

## Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence

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# SPHERES OF AUTONOMY: REFORMING THE CONTENT NEUTRALITY DOCTRINE IN FIRST AMENDMENT JURISPRUDENCE

Steven J. Heyman\*

*Modern First Amendment jurisprudence almost exclusively prohibits laws restricting freedom of speech based on the content of the speech. In this Article, Professor Steven Heyman takes exception to the content neutrality doctrine, arguing that its strict application both minimizes other interests competing with speech and fails to elevate the premises on which the First Amendment stands.*

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## INTRODUCTION

Three decades ago, during the waning days of the Term, the Supreme Court issued an opinion in a routine free speech case. For some months, a postal worker named Earl Mosley had conducted a lonely vigil on the sidewalk outside a Chicago public school, protesting what he regarded as racial discrimination. After the Chicago City Council imposed a ban on picketing outside schools, Mosley challenged the ordinance in federal court, asserting that peaceful, non-disruptive picketing was entitled to protection under the First Amendment.<sup>1</sup> In *Police Department v. Mosley*,<sup>2</sup> the Supreme Court agreed that the ordinance was unconstitutional, but rested its decision on more limited grounds. The Chicago ordinance, Justice Marshall observed, did not prohibit all demonstrations near schools, but instead made an exception for ““the peaceful picketing of any school involved in a labor dispute.””<sup>3</sup> Because the city was unable to advance a persuasive reason for distinguishing between labor and non-labor picketing, Marshall concluded that the ordinance denied protesters like Mosley the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>4</sup>

While at first glance *Mosley* was decided on narrow grounds, this appearance was deceptive, for Justice Marshall took the opportunity to articulate a broad vision of the First Amendment. “The central problem with Chicago’s ordinance,” he declared,

is that it describes permissible picketing in terms of its subject matter.

... But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>5</sup>

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<sup>1</sup> The Court of Appeals for the Seventh Circuit ruled for Mosley on this ground. *Mosley v. Police Dep’t*, 432 F.2d 1256, 1259 (7th Cir. 1970).

<sup>2</sup> 408 U.S. 92 (1972).

<sup>3</sup> *Id.* at 93 (quoting Municipal Code, ch. 193-1(i)).

<sup>4</sup> *Id.* at 99-102.

<sup>5</sup> *Id.* at 95-96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (citations omitted).

Although the case attracted little notice at the time,<sup>6</sup> *Mosley*'s doctrine of content neutrality has become the cornerstone of the Supreme Court's First Amendment jurisprudence.<sup>7</sup> The doctrine has two facets: the government may not restrict speech because of its content (the rule against *content regulation*), nor may it use content as a basis for treating some speech more favorably than other speech (the rule against *content discrimination*). Governmental action that contravenes these principles is said to be "presumptively invalid"<sup>8</sup> under the First Amendment.<sup>9</sup> In addition, the Court has repeatedly rejected the notion that expression may be restricted "to shield the sensibilities of listeners,"<sup>10</sup> or because it "may have an adverse emotional impact on the audience."<sup>11</sup> These doctrines lie at the heart of many important recent decisions, including: *American Booksellers Association v. Hudnut*,<sup>12</sup> which struck down the MacKinnon-Dworkin anti-pornography ordinance; *Simon & Schuster v. Members of New York State Crime Victims Board*,<sup>13</sup> which overturned New York's Son-of-Sam law; *Texas v. Johnson*<sup>14</sup> and *United States v. Eichman*,<sup>15</sup> which held flag-burning protected under the First Amendment; *Collin v. Smith*,<sup>16</sup> which upheld the rights of Nazis to march in Skokie; and *R.A.V. v. City of St. Paul*,<sup>17</sup> which overturned a ban on cross-burning and other forms of hate speech.

As these cases make clear, the content neutrality doctrine remains deeply controversial both on and off the Court.<sup>18</sup> The problem stems from the fact that

<sup>6</sup> See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 & n.43 (1975).

<sup>7</sup> See, e.g., Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50 (2000) (observing that content neutrality "has become the core of free speech analysis").

<sup>8</sup> *United States v. Playboy Entm't Group*, 529 U.S. 803, 817 (2000) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

<sup>9</sup> *Id.* at 813.

<sup>10</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988).

<sup>11</sup> 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

<sup>12</sup> 502 U.S. 105 (1991).

<sup>13</sup> 491 U.S. 397 (1989).

<sup>14</sup> 496 U.S. 310 (1990).

<sup>15</sup> 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

<sup>16</sup> 505 U.S. 377 (1992).

<sup>17</sup> For commentary that generally supports the doctrine, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 12 (2d ed. 1988); Chemerinsky, *supra* note 7; Karst, *supra* note 6; Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Geoffrey R. Stone, *Restrictions on Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991). The strongest critic of the doctrine on the Supreme Court has been Justice Stevens. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420-22 (1992) (Stevens, J., dissenting); *FCC v. Pacifica Found.*, 438 U.S. 726, 744-47 (1978) (plurality opinion); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63-71 (1976) (plurality opinion). For other criticisms of the doctrine from a variety of perspectives, see STEVEN H. SHIFFRIN, THE FIRST

some speech causes harm precisely because of its content: threats may instill fear, incitement provoke violence, false advertising defraud consumers, and so on. This poses a dilemma for First Amendment jurisprudence. According to *Mosley*, speech may “never” be regulated because of its content, for that is “[t]he essence of . . . censorship.”<sup>18</sup> If this view were taken literally, however, it would disable government from regulating speech even when necessary to prevent serious injury to individuals or society. In response to this concern, the Court has carved out two exceptions to the neutrality doctrine. First, the justices have adhered to the traditional view that some categories of speech are entitled to little or no protection under the First Amendment.<sup>19</sup> Second, the Court has held in principle — though very rarely in practice — that even fully protected speech may be regulated based on content where necessary to achieve a compelling government interest.<sup>20</sup>

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AMENDMENT, DEMOCRACY, AND ROMANCE ch. 1 (1990) [hereinafter SHIFFRIN, ROMANCE]; Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); T.M. Scanlon, Jr., *Content Regulation Reconsidered, in DEMOCRACY AND THE MASS MEDIA* 331 (Judith Lichtenberg ed., 1990); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982).

<sup>18</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 96, 99 (1972).

<sup>19</sup> For the traditional view, see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that such categories of speech as obscenity, defamation, and fighting words are outside the protection of the First Amendment). As the Court has observed, in recent decades the scope of these traditional categories has been narrowed, but “a limited categorical approach has remained an important part of our First Amendment jurisprudence.” *R.A.V.*, 505 U.S. at 383.

<sup>20</sup> See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000); *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991). For a rare decision sustaining a content-based regulation under this standard, see *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion) (holding that ban on electioneering within one hundred feet of polling place was necessary to advance compelling state interests in preventing voter intimidation and election fraud).

By contrast, content-neutral regulations are reviewed under a less demanding standard. The Court has held that the government:

may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (citation and internal quotation marks omitted). Similarly, under *United States v. O’Brien*, 391 U.S. 367 (1968), the government may regulate symbolic conduct (such as draft card burning) if the regulation:

Unfortunately, however, the Court has never succeeded in explaining the rationale for these exceptions, or in squaring them with the general principle of content neutrality.<sup>21</sup> If the First Amendment allows harm-based regulation in some cases, why not in others? Yet if speech may be restricted whenever it causes social harm, the First Amendment would seem to afford little protection.

Thus, the Court's free speech jurisprudence has been marked by a deep and unresolved conflict between a strong commitment to content neutrality and an uneasy recognition of the limits of that commitment. This tension is clearly reflected in the justices' rhetoric, in which sweeping statements of the content neutrality principle often appear side-by-side with *ad hoc* exceptions and qualifications.<sup>22</sup> In many cases, there appears to be no principled way for judges to choose between following the general rule and recognizing an exception. For this reason, the Court's First Amendment opinions often seem arbitrary and unpersuasive. Far from illuminating the problem, the doctrine of content neutrality, when taken as the central concern of the First Amendment, only makes it more obscure.

In my view, the time has come to reconsider the content neutrality doctrine. This Essay is offered as a step in that direction. Content neutrality, I shall argue, is an important element of free speech jurisprudence, but it should not be regarded as "the first principle of the First Amendment."<sup>23</sup> Instead, it should be understood

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is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377. The Court has indicated that these two tests for content-neutral regulations are substantially similar, *see Clark*, 468 U.S. at 298, and that they amount to an intermediate standard of review, *see Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997).

<sup>21</sup> *See infra* Part II.A.

<sup>22</sup> For example, writing for the Court in *Simon & Schuster*, Justice O'Connor declared in no uncertain terms that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," 502 U.S. at 116 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)), only to state two pages later that such regulations would be upheld if they met the requirements of strict scrutiny. *Id.* at 118. In a concurring opinion, Justice Kennedy rejected the strict scrutiny exception, and insisted that "the sole question is, or ought to be, whether the restriction is in fact content based." *Id.* at 125 (Kennedy, J., concurring in judgment). Such restrictions, he asserted, "amount[] to raw censorship . . . forbidden by the text of the First Amendment and well-settled principles protecting speech and press." *Id.* at 128 (citation omitted). At the same time, however, he acknowledged that there were certain "historic and traditional categories," such as obscenity, defamation, and incitement, in which content-based regulation was permissible. *Id.* at 127.

<sup>23</sup> *Hill v. Colorado*, 530 U.S. 703, 789 (2000) (Kennedy, J., dissenting) (accusing the majority of disregarding "the neutrality that must be the first principle of the First

within a broader normative framework. The content neutrality doctrine is rooted in an underlying conception of autonomy. When individuals act within the scope of their own autonomy, government may not intrude into this realm by regulating the content of thought or expression. Nor may government interfere with the collective autonomy of citizens by imposing unjustified restrictions on public debate. Some acts of speech, however, should be regarded as invading the autonomy or rights of others (as in the case of threats causing fear or incitement promoting violence). In such cases, the rationale for content neutrality no longer holds; in regulating speech, the government is not invading the autonomy of the speaker or the community, but instead is protecting the rightful freedom of others. In short, I shall contend that the First Amendment permits regulation of speech where necessary to protect the autonomy or rights of others. In this way, it may be possible to harmonize the rule of content neutrality with the exceptions, and to develop a principled approach for determining which should prevail in particular cases.

After discussing the meaning of "content," Part I sets forth the justifications for the content neutrality principle. Part II then explores the appropriate limits of that principle. Part III examines the shortcomings of content neutrality when it is treated as the central principle of the First Amendment, divorced from the normative framework that is developed here. Focusing on judicial efforts to deal with hate speech in *R.A. V. v. City of St. Paul*<sup>24</sup> and with pornography in *American Booksellers Association v. Hudnut*,<sup>25</sup> I argue that the courts' increasing reliance upon the content discrimination doctrine to resolve difficult First Amendment problems only obscures the crucial issues, and leads to hypertechnical decisions that are inaccessible to the public. This approach not only gives short shrift to other values affected by speech, it also fails to persuasively articulate and defend the values that underlie the First Amendment itself. Finally, Part IV discusses how the theory and doctrine of content neutrality should be reformed in order to avoid these difficulties while preserving its important role in First Amendment jurisprudence.

## I. THE JUSTIFICATIONS FOR CONTENT NEUTRALITY

### A. *Introduction: On the Meaning of "Content"*

Let us begin with the idea of content. While content is often identified with what a speaker is saying,<sup>26</sup> this fails to capture the full range of the concept. We must develop a richer, more multi-faceted view of content if we are to understand

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Amendment").

<sup>24</sup> 505 U.S. 377 (1992).

<sup>25</sup> 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

<sup>26</sup> See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (stating that First Amendment precludes government from discriminating among speakers "on the basis of what they intend to say").

the reasons why it is protected under the First Amendment, and what the limits of this protection ought to be.

The content we are concerned with is that of speech and other activity protected by the First Amendment. The amendment protects both *inward thought* and *outward expression or communication*. In turn, communication comprises the following elements: (1) an act of expression by the speaker; (2) the speech itself; and (3) its reception by the listener, which may have an impact not only on the listener herself but also on others (such as an individual who is defamed by the speech). Moreover, although these elements can be distinguished, they can also be regarded as an integrated whole. Thus, the First Amendment is also concerned with (4) the relationship that is formed through communication between the speaker and listener, or within which the communication takes place.

Content can be understood in parallel terms. We can speak of the content of inward thought as well as the content of outward expression or communication. The content of communication includes: (1) its meaning for the speaker, that is, the thoughts or emotions that he intends to express; (2) the objective content of the speech,<sup>27</sup> and (3) the meaning of the speech for those who hear it, or who are otherwise affected by it.<sup>28</sup> Finally, content can refer to (4) a shared meaning or understanding that arises through communication. In short, it would be a mistake to regard content as a single, undifferentiated concept. Instead, we can distinguish between the content of speech *for the speaker, for the listener, and for the two together*, as well as its *objective content*.

In this Part, I explore how each of these elements supports the principle of content neutrality, by establishing a sphere of autonomy that is generally entitled to protection against governmental interference.<sup>29</sup>

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<sup>27</sup> See *infra* Part I.C.2 (discussing the senses in which content may be regarded as “objective”).

<sup>28</sup> This tripartite view of communication may be traced back to Aristotle’s *Rhetoric*. See ARISTOTLE, ON RHETORIC (George A. Kennedy trans., Oxford U. Press 1991). Aristotle identifies three means of persuasion through speech, which he calls *ethos*, *logos*, and *pathos*. *Id.* bk. I, ch. II, §§ 3-6, 1365a, at 37-39. First, speech can seek to persuade through “the character [*ethos*] of the speaker,” which occurs “whenever the speech is spoken in such a way as to make the speaker worthy of credence.” *Id.* § 4, at 38. Second, speech can persuade through “the argument [*logos*] itself,” “when we show the truth or the apparent truth from whatever is persuasive in each case.” *Id.* § 6, at 39. Finally, speech can persuade through “disposing the listener in some way,” which occurs when “the hearers . . . are led to feel emotion [*pathos*] by the speech.” *Id.* § 5, at 38.

<sup>29</sup> A note on terminology: By “autonomy” or “liberty,” I mean the capacity for self-determination, that is, the ability to determine one’s own thoughts and actions, and to control one’s person, without unwarranted interference by others. An individual’s sphere of autonomy is bounded by the autonomy of others. I take rights to be specific instances of autonomy in general. For further discussion of this conception of liberty and its relationship with rights, see *infra* text following note 175; Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1313-14 (1998) [hereinafter Heyman, *Righting the Balance*] (deriving this view from the

### B. Content Neutrality and Freedom of Thought

Although the First Amendment does not expressly mention freedom of thought, it is generally agreed that this freedom lies at the heart of what the amendment was intended to protect.<sup>30</sup> Perhaps the most powerful contemporary defense of this view appears in Justice Marshall's opinion for the Court in *Stanley v. Georgia*,<sup>31</sup> decided only a few years before *Mosley*.

*Stanley* struck down a Georgia law that criminalized the possession of obscene material even within an individual's own home.<sup>32</sup> In this setting, wrote Marshall, the First Amendment liberty "to read or observe what [one] pleases" was reinforced by another right fundamental to a free society — the right to privacy.<sup>33</sup> In challenging the statute, the defendant was merely asserting the freedom "to satisfy his intellectual and emotional needs in the privacy of his own home."<sup>34</sup> The state violated this right when it banned the private possession of obscene material in an effort "to control the moral content of a person's thoughts."<sup>35</sup> Regulation of this sort, Marshall declared, was "wholly inconsistent with the philosophy of the First Amendment": "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."<sup>36</sup>

This language finds strong echoes in Justice Marshall's later opinion in *Mosley*, which also denies the right of government to "control" "thought" or its "content."<sup>37</sup> The conceptual and rhetorical parallels between the two cases suggest that the *Mosley* doctrine rests in part on the principle developed in *Stanley* — that there is an inward realm of thought and emotion into which the law generally is forbidden to intrude.

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natural rights philosophy of Locke, Kant, and others).

<sup>30</sup> See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 21-22 (1970). For the historical basis of this view, see Heyman, *Righting the Balance*, *supra* note 29, at 1282-84, 1287 n.70, 1326 n.271.

<sup>31</sup> 394 U.S. 557 (1969).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 565.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 565-66. In a dramatic violation of this doctrine, a twenty-two-year-old Ohio man named Brian Dalton was recently sentenced to ten years in prison after pleading guilty to possession of child pornography, which consisted merely of fantasies that he wrote in his private journal. See *Child Pornography Writer Gets 10-Year Prison Term*, N.Y. TIMES, July 14, 2001, at A12. Citing ineffective assistance of counsel, Dalton is currently seeking to withdraw his guilty plea in order to raise the First Amendment issue. See Tim Doulin, *Journal Writer Appeals Ruling on Guilty Plea*, COLUMBUS DISPATCH, Nov. 20, 2001, at 12B.

<sup>37</sup> *Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972), quoted *supra* at text accompanying note 5.

As *Stanley* observes, this idea has deep roots in the liberal tradition. For John Locke, the ability to form one's own thoughts and beliefs lay at the foundation of liberty. Liberty, or self-determination, was grounded in the capacity of human beings to ascertain their own good and to direct their own actions through the use of reason.<sup>38</sup> Moreover, the beliefs that individuals hold cause no injury to others.<sup>39</sup> For these reasons, Locke argued that thought and belief were inalienable rights. When individuals entered into civil society, they necessarily conferred on the community, and on the government that it established, jurisdiction over their life, liberty, and property, for it was conflict over such external things that required the formation of society in the first place.<sup>40</sup> But there was no reason why individuals should give up the freedom to think for themselves.<sup>41</sup> It followed that the power of civil society and government did not extend to the internal realm of individual thought and belief.<sup>42</sup> Immanuel Kant drew a similar distinction, holding that the power of law applied only to external actions and not to internal ones, such as thoughts.<sup>43</sup> Likewise, in *On Liberty*, John Stuart Mill argued that the rightful power of society was limited to "the external relations of the individual," and did not extend to those matters that concerned only himself.<sup>44</sup> At the core of this sphere of autonomy was "the inward domain of consciousness," including "liberty of conscience, . . . thought and feeling."<sup>45</sup>

In these ways, the liberal tradition sought to protect the inner life of human beings from external interference and coercion. Over time, liberal thinkers developed an increasingly rich and complex account of what this inner life consisted of. In addition to rational self-determination, Locke understood it in terms of "happiness."<sup>46</sup> Mill further developed this view, arguing that utility or

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<sup>38</sup> See JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. XXI (Peter H. Nidditch ed., Meridian Books 1975) (4th ed. 1700) [hereinafter LOCKE, ESSAY]; JOHN LOCKE, TWO TREATISES OF GOVERNMENT, II § 63 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698) [hereinafter LOCKE, TWO TREATISES].

<sup>39</sup> See JOHN LOCKE, A LETTER CONCERNING TOLERATION (William Popple trans., 2d ed. 1689), in POLITICAL WRITINGS OF JOHN LOCKE 420 (David Wootton ed., 1993) [hereinafter LOCKE, TOLERATION].

<sup>40</sup> See LOCKE, TWO TREATISES, *supra* note 38, II §§ 87, 127-31; LOCKE, TOLERATION, *supra* note 39, at 422.

<sup>41</sup> See LOCKE, ESSAY, *supra* note 38, bk. II, ch. XXVIII, § 10, at 353.

<sup>42</sup> See LOCKE, TOLERATION, *supra* note 39, at 394-95. For a fuller exploration of Locke's view, see Steven J. Heyman, *The Liberty of Rational Creatures: Lockean Natural Rights and the Freedom of Speech and Thought* (Nov. 1999) (unpublished manuscript, on file with author).

<sup>43</sup> See IMMANUEL KANT, THE METAPHYSICS OF MORALS \*214, \*219, \*230 (Mary Gregor trans., 1991).

<sup>44</sup> JOHN STUART MILL, ON LIBERTY 10-14 (David Spitz ed., 1975) (1859) [hereinafter MILL, ON LIBERTY].

<sup>45</sup> *Id.* at 10-14.

<sup>46</sup> See generally LOCKE, ESSAY, *supra* note 38, bk. II, ch. XXI. For a valuable discussion of Locke's view, see ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW

happiness should be understood in light of an ideal of self-development.<sup>47</sup> In his constitutional opinions, Justice Brandeis also connected the idea of happiness with the development of human faculties, and argued that the inner life of individuals should be protected for its own sake. In *Olmstead v. United States*,<sup>48</sup> for example, he wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.<sup>49</sup>

As Justice Marshall recognized in *Stanley*, this passage, although written in defense of the right to privacy, applies with equal force to the freedoms protected by the First Amendment.<sup>50</sup> Indeed, Brandeis's rhetoric underscores the close relationship that the liberal tradition has always perceived between those freedoms and the idea of privacy.

In short, a central tenet of liberalism is that a boundary must be drawn between the outward realm of the state and the inward life of the individual.<sup>51</sup> And this principle is one of the foundations of the First Amendment doctrine of content neutrality. On this view, while the state may regulate external interaction between individuals, it may not seek to control their thoughts and feelings — the content of this internal realm. As Justice Jackson wrote in *West Virginia State Board of*

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18-35, 201-08 (1985).

<sup>47</sup> See MILL, ON LIBERTY *supra* note 44, at 10 (stating that he "regard[s] utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being"); *id.* at 54 (arguing that "the free development of individuality is one of the leading essentials of well-being"); JOHN STUART MILL, UTILITARIANISM ch. 2 (1861), in THE PHILOSOPHY OF JOHN STUART MILL (Marshall Cohen ed., 1961).

<sup>48</sup> 277 U.S. 438 (1928).

<sup>49</sup> *Id.* at 478 (Brandeis, J., dissenting). Although Brandeis, writing as a judge, attributed this view to the Framers, it is actually more characteristic of the period in which he himself lived. That is not to say, however, that this view cannot be seen as implicit in the earlier liberal conception.

<sup>50</sup> See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (quoting *Olmstead*, 277 U.S. at 478).

<sup>51</sup> See, e.g., Isaiah Berlin, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 124 (1969). Of course, this principle also underlies the Court's decisions protecting individual privacy under the Fourth Amendment, *see, e.g.*, *Katz v. United States*, 389 U.S. 347 (1967); and, more controversially, under other provisions such as the Fifth and Fourteenth Amendments, *see, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Whalen v. Roe*, 429 U.S. 589 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

*Education v. Barnette*,<sup>52</sup> such state action “invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control.”<sup>53</sup>

### C. Content Neutrality and Freedom of Communication

#### 1. Speaker Autonomy and Self-Expression

Of course, the First Amendment ensures freedom not only “to think as you will,” but also “to speak as you think.”<sup>54</sup> Both are essential to autonomy. Through speech, individuals express themselves and realize their inherent capacities as human beings.<sup>55</sup> *Mosley* endorses this rationale when it notes that free speech is necessary “to assure self-fulfillment for each individual,”<sup>56</sup> and when it cites Justice Harlan’s observation in *Cohen v. California*<sup>57</sup> that the First Amendment places “the decision as to what views shall be voiced largely into the hands of each of us,” not only to promote a “more perfect polity,” but also “in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”<sup>58</sup>

This discussion points to further grounds for the content neutrality doctrine. In one sense, content refers to the thoughts and feelings within a speaker’s mind; in another sense, it refers to the same ideas and emotions as they are expressed through speech. Government impairs individual autonomy and self-realization when it restricts speech because it disapproves of the fact that the speaker holds certain thoughts or feelings, or because it disapproves of the decision to express them. Even when the government restricts speech for other reasons, the restriction violates the speaker’s right to autonomy and self-fulfillment if those reasons are inadequate ones. Likewise, the First Amendment bars government from compelling citizens to speak, for this violates the “fundamental rule” that “a speaker has the autonomy to choose the content of his own message.”<sup>59</sup>

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<sup>52</sup> 319 U.S. 624 (1943).

<sup>53</sup> *Id.* at 642. For an account of free speech that focuses on the inviolability of individual thought and belief, see DAVIDA J. RICHARDS, TOLERATION AND THE CONSTITUTION chs. 6-7 (1986).

<sup>54</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (citation omitted).

<sup>55</sup> See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS ch. 1 (1984); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-81 (1963) [hereinafter Emerson, *General Theory*].

<sup>56</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972).

<sup>57</sup> 403 U.S. 15 (1971).

<sup>58</sup> *Id.* at 24 (citations omitted).

<sup>59</sup> *Hurley v. Irish Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (citation omitted).

At first glance, it might seem that the notion of speaker autonomy is capable of supplying a complete justification for freedom of thought and expression. As Mill concedes, however, when a person communicates with others, she affects others as well as herself.<sup>60</sup> Thus, a full account of free speech and of content neutrality must extend beyond the idea of speaker autonomy and include other elements, such as the importance of the speech, the freedom of other individuals to hear it, and the social dimension of expression.

## 2. The Speech Itself

The second element of communication is the speech itself — the words or other symbols that the speaker uses to convey meaning to a listener. I shall refer to this as the objective element of communication. Of course, in using this term, I do not mean to imply that language has meaning other than for those who use it. Instead, this element of communication is “objective” in several related senses. First, when an individual expresses his thoughts and feelings in speech, he transforms them from something that is internal and subjective into something that is external and accessible to others. Second, in order to do so, the speaker generally uses words or symbols that have relatively determinate meanings. Third, those meanings are more or less widely understood in the community. Fourth, many acts of speech refer to or make assertions about states of affairs in the social or natural world, or seek to transform those states of affairs. Finally, some acts of speech refer to, or contribute to the apprehension of, a truth that does not depend merely on the subjective views of human beings.

Corresponding to this element is a second sense of “content” — not the meaning of the speech for the speaker, but the objective meaning of the speech. Is it legitimate for the government to regulate content in this sense? In particular, may speech be restricted on the ground that it is false (apart from any impact this falsity may have on the rights of others, such as their reputations)? It is true that, when the government censors speech on this basis, it does not act on a ground that directly contravenes the principles discussed in the previous section: the autonomy and self-expression of the speaker. For the liberal tradition, however, government has no more power to restrict the expression of views on this basis than it has to censor them because it disapproves of people holding or expressing those views.

Liberal thinkers such as Locke and Mill regarded truth as at least partly objective. On this view, of course, the government cannot establish what is true through fiat. Furthermore, the best way to pursue truth is through the free use of individual reason, as well as through open and unrestrained discussion.<sup>61</sup> In this

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<sup>60</sup> MILL, *ON LIBERTY*, *supra* note 44, at 13 (acknowledging that, strictly speaking, the “liberty of expressing and publishing opinions” belongs not to “the inward domain of consciousness,” but rather to “that part of the conduct of an individual which concerns other people”).

<sup>61</sup> See LOCKE, *TOLERATION*, *supra* note 39, at 396; MILL, *ON LIBERTY*, *supra* note 44, ch. 2.

process, force and compulsion have no legitimate place.<sup>62</sup> To be sure, it does not necessarily follow that open debate will lead to the truth. Many liberals, including Locke and Mill, were skeptical about the ability of human beings to attain ultimate truth.<sup>63</sup> However, while free discussion is not a sufficient condition for the attainment of truth, it is a necessary condition. No other path to understanding is open to human beings, with their limited faculties for perceiving and articulating truth.<sup>64</sup> A similar view underlies Justice Holmes' classic defense of the marketplace of ideas in *Abrams v. United States*.<sup>65</sup>

Finally, Locke and Mill argued that, even if the state were capable of authoritatively determining truth, it would not be justified in forcing individuals to accept that truth. In his arguments for religious liberty, Locke contended that while the power of the state "consists only in outward force," "[a]ll the life and power of true religion consists in the inward and full persuasion of the mind."<sup>66</sup> More broadly, Mill argued that for truth to have the vital power to promote the mental development of human beings, and to have a transformative effect on their characters and feelings, it must be held not as "a dead dogma," but as "a living truth" that is present and vivid in the mind.<sup>67</sup>

In short, the traditional "search for truth" justification for free speech<sup>68</sup> focused not only on objective truth, but also on the effect that such truth had on the mind, character, and imagination. Objective truth had little or no value for human beings unless they subjectively believed it. This was the deepest reason why government should not seek to impose beliefs through law, for the use of outward force would undermine the very good that it sought to promote.

### 3. Listener Autonomy and Self-Realization

The third element of communication is the reception of speech by the listener (or what is often called the "communicative impact" of speech).<sup>69</sup> The listener's liberty is a mirror image of the speaker's: just as the latter is entitled to express her views, the former should have a right to hear them. This right also is rooted in the notion of self-determination. The expression to which one is exposed plays a powerful role in shaping the self and its inner life. Respect for autonomy dictates that individuals should have broad freedom to decide for themselves what they wish to see or hear.<sup>70</sup> Access to information is also crucial for the exercise of practical

<sup>62</sup> See LOCKE, TOLERATION, *supra* note 39, at 395.

<sup>63</sup> See LOCKE, ESSAY, *supra* note 38, bk. IV, ch. XVI, § 4, at 659-61; MILL, ON LIBERTY, *supra* note 44, at 22, 44-46, 53-54.

<sup>64</sup> See MILL, ON LIBERTY, *supra* note 44, at 21.

<sup>65</sup> 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>66</sup> LOCKE, TOLERATION, *supra* note 39, at 395.

<sup>67</sup> MILL, ON LIBERTY, *supra* note 44, at 34-42.

<sup>68</sup> The phrase is Mill's. *Id.* at 27.

<sup>69</sup> For a discussion of communicative impact, see *infra* Part II.A-B.

<sup>70</sup> For First Amendment theories that focus on listeners' autonomy, see Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) [hereinafter Scanlon,

choice by individuals.<sup>71</sup> For these reasons, *Stanley v. Georgia* and other cases hold that the First Amendment protects a "right to receive information and ideas."<sup>72</sup> Once more, the government invades a sphere of personal autonomy when it unjustifiably restricts expression out of concern for the effect it may have on willing listeners.

#### 4. The Social Dimension of Communication

So far, we have been considering each element of communication — the speaker's expression, the speech itself, and its reception by the listener — on its own. But these elements cannot be fully understood in isolation from one another. Instead, communication should also be regarded as an integrated whole.

This phenomenon has recently been explored by the philosopher Charles Taylor. In a series of illuminating essays, Taylor argues that the function of communication is not merely to transmit information from one person to another. Instead, speech transforms what is initially a matter of individual awareness into one of common awareness.<sup>73</sup> In this way, the matter being discussed "is no longer just a matter for me, or for you, or for both of us severally, but is now *for us*, that is for us together."<sup>74</sup> In other words, the aim of communication is not simply to convey ideas, but to develop a shared understanding. At the same time, communication establishes a relationship between the participants, a common ground or "vantage point from which we survey the world together."<sup>75</sup> Thus, in addition to its importance for separate individuals, speech also has an intersubjective or social dimension.<sup>76</sup>

This insight points to another sense of "content," and a further justification for the content neutrality rule. Just as the inner lives of individuals constitute spheres

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*Theory*]; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991). This autonomy interest applies less fully in the case of children, however, than in the case of adults. See, e.g., *ACLU v. Reno*, 521 U.S. 844, 869 (1997) (citing *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989)) (noting that "there is a compelling interest in protecting the physical and psychological well-being of minors" by shielding them from harmful materials) (citation and internal quotation marks omitted).

<sup>71</sup> See REDISH, *supra* note 55, ch. 1.

<sup>72</sup> *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); see also *Bd. of Educ. v. Pico*, 457 U.S. 853, 866-68 (1982) (plurality opinion), and cases cited.

<sup>73</sup> See Charles Taylor, *Theories of Meaning*, in 1 PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE 259-60, 263-66 (1985) [hereinafter Taylor, *Theories of Meaning*]; Charles Taylor, *Irreducibly Social Goods*, in PHILOSOPHICAL ARGUMENTS 138-39 (1995) [hereinafter Taylor, *Irreducibly Social Goods*]; Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in PHILOSOPHICAL ARGUMENTS 189-90 (1995).

<sup>74</sup> Taylor, *Theories of Meaning*, *supra* note 73, at 259 (emphasis added).

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., Robin West, *Toward a First Amendment Jurisprudence of Respect: A Comment on George Fletcher's Constitutional Identity*, 14 CARDozo L. REV. 759, 761 (1993).

of autonomy, so do the relationships that arise through communication. Government invades this realm when it attempts, without adequate justification, to restrict communication between willing participants. This is true of speech that occurs in private conversations, and within such relationships as the family. And it is also true of speech that takes place within the realm of public discourse.<sup>77</sup> In particular, the First Amendment sharply restricts the government's power to regulate the content of political speech.

This theme, which is central to modern First Amendment jurisprudence, received its most influential expression in the writings of Alexander Meiklejohn.<sup>78</sup> According to Meiklejohn, American democracy is founded on a "compact" that we have made to be a self-governing people.<sup>79</sup> Within the realm of democratic deliberation, individuals must be free to form and express their own opinions, and to consider the views of others, for only through full debate can the community reach informed decisions on matters of public policy.<sup>80</sup> Although the First Amendment does not foreclose all regulation of speech, it does mean that "no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another."<sup>81</sup> As Meiklejohn explains:

[T]he reason for this equality of status in the field of ideas lies deep in the very foundations of the self-governing process. When men govern themselves, it is they — and no one else — who must pass judgment upon [the merits of ideas]. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*<sup>82</sup>

In *Mosley*, Justice Marshall cites Meiklejohn's view,<sup>83</sup> which clearly represents one of the key sources of the content neutrality doctrine. At the same time, Marshall makes clear that the doctrine is not limited to political discourse, but also

<sup>77</sup> For an illuminating account of the ways in which public discourse can function "to reconcile individual with collective autonomy" within a self-governing community, see Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, in *CONSTITUTIONAL DOMAINS* 268, 280 (1995).

<sup>78</sup> See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM*, THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) [hereinafter MEIKLEJOHN, *POLITICAL FREEDOM*]; Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

<sup>79</sup> MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 78, at 15.

<sup>80</sup> *Id.* at 24-26.

<sup>81</sup> *Id.* at 26-27.

<sup>82</sup> *Id.* at 27 (emphasis added).

<sup>83</sup> *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) ("There is an 'equality of status in the field of ideas' . . .") (quoting MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 78, at 27).

extends to speech that promotes "the continued building of our . . . culture."<sup>84</sup> In this respect, *Mosley* echoes the writings of Thomas I. Emerson, who argued that First Amendment protection extends "beyond the political realm" and "embrace[s] the right to participate in the building of the whole culture, and include[s] freedom of expression in religion, literature, art, science, and all areas of human learning and knowledge."<sup>85</sup> These too fall within the domain of what I am calling the social dimension of expression.<sup>86</sup>

I should make clear that, in bringing out this social dimension, I do not mean to minimize the importance of the individual elements. Each is vital to a full understanding of free expression. First Amendment liberty begins with an individual's autonomy with regard to her own thoughts and feelings. Through expression, these thoughts and feelings are given an outward form, which may then have an impact on the minds of listeners, who also should have autonomy to determine what forms of expression they wish to see or hear. In this way, speech involves interaction between two or more individuals. At the same time, the participants may go beyond their own merely personal standpoints. Through communication, they form relationships that give rise to shared understandings. In this way, speech has a social as well as an individual dimension. And these dimensions interact with one another. On one hand, much individual thought and expression has meaning only within the context of language and culture, social practices and institutions.<sup>87</sup> On the other hand, individual expression plays an important role in shaping the society and its culture. In these ways, each aspect has its own integrity, and also exists in a dynamic relationship with the other.

#### D. Content Neutrality and the Right to Equality

To this point, we have focused on the substantive justifications for content neutrality, or on the ways in which content-based regulation can violate the substantive ideal of autonomy. But there is also another important justification for content neutrality — one that focuses on the ideal of equality.<sup>88</sup>

This ideal is implicit in the justifications we have already discussed.<sup>89</sup> The right to self-fulfillment through thought and expression is one that is shared by all individuals, including both speakers and listeners. It follows that, when the government unjustifiably restricts the exercise of this right by particular individuals, it violates not only their right to free speech, but also their right to equal treatment. Similarly, all members of society have a right to participate in political discourse and to contribute to the broader culture. When particular citizens are denied this

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<sup>84</sup> *Id.* at 95-96.

<sup>85</sup> Emerson, *General Theory*, *supra* note 55, at 883.

<sup>86</sup> The most sophisticated exploration of this social dimension may be found in the work of Robert C. Post. *See, e.g.*, Post, *CONSTITUTIONAL DOMAINS*, *supra* note 77.

<sup>87</sup> *See, e.g.*, Taylor, *Irreducibly Social Goods*, *supra* note 73, at 133-36.

<sup>88</sup> *See, e.g.*, Karst, *supra* note 6; Williams, *supra* note 17, at 666-76.

<sup>89</sup> *See* Karst, *supra* note 6, at 23-26.

right without adequate justification, that denial infringes their right to equality as well as their substantive rights. Finally, while it is an overstatement to say that “[u]nder the First Amendment there is no such thing as a false idea,”<sup>90</sup> the worth of ideas generally should be determined by the people rather than by the government. Government has no jurisdiction over ideas as such, apart from their impact on rights.<sup>91</sup> It is in this sense that “[t]here is an ‘equality of status in the field of ideas.”<sup>92</sup>

In these ways, First Amendment liberty and equality are closely related, and the two often can be understood as two sides of the same coin. Yet the equality justification is not simply redundant. Even when the state has authority to regulate an act of speech (say, by imposing a reasonable regulation of time, place, and manner), the state may not single out particular speakers or kinds of speech without adequate justification. Such regulations violate the right to equality, and constitute impermissible content discrimination. *Mosley* itself is a classic example. Because the City of Chicago was unable to show a persuasive reason for permitting labor picketing near a school while banning all other forms of picketing, the ordinance infringed the right to equality, regardless of whether a ban on all picketing would have violated the First Amendment.<sup>93</sup>

In this way, the equality justification has some independent force. Ultimately, however, this rationale depends on the autonomy justification developed above. It is only because thought and expression constitute spheres of autonomy that government generally may not discriminate between different forms of speech and thought. To put it another way, the doctrine of content neutrality finds its ultimate basis in the First Amendment rather than in the Equal Protection Clause.

#### E. Conclusion

Although this account is little more than a sketch, it helps us to identify the different meanings of “content,” as well as the different grounds for the principle that speech may not be regulated based on content. The term “content” may refer to: (1) the thoughts and feelings of an individual, which may be expressed through speech; (2) the meaning of the speech itself; (3) the meaning that the speech has for those who hear it; and (4) the shared meanings that arise through communication. When the state unjustifiably regulates the content of speech, it invades the spheres of autonomy surrounding the inner lives of individuals (the first and third elements), as well as the relationships within which communication takes place (the fourth element). Nor can such regulation be justified based on the second element, for the

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<sup>90</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

<sup>91</sup> See *LOCKE, TOLERATION*, *supra* note 39, at 420 (“[T]he business of laws is not to provide for the truth of opinions, but for the safety and security of the Commonwealth, and of every particular man’s goods and person.”).

<sup>92</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972) (quoting *MEIKLEJOHN, POLITICAL FREEDOM*, *supra* note 78, at 27).

<sup>93</sup> *Id.* at 99-102.

state has no jurisdiction over meaning as such, but only over actions. In all these ways, content regulation may violate the First Amendment.

This idea of autonomy also helps to explain the scope of the neutrality doctrine. Within the broad category of content-based regulation, a distinction is commonly drawn between regulations based on *subject matter* and those based on *viewpoint*.<sup>94</sup> The former restrict speech on an entire issue, while the latter restrict speech on one side of the issue. For example, a ban on all demonstrations related to foreign policy would be a subject-matter regulation, whereas a ban on demonstrations that oppose the administration's foreign policy would be a viewpoint-based restriction.<sup>95</sup>

At times, both justices and scholars have asserted that the content neutrality doctrine is principally, or even exclusively, concerned with viewpoint-based regulation.<sup>96</sup> This position might make sense if the doctrine simply reflected a concern that the government might abuse its power by restricting expression critical of government officials or policies. For the most part, however, the Court has understood the doctrine more broadly, holding that it applies not only to viewpoint-based regulations, but also to those based on subject-matter — a rule which was laid down in *Mosley* itself<sup>97</sup> and reaffirmed in many subsequent cases.<sup>98</sup> In my view, this

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<sup>94</sup> See, e.g., Chemerinsky, *supra* note 7, at 51.

<sup>95</sup> *Id.*

<sup>96</sup> For example, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court asserted that “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Id.* at 791 (citation omitted). For similar statements, see *Hill v. Colorado*, 530 U.S. 703, 719 (2000) (following *Ward*); *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 57 (1983) (Brennan, J., dissenting) (referring to “the First Amendment’s central proscription against censorship, in the form of viewpoint discrimination”); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976) (plurality opinion) (maintaining that “[t]he essence of [the *Mosley*] rule is the need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the *point of view* being expressed by the communicator”) (emphasis added). For the view that the *Mosley* doctrine should be limited to viewpoint discrimination, see Stephan, *supra* note 17; see also Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 115 (1996) (asserting that “the truly compelling First Amendment principle is viewpoint neutrality,” and questioning the need for “a separate content neutrality rule”) (citation omitted).

<sup>97</sup> According to *Mosley*, the First Amendment bars regulation of speech based not only on “its message [or] its ideas,” but also on “its subject matter, or its content.” *Mosley*, 408 U.S. at 95. In *Mosley*, no one argued that the ordinance constituted viewpoint discrimination. Instead, it was struck down because it drew an impermissible distinction based on “subject matter.” *Id.* at 97.

<sup>98</sup> See, e.g., *Hill*, 530 U.S. at 723 (“Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.”) (citation omitted); *id.* at 770 (Kennedy, J., dissenting) (a law violates the content neutrality doctrine if it “seeks to eliminate public discourse on an entire subject”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (holding ordinance unconstitutional because “it prohibits otherwise permitted speech solely on the basis of the subjects the

rule does not rest merely on the notion that subject-matter regulations may serve as a cloak for viewpoint discrimination.<sup>99</sup> Instead, the basic problem with subject-matter restrictions is that they limit the liberty of citizens to control their own expression.<sup>100</sup>

## II. THE LIMITS OF CONTENT NEUTRALITY

The view developed in Part I allows us to identify not only the justifications for content neutrality, but also the limits of that principle. The *Mosley* doctrine protects the autonomy of speakers, listeners, and the community as a whole to determine the content of their own expression. Content regulation invades this autonomy and thereby violates the First Amendment.

But this doctrine loses much of its force where speech goes beyond the bounds of a sphere of autonomy and infringes the autonomy of others. In regulating such speech, the law does not abridge the liberty of the speaker, but rather performs the core function of protecting the rights of others from violation. To express the point

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speech addresses"); *Boos v. Barry*, 485 U.S. 312, 319 (1988) (plurality opinion) ("We have held that a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic.'") (quoting *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980)).

<sup>99</sup> For suggestions to this effect, see *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 794 (1994) (Scalia, J., concurring in judgment in part and dissenting in part) (asserting that the "vice of content-based legislation — what renders it deserving of the high standard of strict scrutiny" — is that "it lends itself for use" for "invidious, thought-control purposes") (emphasis and citations omitted); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48-49 (1986) (asserting that "the fundamental principle that underlies our concern about 'content-based' speech regulations" is "that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views'") (quoting *Mosley*, 408 U.S. at 95-96); *id.* at 57 (Brennan, J. dissenting) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views.") (internal quotation marks omitted).

<sup>100</sup> The idea of autonomy also shows why the First Amendment's protections extend far beyond a concern with content regulation. Suppose, for example, that the government enacted a law barring a certain class of persons from speaking in public places. Such a law might well have the purpose or effect of restricting the expression of particular views, or of speech on particular subjects. Even if it did not, however, it clearly should be regarded as a violation of the First Amendment because of its restriction on the liberty of particular individuals to engage in speech. Similarly, restrictions on expressive conduct or on the time, place, and manner of expression can unduly limit freedom of speech, even when they do not have the purpose or effect of favoring some kinds of content over others. For this reason, even content-neutral regulations should be subject to serious review under the First Amendment. *See supra* note 20 (describing the intermediate review accorded to content-neutral regulations).

another way, speech may never properly be regulated based on its content in senses (1) or (2) — that is, because the government disapproves of a speaker's holding or expressing a particular view, or disapproves of the idea itself. As I shall show, however, speech may sometimes be regulated based on content in sense (3) — that is, because of the impact of the speech on those who hear it, or on others who are affected by it.<sup>101</sup>

#### A. *The Communicative Impact Approach to Free Speech*

Of course, I recognize that this claim goes against the current of contemporary First Amendment jurisprudence. According to the dominant view, the content of speech may be identified with its *communicative impact* — that is, the effect that it has on listeners or viewers. And the regulation of speech based on communicative impact is precisely what the First Amendment forbids.

The seeds of this view may be found in the well-known case of *United States v. O'Brien*.<sup>102</sup> After burning his draft card to dramatize opposition to the Vietnam war, O'Brien was convicted of violating a federal law that prohibited the willful destruction of draft cards.<sup>103</sup> On appeal, Chief Justice Warren emphasized that the defendant had been convicted only for "the independent noncommunicative impact of [his] conduct" — interference with the efficient operation of the selective service system — and not because of any harm that might be thought to arise from "the alleged communicative element" in his conduct.<sup>104</sup> Without discussing the First Amendment principles that should apply to the latter, the Court held that a less demanding standard should apply to the former, and upheld O'Brien's conviction.<sup>105</sup>

Warren's distinction between the "communicative" and "noncommunicative" aspects of expressive conduct proved to be influential. In his classic essay on flag desecration, John Hart Ely argued that the distinction provided the key to First Amendment analysis.<sup>106</sup> "The critical question," according to Ely, was:

whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.<sup>107</sup>

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<sup>101</sup> These different senses of "content" are explained *supra* Part I.A.

<sup>102</sup> 391 U.S. 367 (1968).

<sup>103</sup> *Id.* at 369-70.

<sup>104</sup> *Id.* at 376, 382.

<sup>105</sup> See *supra* note 20 (quoting the standard adopted in *O'Brien*).

<sup>106</sup> John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-1502 (1975) [hereinafter Ely, *Flag Desecration*].

<sup>107</sup> *Id.* at 1497 (citation omitted).

Although regulations of the latter sort were sometimes acceptable under the First Amendment, those of the former sort rarely were.

For Ely, one of the virtues of the communicative/noncommunicative distinction was that it offered a way to harmonize two First Amendment approaches that had long been at war, commonly known as “absolutism” and “balancing.”<sup>108</sup> Regulations based on noncommunicative impact were appropriately reviewed by balancing the government interests served by the regulation against the effect on speech.<sup>109</sup> By contrast, a ban on regulations based on communicative impact was rooted in the absolutist approach to the First Amendment that had been championed by Justices Black and Douglas.<sup>110</sup> Although Ely himself was sympathetic to the absolutist approach,<sup>111</sup> he acknowledged that it had never commanded a majority on the Supreme Court.<sup>112</sup> Moreover, in his later work Ely came to recognize that a pure form of absolutism was untenable even in principle: “one simply cannot be granted a constitutional right to stand on the steps of an inadequately guarded jail and urge a mob to lynch the prisoner within.”<sup>113</sup> For these reasons, Ely advocated the adoption of “[a]nother, more viable, form of ‘absolutism’”: the view that the First Amendment barred all regulation of communicative impact except where the speech “falls within a few clearly and narrowly defined categories,” such as incitement and libel.<sup>114</sup> Ely did not offer any explanation of how these categories were to be defined, however.

Ely’s approach was soon adopted by Laurence H. Tribe, who used it to structure his account of First Amendment jurisprudence in *American Constitutional Law*.<sup>115</sup> According to Tribe, the First Amendment generally barred regulation based either on what the speaker was saying or on its effects on other people.<sup>116</sup> He described such regulation as “aimed at communicative impact,” and equated it with Mosley’s concept of regulation based on content.<sup>117</sup> For Tribe, as for Ely, this ban reflected an “essentially” absolutist approach to the First Amendment, qualified only by certain narrowly drawn exceptions.<sup>118</sup>

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<sup>108</sup> *Id.* at 1500-02.

<sup>109</sup> *Id.* at 1486-87, 1501-02.

<sup>110</sup> *Id.* at 1493 n.44.

<sup>111</sup> *Id.* (expressing inclination in favor of Black-Douglas approach, “subject to a limited exception for demonstrable falsehoods regarding people or products”).

<sup>112</sup> *Id.*

<sup>113</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 109 (1980) [hereinafter ELY, *DEMOCRACY*].

<sup>114</sup> *Id.* at 109-110.

<sup>115</sup> TRIBE, *supra* note 17, ch. 12 (1st ed. 1978). Tribe’s analysis also drew on work by Thomas Scanlon and Melville Nimmer, who developed their own versions of the distinction between communicative and noncommunicative impact. *Id.* § 12-2, at 580 n.9, 581 n.15 (citing Scanlon, *Theory*, *supra* note 70; Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29 (1973)).

<sup>116</sup> *Id.* § 12-2, at 580-82.

<sup>117</sup> *Id.* § 12-2, at 580-81 (emphasis added).

<sup>118</sup> *Id.* § 12-2, at 582-83.

The Ely-Tribe approach has garnered widespread acceptance not only by scholars, but also by the Supreme Court itself. Thus, in two landmark flag-burning cases, *Texas v. Johnson*<sup>119</sup> and *United States v. Eichman*,<sup>120</sup> the Court equated the “content” of expression with its “communicative impact,”<sup>121</sup> and declared that the “fundamental flaw” of laws against flag desecration was that they “suppress[] expression out of concern for its likely communicative impact.”<sup>122</sup> Similarly, in *Hustler Magazine, Inc. v. Falwell*<sup>123</sup> and other cases, the Court has asserted that speech may not be restricted “because [it] may have an adverse emotional impact on the audience.”<sup>124</sup> At the same time, the Court has followed the “categorical

<sup>119</sup> 491 U.S. 397 (1989).

<sup>120</sup> 496 U.S. 310 (1990).

<sup>121</sup> *Eichman*, 496 U.S. at 315-19; *Johnson*, 491 U.S. at 411-12.

<sup>122</sup> *Eichman*, 496 U.S. at 317. For other instances of this approach, see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) (holding that a restriction on the height of indoor cigarette advertising could not be justified as “a mere regulation of conduct,” because it was “an attempt to regulate directly the communicative impact of [such] advertising”); *Hill v. Colorado*, 530 U.S. 703, 770 (2000) (Kennedy, J., dissenting) (criticizing a restriction on abortion sidewalk counseling for “‘suppress[ing] expression out of concern for its likely communicative impact’”) (quoting *Eichman*, 496 U.S. at 317); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 577 (1991) (Scalia, J., concurring in judgment) (“Where the government prohibits [expressive] conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional.”) (emphasis in original); *United States v. Kokinda*, 497 U.S. 720, 754 (1990) (Brennan, J., dissenting) (arguing that regulation of solicitation on post office grounds was suspect because it was based on “the communicative impact of expression”); *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) (holding that the First Amendment does not protect acts of discrimination or other “potentially expressive activities that produce special harms distinct from their communicative impact”); *Members of City Council v. Vincent*, 466 U.S. 789, 828 (1984) (Brennan, J., dissenting) (arguing that courts should not uphold regulations of speech on aesthetic grounds unless there is “a reasonably reliable indication that it is not the content or communicative aspect of speech that the government finds unaesthetic”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1980) (plurality opinion) (observing that, although “the government has legitimate interests in controlling the noncommunicative aspects of [a] medium, . . . the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects”).

<sup>123</sup> 485 U.S. 46 (1988).

<sup>124</sup> *Id.* at 55. For some other expressions of this theme, see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992); *Johnson*, 491 U.S. at 411-12; *Boos v. Barry*, 485 U.S. 312, 321-22 (1988); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909-911 (1982); *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

This doctrine has sometimes been taken to remarkable lengths. For example, in *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), the Court reviewed the New York “Son-of-Sam” law, which restricted the ability of criminals to profit by selling their stories for publication. In an opinion striking the law down under the content neutrality doctrine, Justice O’Connor summarily rejected any justification for the law based on an “interest in limiting whatever anguish [a criminal’s] victims may suffer from reliving their victimization.” *Id.* at 118. To rely on such an interest, she said, would violate the

approach" urged by Ely and Tribe, and has "permitted restrictions upon the content of speech in a few limited areas," such as obscenity, defamation, and fighting words.<sup>125</sup>

Yet the basis for this categorical approach remains obscure. How are these exceptions to be determined, and how can they be reconciled with the First Amendment rule against content regulation? At times, the justices have been content to invoke longstanding tradition.<sup>126</sup> But the mere fact that exceptions are traditional does not make them justified. In recent decades, the Supreme Court has dramatically expanded the scope of First Amendment protections, and has steadily narrowed the traditional exceptions. Thus, the question of whether particular speech should receive constitutional protection cannot be resolved merely by reference to history, but calls for a normative standard.

To identify such a standard, the justices have sometimes looked to *Chaplinsky v. New Hampshire*,<sup>127</sup> which first formulated the categorical approach.<sup>128</sup> In *Chaplinsky*, the Court declared that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate

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"bedrock [First Amendment] principle . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* (quoting *Eichman*, 496 U.S. at 319; *Johnson*, 491 U.S. at 414) (citation and internal quotation marks omitted).

Another striking example is provided by *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), in which the Court reviewed a state bar association rule that imposed a thirty-day restriction on targeted direct-mail solicitation of accident victims and their relatives. Although the Court upheld the provision, four justices dissented. Rejecting the notion that the regulation could be justified based on a concern "that victims or their families will be offended by receiving a solicitation during their grief and trauma," the dissenters wrote that the Court's decisions "do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. On the contrary, we have said that these 'are classically not justifications validating the suppression of expression protected by the First Amendment.'" *Id.* at 638 (Kennedy, J., dissenting) (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977)). For further criticism of this trend in First Amendment doctrine, see CATHARINE A. MACKINNON, ONLY WORDS 105, 145 n.63 (1993).

<sup>125</sup> *R.A.V.*, 505 U.S. at 382-83.

<sup>126</sup> See, e.g., *id.* at 383 (characterizing exceptions as "traditional limitations" on First Amendment freedoms); *Simon & Schuster*, 502 U.S. at 127 (Kennedy, J., concurring in judgment) (describing exceptions as "historic and traditional categories long familiar to the bar").

<sup>127</sup> 315 U.S. 568 (1942).

<sup>128</sup> See, e.g., *R.A.V.*, 505 U.S. at 382-83 (invoking *Chaplinsky*); *New York v. Ferber*, 458 U.S. 747, 776 (1982) (Brennan, J., concurring in judgment) (same).

breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.<sup>129</sup>

Implicit in *Chaplinsky* is the notion that categorical judgments about First Amendment protection should be made by weighing the social value of the speech against the harm it causes to other social interests.<sup>130</sup> At times, this balancing approach has been made explicit. In *New York v. Ferber*,<sup>131</sup> for example, the majority asserted that “a content-based classification has been accepted [when] it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any,” that the speech should denied constitutional protection.<sup>132</sup> This approach, which has been labeled “definitional balancing,” has been advocated by scholars including Melville Nimmer<sup>133</sup> and Laurence Tribe.<sup>134</sup>

Whatever the merits of this approach, it is difficult to see how it can be harmonized with the basic doctrine of content neutrality. As we have seen, that doctrine is rooted in the absolutist jurisprudence of Justices Black and Douglas and in the free speech theories of Meiklejohn and Emerson.<sup>135</sup> For *Mosley*, speech is protected not merely for instrumental reasons, but also because of its intrinsic value. An interest-balancing approach rests on entirely different premises. Speech is protected only because, and to the extent that, it promotes social welfare. Under that approach, a class of speech should not be protected if its social value is outweighed by the social harm that it causes. It is reasonable to believe, however,

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<sup>129</sup> *Chaplinsky*, 315 U.S. at 571-72.

<sup>130</sup> As the Court indicated, *id.* at 572 nn.4 & 5, its dictum was drawn from ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 149-50 (1941). In Chafee’s work, the balancing methodology is clear. *Id.* at 149 (stating that the “social interest” injured by speech “must be weighed in the balance” against the “countervailing social interest in the attainment and dissemination of truth”). For a discussion of balancing in post-World War I Progressive free speech jurisprudence, of which Chafee was the leading academic exponent, see David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 1018-19 (1996).

<sup>131</sup> 458 U.S. 747 (1982).

<sup>132</sup> *Id.* at 763-64.

<sup>133</sup> See MELVILLE NIMMER, *NIMMER ON FREEDOM OF SPEECH* (1984); Nimmer, *supra* note 115.

<sup>134</sup> See TRIBE, *supra* note 17, § 12-2, at 792-93. As Professor Tribe expresses the point, “[a]ny exclusion of a class of activities from first amendment safeguards represents an implicit conclusion that the governmental interests in regulating those activities are such as to justify whatever limitation is thereby placed on the free expression of ideas. Thus, [such] determinations . . . presuppose some form of ‘balancing’ whether or not they appear to do so.” *Id.*

<sup>135</sup> See *supra* text accompanying notes 78-85 (Meiklejohn and Emerson) and 110-18 (Black and Douglas).

that there are many kinds of speech that on balance cause more harm than good. If balancing is taken seriously, then, it seems most unlikely to be consistent with a rule that speech may rarely if ever be regulated because of its communicative impact. In short, far from resolving the question of how exceptions are to be justified, the appeal to balancing only makes the problem seem more intractable.

For Ely, an important advantage of the categorization approach was that it would obviate the need for *ad hoc* balancing in particular cases — an approach that he, like many others, regarded as inadequate to protect freedom of speech, particularly in times of national crisis.<sup>136</sup> Departing from Ely's view, the Court in *Simon & Schuster* declared that even fully protected speech may be subjected to content-based regulation if the requirements of strict scrutiny were met.<sup>137</sup> Although this position met with strong criticism from Justice Kennedy,<sup>138</sup> the majority offered no reasoned explanation for its view.<sup>139</sup>

To summarize, the communicative impact approach to the First Amendment has become the prevailing view both on and off the Court. This view identifies content-based regulation with regulation based on communicative impact, and holds that such regulation is forbidden by the First Amendment. At the same time, however, it is clear that there are instances in which the communicative impact of speech justifies regulation. Recognizing this, the dominant approach would permit regulation in some cases. But neither courts nor scholars have been able to offer a satisfactory account of how these exceptions are to be determined, or how they can be harmonized with the general rule. In all of these ways, First Amendment jurisprudence finds itself in a quandary.

### B. Reconsidering the Role of Communicative Impact

To escape from this predicament, we must return once more to the notion of content. As we have seen, Ely holds that the "critical question" is "whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message."<sup>140</sup> In light of the discussion in Part I, we can see that this formulation contains two distinct elements. The first, "the fact that the defendant is communicating" — or, as Ely also puts it, "what the defendant was saying"<sup>141</sup> — corresponds to what I have called the second element of communication, the speech itself, while the latter part of his statement, "the way

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<sup>136</sup> See ELY, DEMOCRACY, *supra* note 113, at 109-16; Ely, *Flag Desecration*, *supra* note 106, at 1500-1.

<sup>137</sup> *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

<sup>138</sup> *Id.* at 124 (Kennedy, J., concurring in judgment).

<sup>139</sup> *Id.* at 118.

<sup>140</sup> Ely, *Flag Desecration*, *supra* note 106, at 1497.

<sup>141</sup> *Id.*

people can be expected to react to his message,"<sup>142</sup> corresponds to the third element, the reception of the speech by its audience. In this way, Ely conflates two different elements of communication.

Of course, these elements are closely related to one another. But the distinction between them takes on crucial importance when one is trying to understand the basis and limits of content neutrality. The government, I have contended, may never regulate speech merely because it disapproves of the fact that the speaker holds particular views, for this would violate the speaker's autonomy.<sup>143</sup> Nor may speech be regulated merely because of disapproval of the ideas themselves, because government has no jurisdiction over the realm of ideas as such.<sup>144</sup> But the question of whether speech may be regulated to protect listeners is more complex.

As we have seen, both speakers and listeners have a right to autonomy. Just as a speaker is entitled to determine the content of his own expression, other individuals have a right to decide whether they wish to hear it. It follows that government may not regulate the content of speech in order to protect willing listeners, for that would violate their autonomy.<sup>145</sup>

At first glance, it might also appear that, on this view, individuals have a right to be free from all unwanted communication. But such a conclusion would be far too broad. For example, citizens have a right to engage in expression on matters of public concern — a right that is especially strong in public places. Moreover, this right is not limited to politics, but extends to art, culture, morality, religion, science, and other matters of common concern. When expression of this sort is directed to the public at large, it does not lose First Amendment protection simply because some (or even most) individuals object to hearing it. Instead, as Justice Harlan declared in *Cohen v. California*,<sup>146</sup> "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."<sup>147</sup>

These principles derive, in part, from the social dimension of expression. Speech is not merely individual but social in nature.<sup>148</sup> For this reason, speech that is properly directed toward the community as a whole, and that does not violate the rights of individuals, may not be restricted for purely private reasons. Moreover, speakers should have some latitude to attempt to communicate directly, on matters of general concern, even with individuals who initially may be unwilling. Citizens should have a right to presume that other individuals are interested in communicating on matters of common concern, until a particular listener makes clear that he is not.

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<sup>142</sup> *Id.*

<sup>143</sup> See *supra* Part I.C.1.

<sup>144</sup> See *supra* Part I.C.2.

<sup>145</sup> See *supra* Part I.C.3.

<sup>146</sup> 403 U.S. 15 (1971).

<sup>147</sup> *Id.* at 21 (citation omitted).

<sup>148</sup> See *supra* Part I.C.4.

Ultimately, however, there cannot be an unlimited right to force communication on an unwilling individual if the idea of listener's autonomy is to have any meaning. Speech of this sort can violate the listener's rights in two different ways. First, regulation is justified in some cases simply to protect "[t]he unwilling listener's interest in avoiding unwanted communication."<sup>149</sup> As the Supreme Court recently observed in *Hill v. Colorado*,<sup>150</sup> this interest is an aspect of privacy, or what Justice Brandeis called the "right to be let alone."<sup>151</sup> Although this interest is at its strongest within the home,<sup>152</sup> the Court has also recognized its force in other situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure."<sup>153</sup> In *Hill*, for example, the Court upheld a statute that made it unlawful to knowingly approach within eight feet of a person entering an abortion clinic or other medical facility, without that person's consent, for purposes of "engaging in oral protest, education, or counseling."<sup>154</sup> This regulation, the majority concluded, was justified to protect the "the interests of unwilling listeners."<sup>155</sup>

Forced communication is wrongful because it disregards the recipient's capacity for free choice, and disrespects the boundary that separates the self from others. I shall call this sort of injury *formal*. In principle, at least, such injury is independent of the content of the unwanted communication.<sup>156</sup>

In other situations, however, speech can inflict *substantive* injury on the listener. In such cases, speech causes injury precisely because of its content or communicative impact. Thus individuals can be placed in terror by threats of present or future violence. Likewise, a person may suffer severe distress upon

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<sup>149</sup> *Hill v. Colorado*, 530 U.S. 703, 716 (2000).

<sup>150</sup> 530 U.S. 703 (2000).

<sup>151</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), quoted in *Hill*, 530 U.S. at 716-17.

<sup>152</sup> See, e.g., *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding ban on demonstrations stationed in front of an individual's residence); *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) (upholding statute that allowed individuals to direct the post office not to deliver mail they deemed to be obscene).

<sup>153</sup> *Hill*, 530 U.S. at 713 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)).

<sup>154</sup> *Id.* at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)).

<sup>155</sup> *Id.* at 718.

<sup>156</sup> *Id.* at 716 (suggesting that "it may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription") (citation and internal quotation marks omitted). As the examples of *Rowan*, *Frisby*, and *Hill* indicate, however, judgments about whether speech is an invasion of privacy often depend in part on the content of the speech. Those cases allow the government to protect individuals not from all unwanted communication, but rather from communication that is unwanted because it is highly personal or offensive. Similarly, the tort of invasion of privacy through "intrusion upon seclusion" does not protect against all unwelcome intrusions, but only against those that "would be highly offensive to a reasonable person." *RESTATEMENT (SECOND) OF TORTS* § 652B (1977).

being told (falsely) that a loved one has been gravely injured or killed.<sup>157</sup> In such cases, the injury flows directly (in Ely's words) from "what the defendant was saying," and "more particularly [from] the way [the listener] can be expected to react" to it.<sup>158</sup>

Opponents of regulation might respond in several ways. First, they might deny that mere words can cause injuries to others, or at any rate that speakers should be regarded as responsible for such injuries.<sup>159</sup> Individuals can control their own speech, but they cannot control the way that others respond to it. Respect for the autonomy of both speakers and listeners dictates that "[a]ny consequences involved in the listener's reaction . . . must be attributed, in the end, to the listener";<sup>160</sup> speech is only "as powerful as the audience allows it to be."<sup>161</sup> For these reasons, injuries that depend on "mental intermediation" cannot justify regulation of speech.<sup>162</sup>

It is certainly true that, where free speech is at stake, notions of causation and responsibility must be carefully confined. Thus, for the most part, modern First Amendment doctrine allows regulation only where there is a close relationship between speech and injury.<sup>163</sup> Nevertheless, the assertion that speech should never be regarded as responsible for causing injury is far too broad. For example, an individual who receives a threat of violence will envision the impending danger, and this will cause him to experience fear or at least apprehension (that is, a cognitive awareness that he is in danger).<sup>164</sup> Such reactions are not merely instinctual but rational, for only in this way can one assess the danger and react to it. Thus, speech of this sort inevitably has effects on the listener, effects that are not (fully) within the latter's control.<sup>165</sup> At least where the speaker intends to produce those effects, she should be regarded as responsible for causing them. One can hold otherwise only by focusing on some elements of speech (the speaker's self-expression or the objective meaning of the speech) in isolation from others (the

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<sup>157</sup> For a classic case which contributed to the development of the new tort of intentional infliction of emotional distress, see *Wilkinson v. Downton*, [1897] Q.B.D. 57.

<sup>158</sup> Ely, *Flag Desecration*, *supra* note 106, at 1497.

<sup>159</sup> See, e.g., C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 989-92 (1997).

<sup>160</sup> *Id.* at 992 (citation omitted).

<sup>161</sup> *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 327-28 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

<sup>162</sup> *Id.* at 329.

<sup>163</sup> For example, under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), speech that advocates law violation may be restricted only where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Similarly, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), holds that speech may be restricted as "fighting words" only when it "tend[s] to incite an immediate breach of the peace." *Id.* at 572.

<sup>164</sup> See RESTATEMENT, *supra* note 156, § 21, comm. b (explaining that the injury requirement for the tort of assault is satisfied by "apprehension" of an imminent unlawful contact, even if the plaintiff suffers no fear).

<sup>165</sup> See Heyman, *Righting the Balance*, *supra* note 29, at 1342.

speech's effect on the listener and the intersubjective nature of communication). But viewing the elements in this way overlooks the fact that they also constitute an integral whole. A person who communicates her thoughts and feelings to another generally intends to produce some effect.<sup>166</sup> Communicative impact is not an accidental, but an essential feature of communication. Indeed, this is one reason why the First Amendment generally protects communicative impact. However, just as speech can have beneficial effects on listeners, it can also have harmful effects. When these effects are intentionally imposed on an unwilling listener, the speaker should be regarded as responsible for causing them.

Alternatively, opponents of regulation might concede that speech can cause mental or emotional injuries, but deny that such injuries are serious ones. This response runs contrary to common sense — most people would experience fear upon receiving a threat of violence, or intense grief at news of a loved one's death, and would regard these as serious injuries. The response also runs contrary to the view taken by tort and criminal law, which (at least in the absence of free speech concerns) often treat such statements as unlawful, and subject them to liability under the heading of assaults, threats, or intentional infliction of emotional distress.<sup>167</sup> Finally, this response is inconsistent with the premises of First Amendment theory itself. That theory rests in part on the notion that the thoughts and feelings of individuals have important value. If that is true of speakers, however, then it is equally true of listeners and others affected by speech. But just as speech is capable of expressing the speaker's thoughts and feelings, it is capable of injuring those of others. And this may constitute a serious injury.

Finally, it might be argued that even if expression is capable of inflicting serious harm, that harm does not justify restrictions on free speech.<sup>168</sup> This argument might appeal to the notion that, in a liberal society, individuals have fundamental rights that may not be restricted simply to promote the welfare of others. Instead, any harm that speech causes to social welfare is simply the price that we pay for a free society.

Although this argument has considerable force in general, it has two fatal flaws in the present context. First, many of the injuries that I am discussing are not to society in general, but to particular individuals. Second, these injuries are not mere "harms," that is, setbacks to welfare, but constitute "injuries" in the strict sense — that is, violations of *rights*.<sup>169</sup> For example, threats of death or serious bodily harm

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<sup>166</sup> See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 101 (2d ed. 1975) ("Saying something will often, or even normally, produce certain consequential effects upon the feelings, thoughts, or actions of the audience, or of the speaker, or of other persons: and it may be done with the design, intention, or purpose of producing them . . .").

<sup>167</sup> See, e.g., *RESTATEMENT*, *supra* note 156, §§ 21, 46 (defining torts of assault and intentional infliction of emotional distress); *MODEL PENAL CODE AND COMMENTARIES* § 211.3 (1980) (providing that it shall be a felony to threaten to commit any crime of violence with purpose to terrorize another).

<sup>168</sup> See, e.g., *Baker*, *supra* note 159.

<sup>169</sup> See *OXFORD ENGLISH DICTIONARY* 981 (2d ed. 1989), s.v. *injury*.

invade the target's right to personal security, while falsely telling a person that her husband has died violates her right to be free from intentional and unjustified attacks on her emotional well-being. My contention is that, under the First Amendment, speech may be regulated based on communicative impact when it unjustifiably violates the rights of others.

This approach to freedom of speech has deep roots in American constitutional history.<sup>170</sup> The eighteenth-century American understanding of free speech was woven from many strands. Among the most important, however, was the natural rights tradition. Liberty of speech, thought, and belief were counted among the inherent and inalienable rights of individuals — rights that they would not part with when they established civil society and government. Moreover, freedom of speech was a right that would be retained by the citizens of a republic in order to supervise the government and check abuses of power. As an inalienable right, free speech was not subject to regulation for the common good in the way that more ordinary forms of liberty were. Yet the freedom of speech was not absolute. Instead, like other fundamental rights, it was limited by the rights of others. Speech that invaded those rights (for example, by unjustifiably defaming others) was wrong and subject to regulation by law. In imposing such regulation, the government did not violate freedom of speech, but rather fulfilled its duty to protect the rights of other individuals.<sup>171</sup> This understanding of free speech informed the adoption not only of the First Amendment, but also of the Fourteenth Amendment, which provided the basis for applying the First Amendment to the states.<sup>172</sup>

In addition to this historical foundation, there is a strong normative basis for the principle that free speech is limited by other rights. For the liberal tradition, it is axiomatic that an individual's liberty is bounded by the equal liberty of others.<sup>173</sup> As Mill recognizes, this principle applies to free speech no less than to other forms of liberty.<sup>174</sup> To be sure, there are some cases in which speech has such important value that it should take precedence over other rights. But one can reach this conclusion only after comparing the value of a particular kind of speech with the value of the right with which it conflicts. There is no warrant for holding that speech always trumps other rights.

The crucial question then becomes, what are the other rights that may set bounds to free speech? Here I shall summarize an account that I have developed elsewhere — an account which draws on the natural rights background of the First and Fourteenth Amendments, as well as on our own contemporary understanding of fundamental rights.<sup>175</sup> On this view, rights are specific instances of liberty, which in turn is understood as autonomy or self-determination. Rights represent what it

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<sup>170</sup> See Heyman, *Righting the Balance*, *supra* note 29, at 1282-98.

<sup>171</sup> On the duty to protect rights, see Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

<sup>172</sup> See Heyman, *Righting the Balance*, *supra* note 29, at 1296-98.

<sup>173</sup> See, e.g., LOCKE, TWO TREATISES, *supra* note 38, II § 6; KANT, *supra* note 43, at \*230.

<sup>174</sup> MILL, ON LIBERTY, *supra* note 44, at 53, quoted *infra* note 278.

<sup>175</sup> See generally Heyman, *Righting the Balance*, *supra* note 29.

means to be a free person in various realms of human life. Our conception of liberty begins with what it means to be free in the external world. External freedom encompasses the right to control one's own body and actions, as well as to acquire, use, and dispose of external things. The liberties protected by the First Amendment can be understood in part on this level. Freedom of mind is an aspect of the right to one's person, while the freedom to speak falls within the broader liberty to act as one likes. But the idea of external freedom also encompasses other rights — above all, the right to personal security, which can be infringed by incitement and threats of violence. In this way, the same principles that justify free speech also give rise to other rights which set bounds to that freedom.

Although our notion of liberty may begin with external rights, it does not end there. If we ask why human beings have rights to life, liberty, and property, the answer (at least in part) is that they are beings capable of self-determination. Thus external freedom is rooted in inner freedom or self-direction. This points to a second category of rights — rights of personality, which enable an individual to develop and express herself and to interact with other persons. Once again, First Amendment freedoms may be understood in these terms: individuals should be free to develop their own thoughts and feelings and to express them to others. And once more, this justification extends beyond liberty of speech and thought to support other rights as well. Respect for the integrity of personality dictates that an individual should be free from intentional assaults on her mental or emotional well-being; from unwarranted intrusions into her privacy, which represents the boundary between the self and the world; and from unjustified attacks on her reputation, or the social aspect of personality. For these reasons, the law is justified in protecting against intentional infliction of emotional distress, invasion of privacy, and defamation, even when these injuries are inflicted through speech.

Individual liberty finds protection and flourishes within an organized community. As citizens, individuals have a right to participate in collective self-determination and other aspects of community life. One of the most important ways in which they do so is through free speech. At the same time, those who take part in common activities have an obligation to respect the rights of other participants and the community as a whole. This obligation is violated, for example, by intentionally making false and defamatory statements about others in public debate, for speech of this sort violates not only their own rights but also those of the community, by undermining the integrity of public discourse on which democratic self-government depends.<sup>176</sup>

By this point, the underlying form of the argument should be clear. To justify freedom of speech and thought, one must appeal to notions of freedom that go beyond these rights. That is not to say (as some theorists have argued) that freedom of speech and thought have no intrinsic value.<sup>177</sup> Instead, the point is that, to give

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<sup>176</sup> *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (observing that “[t]he use of calculated falsehood” in political debate is “at odds with the premises of democratic government” and is outside the protection of the First Amendment) (citation omitted).

<sup>177</sup> See STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING,

a satisfying account of this value, we must recognize that free speech and thought are not isolated rights, but are part of a broader conception of what it means to be a free person. The justifications that we give for free speech and thought must invoke this more general conception of freedom. But this conception is broad enough to encompass not only free speech, but also such rights as personal security, privacy, and reputation. Because the latter rest on the same grounds as free speech, they are of the same general order of value. For these reasons, speakers generally must respect these other rights.

It would be a mistake, however, to conclude that free speech must always yield to other rights. To begin with, a speaker generally should not be held responsible for violating other rights unless he acts with a particular state of mind (such as intent or recklessness).<sup>178</sup> Moreover, in some cases the value of speech is so great as to justify overriding another right. A classic example is *New York Times Co. v. Sullivan*,<sup>179</sup> in which the Supreme Court recognized a constitutional privilege to engage in good-faith criticism of the conduct of public officials, even if the criticism should prove to be false and defamatory.<sup>180</sup> When no such privilege is justified, however, speakers can properly be held responsible when, acting with the requisite state of mind, they speak in a way that violates the fundamental rights of others.

In conclusion, content neutrality is grounded in a conception of autonomy. Government may not intrude into the inward thoughts and feelings of individuals, nor may it regulate speech because it disapproves of the speaker's holding or expressing the views in question, because this would violate the speaker's autonomy. Nor may government seek to protect willing listeners from the communicative impact of speech, for this would violate their own autonomy. The case is quite different, however, where the communicative impact of speech causes serious and unjustified injury to an unwilling listener. In that case, the speech goes beyond the bounds of the speaker's autonomy and invades that of the listener. When the government regulates speech in such cases, it does not improperly regulate content within the mind of a speaker, or a willing listener, or content that is internal to the relationship between a willing speaker and listener. Instead, it acts

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TOO (1993); Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061 (1993), reprinted in STANLEY FISH, THE TROUBLE WITH PRINCIPLE 93 (1999).

<sup>178</sup> What the relevant state of mind is will vary from one wrong to another, depending on the value of the speech and of the other right (among other considerations). For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and subsequent cases, the Supreme Court held that, in light of the overriding importance of the speech in question, public officials and other public figures should be permitted to recover for defamation only where they can show that a statement was knowingly or recklessly false. *Id.* at 279-80. By contrast, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court found that where private figures were defamed, the balance came out somewhat differently, and that defendants could be held liable for negligence. *Id.* at 347-48.

<sup>179</sup> 376 U.S. 254 (1964).

<sup>180</sup> *Id.* at 266-83.

to protect an unwilling listener against injury. In so doing, the law performs its core function of protecting the rights of others from violation.

### C. *Categories of Regulable Speech*

The prevailing approach holds that speech may be regulated on the basis of its communicative impact only in exceptional circumstances, yet is unable to explain those exceptions. In this section, I argue that the rights-based approach set forth above is better able to account for the structure of contemporary First Amendment doctrine. At the same time, this approach provides a critical standard by which to assess the Supreme Court's decisions on whether particular categories of speech may be regulated on the basis of content.

#### 1. Threats and Incitement

The Court's decisions make clear that threats of violence are not protected by the First Amendment.<sup>181</sup> As the Court recently observed in *R.A.V. v. City of St. Paul*,<sup>182</sup> the law prohibits such threats in order to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."<sup>183</sup> In other words, such laws are necessary to ensure the right to personal security. Speech can also violate this right in another way — by inciting its audience to attack a third person.

As the cases of threats and incitement make clear, speech can cause injury to the community as well as to individuals. Personal security is a right that inheres not only in the particular individual who is threatened, but also in each and every member of society. An assault on one is therefore regarded as an attack against all. Accordingly, threats and incitement may provide the basis both for civil actions by private individuals and for criminal prosecution by the state.<sup>184</sup> In other instances, speech can cause injury to the community or the state even when it inflicts no cognizable injury on individuals. For example, threatening to destroy a government building, or inciting others to do so, constitutes a wrong against the state, regardless of whether particular persons are endangered. Likewise, committing perjury and filing false tax returns are wrongful because they interfere with the administration of justice and the tax system, respectively.

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<sup>181</sup> See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence" or "threats of violence.") (citation omitted); Watts v. United States, 394 U.S. 705, 707 (1969).

<sup>182</sup> 505 U.S. 377 (1992).

<sup>183</sup> *Id.* at 388.

<sup>184</sup> See, e.g., *supra* note 167 (citing Model Penal Code provision on terroristic threats); WAYNE R. LAFAVE, CRIMINAL LAW § 6.1 (3d ed. 2000) (describing crime of solicitation); *id.* § 6.7(a) (describing liability for aiding and abetting crime by encouraging its commission).

Of course, one of the overriding themes of modern First Amendment jurisprudence is that the danger to free speech is greatest when the state seeks to restrict speech in order to prevent some injury to itself.<sup>185</sup> Courts must be vigilant to ensure that speech is not suppressed merely because it is critical of the government or offensive to the political views of a majority. It was for this reason, among others, that Justices Holmes and Brandeis argued for a stringent interpretation of the "clear and present danger" test.<sup>186</sup> Their view was substantially adopted in *Brandenburg v. Ohio*,<sup>187</sup> which held that government may forbid speech that advocates unlawful conduct or revolution only where such speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>188</sup>

There are thus strong reasons to hold government to the most rigorous standards when it seeks to regulate speech directed against itself. This, however, should not lead us to overlook the fact that some speech is wrongful because it causes injury to the state or to the community at large. As Justice Brandeis observed in *Whitney v. California*,<sup>189</sup> while First Amendment rights "are fundamental, they are not in their nature absolute," but instead are subject to restriction where necessary "to protect the state from destruction or from serious injury, political, economic or moral."<sup>190</sup> If there is a problem with this formulation, it is not that it recognizes injuries to the state, but that it neglects to mention the infringement of individual rights, which ought to be no less central to an account of free speech and its limits.

## 2. Insulting or Fighting Words

In *Chaplinsky v. New Hampshire*,<sup>191</sup> the Supreme Court recognized another category of unprotected speech, "insulting or 'fighting' words," which it defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>192</sup> Such words, Justice Murphy asserted, had "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>193</sup> While the "fighting words" doctrine has been criticized for sacrificing individual liberty to social order,<sup>194</sup> I believe that it is defensible from a rights-based perspective.

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<sup>185</sup> See, e.g., ELY, DEMOCRACY, *supra* note 113, at 107-09, 11-16; Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

<sup>186</sup> See, e.g., *Whitney v. California*, 274 U.S. 357, 373-79 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

<sup>187</sup> 395 U.S. 444 (1969) (per curiam).

<sup>188</sup> *Id.* at 447.

<sup>189</sup> 274 U.S. 357 (1927).

<sup>190</sup> *Id.* at 373 (Brandeis, J., concurring) (citation omitted).

<sup>191</sup> 315 U.S. 568 (1942).

<sup>192</sup> *Id.* at 572.

<sup>193</sup> *Id.*

<sup>194</sup> See, e.g., FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 252-60 (1981);

Speech can provoke responsive violence in several ways. First, words can constitute a form of wrongful aggression by conveying a “message of personal injury and imminent violence.”<sup>195</sup> Faced with such a threat to personal security, the target may respond with force, or with abusive language that soon results in violent confrontation. Second, insulting speech can provoke violence by attacking the target’s dignity. In both cases, the speech violates the rights of the target as well as the community’s right to the peace. Finally, speech can constitute a challenge to fight. Even when this does not violate the target’s right to security (because the challenge can be refused), it nevertheless threatens the public peace.

In recent decades, the Court has focused on the “breach of the peace” branch of *Chaplinsky*,<sup>196</sup> leaving it unclear whether speech may still be restricted on the grounds that it “inflict[s] injury” “by [its] very utterance.”<sup>197</sup> Recent decisions indicate that this remains an open question.<sup>198</sup>

The way in which the question is framed will strongly influence the answer that we give to it. If we approach the problem as it is formulated in *Chaplinsky* — as a conflict between free speech and “the social interest in order and morality”<sup>199</sup> — we may be inclined to protect individual liberty by confining the social interest as narrowly as possible, that is, to the prevention of imminent violence. But the problem looks quite different when we view it as involving rights on both sides. As the courts have increasingly recognized over the past century, the law should protect not only external rights such as life, liberty, and property, but also personality rights such freedom from intentional infliction of emotional distress.<sup>200</sup> But speech clearly can be used to inflict severe distress on others — for example, by falsely informing another that a loved one is dead. If the Court were to overrule the “inflict injury” branch of *Chaplinsky*, such speech might be protected by the First Amendment. In my view, the law also should be allowed to protect personal dignity<sup>201</sup> on the ground that this is an essential aspect of what Brandeis once called the right to an “inviolate personality.”<sup>202</sup>

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Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 508-14.

<sup>195</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 408 (1992) (White, J., concurring in judgment).

<sup>196</sup> See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972).

<sup>197</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>198</sup> The Court was invited to reconsider the *Chaplinsky* definition in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), but found it unnecessary to reach the question. Instead, all of the justices assumed, at least for purposes of argument, that the entire definition remains good law. *Id.* at 381; *id.* at 401 (White, J., concurring in judgment); *id.* at 432 (Stevens, J., concurring in judgment).

<sup>199</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>200</sup> See *supra* text following note 175.

<sup>201</sup> See Heyman, *Righting the Balance*, *supra* note 29, at 1373-74.

<sup>202</sup> Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

For these reasons, I believe that a strong argument can be made for retaining both branches of *Chaplinsky*.<sup>203</sup> At the same time, it is crucial to ensure that this doctrine is not used to suppress ideas. When speech seeks to communicate ideas, no matter how controversial or provocative, it may not be restricted simply because listeners find those ideas offensive. The basic line to be drawn is between the bona fide expression of ideas on one hand and personal abuse on the other.<sup>204</sup>

### 3. Defamation and Invasion of Privacy

*Chaplinsky* also mentions libel as an unprotected category of speech.<sup>205</sup> In contrast to insulting words, which injure their target directly, libel causes injury indirectly by damaging an individual's reputation, or the way that others perceive her. Once again, while *Chaplinsky* explains the harm of defamation in terms of "the social interest in order and morality,"<sup>206</sup> the harm is better understood from a rights-based perspective. Individual personality has an important social dimension. For purposes of social interaction, an individual's identity is largely determined by how others view her. To make false statements about a person that lower her in the esteem of the community constitutes a serious wrong to personality.<sup>207</sup>

*Chaplinsky* observed that laws against libel had "never been thought to raise any Constitutional problem" because such speech contributed little if anything to the search for truth.<sup>208</sup> As the Court came to recognize in *New York Times Co. v. Sullivan*,<sup>209</sup> however, the law of defamation can raise very serious constitutional problems, for it imposes substantial restraints on free speech regarding matters of public concern. For this reason, Justices Black and Douglas argued that such speech should enjoy absolute protection under the First Amendment.<sup>210</sup> Although this position would give strong protection to free speech, however, it would unduly sacrifice the right to reputation, a right that, in Justice Stewart's words, "reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty."<sup>211</sup>

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<sup>203</sup> For a fuller discussion, see Heyman, *Righting the Balance*, *supra* note 29, at 1369-75.

<sup>204</sup> Although this distinction will often be easy to draw, it becomes more problematic in the case of ideas that themselves reflect hostility toward a person or group (as in the case of hate speech). For an exploration of whether the expression of ideas can inflict injury, see *infra* text accompanying notes 270-78.

<sup>205</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>206</sup> *Id.*

<sup>207</sup> See Heyman, *Righting the Balance*, *supra* note 29, at 1336-39.

<sup>208</sup> *Chaplinsky*, 315 U.S. at 572.

<sup>209</sup> 376 U.S. 254 (1964).

<sup>210</sup> *Id.* at 297 (Black, J., concurring) ("An unconditional right to say what one wants about public affairs is what I consider to be the minimum guarantee of the First Amendment.").

<sup>211</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

Moreover, as Justice Brennan noted in *Garrison v. Louisiana*,<sup>212</sup> “[c]alculated falsehood” has no legitimate place in public debate.<sup>213</sup>

For these reasons, the Court declined to adopt an absolutist position and instead recognized a series of qualified privileges. To protect good-faith criticism of official conduct, *New York Times* held that a public official could recover for defamation only on the basis of convincing proof that a statement was knowingly or recklessly false.<sup>214</sup> Subsequent decisions extended this rule to lawsuits brought by public figures.<sup>215</sup> In *Gertz v. Robert Welch, Inc.*,<sup>216</sup> however, the Court concluded that the balance between free speech and reputation should be struck differently where the plaintiff was a private person. In such cases, the Court ruled, defendants properly could be held responsible for false and defamatory statements made without reasonable care.<sup>217</sup> In this way, the Court has sought to achieve a reasonable accommodation between the rights of free speech and reputation.<sup>218</sup>

Over the past century, the law has also come to recognize a right to privacy.<sup>219</sup> By preserving the boundary between the self and the world, privacy allows individuals to direct their own thoughts and actions and to cultivate a rich inner life, free from undue interference by others.<sup>220</sup> Invasion of privacy takes two main forms: improper *intrusion* into an individual’s private life (e.g., through obscene or harassing telephone calls), and unwarranted *exposure* of that private life to the world (through publication of highly personal information).<sup>221</sup> Of course, both forms of invasion of privacy can be committed through speech.

As already noted, the Supreme Court has upheld some measures designed to protect against intrusive forms of expression, such as demonstrations in front of a person’s home.<sup>222</sup> Yet the Court has consistently struck down efforts to protect privacy in the second sense — for example, through laws that bar the media from publishing the names of rape victims.<sup>223</sup> The Court’s refusal to protect informational privacy may be attributed to several factors: the justices’ discomfort at recognizing new categories of regulable speech; the quasi-absolutist view that, under the First Amendment, the state may rarely if ever regulate speech that is true;<sup>224</sup> and the modern tendency to frame First Amendment problems as conflicts

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<sup>212</sup> 379 U.S. 64 (1964).

<sup>213</sup> *Id.* at 75.

<sup>214</sup> *New York Times*, 376 U.S. at 279-80.

<sup>215</sup> *Curtis Publ’g Co. v. Butts & Associated Press v. Walker*, 388 U.S. 130 (1967).

<sup>216</sup> 418 U.S. 323 (1974).

<sup>217</sup> *Id.* at 347-48.

<sup>218</sup> *Id.* at 343.

<sup>219</sup> See, e.g., RESTATEMENT, *supra* note 156, §§ 652A-652E.

<sup>220</sup> See Heyman, *Righting the Balance*, *supra* note 29, at 1332-36.

<sup>221</sup> See RESTATEMENT, *supra* note 156, §§ 652B, 652D (defining the torts of intrusion upon seclusion and unreasonable publicity to private life).

<sup>222</sup> See *supra* note 152.

<sup>223</sup> See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

<sup>224</sup> In *Florida Star*, the media defendant urged the Court to hold that under the First

between the right to free speech and "state interests," rather than other rights.<sup>225</sup> When the issue is viewed from a rights-based perspective, however, it is clear that privacy is no less deserving of protection than is reputation. Both are essential aspects of the right to an "inviolate personality."<sup>226</sup> Individuals generally should be entitled to decide for themselves whether to communicate highly personal information to others. When the courts hold that, under the First Amendment, such information may be published without consent, the subject's right to autonomy is improperly subordinated to the interests of the society (as well as the speaker). But this position misunderstands the nature of the social realm and the social dimension of expression. Rather than negating individual autonomy, society should be based on respect for such autonomy.<sup>227</sup> Communication generally should be voluntary. In the case of highly personal information, however, the content properly belongs to the subject of the information. When such information is published without consent, the subject in effect is forced to be an unwilling speaker.

For these reasons, speech that infringes the right to privacy should be subject to regulation, except where that right is outweighed by the value of the expression. This is the crucial issue in such cases — an issue which is not illuminated by the content neutrality doctrine.<sup>228</sup>

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Amendment "the press may never be punished, civilly or criminally, for publishing the truth." *Florida Star*, 491 U.S. at 531. Although the Court declined to rule on this contention, it did hold that "'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information,'" at least in the absence of "'a need to further a state interest of the highest order.'" *Id.* at 533 (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)) (citation omitted).

The Court's recent decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), expands the reach of this principle, but at the same time indicates some limits. In a six to three ruling, the Court upheld the First Amendment right of a media defendant to broadcast a tape recording of a private cellular telephone conversation regarding a matter of public concern, although the defendant knew or had reason to know that the conversation had been unlawfully intercepted and recorded by a third party. In separate opinions, however, five justices indicated that they would uphold a statutory ban on the disclosure of unlawfully intercepted conversations in most cases, reasoning that such a ban served to protect not only an interest in personal privacy, but also a First Amendment interest in promoting private speech. *Id.* at 535 (Breyer, J., concurring); *id.* at 541 (Rehnquist, C.J., dissenting). For further discussion of *Bartnicki*, see *infra* text accompanying notes 233-43.

<sup>225</sup> For criticism of this tendency, see Heyman, *Righting the Balance*, *supra* note 29, at 1305-13.

<sup>226</sup> Warren & Brandeis, *supra* note 202, at 215.

<sup>227</sup> See, e.g., ALAN BRUDNER, THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE 16-18 (1995) (emphasizing the interdependence of the individual and community); G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 261R, at 284-85 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (same).

<sup>228</sup> The Court also has adhered to the traditional view that obscenity is unprotected by the First Amendment. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957). The rationale

#### D. Conclusion

While content neutrality has an important place in free speech jurisprudence, it is an overstatement to say, as the Court did in *Mosley*, that content may never be taken into account.<sup>229</sup> Instead, in deciding First Amendment cases, courts must consider content in three important ways. First, the court must determine whether a particular act is sufficiently expressive to be regarded as “speech” for First Amendment purposes. This question is especially important in cases involving symbolic conduct, such as draft card burning,<sup>230</sup> and other cases of nonverbal conduct, such as erotic dancing.<sup>231</sup> Second, a court must consider the impact of the speech on unwilling listeners and third parties, in order to determine whether it violates their rights.<sup>232</sup> Finally, if the speech does infringe other rights, the court must consider the value of the speech in order to decide whether it should nevertheless be privileged under the First Amendment. This judgment also requires a consideration of content.

The final point deserves elaboration, because it highlights a fact that is generally overlooked — that it is sometimes necessary to take content into account *in order to afford greater protection to the most valuable forms of speech*. This point is well illustrated by the Supreme Court’s decision last Term in *Bartnicki v. Vopper*.<sup>233</sup> In that case, an unknown person illegally intercepted and recorded a cellular telephone conversation, in which two officials of a teachers’ union discussed a proposed strike and made vague threats to use violence against school board officials.<sup>234</sup> The tape recording found its way to Vopper, a radio commentator, who played it repeatedly on his public affairs program,<sup>235</sup> in violation of a federal statute that made it unlawful to intentionally disclose the contents of a communication that one knows or has reason to know was illegally intercepted.<sup>236</sup>

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for this view — that obscenity may be restricted to safeguard public and private morality — is problematic from the standpoint of a rights-based theory of the First Amendment. The problem of obscenity is a complex one, however, which deserves a much fuller discussion than it can receive here.

In recent years, the traditional liberal-conservative debate over obscenity has been transformed by the rise of a new perspective — the argument of some feminists that pornography causes harm to women. A focus on such harm is the most plausible way to bring the issue of pornography within a rights-based approach. This issue will be discussed below in connection with *Am. Booksellers Ass’n v. Hudnut*. See *infra* Part III.B.

<sup>229</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 99 (1972).

<sup>230</sup> See, e.g., *United States v. O’Brien*, 391 U.S. 367 (1968).

<sup>231</sup> See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000).

<sup>232</sup> See *infra* Part II.C (discussing threats, incitement, fighting words, defamation, and invasion of privacy).

<sup>233</sup> 532 U.S. 514 (2001).

<sup>234</sup> *Id.* at 518-19.

<sup>235</sup> *Id.* at 519.

<sup>236</sup> 18 U.S.C. § 2511(1)(c) (1994).

Invoking the statute, the union officials sued Vopper for broadcasting the tape; in defense, he argued that the statute violated the First Amendment.

Writing for the majority, Justice Stevens observed that the statute was designed to protect privacy and to encourage individuals to freely engage in private speech, without fear that their conversations would be overheard by or disclosed to others.<sup>237</sup> Acknowledging that these were "interests of the highest order,"<sup>238</sup> Stevens left open the possibility that the statute would be held constitutional in most of its applications.<sup>239</sup> But he concluded that, under the First Amendment, the statute could not be applied to a case like *Bartnicki*, which involved "the publication of truthful information of public concern."<sup>240</sup> In reaching this conclusion, the majority relied on *New York Times Co. v. Sullivan*,<sup>241</sup> in which the Court ruled that even if the states could generally proscribe libel, they could not impose liability for good-faith criticism of official conduct without violating the "profound national commitment" to free debate on public issues.<sup>242</sup>

Thus, in both *New York Times* and *Bartnicki*, the Court drew content-based distinctions in order to promote what it viewed as "the core purposes of the First Amendment."<sup>243</sup> Of course, I do not mean to suggest that either courts or

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<sup>237</sup> *Bartnicki*, 532 U.S. at 518, 532-33.

<sup>238</sup> *Id.* at 518.

<sup>239</sup> *Id.* at 532. In separate opinions, five members of the Court clearly indicated that they would take this position. See *supra* note 224 (discussing opinions of Breyer, J., and Rehnquist, C.J.).

<sup>240</sup> *Bartnicki*, 532 U.S. at 534.

<sup>241</sup> 376 U.S. 254 (1964).

<sup>242</sup> *Id.* at 270; see *Bartnicki*, 532 U.S. at 534 (discussing *New York Times*).

<sup>243</sup> *Bartnicki*, 532 U.S. at 533-34. Conversely, a strict adherence to the content neutrality doctrine sometimes can have a speech-restrictive effect. Consider, for example, the development from *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968), to *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Logan Valley*, the Court held that First Amendment rights extend not only to public property such as streets and parks, but also to privately-owned shopping centers that are generally open to the public and that serve as community business districts. *Logan Valley*, 391 U.S. at 319-20. On this ground the Court upheld the right of labor union members to picket a business located in a privately owned shopping center. A few years later, however, in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court ruled that anti-war protesters had no First Amendment right to distribute leaflets in a privately owned shopping center. The Court limited *Logan Valley* to speech related to a shopping center's operations. Finally, in *Hudgens*, the Court overruled *Logan Valley* and rejected a First Amendment right of access even for picketing related to the operations of the center. Citing *Mosley*, Justice Stewart observed that, under the First Amendment, no distinctions could be drawn based on the content of speech. *Hudgens*, 424 U.S. at 520. From this principle, he said, it followed that if the protesters in *Lloyd Corp.* "did not have a First Amendment right to enter this shopping center to distribute handbills concerning Vietnam, then the pickets in the present case did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike" against a business located there. *Id.* at 520-21. In this way, the neutrality principle was turned against the existence of broader free speech rights.

legislatures should have carte blanche to make distinctions based on content. Instead, the point is that, in situations where there are real differences in the value of different forms of speech, or in the impact that they have on other rights, the purposes of the First Amendment may best be served by recognizing those differences in order to ensure that the most valuable forms of expression receive a high level of protection.

### III. CONTENT NEUTRALITY AND THE FLIGHT FROM SUBSTANCE

The first two parts of this Essay explored the foundations and limits of the content neutrality doctrine. At the heart of the doctrine is the inherent value of autonomy. When government regulates the content of communication that takes place between willing individuals, and that affects no other rights, the regulation violates the autonomy of both parties, as well as the integrity of the relationship between them. Moreover, when a regulation improperly restricts public discourse, it infringes the autonomy of the community as a whole.

The idea of autonomy also enables us to identify the appropriate limits of content neutrality. Speech can violate the rights of others when it is forced on an unwilling audience, or when the communication of its content inflicts certain kinds of injuries on listeners. Speech can also violate the rights of third parties, as in cases of incitement and defamation. In all of these situations, the speaker goes beyond the bounds of his own autonomy and invades the autonomy of others. In such cases, the rule against content regulation should not apply. And the same is true of the ban on content discrimination. When speech violates other rights, this provides a reasonable justification for treating it more restrictively than other speech. To do so does not deny the speaker's right to equality, for the duty to respect the rights of others applies to all alike.

In short, the limits of content neutrality derive from the same principles that justify the doctrine itself. Unfortunately, the courts have failed to recognize these limits, at least in a clear and consistent way. Instead, when judges determine that a law is based on the content or communicative impact of speech, and that the speech does not fall within a few unprotected categories, they almost invariably hold the law unconstitutional under the *Mosley* doctrine. In this way, the doctrine has a powerful tendency to obscure what should be the central issues in many First Amendment cases: whether the regulated speech violates the rights of other individuals or the community; and if so, whether the speech should nevertheless be protected because of its value.

In this Part, I explore how this failure to recognize the limits of content neutrality has marred judicial efforts to grapple with two major First Amendment problems — hate speech and pornography. These problems are highly complex, and I do not suggest that a rights-based approach yields easy answers to them. Instead, my contention is that, rather than illuminating these issues, the courts' resort to the content neutrality doctrine has only obscured them.

### A. Hate Speech: R.A.V. v. City of St. Paul

Recent years have seen an increasing concern with the problem of hate speech — expression that is intended to insult or degrade others on the basis of race, religion, or other characteristics.<sup>244</sup> Many colleges and universities, as well as some localities, have sought to regulate such speech on the ground that it causes serious injury to its targets as well as to the community. The constitutionality of such regulations was at issue in *R.A.V. v. City of St. Paul*.<sup>245</sup>

Together with several other teenagers, R.A.V. burned a wooden cross inside the yard of an African-American family who lived across the street.<sup>246</sup> He was arrested and charged with violating a St. Paul ordinance that made it a misdemeanor to “place[] on public or private property a symbol, object, . . . or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. . . .”<sup>247</sup> On its face, the ordinance was clearly overbroad, for speech does not lose First Amendment protection merely because it causes “anger” or “resentment” in others.<sup>248</sup> Relying on an earlier decision, however, the Minnesota Supreme Court held that the St. Paul ordinance was limited to what *Chaplinsky v. New Hampshire*<sup>249</sup> described as “insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>250</sup> When it was construed in this way, the state court concluded, the ordinance was constitutional because it applied only to speech that was unprotected by the First Amendment.<sup>251</sup>

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<sup>244</sup> For collections of writings on hate speech, see HENRY LOUIS GATES ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); HATE SPEECH AND THE CONSTITUTION (Steven J. Heyman ed., 1996).

<sup>245</sup> 505 U.S. 377 (1992). In another leading case, the United States Court of Appeals for the Seventh Circuit relied on *Mosley* in striking down several ordinances that were designed to prevent a neo-Nazi march in Skokie, Illinois, a Chicago suburb with a large number of Holocaust survivors. See *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir.) (citing *Mosley*, 408 U.S. at 98), cert. denied, 439 U.S. 916 (1978). For a discussion of the issues presented by the Skokie case, see Heyman, *Righting the Balance*, *supra* note 29, at 1382-88.

<sup>246</sup> *R.A.V.*, 505 U.S. at 379.

<sup>247</sup> *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, MINN. LEGIS. CODE § 292.02 (1990) [hereinafter St. Paul Ordinance]).

<sup>248</sup> See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

<sup>249</sup> 315 U.S. 568 (1942).

<sup>250</sup> *Id.* at 572. For the Minnesota decision, see *In re the Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991). The state court also held that the ordinance was constitutional insofar as it applied to expression that constituted unprotected incitement under *Brandenburg*. *R.A.V.*, 464 N.W.2d at 510.

<sup>251</sup> *R.A.V.*, 464 N.W.2d at 511.

A deeply divided Supreme Court reversed. Writing for the five-member majority, Justice Scalia accepted the state court's construction of the ordinance as authoritative, and assumed that the law covered only unprotected fighting words.<sup>252</sup> Nevertheless, he held the ordinance unconstitutional because, instead of proscribing fighting words in general, it banned only a subset of fighting words — those "that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'"<sup>253</sup> Scalia concluded that this selective regulation violated the First Amendment ban on content discrimination.<sup>254</sup>

*R.A.V.* provides a dramatic illustration of the ways in which an undue focus on content neutrality can distort First Amendment analysis. As I have argued, a crucial threshold question in free speech cases is whether the regulated speech unjustifiably violates the rights of other individuals or the community. Speech that wrongfully injures others falls outside the speaker's autonomy, and thus outside the rule of content neutrality.

Like most modern First Amendment opinions, *R.A.V.* does not speak in terms of the other rights that may be affected by speech. Instead, in explaining why fighting words are unprotected, Scalia quotes *Chaplinsky*'s assertion that such words are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>255</sup> Regardless of how the issue is framed, however, Scalia recognizes (at least for purposes of argument) that fighting words cause unjustified injury both to individuals and to society, and that for this reason they may be restricted based on content.

Moreover, Scalia acknowledges that, within an unprotected category of expression, some acts of speech may be more harmful than others. In such cases, government may choose to regulate only the most harmful instances of unprotected speech without violating the content discrimination rule.<sup>256</sup> For example, a state "might choose to prohibit only that obscenity which is the most patently offensive in its prurience — *i.e.*, that which involves the most lascivious displays of sexual activity."<sup>257</sup> But this raises the obvious question of whether the St. Paul ordinance could be justified on the same ground: that it sought to regulate only the most harmful forms of fighting words. Could not St. Paul reasonably determine (in Justice Stevens's words) "that harms caused by racial, religious, and gender-based

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<sup>252</sup> *R.A.V.*, 505 U.S. at 381.

<sup>253</sup> *Id.* at 391 (quoting St. Paul Ordinance, *supra* note 247, § 292.02).

<sup>254</sup> Four justices sharply criticized the majority's analysis, but would have held the ordinance unconstitutional on other grounds — that it was not limited to "fighting words" as defined in *Chaplinsky* and was substantially overbroad. *Id.* at 397-98 (White, J., concurring in judgment).

<sup>255</sup> *Id.* at 383 (quoting *Chaplinsky*, 315 U.S. at 572).

<sup>256</sup> *Id.* at 388-89.

<sup>257</sup> *Id.* at 388.

invective are qualitatively different from that caused by other fighting words," and therefore merit different treatment.<sup>258</sup>

Although Scalia's response is not entirely clear, it appears to run as follows. Fighting words cause harm, and are unprotected by the First Amendment, not because of the "particular idea[s]" they express, but because of the *manner* in which they express those ideas — that is, in such a way as to cause immediate injury or violence.<sup>259</sup> But the fact that the state may ban this manner of expression under *Chaplinsky* does not give it a license to regulate "based on hostility . . . towards the underlying *message* expressed."<sup>260</sup> In the present case, Scalia argues:

St. Paul has not singled out an especially offensive mode of expression — it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance.<sup>261</sup>

"Selectivity of this sort," he concludes, "creates the possibility that the city is seeking to handicap the expression of particular ideas."<sup>262</sup> This is precisely what the doctrine of content discrimination aims to prevent.<sup>263</sup>

In my view, Justice Scalia's response is unpersuasive. First, the distinction between "mode" and "message" cannot be sustained in this context. Fighting words do not constitute a "mode of speech" in the way that a "noisy sound truck" does.<sup>264</sup> Instead, they cause harm through the meaning that they convey. When fighting words take the form of assaults or threats, the meaning is one of "personal injury and imminent violence. . . ."<sup>265</sup> In other cases, the words express contempt for the listener, or dare him to fight. In all of these cases, however, fighting words inflict injury only because of what they express.<sup>266</sup> If this were not true, then restrictions on fighting words, like those on sound trucks, would not be an instance of content-based regulation at all.

Of course, this is not enough to refute Justice Scalia's point. One might concede that fighting words cause injury because of the message they express, but argue that this injury results solely from an *immediate* message of violence or contempt, and not from any broader *ideological* message the words are meant to

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<sup>258</sup> *R.A.V.*, 505 U.S. at 424 (Stevens, J., concurring in judgment).

<sup>259</sup> *Id.* at 393.

<sup>260</sup> *Id.* at 386 (emphasis added).

<sup>261</sup> *Id.* at 393-94.

<sup>262</sup> *Id.* at 394.

<sup>263</sup> *Id.* at 387.

<sup>264</sup> *R.A.V.* 505 U.S. at 386 (citation and internal quotation marks omitted).

<sup>265</sup> *Id.* at 408 (White, J., concurring in judgment).

<sup>266</sup> See *supra* Part II.C.2.

convey. On this view, the St. Paul ordinance was unconstitutional because it was directed against the latter rather than (or in addition to) the former.<sup>267</sup>

On one level, this distinction is a valid and important one. There certainly is a difference between an immediate message of violence or contempt, on one hand, and a general ideology on the other. It is a fundamental principle of the First Amendment that government has no power to regulate the expression of ideology as such, divorced from concrete harm.

At least as construed by the Minnesota Supreme Court, however, that is not what the St. Paul ordinance did. Instead, it restricted all displays of race-based fighting words, whether or not they were intended to express a broader ideology. As the ordinance's references to "a burning cross or Nazi swastika" make clear, it did encompass expressions of ideology.<sup>268</sup> But it did so only where those expressions conveyed a message of immediate violence or contempt, and thus amounted to fighting words under *Chaplinsky*.<sup>269</sup> In other words, the ordinance banned the expression of ideas only when it threatened to cause imminent injury.

But is it possible for the expression of ideas to cause injury? In many ways, this question lies at the heart not only of *R.A.V.*, but also of many other contemporary disputes over freedom of expression. The question is rarely discussed, however. In *R.A.V.*, for example, the majority insisted that the regulation was based not on the injuries caused by hate speech but rather "on hostility towards its protected ideological content,"<sup>270</sup> while the concurring justices took the opposite view.<sup>271</sup> Neither side considered whether speech can cause injury because of the ideas it expresses. This issue must be confronted, however, if we are to have any hope of moving beyond sterile and seemingly endless debates over whether particular regulations are "really" aimed at ideas, or instead are "really" designed to prevent harm.

In general, the expression of ideas should not be regarded as causing injury. This is a central tenet of the liberal tradition, and lies at the core of the First Amendment. On the liberal view, whether based on a Lockean or Kantian theory of natural rights or a Millian ideal of self-development, rights are rooted in the human capacity for autonomy or self-determination.<sup>272</sup> Human beings have autonomy because, and insofar as, they are capable of directing their actions through their own reason. But the use of reason requires free and open discussion.<sup>273</sup> It follows that individuals cannot complain of wrongful injury merely

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<sup>267</sup> See *R.A.V.*, 505 U.S. at 395 (asserting that the ordinance "regulates expression based on hostility towards its protected ideological content").

<sup>268</sup> St. Paul Ordinance, *supra* note 247, § 292.02.

<sup>269</sup> See *In re the Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).

<sup>270</sup> *R.A.V.*, 505 U.S. at 395.

<sup>271</sup> *Id.* at 407, 411 (White, J., concurring in judgment) (arguing that the St. Paul ordinance did not involve "the official suppression of ideas," but rather reflected the city's judgment that group-based insults caused greater harms than others).

<sup>272</sup> See, e.g., MILL, ON LIBERTY, *supra* note 44, at 10-14; Heyman, *Righting the Balance*, *supra* note 29, at 1314 (discussing Lockean and Kantian natural rights theory).

<sup>273</sup> See *supra* text accompanying notes 61-65.

because they are exposed to ideas they dislike or find offensive. In general, a reasonable person will consider ideas and respond to them on a rational level.

There are some cases, however, in which speech can cause injury precisely because of the ideas expressed. Thus (to borrow Ely's example<sup>274</sup>) a speaker who shouts "Lynch him!" to an angry crowd gathered in front of a jail expresses an idea about how the crowd should act. As the courts have long recognized, words of this sort can constitute "triggers of action."<sup>275</sup> Under *Brandenburg v. Ohio*,<sup>276</sup> such speech is unprotected if it is both intended and likely to bring about imminent violence.<sup>277</sup>

Opponents of regulation might respond that this is not what they mean when they assert that the expression of ideas cannot cause injury. Instead, by "ideas" they mean general ideas or ideological opinions, rather than particular notions such as that the crowd should lynch this prisoner. The difficulty with this response, however, is that the general includes the particular. Consider the idea that (accused) rapists should be lynched. When articulated in general terms, apart from any actual situation, this idea causes no concrete injury to others. That may no longer be true, however, when the idea is expressed in a particular context — in front of an angry crowd outside a jail. There, the general idea about how rapists should be treated is conjoined with the belief that this individual is a rapist, and this may have both the purpose and effect of leading the crowd to conclude that this prisoner should be lynched. In this situation, the expression of the general idea contributes in an important way to the injuries suffered by the prisoner, and should be held responsible for those injuries.<sup>278</sup>

It is now possible to see how the expression of racist ideology through cross-burning can cause injury. Cross-burning expresses the belief that minority groups are inferior and should be subjected to violence or driven out of the community. This general idea includes the particular idea that these things should be done to the family in question. When the cross is burned on the family's lawn, this causes injury to them, in the same way as any other fighting words (that is, through its

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<sup>274</sup> See *supra* text accompanying note 113.

<sup>275</sup> *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (Learned Hand, J.), *rev'd on other grounds*, 246 F. 24 (2d Cir. 1917).

<sup>276</sup> 395 U.S. 444 (1969) (per curiam).

<sup>277</sup> *Id.* at 447.

<sup>278</sup> Mill recognizes this point when he writes that, although human beings generally "should be free to form opinions and to express their opinions without reserve":

[E]ven opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard.

MILL, ON LIBERTY, *supra* note 44, at 53.

emotional impact or its tendency to provoke responsive violence). Here, the “minor premise” of the syllogism is supplied by the defendant’s act of identifying this family as a target and burning the cross in their yard.

Contrary to Scalia’s view, then, fighting words inflict injury not merely because of their mode of expression, but because of the meaning they convey. And in this context, no bright-line distinction can be drawn between the immediate message of the speech and its ideological content.

Up to this point, we have been focusing on Justice Scalia’s contention that the St. Paul ordinance amounted to unconstitutional *content regulation* because it sought to restrict fighting words not as a mode of expression, but because of the underlying message they conveyed. But Scalia’s argument also contains another strand, one that focuses on *content discrimination*. On this view, the problem with the ordinance is not necessarily that it restricts the messages expressed by fighting words, but rather that it selectively regulates some messages and not others. For example, in responding to Justice Stevens’s contention that the St. Paul ordinance was directed “not to speech of a particular content, but to particular ‘injur[ies]’ that are ‘qualitatively different’ from other injuries,”<sup>279</sup> Scalia writes:

This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” are those symbols that communicate a message of hostility based on one of these characteristics.<sup>280</sup>

By selectively proscribing messages of this sort, Scalia argues, St. Paul violated the First Amendment ban on content discrimination.<sup>281</sup>

Although Scalia is correct that the St. Paul ordinance regulated some messages rather than others, that should not be sufficient to show illegitimate content discrimination. Instead, the crucial question is what the *reason* for the discrimination was. As I have argued, speech that “communicate[s] a message of hostility”<sup>282</sup> is capable of inflicting injury. But some messages inflict greater injury than others. A law that imposes a higher level of regulation on speech that inflicts greater injury should not be struck down under the content discrimination doctrine. The focus of the inquiry should therefore be on the existence and seriousness of the injuries caused by different acts of speech. Scalia turns this analysis on its head, by first observing that any such injuries must flow from the content of the speech, and

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<sup>279</sup> *R.A.V.*, 505 U.S. at 392 (quoting *id.* at 424 (Stevens, J., concurring in judgment)).

<sup>280</sup> *Id.* at 392-93.

<sup>281</sup> *Id.* at 393-94.

<sup>282</sup> *Id.* at 393.

then holding that distinctions based on content are “presumptively invalid.”<sup>283</sup> When the *Mosley* doctrine is used in this way, it is hardly possible to formulate, let alone resolve, the crucial issues in First Amendment cases.

How should we answer the critical question in *R.A.V.*? Do insults based on race, gender, and religion cause greater injury than insults in general? There are several reasons for believing that they do. First, unlike insults that express merely personal dislike, group-based insults often deny the very humanity of those against whom they are directed. In this way, they inflict a deeper injury on their targets.<sup>284</sup> Second, in an important sense, group-based insults are directed not only against specific individuals, but also against the group in general. For this reason, they may inflict injury on a greater number of people, and may tend to provoke violence on a broader scale. By exacerbating tensions between groups, such insults also tend to cause greater harm to the community as a whole. And all of these injuries are heightened when the insults are directed against members of groups that have historically been subjected to discrimination and oppression.<sup>285</sup>

The Supreme Court recognized the force of these considerations in *Wisconsin v. Mitchell*,<sup>286</sup> decided only one year after *R.A.V.* After Todd Mitchell and some friends had watched a motion picture that depicted violence against blacks during the civil rights movement, Mitchell incited the group to severely beat and rob a young white boy who happened to walk by.<sup>287</sup> Upon conviction of aggravated battery, Mitchell’s sentence was increased under a state hate crimes law that provided for enhanced sentences when the defendant intentionally selected the victim because of his “race, religion, color, disability, sexual orientation, natural origin or ancestry.”<sup>288</sup> Relying on *R.A.V.*, the Wisconsin Supreme Court struck down the hate crimes law on the ground that it subjected defendants to greater punishment because of the “ideological content of [their] thought[s].”<sup>289</sup> In an opinion by Chief Justice Rehnquist, the United States Supreme Court unanimously reversed, observing that there was reason to believe that “bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest” than other crimes.<sup>290</sup> “The State’s desire to redress these perceived harms,” Rehnquist added, “provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs or biases.”<sup>291</sup> If this is true of laws against hate

<sup>283</sup> *Id.* at 382.

<sup>284</sup> See Steven J. Heyman, *Hate Speech and the Theory of Free Expression*, in 1 HATE SPEECH AND THE CONSTITUTION, *supra* note 244, at xliv [hereinafter Heyman, *Hate Speech*].

<sup>285</sup> See *R.A.V.*, 505 U.S. at 408-09 (White, J., concurring in judgment) (contending that the “overriding message of personal injury and violence” conveyed by fighting words “is at its ugliest when directed against groups that have long been the targets of discrimination”).

<sup>286</sup> 508 U.S. 476 (1993).

<sup>287</sup> *Id.* at 479-80.

<sup>288</sup> *Id.* at 480 (quoting Wis. Stat. § 939.645(1)(b)).

<sup>289</sup> *State v. Mitchell*, 485 N.W.2d 807, 815 (1992).

<sup>290</sup> *Mitchell*, 508 U.S. at 488.

<sup>291</sup> *Id.*

crimes, however, it is difficult to understand why it is not equally true of laws against hate speech, where that speech falls within an unprotected category such as fighting words. In both instances, the state seeks to impose greater regulation on bias-motivated acts because they are “thought to inflict greater individual and societal harm” than other unprotected acts.<sup>292</sup>

For these reasons, I believe that some forms of hate speech regulation should be upheld under a rights-based approach to the First Amendment.<sup>293</sup> Of course, this issue is deeply controversial. For present purposes, what is most important is not how the courts should rule on the question, but how they should approach it. If my argument is correct, the courts should not seek to dispose of the issue with a formalistic invocation of the content discrimination doctrine, as the majority did in *R.A.V.* Instead, they should directly address the substantive issues in the case: whether the regulated speech infringes the rights of others, and whether the speech has sufficient value that it should nevertheless be protected by the First Amendment.

In addition to these normative and analytical advantages, a substantive approach to First Amendment cases has important political and rhetorical virtues. As *R.A.V.* illustrates, the content discrimination doctrine is capable of generating opinions that are so inordinately technical that even lawyers have difficulty understanding them. While such decisions may result in protecting speech in particular cases, they do nothing to promote public understanding of the broader values underlying the First Amendment, or of the importance of free speech in our social, political, and constitutional order. To the extent that the Supreme Court has an educative role in our system, that role is better served by opinions that openly canvass the substantive values on both sides, rather than obscuring them in a technical haze. When an opinion that focuses on substantive values upholds a First Amendment claim, the opinion is more likely to promote popular acceptance of free speech and tolerance of dissent. Such an opinion is also more likely to be perceived as legitimate by the losing side, which can at least feel that its concerns have received serious consideration. Although a substantive approach may result in upholding more regulations of speech, it should do so only in cases where a strong argument can be made that, on balance, our constitutional values are best served by allowing regulation. In all these ways, a substantive approach seems preferable to one that strongly focuses on the idea of neutrality.

The contrast between these two approaches clearly emerges when we compare *R.A.V.* with the leading Canadian hate speech decision, *Regina v. Keegstra*.<sup>294</sup> In that case, the Supreme Court of Canada was asked to determine whether a federal law banning the willful promotion of hatred against racial, ethnic, and religious groups violated the Canadian Charter of Rights and Freedoms. Because the law directly “restrict[ed] the content of expression by singling out particular meanings that are not to be conveyed,” the court found that the law clearly limited the

<sup>292</sup> *Id.* at 487-88.

<sup>293</sup> For fuller discussion, see Heyman, *Hate Speech*, *supra* note 284.

<sup>294</sup> [1990] 3 S.C.R. 697.

freedom of expression guaranteed by Section 2(b) of the Charter.<sup>295</sup> That was not the end of the case, however, for the Charter expressly provided in Section 1 that all of the rights it set forth were subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>296</sup> To identify those limits, the court looked to the same “values and principles” that underlay the Charter rights themselves: “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”<sup>297</sup>

Applying this approach, the court found that the willful promotion of group hatred caused two kinds of harm that were of the utmost concern in a free and democratic society. First, such expression inflicted severe psychological and dignitary injury on members of the target group.<sup>298</sup> Second, the expression caused harm to the society at large by creating “serious discord” between social groups.<sup>299</sup> Having identified the harms caused by the regulated speech, the court proceeded to consider the value of the speech. That value was irrelevant when the question was whether the speech fell within the outer bounds of Section 2(b), for that section placed “a high value . . . upon freedom of expression in the abstract.”<sup>300</sup> But the nature and value of the expression could not be ignored when the question was whether it could legitimately be regulated under Section 1.<sup>301</sup>

Hate propaganda, the court found, was remote from the core values underlying the Charter’s guarantee of free expression.<sup>302</sup> Although truth “can rarely . . . be identified with absolute certainty, . . . [t]here is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world.”<sup>303</sup> Hate speech might promote the speaker’s own fulfillment, but only by attacking the “individual self-development and human flourishing” of other citizens.<sup>304</sup> Finally, hate propaganda was inimical to democratic values because it promoted “a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial

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<sup>295</sup> *Id.* at 730. Section 2(b) guarantees the “fundamental freedoms” of “thought, belief, opinion and expression, including freedom of the press and other media of communication.” CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 2 (citation omitted).

<sup>296</sup> *Id.* § 1. Provisions of this sort are common in democratic constitutions adopted after World War II. See Lorraine Eisenstat Weinrib, *Hate Promotion in a Free and Democratic Society*: *R. v. Keegstra*, 36 MCGILL L.J. 1416 (1991).

<sup>297</sup> *Keegstra*, [1990] 3 S.C.R. at 736 (quoting *R. v. Oakes*, [1986] 1 S.C.R. 103, 136) (citation omitted).

<sup>298</sup> *Id.* at 746-47.

<sup>299</sup> *Id.* at 747-48.

<sup>300</sup> *Id.* at 760.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 761-62.

<sup>303</sup> *Id.* at 762-63.

<sup>304</sup> *Id.* at 763.

or religious characteristics.”<sup>305</sup> In all these ways, hate speech had no more than marginal value. Indeed, one could reasonably argue that, on the whole, hate speech regulation tended to promote rather than detract “from values central to freedom of expression.”<sup>306</sup> For these reasons, the court rejected Keegstra’s challenge to the hate-promotion law.

Regardless of whether one agrees with the result in *Keegstra*, there is much to be said for the way the Canadian court approaches the problem — by carefully assessing the substantive values on both sides. The court begins by considering the harm caused by the speech — a harm defined in terms of the fundamental values underlying the Charter — and then weighs that harm against the value of the speech, defined in the same terms. As I have suggested, constitutional values are better served by this sort of substantive approach than by the highly technical and formalistic analysis of *R.A.V.*

#### B. *Pornography*: American Booksellers Association v. Hudnut

The traditional justification for regulating obscene materials was that they tended to undermine public morality, as well as the morals of those who read or viewed them. In the 1980’s, Catharine A. MacKinnon and Andrea Dworkin proposed legislation based on a radically different view — that pornography should be restricted because it caused harm to women.<sup>307</sup> A version of the MacKinnon-Dworkin ordinance was adopted by the Indianapolis city council in 1984.<sup>308</sup> The ordinance declared pornography to be a form of sex discrimination.<sup>309</sup> Pornography was defined as “the graphic sexually explicit subordination of women, whether in pictures or in words,” that also included other specified elements.<sup>310</sup> Civil sanctions

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<sup>305</sup> *Id.* at 764.

<sup>306</sup> *Id.* at 765.

<sup>307</sup> For a version of the ordinance, see MODEL ANTI-PORNOGRAPHY LAW, in Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN’S L.J. 1, 25-26 (1985).

<sup>308</sup> See Am. Booksellers Ass’n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 324 (quoting Indianapolis Code § 16-3(q)). Pornography was defined as:

the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented as being penetrated by objects or animals; or

were provided against those who violated the ordinance by, for example, producing or distributing pornography.<sup>311</sup> Immediately upon its enactment, the ordinance was challenged in federal court as a violation of the First Amendment.

As drafted, the ordinance raised serious vagueness and overbreadth concerns. The ordinance's definition of pornography was difficult to understand and potentially quite broad.<sup>312</sup> Moreover, unlike the Supreme Court's definition of obscenity in *Miller v. California*,<sup>313</sup> the ordinance made no provision for considering the work as a whole, and made no exception for works with serious literary, artistic, political, or scientific value.<sup>314</sup> The district court relied on these grounds, among others, to invalidate the ordinance.<sup>315</sup> In an opinion by Judge Easterbrook, however, the court of appeals largely avoided the vagueness and overbreadth doctrines, and instead based its decision on far broader grounds.<sup>316</sup>

Easterbrook did not deny that pornography caused serious harm to women. On the contrary, he wrote that:

[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, “[p]ornography is central in creating and maintaining sex as

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- (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
  - (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”

*Id.* (quoting Indianapolis Code § 16-3(q)).

<sup>311</sup> *Id.* at 325-26.

<sup>312</sup> See, e.g., Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'Y REV. 130, 131-32 (1985) (arguing that the ordinance was overbroad).

<sup>313</sup> 413 U.S. 15 (1973). In *Miller*, the Court held that material can be proscribed as obscene if:

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

*Id.* at 24 (citations and internal quotation marks omitted).

<sup>314</sup> See *Hudnut*, 771 F.2d at 325.

<sup>315</sup> Am. Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984).

<sup>316</sup> See Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]."<sup>317</sup>

Nevertheless, Easterbrook held the ordinance unconstitutional under the *Mosley* principle, concluding that it constituted viewpoint discrimination. "Under the ordinance," he wrote:

[G]raphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.<sup>318</sup>

According to Easterbrook, such discrimination was unconstitutional *per se*.<sup>319</sup> Although the courts sometimes "balance[d] the value of speech against the costs of its restriction," such balancing was improper where the government had "created an approved point of view."<sup>320</sup> Instead, Easterbrook asserted, the First Amendment guaranteed an "absolute right to propagate opinions that the government finds wrong or even hateful."<sup>321</sup> By a six to three vote, the decision was summarily affirmed by the Supreme Court.<sup>322</sup>

Judge Easterbrook's opinion in *Hudnut* suffers from the same fundamental flaw as Justice Scalia's in *R.A.V.* The crucial question in such cases is whether the

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<sup>317</sup> *Id.* at 329 (quoting Indianapolis Code § 16-1(a)(2)). In a footnote, Easterbrook qualified this statement, observing that the evidence on the effects of pornography was conflicting and "very difficult to interpret." *Id.* at 329 n.2. "In saying that we accept the finding that pornography . . . leads to unhappy consequences," he explained, "we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions." *Id.* (citation omitted).

<sup>318</sup> *Id.* at 328.

<sup>319</sup> *Id.* at 325, 331-32.

<sup>320</sup> *Id.* at 331-32.

<sup>321</sup> *Id.* at 328.

<sup>322</sup> *Hudnut v. Am. Booksellers Ass'n*, 475 U.S. 1001 (1986), *aff'g mem.* 771 F.2d 323 (7th Cir. 1985). Chief Justice Burger and Justices Rehnquist and O'Connor voted to set the case for argument. *Id.*

speech unjustifiably violates the rights of others. If so, then the speech falls outside of the speaker's sphere of autonomy, and the bans on content and viewpoint discrimination should not apply. As in *R.A.V.*, the court's approach in *Hudnut* only obscures this basic issue.<sup>323</sup>

As Easterbrook concedes, reasonable arguments have been made that the production, distribution, and display of pornography causes serious injury to women.<sup>324</sup> In particular, it can be argued that, by portraying women as mere sexual objects to be exploited or abused, pornography is inherently degrading to women, thereby violating their fundamental right to dignity; that pornography reinforces the social inequality and subordination of women; and that pornography promotes violence and discrimination against them. When taken as justifications for regulating pornography under a rights-based approach to the First Amendment, these claims raise a host of fascinating and difficult issues. To the extent that these arguments assert injury to women as a group, they pose a fundamental question concerning the nature of rights — namely, whether groups can be said to have rights. Alternatively, one might frame the question as whether there are group-based wrongs, whether or not there is such a thing as group rights. On the other hand, to the extent that the feminist arguments assert that pornography results in injuries to individual women, such as violence and discrimination, there are important issues of causation. As Easterbrook notes, decisions such as *Brandenburg v. Ohio*<sup>325</sup> allow regulation of speech only where there is a much closer relationship between speech and injury than is usually the case with pornography.<sup>326</sup> Yet *Brandenburg* was concerned with political speech. In cases involving obscenity or adult expression, the Court has often been willing to allow regulation on the basis of a much less direct and immediate showing that such

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<sup>323</sup> For persuasive criticism of *Hudnut*'s approach to pornography regulation, see Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589. For a defense of the viewpoint discrimination approach, see Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461 (1986).

<sup>324</sup> For some feminist arguments for pornography regulation, see MACKINNON, *supra* note 124; Dworkin, *supra* note 307; Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL & PUB. AFF. 293 (1993); Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Sunstein, *supra* note 323. Some other feminists oppose regulation. See, e.g., NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995); Nan Hunter & Sylvia Law, *Brief Amicus Curiae of Feminist Anti-Censorship Taskforce*, 21 U. MICH. J.L. REFORM 69 (1987-1988); Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097 (1994). For an excellent overview of the debate, see FEMINISM AND PORNOGRAPHY (Drucilla Cornell ed., 2000).

<sup>325</sup> 395 U.S. 444, 447 (1969) (per curiam).

<sup>326</sup> See *Hudnut*, 771 F.2d at 333.

speech causes harm.<sup>327</sup> For this reason, the issue of causation would appear to be an open question.

For present purposes, there is no need to resolve these issues. Instead, the critical point is that they should not be evaded by invoking the content neutrality doctrine. As I have argued, that doctrine should not protect speech that unjustifiably violates the rights of others. Whether that was true of pornography was the key question in *Hudnut* — a question that the court's opinion only obscured.

*Hudnut* also strikingly illustrates another problem with an expansive form of the content neutrality doctrine. From one point of view, the doctrine allows speakers to engage in self-expression at the expense of others. From another perspective, however, the doctrine protects the objective content of speech, or the social process of expression, regardless of its effect on the subjectivity or freedom of anyone. In *Hudnut*, Easterbrook makes no claim that pornography, as defined in the Indianapolis ordinance, is important for the self-realization of those who produce or view it. Moreover, he concedes that pornography tends to "perpetuate subordination" and to promote violence and discrimination against women.<sup>328</sup> Nevertheless, he asserts that "this simply demonstrates the power of pornography as speech."<sup>329</sup> "A belief may be pernicious — the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions."<sup>330</sup> Moreover, as these instances show, "pernicious belief[s] may prevail."<sup>331</sup> The process of communication is not necessarily rational: it often works by promoting "unconscious responses" that "influence the culture and shape our socialization" without being "directly answerable by more speech."<sup>332</sup> But these considerations, Easterbrook asserts, are irrelevant under the First Amendment, which protects speech despite — or rather because of — the impact that it has on individuals and the social world.<sup>333</sup>

In this regard, Easterbrook's views have much in common with those of Justice Holmes. In his famous dissent in *Abrams v. United States*,<sup>334</sup> Holmes asserted that free speech was possible only when individuals overcame their attachment to their own subjective beliefs, and instead came to trust to the objective workings of the marketplace of ideas.<sup>335</sup> In *Abrams*, Holmes held out the hope that the market would lead to the truth, and to the good sought by individuals.<sup>336</sup> Yet he tended to

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<sup>327</sup> See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

<sup>328</sup> See *Hudnut*, 771 F.2d at 329, quoted *supra* in text accompanying note 317.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 328.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 330.

<sup>333</sup> See *id.* at 329-30.

<sup>334</sup> 250 U.S. 616 (1919).

<sup>335</sup> *Id.* at 630-31 (Holmes, J., dissenting).

<sup>336</sup> *Id.*

identify truth with the views held by the most powerful groups within the society.<sup>337</sup> Like other aspects of social life, the marketplace of ideas was ultimately governed not by reason but by force. For Holmes, then, nothing in the idea of free speech precluded the possibility that pernicious beliefs might prevail. As he put it in *Gitlow v. New York*,<sup>338</sup> “[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”<sup>339</sup>

This dark, almost nihilistic view of the First Amendment — what might be called free speech noir — may seem far removed from the positive vision expressed in *Mosley*, which regards freedom of expression as necessary to promote “self-fulfillment for each individual” and “the continued building of our politics and culture.”<sup>340</sup> If these values are taken seriously, however, they would allow the law to regulate speech that violates the rights of other individuals to pursue their own self-fulfillment or to participate in the life of the community. As *Hudnut* suggests, then, the darker Holmesian view provides one important foundation for a broad doctrine of content neutrality that protects speech regardless of its impact on others.

#### IV. REFORMING CONTENT NEUTRALITY

In this Essay, I have argued that the idea of content neutrality plays a deeply ambivalent role in contemporary First Amendment jurisprudence. On one hand, content neutrality is essential to freedom of speech, while on the other, the courts have often used the notion in a way that disregards other fundamental rights and obscures the critical issues in First Amendment cases. This Part discusses how the theory and doctrine of content neutrality should be reformed in order to preserve its strengths while avoiding its difficulties.

##### A. *Reforming the Theory*

Content neutrality, I have argued, is rooted in a conception of individual and collective autonomy. According to the *Mosley* view, this autonomy is invaded whenever speech is regulated based on its content. While this view contains an essential truth, it is fatally one-sided, because it focuses only on the positive values of speech without recognizing the injuries that it can cause. Speech can be used to threaten personal safety, incite violence, invade privacy, damage reputation, and so on. In all these instances, the injury flows from the content of expression. Yet

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<sup>337</sup> See, e.g., Letter from Oliver Wendell Holmes, to Learned Hand (June 24, 1918), in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 757 (1975) (defining “the truth” as “the majority vote of that nation that can lick all others”).

<sup>338</sup> 268 U.S. 652 (1925).

<sup>339</sup> *Id.* at 673 (Holmes, J., dissenting).

<sup>340</sup> *Police Dep’t v. Mosley*, 408 U.S. 92, 95-96 (1972) (citation omitted).

nothing in the *Mosley* principle allows for regulation in such cases, or in other instances where speech arguably causes serious injury. While the neutrality principle is said to rest on the need “[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual,”<sup>341</sup> it protects speech even when it undermines these ends. This outcome can be avoided only by carving out ad hoc exceptions that are difficult to square with the principle stated in *Mosley*. The problem with the *Mosley* doctrine, then, is that it is too formalistic, protecting speech even when this would undermine the doctrine’s own substantive purposes.

From another standpoint, however, it may be said that the *Mosley* approach is not formalist enough. The doctrine recognizes the autonomy of speakers, but fails to recognize the autonomy of others who may be affected by the speech. This autonomy imposes limits on the speaker’s liberty, for as a general rule individuals have no right to violate the equal freedom of others. Thus, the difficulty with *Mosley* is not merely that it protects speech in a way that disregards the speech’s impact on important substantive values, but also that it fails to recognize the formal limits that are imposed on all rights by the duty to respect the rights of others.

Under the First Amendment, the government may not restrict content within the speaker’s own sphere of autonomy. When one person communicates with another, however, what was initially content *for the speaker* becomes content *for the listener* as well. At this point, the principle of content neutrality can no longer hold absolute sway. As a general rule, speakers have no right to infringe upon the autonomy of others. As we have seen, speech can violate autonomy in several ways. One is by forcing communication on an unwilling listener, thereby violating her own freedom to decide for herself what expression to hear. Second, speech can violate autonomy through the effect that its content has on the mind of an unwilling listener. For example, assaults and threats cause apprehension of violence, thereby violating the right to personal security, while intentional infliction of emotional distress causes grave injury to the mind and feelings of the listener. In these cases, speech violates autonomy by inflicting substantive injury. Speech can also violate the rights of third parties by inciting violence against them, invading their privacy, or defaming them.

In short, the *Mosley* principle ensures broad autonomy for speakers, but only by effacing other spheres of autonomy. We can put the same point in terms of the elements of communication. Through expression, the speaker’s own subjective thoughts and feelings take on outward, objective form as speech, which is then capable of having an impact on the minds of others. Expression promotes the speaker’s self-fulfillment and may also promote self-realization for those who choose to listen to it. Because *Mosley* fails to recognize the appropriate limits of free speech, however, it allows the subjectivity of speakers to flourish at the expense of the subjectivity or selfhood of those affected by the speech. At the same time, *Mosley*’s invocation of content neutrality makes this asymmetry difficult to perceive.

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<sup>341</sup> *Id.*

The effect of *Mosley* can also be viewed in a different way: not as protecting the subjectivity of speakers at the expense of others, but as protecting objective content regardless of its impact on the subjectivity and freedom of anyone. As I have suggested, Justice Holmes's conception of the marketplace of ideas and Judge Easterbrook's views in *Hudnut* may be understood in this way.<sup>342</sup> To take another example, news organizations often cover certain stories in a way that is inconsistent with individual interests in privacy and reputation, as well as with social interests in the character of public discourse. In some instances, at least, the news organizations themselves might prefer not to pursue the stories in this way, but feel compelled to do so to meet competition from rival organizations. Such news coverage may cause serious harm to the individuals upon which it focuses. And while many members of the public will watch such coverage if it is available, a majority of the public (including many of those who would watch) might prefer that it not be available in order to protect the individual and social interests that would be damaged by it. In a situation like this, the interests of most people might well be advanced by rules requiring that news organizations respect limits designed to protect individual privacy and reputation. As it is usually applied, however, the content neutrality doctrine would prevent such limits from being imposed by law;<sup>343</sup> and in the absence of legal enforcement, these principles will have little power to restrain intrusive coverage. In such cases, the content neutrality rule has the effect of protecting content regardless of any destructive effects it might have on individuals.

In response, it might be said that no limits can be imposed on objective content, or on the social process of communication, to protect the subjectivity and rights of individuals, because this presupposes a static conception of the self. The self is not a fixed, independent entity, but is shaped by society and culture, including the process of expression.

Although this view has considerable force, it is no less one-sided than the conception it criticizes. While the self is not fixed, neither is it merely a product or construction of the society and its culture. Instead, there is a dynamic relationship between self and society. As our conception of the self develops, this has an important impact on the society and culture, and vice versa. Although we must be careful not to cut off possibilities for human change by invoking a static conception of the self, we also should not leave the self unprotected from destructive forces in the society and culture. Once again, this calls for a careful effort to reconcile values on both sides. It is just this process that is ruled out by a rigid adherence to the principle of content neutrality.

For these reasons, the theory of content neutrality should be reformed so that it recognizes the autonomy not only of speakers, but also of others affected by the speech. When speech infringes the rights of other individuals or the community, it should be subject to regulation unless its value is such as to justify the infringement. In making such judgments, lawmakers and courts must balance

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<sup>342</sup> See *supra* Part III.B.

<sup>343</sup> See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

competing rights. This should be done in an open way that carefully assesses the considerations involved.

In this way, the idea of content neutrality would be reformed not merely in the ordinary sense, but in another sense as well. Content neutrality, I have argued, bars the government from crossing the formal boundary that surrounds individual liberty and from regulating the content within. On this view, individual autonomy is bounded by other spheres of autonomy. The effect of *Mosley*, however, has been to dissolve these other spheres, thereby removing the limits that they impose on free speech. On the view presented here, the idea of content neutrality should be re-formed by putting that idea back within a framework that recognizes not only the autonomy of speakers, but also the formal bounds that are imposed by the duty to respect the rights of others.

On this view, speech may be regulated only when its value is outweighed by that of other fundamental rights. Even so, some may fear that this approach would unduly sacrifice First Amendment values. It may be argued, however, that the approach would enrich rather than undermine those values. When speech is required to respect the rights of others, it is directed away from destructive forms such as fighting words and toward more authentic forms of self-expression and communication with others.<sup>344</sup> Speech of this sort is more consistent with the constitutional conception of free speech as a right (which may not be used to wrongfully injure others), as well as with the substantive goods that we use this freedom to pursue.

## B. Reforming the Doctrine

### 1. When Should Regulations be Regarded as Content-Based?

Finally, let us consider how the doctrine of content neutrality should be reformed. The first question is when regulations should be regarded as content-based rather than content-neutral, and therefore in need of the kind of justifications discussed in this Essay. At first blush, one might expect regulations to be regarded as content-based when they restrict speech on the basis of content on their face, or when they are clearly intended to do so. In *City of Renton v. Playtime Theatres, Inc.*,<sup>345</sup> however, the majority ruled that laws should be treated as content-based only when they are “enacted for the *purpose* of restraining speech” based on its content.<sup>346</sup> Under this approach, even when a regulation expressly classifies and imposes burdens on speech based on content, the regulation will be treated as content-neutral if the government can point to some legitimate justification for adopting it. In *Renton*, the Court held that an ordinance that restricted the location of adult movie theaters was not content-based because it was “aimed not at the

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<sup>344</sup> See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452-53 (1990).

<sup>345</sup> 475 U.S. 41 (1986).

<sup>346</sup> *Id.* at 46-47 (emphasis added).

*content* of the films shown at [such theaters,] but rather at the *secondary effects* of such theaters on the surrounding community," such as higher crime rates and lower property values.<sup>347</sup> Under the lower standard of review applied to content-neutral regulations, the ordinance was upheld.<sup>348</sup> In recent years, the Court has increasingly resorted to this "secondary effects" doctrine, although it has done so most often in cases involving sexually explicit expression, which the Court has often relegated to a lesser status under First Amendment.<sup>349</sup> On the other hand, the Court has refused to apply *Renton* to laws that seek to protect listeners from the emotional impact of speech, holding that this is a direct and not a secondary effect.<sup>350</sup>

Underlying *Renton* is the valid insight that laws may be justified even when they regulate speech based on content. But this insight relates to the *justification* for a regulation, not to the threshold question of whether a justification is required because the law is content-based.<sup>351</sup> Under the approach taken here, a regulation should be regarded as content-based if its application turns on content in any of the four senses that I have discussed: (1) the meaning of the speech for the speaker; (2) its objective meaning; (3) its impact on the listener; or (4) the communication of meaning from speaker to listener. Regulations based on content in any of these senses restrict the First Amendment liberties of speakers and/or listeners. Regulations of this sort are not necessarily unconstitutional, but they can be justified only to protect the rights of others.<sup>352</sup> Laws should be regarded as content-neutral only if they are limited to the time, place, and manner of expression, without regard to content, or if, as in *United States v. O'Brien*,<sup>353</sup> they are aimed at the noncommunicative impact of conduct and have only an incidental effect on expression.

Such an approach would promote constitutional values better than the approach taken in *Renton*. On one hand, the standard of review should not vary depending on whether the Court sympathizes with the regulation at issue. On the other hand, an important reason why decisions like *Renton* seek to avoid content-based analysis is that the analysis is so demanding as to almost invariably strike down the regulation under review. No such evasion would be necessary if the Court adopted the approach of this Essay, and recognized that some content-based regulations are entirely legitimate.

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<sup>347</sup> *Id.* at 47.

<sup>348</sup> *Id.* at 50-55.

<sup>349</sup> For the most recent example, see *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

<sup>350</sup> See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988); *id.* at 334 (Brennan, J., concurring in judgment).

<sup>351</sup> See *Renton*, 475 U.S. at 56-57 (Brennan, J., dissenting). For persuasive criticism of *Renton*, see Williams, *supra* note 17, at 628-35.

<sup>352</sup> This is true in all cases where free speech is a fundamental right. As I have suggested elsewhere, however, there may be some sorts of speech (such as commercial advertising) that should be regarded as non-fundamental rights. Speech of this sort should be subject to regulation not only to protect other rights, but also to promote the public good. See Heyman, *Righting the Balance*, *supra* note 29, at 1317 n.227.

<sup>353</sup> 391 U.S. 367 (1968).

## 2. How Should Courts Review Content-Based Regulations?

Although *Mosley* declared that content-based regulation “is never permitted,”<sup>354</sup> later decisions recognized two major exceptions to this rule.<sup>355</sup> First, the law could restrict expression that fell within an unprotected or less protected category, such as fighting words, incitement, or obscenity.<sup>356</sup> Second, even fully protected speech was subject to content-based regulation if necessary to promote a compelling government interest.<sup>357</sup>

As we have seen, however, these exceptions have done little to mitigate the rigidity of the *Mosley* doctrine. The Court has been quite reluctant to recognize new categories of unprotected speech. Indeed, it has done so only once, by holding in *New York v. Ferber*<sup>358</sup> that child pornography was outside the protection of the First Amendment. In two other contexts, commercial speech and “adult” expression, the Court has accorded a category some protection, but less than that enjoyed by fully protected speech.<sup>359</sup>

To be sure, courts should be extremely careful not to unduly expand the categories of regulable expression. New categories should be recognized only when they are clearly justified. But there is no warrant for assuming that the categories recognized in previous cases are the only valid ones. As one would expect from a process of case-by-case adjudication, the categories of unprotected speech have been determined in piecemeal fashion, and have never been worked out in a logical or systematic way.<sup>360</sup> It follows that the Court should not decline to recognize a category simply because it has not previously been recognized. The problem with such an approach is strikingly illustrated by the Court’s treatment of privacy — a right which has as much claim to protection as the right to reputation, but which has received little protection, in part because of the Court’s hesitance to recognize new categories of regulable expression.<sup>361</sup>

The second exception to the *Mosley* doctrine also has done little to afford protection to other rights. Although the Court has stated that it would uphold content-based regulations that are able to withstand strict scrutiny, it has very rarely

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<sup>354</sup> *Mosley*, 408 U.S. at 99.

<sup>355</sup> See *supra* Part II.A.

<sup>356</sup> See *supra* note 129 and accompanying text.

<sup>357</sup> See *supra* note 137 and accompanying text.

<sup>358</sup> 458 U.S. 747 (1982).

<sup>359</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (commercial speech); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (adult expression); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion) (same).

<sup>360</sup> In *Chaplinsky*, for example, the Court mentioned “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words” as categories of unprotected speech, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), yet failed to mention such obvious categories as threats and incitement.

<sup>361</sup> See *supra* text accompanying notes 219-28.

done so.<sup>362</sup> This is hardly surprising, for strict scrutiny is designed to sharply limit governmental power in the areas to which it applies.

Even if strict scrutiny were not applied in a way that made it “strict” in theory [but] fatal in fact,”<sup>363</sup> there are at least two reasons why it would be difficult to use the doctrine to protect other rights from being infringed by speech. First, strict scrutiny allows regulation only to achieve an extraordinary or “compelling” government interest. Second, the regulation must be shown to be “necessary” in a strong sense — that is, it must be the least restrictive means of promoting the government interest. These two facets of the doctrine are meant to erect a very high barrier against regulation. That may be entirely appropriate when First Amendment problems are viewed as the strict-scrutiny doctrine views them — as conflicts between the right to free speech and “government interests.” When the issue is framed in this way, we may well be inclined to protect freedom as much as possible. As I have shown, however, many free speech problems are better understood as conflicts between free speech and other fundamental rights. In such cases, it is not appropriate to begin with a very strong presumption in favor of protecting speech.<sup>364</sup> Instead, the court should carefully consider the value of the rights on both sides.

Rather than applying strict scrutiny, or merely inquiring whether the speech at issue falls into a traditionally unprotected category, courts should first ask whether the speech infringes fundamental rights belonging to other individuals or the community. If so, the court should determine whether the value of the speech outweighs the injury that it causes. If it does, then the speech should be held privileged under the First Amendment; if not, the speech unjustifiably invades the rights of others and should not be protected by the rule against content regulation.<sup>365</sup>

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<sup>362</sup> See *supra* Part II.A.

<sup>363</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>364</sup> In his concurrence in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), Justice Breyer expresses a similar view: “What this Court has called ‘strict scrutiny’ — with its strong presumption against constitutionality — is normally out of place where, as here, important competing constitutional interests are implicated.” *Id.* at 537 (Breyer, J., concurring). In *Bartnicki*, the “competing constitutional interests” that Breyer has in mind include the interests in privacy and in private speech. *Id.* Strictly speaking, however, the Constitution protects these interests against interference only by the government, not by private parties. Thus, it appears that in this passage Breyer uses “constitutional interests” in a broad sense, to refer to fundamental rights of the sort that are protected against government interference by the Constitution, and against private interference by state and federal law. For a defense of the view that free speech may be regulated to protect other fundamental rights, whether those rights are protected by the Constitution or by other sources of law, see Heyman, *Righting the Balance*, *supra* note 29, at 1366-68.

<sup>365</sup> Insofar as possible, such determinations should be made on a categorical rather than an *ad hoc* level. In addition to being more principled, a categorical approach offers the greatest protection against the impulse to suppress expression merely because it is unpopular, or because of heightened fears in times of crisis. See, e.g., Ely, *Flag Desecration*, *supra* note 106, at 1500-01. As Professor Shiffrin has shown, however, there

Finally, the court should consider whether the regulation violates the rule against *content discrimination* by treating the regulated speech less favorably than other speech that has the same value and causes the same sort of injury.

### 3. Should the Doctrine Apply to Unprotected Speech? *R.A.V.* Revisited

As we have seen, in *R.A.V. v. City of St. Paul*,<sup>366</sup> the Supreme Court reviewed an ordinance that banned cross burning and other forms of hate speech based on race, religion, and gender. As authoritatively construed by the state courts, the ordinance applied only to speech that amounted to unprotected “fighting words” under *Chaplinsky*.<sup>367</sup> Nevertheless, Justice Scalia held that the ordinance improperly discriminated on the basis of content, because instead of banning all fighting words, it singled out those based on race, religion, and gender.<sup>368</sup>

The majority was able to reach this result only by means of a dramatic expansion of the content discrimination doctrine. In earlier cases, the doctrine had been applied only to discrimination between different forms of constitutionally protected expression (such as the labor and non-labor picketing at issue in *Mosley*).<sup>369</sup> In *R.A.V.*, the Court for the first time held that the doctrine also barred the state from drawing distinctions within *unprotected categories of speech* such as fighting words.<sup>370</sup> Sharply criticizing this innovation, Justice White argued that the majority’s holding undermined the traditional “categorical approach” to the First Amendment, under which certain narrowly defined classes of speech were unprotected and could be “regulated freely on the basis of content.”<sup>371</sup>

In a previous section, we explored *R.A.V.*’s treatment of the problem of hate speech.<sup>372</sup> Here I want to focus on Justice Scalia’s revision of the content discrimination doctrine. Was it appropriate for the Court to expand the rule in the way that it did? In my view, the doctrine does have some application to unprotected expression, but it should be applied in a more flexible way than with regard to protected speech.

At the outset of his opinion, Scalia acknowledges that the Court has repeatedly described certain categories of speech as outside the protection of the First Amendment. But these statements, he contends, “must be taken in context” and are not “literally true.”<sup>373</sup> Instead:

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are situations in which constitutional values are best protected through more particularized decisionmaking. See SHIFFRIN, ROMANCE, *supra* note 17, at 15-17.

<sup>366</sup> 505 U.S. 377 (1992).

<sup>367</sup> *Chaplinsky*, 315 U.S. at 572; *see also R.A.V.*, 505 U.S. at 380-81 (internal quotation marks omitted) (discussing state court decision).

<sup>368</sup> *See R.A.V.*, 505 U.S. at 391.

<sup>369</sup> *See supra* text accompanying notes 1-4.

<sup>370</sup> *R.A.V.*, 505 U.S. at 400.

<sup>371</sup> *Id.* at 399-403 (White, J., concurring in judgment).

<sup>372</sup> *See supra* Part III.A.

<sup>373</sup> *R.A.V.*, 505 U.S. at 383 (citation omitted).

What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.<sup>374</sup>

If the government were allowed to draw distinctions within an unprotected category of expression, Scalia argues, it might use this power to suppress ideas or viewpoints of which it disapproves.<sup>375</sup> For this reason, such distinctions, like other forms of content discrimination, should be treated as “presumptively invalid,” and upheld only when necessary to serve compelling state interests.<sup>376</sup>

In this way, *R.A.V.* transposes the *Mosley* doctrine to the realm of unprotected speech. At the same time, Scalia concedes that the doctrine “applies differently in [this] context . . . than in the area of fully protected speech.”<sup>377</sup> In particular, the rule should not apply “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable,” for in this situation “no significant danger of idea or viewpoint discrimination exists.”<sup>378</sup> Scalia offers several illustrations of what he means:

[1] A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. . . . [2] And the Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President. . . . But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. [3] And . . . a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment

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<sup>374</sup> *Id.* at 383-84.

<sup>375</sup> *Id.* at 387, 390.

<sup>376</sup> *Id.* at 382; *see id.* at 395-96 (applying strict scrutiny).

<sup>377</sup> *Id.* at 387 (citation omitted).

<sup>378</sup> *Id.* at 388. Scalia also lists several other instances in which the doctrine should not apply because there is “no significant danger of idea or viewpoint discrimination,” *id.*: (1) regulations that are aimed not at content but at the “secondary effects of speech,” *id.* at 389 (internal quotation marks omitted), as defined in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *discussed in supra* Part IV.B.1; (2) regulations of conduct that impose incidental restrictions on symbolic speech, *see R.A.V.*, 505 U.S. at 389-90; and (3) any other situation in which “the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot,” *id.* at 390.

protection . . .) is in its view greater there. . . . But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.<sup>379</sup>

In each of these examples, the criterion that the legislature has used to define the subcategory of prohibited speech (offensive political messages, mention of the President's urban policy, demeaning portrayals of men) has no connection at all with the reason why the entire category of speech (obscenity, threats, commercial speech) is denied full protection under the First Amendment. Instead, in these illustrations the legislature obviously has used those categories as "vehicles for content discrimination"<sup>380</sup> entirely unrelated to the reason why the speech is proscribable. In such cases, it may be appropriate to subject the regulations to the same standard of review that would apply to any other form of content discrimination.

In most cases, however, the issue is not so clear-cut, for there is a plausible connection between the legislative criterion and the reason why the entire category of speech is unprotected. In *R.A.V.*, for example, the St. Paul City Council may have believed that insults based on race, religion, or gender were more deeply degrading than other insults, and therefore more likely to inflict injury or provoke violence. If so, then the ordinance would fall within Scalia's exception for content discrimination that is based on "the very reason [why] the entire class of speech [fighting words] is proscribable."<sup>381</sup>

In short, even under Scalia's approach, a legislature may be justified in drawing a distinction within an unprotected category of speech if there is a sufficient relationship between the legislative classification and the reason why the entire category is unprotected. The critical issues then become: (a) how close this relationship must be; and (b) who should decide whether such a relationship exists.

Here a comparison with the Court's approach to protected speech may be illuminating. There, too, a content-based classification will be upheld if it is sufficiently related to a constitutionally acceptable reason for regulation. In the area of protected speech, this relationship must be a very close one: under the strict scrutiny doctrine, the regulation must be "*necessary* to serve a *compelling* [government] interest," and must be "*narrowly drawn* to achieve that end."<sup>382</sup> In applying this standard, the Court grants little deference to the legislature, but instead undertakes to determine for itself whether such a relationship has been shown to exist.

These features of strict scrutiny reflect the basic premises of the Court's content neutrality jurisprudence. That jurisprudence is based on the view that there are few legitimate reasons for regulating the content of speech that is protected by

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<sup>379</sup> *R.A.V.*, 505 U.S. at 388-89 (citations omitted).

<sup>380</sup> *Id.* at 383-84.

<sup>381</sup> *Id.* at 388.

<sup>382</sup> *Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (emphasis added) (citation and internal quotation marks omitted).

the First Amendment.<sup>383</sup> For this reason, the Court holds that there is a strong presumption against the validity of content-based regulation — a presumption that can be overcome only by a convincing demonstration that a particular regulation is necessary to meet a compelling interest.<sup>384</sup>

This discussion points to a fundamental distinction between the realms of protected and unprotected speech — a distinction that has crucial implications for how the *Mosley* rule should apply to each. In the area of protected speech, content regulation is presumptively unconstitutional. In the area of unprotected speech, this presumption is reversed. Instead, the general rule is that the state does have authority to regulate an unprotected category of speech, such as fighting words, to prevent the harms that it causes. In determining whether and how such speech should be regulated, the legislature must consider a wide range of factors: the seriousness of the harms caused by the speech; the likely effectiveness of regulation; the costs of enforcement; the impact of regulation on free speech and other values; and so on. In light of these considerations, the legislature might choose to regulate some kinds of speech within the unprotected category, but not others; or to impose greater regulation on some kinds than others. To be sure, the classifications that the legislature adopts must be subject to judicial review under the First Amendment. The key question, however, is what form this review should take. Because regulation of speech within an unprotected category is presumptively constitutional, it should not be subject to the very stringent review applied to restrictions on protected speech. Instead, the legislature should be afforded a greater degree of leeway. In particular, rather than requiring a very close connection between the legislative classification and the allowable reason for regulation, a substantial relationship should suffice. And because decisions as to whether and how to regulate (and the factors on which these decisions are based) call for essentially legislative judgments, courts should defer to reasonable determinations by the legislature, rather than imposing their own views.

Under this approach, a ban on group-based fighting words should be upheld. As Justice Stevens observed, it was entirely “reasonable and realistic” for the St. Paul City Council to “determine that threats based on the target’s race, religion, or gender cause more severe harm to both the target and the society than other threats.”<sup>385</sup> The majority disregarded this legislative judgment and unhesitatingly

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<sup>383</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 337 (1988) (Brennan, J., concurring in part and in judgment) (referring to “the unlikelihood of any legitimate governmental interest in a content-based restriction on speech (especially political speech)”).

<sup>384</sup> In this Essay, I have argued that the Court has taken too narrow a view of the reasons for regulating speech, and have criticized the use of strict scrutiny in cases that involve conflicts between speech and other fundamental rights. *See supra* Part IV.B.2. The argument of the present section is that, whatever the merits of the Court’s approach in general, it should not be uncritically extended to the realm of unprotected speech.

<sup>385</sup> *R.A.V.*, 505 U.S. at 424 (Stevens, J., concurring in judgment); *see also id.* at 425 (same); *id.* at 407 (White, J., concurring in judgment) (arguing that, “[i]n light of our Nation’s long and painful experience with discrimination,” it was “plainly reasonable” for St. Paul to make a “judgment that harms based on race, color, creed, religion, or gender are

substituted its own, asserting that the ordinance “assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech . . . is proscribable.”<sup>386</sup> The majority then invoked strict scrutiny to invalidate the ordinance.<sup>387</sup> In this way, the Court unwisely held regulations of unprotected speech to the same demanding standards that govern expression that is fully protected by the First Amendment.<sup>388</sup>

#### 4. State Support for Expression

This Essay has focused on how the content neutrality principle should apply to laws that restrict speech. But the issue of neutrality also arises when the government takes a more affirmative approach to expression. When the government itself speaks, either directly or through private surrogates, there is general agreement that the content neutrality doctrine does not apply, and that the government may determine the content of its own speech.<sup>389</sup> The problem is much more complex, however, when the government provides funding for private expression. In struggling with this issue, the Supreme Court has oscillated between two diametrically opposed views. Some opinions apply the neutrality doctrine to funding decisions in much the same way that it applies to traditional restrictions on speech.<sup>390</sup> Other cases reject this view and maintain that the First Amendment imposes few if any constraints on funding decisions.<sup>391</sup>

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more pressing public concerns than the harms caused by other fighting words”) (citations omitted); *supra* text accompanying notes 284-92 (discussing the deeper injuries caused by group-based insults).

<sup>386</sup> *R.A.V.*, 505 U.S. at 393 (citation omitted). The majority rested this conclusion on the unpersuasive and hypertechnical grounds discussed earlier, *supra* text accompanying notes 259-66, that the injuries caused by fighting words derive only from the way in which they are expressed, not the messages they convey, and that there is therefore no reason to believe that fighting words based on race, religion, or gender cause any greater injury than others. See *R.A.V.*, 505 U.S. at 393-94.

<sup>387</sup> *Id.* at 395-96.

<sup>388</sup> For other criticisms of this doctrinal expansion, see STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 49-87 (1999); Chemerinsky, *supra* note 7, at 59-63 (contending that “Justice Scalia’s approach in *R.A.V.* adds enormous confusion to the law concerning the principle of content neutrality”).

<sup>389</sup> See, e.g., *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 833-34 (1995).

<sup>390</sup> See, e.g., *id.* The most forceful statements of this position may be found in *NEA v. Finley*, 524 U.S. 569, 600 (1998) (Souter, J., dissenting), and *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (Blackmun, J., dissenting).

<sup>391</sup> See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). The most uncompromising statement of this view appears in *Finley*, 524 U.S. at 590 (Scalia, J., concurring in judgment).

As I have argued elsewhere, both views are unsatisfactory.<sup>392</sup> Under the First Amendment, the government cannot have arbitrary power to determine what speech to support. But the problem cannot adequately be understood on the model of traditional censorship. In relation to individual autonomy of thought and expression, government represents an external force. The government may restrict this autonomy only when necessary to protect the autonomy of others. But the situation is quite different in the funding context. In this setting, the relationship between government and expression is more internal. When the government establishes a program to support expression, it does so to promote some public good. If the program is to be effective, the government must be able to determine what forms of expression will best promote this good. For example, if a state creates a program to support the arts, it will provide funding for artistic expression, but not for scientific inquiry. Moreover, the state may decide to award grants based on artistic excellence, or to give preference to works that relate to the history and culture of that state. Of course, such distinctions are based on content, and would be impermissible if used to regulate private expression. Under the First Amendment, the state may not punish people who choose to pursue careers in science rather than art, or who produce art that falls short of excellence, or that does not relate to the history or culture of the state. Yet distinctions of this sort may be perfectly legitimate in the context of funding programs, whose aim is not to restrict liberty, but rather to provide benefits both for individuals and for the community at large. In the context of private expression, the ideal of autonomy means that individuals generally should be free to make their own decisions. By contrast, in the funding context autonomy is not merely individual, but also communal: While individuals should have a right to seek to participate in public programs, the community also should have a right to shape such programs in a way that will best promote the public good.

These considerations lead to a centrist position on state-supported speech. On one hand, the state should have substantial authority to determine the contours of funding programs. On the other hand, the state must be prevented from using this power to penalize private expression. Moreover, the benefits of public programs should be distributed in a way that is fair in light of the purposes they are intended to serve. To meet these concerns, laws that impose restrictions on funding should be reviewed as follows. First, as a threshold matter, the court should ask whether the law denies support to applicants because of their speech *outside the context of the public program*. If so, the law should be treated in the same way as a traditional regulation of expression. Absent adequate justification, such a law should be struck down as an “unconstitutional condition” or penalty on protected speech.<sup>393</sup>

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<sup>392</sup> Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119 [hereinafter Heyman, *State-Supported Speech*].

<sup>393</sup> “The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.” Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1419 (1989).

When a law restricts funding for expression only within the context of the program itself, the problem should not be viewed as one of unconstitutional conditions.<sup>394</sup> Instead, such laws should receive a form of intermediate scrutiny.<sup>395</sup> Under this approach, criteria for funding should be upheld if several requirements are met. First, the criteria must be substantially related to the purposes of the program. Second, those purposes must be constitutionally legitimate. Third, the criteria must treat the program's beneficiaries (and others) in a way that accords with constitutional norms of respect for individual liberty and equality. Finally, the program must not have the purpose or effect of undermining other aspects of the constitutional order. Under this analysis, a state arts program could award funds on the basis of artistic excellence. But it could not provide funding only for Democratic artists, for this would not be substantially related to any legitimate purpose served by the program. Nor could funding be conditioned on an artist's agreement to submit her completed work to government officials and to make whatever changes they demanded, for this would be inconsistent with the autonomy of thought and expression protected by the First Amendment.

In short, funding decisions should not be free from First Amendment constraints. Those constraints do not apply in the same way in all contexts, however. Under the First Amendment, the state's authority to restrict expression on the basis of content is fairly limited. By contrast, when the state establishes a program to affirmatively support expression, it may take content into account to the extent necessary to promote the public purposes of the program, so long as other constitutional principles are respected.

## V. CONCLUSION

When confronted with difficult First Amendment problems, courts have increasingly resorted to the content neutrality doctrine. That is understandable, for the doctrine appears to offer judges a way to escape from grappling with such ideologically charged issues as hate speech and pornography. But this escape is an illusion. Controversies over free speech arise from real conflicts of values — conflicts that cannot be resolved by a formalistic appeal to neutrality.

This Essay has urged the adoption of a more substantive approach — an approach that seeks to identify the competing values and to reconcile them within a broader normative framework. The key to this framework lies in the ideal of autonomy. The First Amendment reflects a conception of the autonomy of individuals and the community to determine the content of their own expression. That is the foundation of the content neutrality principle. In some instances,

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<sup>394</sup> See *Rust*, 500 U.S. at 197 (observing that the Court's "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the [Government-funded] program").

<sup>395</sup> See Heyman, *State-Supported Speech*, *supra* note 392, at 1154-58.

however, speech goes beyond the bounds of the speaker's autonomy and violates the rights of others — rights such as personal security, privacy, reputation, and equality, which are grounded in the same values as free speech itself. When the state regulates such expression, it should not be regarded as violating the First Amendment, but rather as fulfilling its responsibility to protect the rights of its citizens. It is by safeguarding those rights, including freedom of speech, that we can best realize the vision articulated in *Mosley* — to promote “the continued building of our politics and culture, and to assure self-fulfillment for each individual.”<sup>396</sup>

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<sup>396</sup> *Mosley*, 408 U.S. at 95-96.