved over and over again that words were necessary to debase prey and legitimize lies and to encourage compliance in crimes. Their slogans were incitement, a saturation propaganda that normalized the subhuman status of the "other" (in the case of the Nazis, Jews *and* homosexuals[223]). The religious right campaign against Gays understands propaganda as well as the Nazis did. Once their slogans are part of everyday reality, "the deviant (in sociological terms) . . . [will] stand out in bold relief."[224] Is it any wonder that Larry King is dead, that Sean Kennedy is dead, that countless, nameless others are dead? Of course, words alone did not kill them. That is a simplistic defense that does not deserve credibility. Words alone did not kill them, but a social environment of hate, of which words are a part, cosseted their killers in contextual support. As Andrea Dworkin observed of German police who murdered Jews: [T]he social environment . . . made them heroes or good soldiers or good Germans or just one of the . . . boys."[225] Jew (then and now), like Gay (then and now), was a word that stigmatized and killed. Isaiah Berlin made the connection: "The Nazis were led to believe by those who preached to them by word of mouth or printed words that there existed people, correctly described as subhuman. . . . [I]f you believe it, because someone has told you so, and you trust this persuader, then you arrive at a state of mind where, in a sense quite rationally, you believe it necessary to exterminate Jews . . . ."[226] Religious or otherwise, anti-identity speech is more than viewpoint or abstraction; it is dangerous. Coercion is not a viewpoint. Incitement is not a viewpoint. Neither is murder.

attorneys represented Chase Harper); Alliance Defense Fund News Center, *ADF Attorney Available To Media After Hearing in "Be Happy, Not Gay" Case*, Apr. 3, 2008, http://www.alliancedefensefund.org/news/story.aspx?cid=4459 (noting that ADF attorneys represented Alex Nuxoll).

222. The extent to which the religious origins of anti-Gay initiatives and speech should further insulate those initiatives and speech is debated. *See, e.g.*, Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187 (2007); George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553 (2007); John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223 (2007).

223. *See generally* RICHARD PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS (1986). Because history is generally oriented heterosexual, the Nazis' Gay victims often are historically invisible, but important scholarship chronicling the mass murder of Gays in the Holocaust does exist. *See id.*

224. DWORKIN, SCAPEGOAT, *supra* note 151, at 151.

225. *Id.*

226. *Id.* at 141.

IV. SPEECH AND EQUALITY

> *The creation of a rich and dependable object worked; the building-in of secure sequences of behavioral time; the comfortable mastery of space; firm links between the acting organism and the external world; all of these add up to solid answers to our four common human problems. "What shall I do? What may I hope? What can I know? What is man?"*
>
> *—Ernest Becker, The Revolution in Psychiatry*[227]

Once anti-identity speech is regarded as action inducing harm, a speech theory that has its foundation in equality can emerge. No group systematically shamed, degraded, and dehumanized can possess equality. German courts manipulated free speech doctrine in many of the same ways it is currently manipulated in the United States. The German courts held that only individuals could be libeled, thereby protecting favored groups but allowing powerful, socially dominate groups to systematically degrade others. Scholar David Riesman linked this particular speech doctrine directly to the rise of the Nazis.[228]

Certainly, the doctrine espoused by the German courts made possible the systematic defamation of Jews in ways that cast them in ill-repute and made them easy scapegoats. When the Allies occupied Germany, they had to confront this problem head-on. They did so quite reasonably, by licensing German presses.[229] This was particularly the case in the American zone. When these presses published material inconsistent with the Allied agenda, the licenses were revoked.[230] There was also school curriculum reform to combat the Nazi ideology among German youth.[231]

In the United States, viewpoint-based theory says nothing whatever of equality. It does not take equality into account. What makes a viewpoint is a matter of power. Power hierarchy, subordination and domination, is the stuff U.S. law is made of. Gay people are subjugated in this country, relegated to a lesser caste, precisely because it is the viewpoint, so expressed, of powerful people. The reason that proposing regulation of coercion and incitement is cast as viewpoint discrimination is precisely because powerful people disagree with it.[232] There is certainly genuine social

227. ERNEST BECKER, THE REVOLUTION IN PSYCHIATRY (1974).

228. *See* David Riseman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 728–30 (1942).

229. *See* JOHN GIMBEL, THE AMERICAN OCCUPATION OF GERMANY: POLITICS AND THE MILITARY, 1945–1949, at 246–47 (1968).

230. *Id.*

231. *Id.*

232. I don't mean to make this personal. I'm not suggesting that every individual bigot is powerful. But I am suggesting that, as a matter of social hierarchy, white, heterosexual, male bigots are powerful as a class and that the law scaffolds that power. Academic apologists for the state of the law are there

disagreement about whether Gay people should be able to exist as Gay people.[233] Neither ten years of *Will & Grace* nor four seasons of *Queer Eye for the Straight Guy* has changed that. But the content/viewpoint approach obfuscates the fact that the focus on anti-identity speech as a discrete category of harmful speech is not content-based. It is harm-based—focused entirely on the harm in action that the speech produces (the most common forms of harm being coercion and incitement, as I have explained).

In *Nuxoll*, Judge Posner's principal departure from the approach taken by the *Harper* majority is summed up in his belief that

> [P]eople do not have a legal right to prevent criticism of their beliefs or for that matter their way of life. There is no indication that the negative comments that the plaintiff wants to make about homosexuals or homosexuality names or otherwise targets an individual or is defamatory. Anyway, though *Beauharnais v. Illinois* has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.[234]

As I have shown, Judge Posner is quite wrong in his assessment that statements denigrating Gays are not defamatory. But he is also wrong, as a matter of theory, in his point of departure. Posner's concentration on defamation and its theory is only half the story. The theory of group defamation does not adequately reflect what is accomplished through anti-identity speech. Defamation law survives, of course, as it is applied to individuals; its derivative applications to groups in *Beauharnais v. Illinois* perhaps having been discredited, especially in as far as group libel claims are concerned. Since *New York Times Co. v. Sullivan*,[235] safeguards against group-based defamation have been severely circumscribed for fears that laws against group defamation may compromise legitimate expressions of political viewpoint.[236] In this sense, group defamation is approached as a theory about the expression of ideas, which it inevitably is. It is not—overtly, anyway—a theory about

to buoy up the status quo when it begins to lag. Especially when they suggest that bigots are not powerful, they betray the magnitude of that power.

233. Robert F. Nagel, *Playing Defense in Colorado*, FIRST THINGS, May 1998, at 34, 34–35.

234. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 672 (7th Cir. 2008) (citations omitted).

235. 376 U.S. 254 (1964).

236. It should not be overlooked that the evolution of defamation law in the United States tracks its treatment by German courts as the Nazis rose to power. German courts generally held that only individuals could be defamed, not groups. David Riseman explains how this approach to the law of defamation was instrumental in the Nazi campaign systematically to subordinate Jews and to impose inferiority through mass propaganda campaigns. *See* Riseman, *supra* note 228, at 728–29, 1282.

discrimination, which is at the heart of the controversy over anti-identity messages. Discrimination accomplished through words, even in so much as it expresses a viewpoint, has never been shielded from legal regulation by the First Amendment.

Discrimination and inequality have always, in a very real sense, been the product of something somebody said. "We don't serve blacks here"[237]; "no Jews"[238]; "walk more femininely, talk more femininely, dress more femininely, wear make-up, have your hair styled, and wear jewelry"[239]; and "Fuck me or you're fired"[240] are all verbal expressions of certain viewpoints. All have been held regulable. All speech expresses some idea[241]; as Justice Holmes observed: "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[242] But we, today, recognize certain expressions and the acts they constitute—acts of discrimination—as affronts to the equality norm embodied in the Fourteenth Amendment. They are more than the expression of an idea; they are discriminatory acts that violate the Constitution. Words that are more than mere words—words whose expressions of contempt and discriminatory animus are then acted out in *real* manifestations are constitutionally suspect and regulable. The law's concern is not with what the speech says (at least not only that) but with what it *does*.

Because anti-identity speech is at once both defamation and discrimination,[243] a substantive equality theory of group defamation would necessarily center on the subordination (the harm) accomplished through the dissemination of the anti-identity message—inequality in verbal form. The dissemination of anti-identity messages about historically marginalized groups facing systemic and systematic disadvantage creates social inequality,

237. *See, e.g.*, Blow v. North Carolina, 379 U.S. 684 (1965) (finding that a restaurant serving "whites only" violated the Civil Rights Act of 1964).

238. This sort of segregation was common, of course, to Germany in the Nazi era.

239. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (Brennan, J., concurring) (Justice Brennan believed such statements constituted sex-stereotyping in violation of Title VII).

240. Stockett v. Tolen, 791 F. Supp. 1536, 1543 (S.D. Fla. 1992).

241. This seemed to be a bedrock First Amendment principle until the dissenters in *Morse v. Frederick* (the famous "BONG HiTS 4 JESUS" case) questioned whether Frederick's speech was not simply "nonsense," lacking communicative value. Morse v. Frederick, 127 S. Ct. 2618, 2649 (2007) (Stevens, J., dissenting).

242. Towne v. Eisner, 245 U.S. 418, 425 (1918).

243. By this I mean that anti-identity speech cannot say what it says without also doing what it does—which is the coercive imposition of inferiority through words. As Catharine MacKinnon rightly notes, not all speech has this power to be both speech and action simultaneously, but anti-identity speech assuredly does. *See* CATHARINE A. MACKINNON, ONLY WORDS 12–13 (1993).

which becomes political and legal inequality. Without the prejudice perpetuated by anti-identity expression, power hierarchies could not exist and systems of social subordination that scaffold power through the promotion of inequality would not exist. Inequality of opportunity is controlled through the coercive imposition of a lower caste status. The impossibility of equality of opportunity in an atmosphere of derision and contempt is exactly what the *Harper* majority recognized[244]—as did Judge Posner,[245] although he missed entirely the connection between the atmosphere of contempt and the speech that creates the atmosphere.

Speech that says, quite authoritatively because it encounters no official resistance, that a group is second-class or no-class is precisely how caste systems are built and maintained. Words create the hierarchies and people fill them. If we are ever to reach the heart of darkness where these hierarchies are made to seem reasonable and natural—inevitable—if we are ever to reach this place where pulverization of the marginalized is not only condoned but encouraged, we must deal with the problem of anti-identity speech. The most reasonable way to do that is to admit that anti-identity expressions offend the equality norm and can thereby be restricted consistent with the First Amendment free speech norm. To put it another way—in the accepted parlance of the courts—dedication to equality and an understanding of how anti-identity speech obliterates hope of equality for people in the aforementioned ways creates the compelling interest necessary to abridge the fundamental right of free speech (or to take discrimination in verbal form outside the expressive paradigm altogether).[246]

Of course, there is the problem of narrow tailoring. In a case like *Harper*, which deals only with restrictions of anti-identity speech in public schools—realizing that young people are vulnerable and impressionable; still exploring their identities, they are at the greatest risk of destruction from attacks on their identity; and they are in this peculiar environment where they cannot escape attack—ought to satisfy this type of balancing quite easily. The resulting regulation is narrowly tailored to achieve the compelling interest in protecting the equality of identified, usual targets of anti-identity speech in a setting where they are perhaps most vulnerable to its effects. In other situations, less discrete, the balancing would still be performed. In some cases, bigoted speech might still prevail, but at least the constitutional balancing would be a fairer fight,

244. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–79 (9th Cir. 2006) vacated, 549 U.S. 1262 (2007).

245. Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 671–72 (7th Cir. 2008).

246. It seems to me that sexual harassment law is an example of a category of speech being excepted from the usual First Amendment paradigm. So far as I know, no sexual harassment defendant has claimed successfully that his sexually-charged expression is protected by the First Amendment.

including two recognized and legitimate constitutional rights—speech and equality—not merely the right of free speech juxtaposed against some vague notion of civility, "[m]utual respect and forbearance."[247] The operative difference in focus of current defamation theory and a substantive equality approach to the same is the all-important shift in focus from the *viewpoint expressed* to the *harm enacted* by that same expression—lived realities versus theoretical abstractions. When the problem is conceptualized this way—realistically—the constitutional balance shifts, and equality has a fighting chance.

A substantive equality approach does not require a total subversion of current First Amendment theory.[248] The theoretical underpinning of First Amendment theory, the principle that there is, under the First Amendment, no false idea,[249] is not jettisoned. Rather, a substantive equality approach to speech theory simply recognizes that there is another constitutional principle, that of equality under the Fourteenth Amendment, that has heretofore been absent from the analysis. The idea that some people are inherently inferior may be just fine under the First Amendment as a private opinion, but its authority as a privileged basis for public policy evaporates—is in fact rejected outright by the Constitution's espoused commitment to equality under the Fourteenth Amendment. This would not mean that ideas contrary to equality could not be expressed, only that their expression would not be effectively off-limits or out of the bounds of constitutional inquiry or regulation. An expressive means of practicing or effectuating inequality (enacting it) has never been recognized as an exception to the equality norm.[250]

In countries where atrocities are not consigned to a national amnesia, the words and symbols of subordination—the same words and symbols considered to be merely offensive viewpoints here—are treated as acts and as instrumentalities of acts. They are held

247. *Nuxoll*, 523 F.3d at 672.

248. In fact, although he is not particularly sympathetic to the anti-hate speech movement, Professor Kenneth Karst's observation that "[t]he principal of equality . . . is not just a peripheral support for the freedom of expression, but rather part of the 'central meaning of the First Amendment'" is salient. Kenneth L. Karst, *Equality As a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 273 (1964)).

249. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

250. *See* Norwood v. Harrison, 413 U.S. 455, 470 (1973) ("Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."). My argument here and in the following paragraph is particularly indebted to Catharine MacKinnon. *See* MACKINNON, *supra* note 243, at 71–76.

accountable for the realities they create.[251] In the international instruments that have emerged after World War II, subordinating prejudices are condemned as false.[252] The law does not ignore them; it confronts them. The law recognizes that subordination is an action, as well as a viewpoint, and that subordination accomplished through words is no less subordination. Take, for example, the International Convention on the Elimination of All Forms of Racial Discrimination, which requires all state parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred . . . ."[253] Also, an approach similar to the one I outline above was adopted by the Supreme Court of Canada in upholding a provision of the Canadian criminal code that outlawed the dissemination of hate propaganda.[254]

This equality-based approach to speech stands in stark contrast to the condition in the United States. But judicial understanding of equality and inequality from speech has not always been so stilted. The U.S. Supreme Court came closest to confronting that link in *Beauharnais v. Illinois*.[255] The majority opinion held 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."[256]

Even in dissent, Justice Douglas comprehended the basic relation between anti-identity speech and equality, writing:

> Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country

251. It is interesting to know that Telford Taylor, a U.S. prosecutor in the Nuremberg Trials, believed that Julius Streicher was wrongly sentenced to death: "There was no accusation that Streicher himself had participated in any violence against Jews, so the sole (and difficult) legal issue was whether or not 'incitement' was a sufficient basis for his conviction." TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 376 (1992). In fact, what Nuremberg showed emphatically was a connection between anti-identity saturation propaganda and genocide. Only the distinctly American hallucination that words have no meaning can explain Taylor's critique of Streicher's just deserts.

252. *See* Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 3–4 (1996).

253. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Mar. 12, 1969, 660 U.N.T.S. 195, 218–20.

254. R. v. Keegstra, [1990] 3 S.C.R. 697 (Can.) (available in English at 1990 CarswellAlta 192).

255. 343 U.S. 250, 262–63 (1952).

256. *Id.* at 263.

> could be made an indictable offense. For such a project would be more than the exercise of free speech.[257]

Justice Douglas recognized that, in these situations, the pernicious speech is being restricted not for what it says, but for what it does. But neither majority nor dissent mentions the Fourteenth Amendment's guarantee of equality.

In fact, no speech case, before *Beauharnais* or since, has explicitly invoked an equality rationale as a basis for judicial decision-making.[258] Speech authoritarians suggest that cases, like

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

258. It is no surprise that a Court intent on gender "blindness," *see, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–25 (1982), and color "blindness," *see, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 127 S. Ct. 2738, 2751–52 (2007), should also formulate a doctrinal edifice for speech that has as its foundation equality "blindness." The Court's intent to ignore inequalities and power structures reached dithering heights in *New York Times Co. v. Sullivan*, in which the Court brought the law of libel within the ambit of the First Amendment. 376 U.S. 254, 256 (1964). Although it did not explicitly overrule *Beauharnais*, *Sullivan* is seen by many as the bullet to the head of group defamation law. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 978 (2d ed. 2002); Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality,* 46 CASE W. RES. L. REV. 449, 459 n.41 (1996). But Professor Alexander Tsesis offers a particularly lucid explanation of how *Beauharnais* has survived *Sullivan*:

> *New York Times* quotes *Beauharnais,* indicating its continuing precedential value. Moreover, even *R.A.V. v. St. Paul*, which was otherwise critical of a hate speech ordinance, quoted *Beauharnais* for the proposition that some categories of speech are "not within the area of constitutionally protected speech." 505 U.S. 377, 383 (1992). *New York Times*'s effect on *Beauharnais* extends only to cases where group libels are directed at public personalities. New York v. Ferber, 458 U.S. 747, 763 (1982).

Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389, 396–97 n.57 (2004) (citation omitted).

Wherever one might come down on the vitality of *Beauharnais*, the truth is that the *Sullivan* Court had other options. The inaccuracies for which the racist police commissioner of Montgomery, Alabama sued were extremely minor. To prevail in a libel suit, the plaintiff has to prove damages resulting from the untrue speech. The trivial inaccuracies in the *New York Times* ad criticizing racist police likely produced no such damage. Supporters of civil rights realized the police were racist; supporters of segregation refused to believe. Any discrepancies in the ad likely changed little. Moreover, the cause supported by the *New York Times* was of greatest constitutional import—it was the cause to advance racial equality, to destroy segregation. The Court just as easily could have concluded that the important, special nature of equality rendered the minor inaccuracies of the *New York Times* article not actionable, instead of ruling that the special nature of public officials made them so. The *Sullivan* Court's refusal to even consider the equality implications of the case left the law of First Amendment speech and the law of Fourteenth Amendment

Brandenburg, in which the "ideas" of the Ku Klux Klan were protected,[259] naturally led to cases like *NAACP v. Claiborne Hardware*, in which the speech of Black civil rights agitators was protected.[260] In other words, we cannot protect the speech of those working for equality, like civil rights leaders of the 1960s, unless we also protect those who would threaten, terrorize, and incite the murder of those same leaders. But Catharine MacKinnon pulverizes this silly logic when she writes:

> Suppressed entirely in the piously evenhanded treatment of the Klan and the boycotters—the studied inability to tell the difference between oppressor and oppressed that passes for principled neutrality in this area as well as others—was the fact that the Klan was promoting inequality and the civil rights leaders were resisting it, in a country that is supposedly not constitutionally neutral on the subject.[261]

Indeed, the Constitution does not require viewpoint neutrality in matters of equality. In fact, the Constitution requires that government not promote inequality. That guarantee does not require explication by way of an esoteric theory of interpretation of a "living" Constitution; it is textually explicit.[262] Any nation that has such a guarantee of equality has not only the ability but also the obligation to confront speech that creates and maintains a caste system among its citizens. The United States is no exception.

In the United States, however, the law of equality and the law of free speech are rarely seen as intersecting on the same plane—at least not by the courts or by those academics who believe in speech authoritarianism and who have come to monopolize free speech discourse. In most First Amendment speech jurisprudence, speech is not treated as an agent of equality, but rather as something detached and operating in some independent realm of existence. In this country, we will hear the Klansman speak because, as despicable as his message may be, we are told, he is engaging in the sacrosanct core political "speech." We will even allow him to goose-step through the neighborhoods predominately inhabited by his targets because of his right to free "speech."[263]

But no member of the Klan realistically believes that his

equality entirely disintegrated.

259. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

260. 458 U.S. 886, 915 (1982).

261. MACKINNON, *supra* note 243, at 86.

262. U.S. CONST. amend. XIV, § 1.

263. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.) (holding that a Nazi party marching in the streets of a predominantly Jewish neighborhood is protected speech).

marching and sheet-wearing and cross-burning will bring about a political shift in which African-Americans are returned to shackles or even depart for Africa.[264] No, the purpose of Klan activity is to send the haters' message to the hated: "Nigger, here is what we think of you; here is what we may do to you given the chance. We would replace this charred wood with your charred body. Live in fear!" This is no mere expression stopping in the abstract. It is quintessential anti-identity speech, and the anti-equality message it delivers is a real, palpable injury sustained by real, breathing human beings. Shielding this type of psychological battery as constitutionally protected speech makes the law of equality and the law of free speech as divorced, as disconnected, as disintegrated as they can possibly be.

How did we get to this point? The modern law of free speech draws its essence from cases involving suppression of Communist speech during the McCarthy era.[265] The Supreme Court, in a vindication of free speech, ultimately ruled that Communists have the right to engage in anti-American government speech.[266] This conclusion, we are told, is supported by the history that shaped the free speech norm. And I believe that this is right. What does not follow as necessarily true is the conclusion that all speech must be constitutionally protected for the same reasons. For example, legal historian and speech scholar Michael Kent Curtis has written voluminous literature on the development of a robust free speech regime that should—and does—protect virtually all speech because all speech necessarily shelters an idea[267] and serve as a sort of

264. In fact, dialogue between the oppressed and the oppressor cannot really exist in these circumstances. Those who create history and those who are dispersed outside of it simply do not speak the same language.

265. In earlier work, Professor Michael Kent Curtis attributes this view to Catharine MacKinnon. MICHAEL KENT CURTIS, FREE SPEECH: THE PEOPLE'S DARLING PRIVILEGE 414 n.1 (2000) [hereinafter CURTIS, FREE SPEECH] (disagreeing with MacKinnon). Curtis has recently repeated this attribution in conversation with me. However, I arrive at this conclusion based on an independent reading of the case law, with the understanding that *Yates v. United States*, 354 U.S. 298, 312–27 (1957), was the tipping point in the slide to *Brandenburg*. So far as I can tell, Professor MacKinnon does not cite *Yates* at all.

Professor Alexander Tsesis also cites the debate over Communist speech as central to the development of modern First Amendment doctrine, but he makes no reference to the *Yates* decision. TSESIS, *supra* note 155, at 121.

266. *Yates*, 354 U.S. at 318–21 (distinguishing *Dennis v. United States*, 341 U.S. 494 (1951), and holding that mere advocacy of belief was not enough for prosecution under the Smith Act).

267. Michael Kent Curtis, *Critics of "Free Speech" and the Uses of the Past*, 12 CONST. COMMENT. 29, 64–65 (1995) [hereinafter Curtis, *Uses of the Past*].

insurance policy for "individual and political freedom."[268]

Curtis argues that a broad conception of free speech is absolutely necessary for the protection of minority interests and, *a fortiori,* that reconceptualizing free speech doctrine will destroy any hope for future progress. He cites his impressive historical scholarship as proof.[269] In his explication, there is compelling alarmist appeal. To the contrary, however, neither the history of the First Amendment nor its judicial development clearly points to that conclusion; and this is exactly what Professor Curtis's scholarship bears out (unintentionally). He writes:

> Many advocates of new restrictions on speech based on its ideas or point of view pay little attention to free speech history. As a result, while critics have deepened our understanding by highlighting some of the costs of broad protection for speech that is evil, they have left the benefits of protection and costs of changing it in darkness.[270]

But Curtis's recitation of the "past" as though it were more than the past—as though it were preordained—obscures the ability of a different equality-based conception of free speech for the future to protect the free speech interests of the marginalized without doing the damage that is inherent in the current free speech framework. Mostly, Curtis's invocation of history proves my point. A favorite example is the plight of abolitionists in the antebellum South.[271] In the absence of a powerful free speech commitment grounded in equality, the South succeeded in suppressing the pro-equality speech of the abolitionists. Nobody, then or now, seriously contended that the abolitionists' speech was contrary to equality. The South understood why the speech suppression was necessary as surely as it understood, from the Southern perspective of power, the necessity of the Civil War.

An equality-based speech system would have subjected suppression of abolitionist speech to the most stringent constitutional scrutiny. Through this lens, the justifications of the

268. *Id.* at 52.

269. *See generally*, CURTIS, FREE SPEECH, supra note 265 at 414–37; Curtis, *Uses of the Past*, supra note 267; Michael Kent Curtis, *Free Speech and Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419 (1996). Professor Curtis writes as a part of this Symposium as well—largely to refute the perspective I articulate in this Article. *See* Curtis, *Be Careful*, *supra* note 54.

270. Curtis, *Uses of the Past*, *supra* note 267, at 30.

271. *Id.* at 35–40. Professor Alexander Tsesis explains (and I agree) that the suggestion that the abolition of slavery represents a historical triumph of the free speech system (the marketplace of ideas version, anyway) is a misinterpretation of history. *See* Alexander Tsesis, 44 WAKE FOREST L. REV 497 n.68 (2009).

Southern establishment collapse. The "emotional injury"[272] alleged by slaveholders because abolitionist theory was "offensive to their feelings"[273] is hardly compelling, especially when it is weighed against the equality interests of the voiceless slave, given voice by the abolitionists. So, under my system, we would have arrived at protection of the abolitionists without the supposedly necessary protection of the Klansmen. Why this would not be a preferable system is unfathomable to me. As for the fear that it will be impossible to tell the powerful from the powerless, Professor Curtis's scholarship also proves this false.

> Although the reasons given for silencing abolitionists were lofty—protecting the public peace and national unity—behind those reasons were the powerful economic interests of the slaveholders and the Northern mercantile classes who traded with them. In 1859, John Bingham, later the main author of section one of the Fourteenth Amendment, put it this way, "These gentlemen apprehend that if free speech is tolerated and free labor protected by law, free labor might attain . . . such dignity . . . as would bring into disrepute the system of slave labor, and bring about . . . gradual emancipation, thereby interfering with the profits of these gentlemen."[274]

Abraham Lincoln warned (more poignantly in my opinion) of the "proneness of prosperity to breed tyrants."[275] The difference in the condition of the tyrant and the slave (and those advocating for the dignity of Blacks) was apparent even then.

Or consider the comparatively more recent example of suppressing the anti-war speech of Eugene Debs during World War I.[276] I support the notion that the free speech norm means that one may oppose wars; I have even written in opposition to war myself.[277] The rethinking of the free speech system in the way that I propose would not be a return to the "bad tendency" test that upheld Debs's jailing. This form of speech would still be governed by *Yates v.*

272. Curtis, *Uses of the Past*, *supra* note 267, at 36.

273. *Id.*

274. *Id.* at 37 (quoting CONG. GLOBE, 36th Cong., 1st Sess. 1861 (1860)) (alteration in original).

275. THE COLLECTED WORKS OF ABRAHAM LINCOLN 406 (Roy P. Basler ed., 1953).

As to this general fear that judges will not be able to distinguish adequately what is oppression in any given situation, I am drawn to Oliver Wendell Holmes's pithy observation that "even a dog distinguishes between being stumbled over and being kicked." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881). Is it too much to hope that judges are at least as discerning?

276. Debs v. United States, 249 U.S. 211 (1919).

277. Shannon Gilreath, *Know Thine Enemy*, PRIDE AND EQUALITY, Jan./Feb. 2006, at 3 (discussing Gay service men and women in the Iraq war effort).

United States[278] and contemporary precedent. It is outside the narrow realm of anti-identity, anti-equality speech as I have defined it. But even if we were to stretch, even if we were to force my round theory into a square hole, Debs might still win. He might win because my theory requires us to examine the power structure. Who has the power? Debs's speech is contrary to the government's own endorsement of the war. The government is the oppressor here; Debs is the oppressed. To suggest that protecting Gay students from anti-identity, anti-equality speech means we must allow the government to suppress anti-war speech is to cast Gay school youth on par with the power of the United States government. The assertion is ridiculous.

Professor Curtis believes that suppression of speech based on injury that amounts to "hurt feelings, offense, or resentment,"[279] will lead to the suppression of many types of speech that both of us would agree should be protected. He cites an impressive array of cases from First Amendment history. But this, again, is a reduction of anti-identity speech to mere "hurt feelings"[280]; it fails to distinguish between mere offense and real harm to the equality interests of the victim. The Court was confused about this (or obtuse) in *R.A.V.*, in *Texas v. Johnson*, in *Cohen v. California*, in *Terminiello v. Chicago*, and no doubt in other cases that Curtis would say were rightly decided. "[A]bolitionist criticism of slaveholders, jokes about political figures [assuming they were not also anti-identity speech], flag burning, wearing 'Fuck the Draft' on one's jacket"[281] are not imperiled by an equality-based speech perspective. People who may be "offended" by burnt flags or the word "fuck" are not being attacked by such speech on the basis of a component of their core identity. To believe that they are is to see "identity" in the way that the powerful (whose identity is already protected) see identity: as an accumulation of entitlements to have things exactly the way they want them—pristine stars and bars, no expletives, or whatever the desire may be.

In conversation about this essay a friend gave the following example in an effort to refute my theory: Any agitations against the status quo can be seen as an attack against the powerful. How is it that your rules won't end up protecting the powerful from merited

278. 354 U.S. 298 (1957).

279. Specifically, Curtis writes: "The Court has refused broadly to find the fact that speech (not focused on a particular individual) that causes 'hurt feelings, offense, or resentment' is sufficient to strip the speech of constitutional protection. If such consequences were regarded as sufficient injury, much . . . expression . . . could be suppressed." Curtis, *Uses of the Past*, *supra* note 267, at 43 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (1992) (White, J., concurring)).

280. This is a characterization of anti-identity speech that I have proven false in the preceding paragraphs of this Article.

281. Curtis, *Uses of the Past*, *supra* note 267, at 43.

attack? For example, what if unionists say, "CEO Smith is a capitalist pig and the blood of workers is on his hands?" Hasn't the CEO's identity been attacked?

This is an understandable reaction. It is understandable because it stems from the way the powerful have taught us to think about free speech. If we protect vulnerable minorities from anti-identity speech, surely this will mean that we will unintentionally insulate wrongdoers from justified impeachment. But this follows only if we fail to draw a principled distinction between speech used as a tool for democratic change and speech designed and utilized as verbal battery. The harm of anti-identity speech is different in kind and degree from any harm inherent in general political unrest. For instance, if tomorrow an outcry against law professors arose—an outcry so resilient and prolonged that it became uncomfortable for me to be a law professor—I could renounce my profession; I could go to Tahiti and paint like Gauguin, or assume whatever other profession that struck my fancy. The same is true of the CEO in my friend's example. The CEO could change his anti-labor policies or just stop being CEO; there are a multitude of solutions for someone in his position.

But I cannot so easily relinquish my identity as a Gay man—in fact, it is impossible for me truly to relinquish it. I can pretend that I am other than what I am, but in the end I will simply be a Gay man closeting my true identity. Indeed, identity minorities are targeted precisely because of this inability to change identities. We are like the Pariahs of the Indian caste system. It is impossible for us to transmute ourselves into a more acceptable caste, no matter what we do, no matter what we achieve, no matter how we pretend; that is exactly what makes us easy and comfortable targets. Therein lies the difference in speech targeting the CEO and speech targeting an identity group. The intentionality of anti-identity speech is not to get the target to change something about himself. The intentionality is not social advocacy. The verbal predator knows that no meaningful change is really possible. Instead, the intention of anti-identity speech is to liquidate the target, to render him utterly powerless.

The failure to comprehend the difference is inherent in the power hierarchy itself. With power inevitably comes narcissism, and the invisibility of the victim in most First Amendment analyses of anti-identity speech is driven by a narcissism of which its perpetrators are mostly unaware. Maybe the vocabulary of vilification can only really be understood, in an existential sense, by its victims. This would explain why the defamation and discrimination accomplished through it are treated as if they don't matter by those who lack the experiences that animate the vocabulary. In this country, where the Holocaust is something that happened someplace else and where slavery and segregation of Blacks has been assigned to our peculiar brand of amnesiac history,

the verbal and visual symbols that bring these traumas newly alive to their victims are considered perfectly legal—somebody else's civil liberty. [282]

V. CONCLUSION

> *The struggle to break the form is paramount. Because we are otherwise contained in forms that deny us the possibility of realizing a form (a technique) to escape the fire in which we are being consumed.*
>
> —*Julian Beck, The Life of the Theatre*[283]

Writing this Article has been the most difficult professional obligation I have undertaken for many reasons. My involvement in efforts to pass an anti-bullying bill ("The School Violence Prevention Act") in North Carolina was one of those reasons. My work on this bill, which would have required schools to protect youth from verbal assaults before the words turned physical, formed the spine of this article. I will not lie; I took the bill's failure hard. And I took it personally. How could I not? As James Lee Burke put it, through his narrator in *A Stained White Radiance*, "[w]e all have an extended family, people whom we recognize as our own as soon as we see them."[284] For me, like Burke's narrator, "[t]hey're the walking wounded, the ones to whom a psychological injury was done that they will never be able to define."[285] Indeed, "for those who were most deeply injured as children, words of moral purposes too often masked acts of cruelty."[286] I wanted the law (and the powerful people who make law) to care about these people—these Gay youth. When it (they) did not, I took it very personally.

And writing this Article confirmed what I already knew: the law of free speech does not care about them either. Of course I already knew it to be so, but in writing, forced as I was to talk to hurt people and to read judicial opinion and academic observation that reify that hurt, I had to face and digest the law's failure over and over again, and over an extended period of time.

Writing the Article was also hard because it put me at odds with many people I otherwise admire—civil libertarians with whom I agree on many other issues, but whose free speech absolutism cossets killers. And writing the Article was hard because it tested my longtime commitment to pacifism like no other experience. This

282. This, I think, explains why most academics who have written about speech from the pro-equality point of view have themselves been members of traditionally targeted minorities. *See*, *e.g.*, DELGADO & STEFANCIC, WORDS THAT WOUND, *supra* note 88; DWORKIN, SCAPEGOAT, *supra* note 151; MACKINNON, *supra* note 243; Matsuda, *supra* note 76.

283. BECK, *supra* note 1, at 1.

284. DWORKIN, SCAPEGOAT, *supra* note 151, at 1 (quoting James Lee Burke).

285. *Id.*

286. *Id.*

commitment was shaken with the realization of the depth of evil that could have been avoided if Helmut Hirsch, an American Jew and Julius Streicher's would-be assassin, had only succeeded in killing him. Alas, it was Hirsch who was decapitated by the Nazis in 1937, just one of some six million Jewish victims.[287]

It is because of this personal nature of my stake in the debate about speech and equality that I am keenly aware of Professor Michael Curtis's warning: "[t]houghtful arguments for revision [of the free speech norm] would recognize that departures from [the status quo] involve serious dangers and that exceptions need to be confined by tough, narrowly drawn, and very careful rules."[288] I could not agree more. Because the speech authoritarians have won, however, it is hard to believe that the absolutist view of free speech they advocate is wrong or that thoughtful departures from the absolutist norm are possible. But a free speech system that allows reasonable regulation of anti-identity, anti-equality speech aimed at people who face systematic and systemic powerlessness and subordination in contravention of their constitutionally guaranteed (and compelling) interest in equality is exactly this sort of system: one in which both a commitment to free speech and a commitment to equality are respected. When the victims of anti-identity speech can finally assert human rights against devastating, victimizing speech, a rational understanding of the free speech norm will emerge, and Gay youth—thereby Gay women and men—will finally have a shot at a dignified place in their country. We will be closer to an America where everyone matters—not just the powerful. Equality may mean something after all.

287. WILLIAM L. SHIRER, BERLIN DIARY: THE JOURNAL OF A FOREIGN CORRESPONDENT 1934–1941, at 74 (1941).

288. Curtis, *Uses of the Past*, *supra* note 267, at 52.