

**\*653 HATE SPEECH IN CONTEXT: THE CASE OF VERBAL THREATS**

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"Whether a particular act or message is . . . entitled to First Amendment protection turns on context as well as content."

--Justice John Paul Stevens [\[FNaa1\]](#)

"A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

--Justice Oliver Wendell Holmes, Jr. [\[FNaaa1\]](#)

"Fuck you, Nigger Bitch!"

--Screamed five times by a white motorcyclist at a passing motorist the day before the Los Angeles Riots began on April 29, 1992. [\[FNaaaa1\]](#)

**\*654 INTRODUCTION**

In the last few years a number of scholars have considered the problem of hate speech and have proposed law reforms to address those problems. [\[FN1\]](#) In particular, some critical race theorists have objected to the way in which the First Amendment has been interpreted to protect and defend racist speech and, not incidentally in their view, to protect and defend racism. [\[FN2\]](#) Joining debate with the critical race scholars have been a number of other scholars who have **\*655** taken a variety of positions on whether, and if so to what extent, various social institutions should attempt to regulate hate speech. [\[FN3\]](#) Many of these commentators have critiqued the proposals of the critical race theorists and others as being insufficiently sensitive to First Amendment issues. [\[FN4\]](#)

The debate over hate speech has frequently appeared to require a choice between two competing paradigms: [\[FN5\]](#) should virulent, racist speech that continues to infect our society, promote racism and undermine equality be regulated, at least to some degree? Or, does the idea of a free, open, "tolerant" [\[FN6\]](#) and democratic society, one in which the space for unpopular and controversial ideas seems all too narrow, require that we allow such speech to go unpunished and unregulated?

These paradigms reveal that, on the one hand, hate speech-like speech that excludes people from employment, housing or voting, and violates civil rights laws--constitutes discrimination. [\[FN7\]](#) On **\*656** the other hand, some hate speech is also part of a national discussion about race.

[FN8] Like Robert Post, Ken Karst and Charles Lawrence, I believe that it is crucial to continue our collective conversation about race and the meaning of racial difference. [FN9] Only through talking about race can people of different racial identities possibly learn how to live together in more respectful ways and perceive more than just the chasms that separate them from others. The dilemma confronting all of us is the extent to which it is possible to create the conditions for "free discussion" about race while simultaneously eliminating discrimination resulting from speech.

Posing the problem of hate speech in the abstract tends to polarize the conversation. Arguing at the level of general principle, i.e., discrimination versus free speech, prevents us from seeing how much agreement there may be in specific situations. For example, in her crucial 1989 article, Professor Mari Matsuda powerfully described the harms that are created by some forms of hate speech. [FN10] In response, a number of authors repeatedly referred to the problem as one of regulating merely "offensive" speech, as though Professor Matsuda were talking about banning public profanity. [FN11] If any progress \*657 is to be made in the conversation about race, at a minimum those who oppose hate speech regulations generally must either deny the existence of the harms so clearly articulated by Matsuda, Lawrence, Delgado and other critical race theorists, or acknowledge these harms and explain why they do not justify regulation.

If racist hate speech is "any expression of the idea that color marks a person as suspect in morals or ability," [FN12] it is apparent that such a definition ranges across a wide spectrum of speech: from racist vilification directed by skinheads at a black child, to disparaging remarks about a co-worker; from racist diatribes by black nationalists or Nazis carried on some cable stations, to off-the-cuff remarks or "jokes" that reinforce racial stereotypes. The types of situations grouped under the rubric "hate speech" range from serious harms to problems of insensitivity, offensive speech and the breakdown of civility rules. Although general discussions about hate speech have helped us to understand some of the larger issues at stake, refocusing the discussion on specific forms of hate speech may not only illuminate possible areas of agreement, but also narrow the class of situations in which disagreement will persist. We might, for example, distinguish racist threats of violence from speech that offends or violates civility rules. First Amendment concerns with hate speech regulations will most likely be minimized if one specifies which forms of hate speech trigger concern and describes the category of speech narrowly. One goal might be to target the particular forms of hate speech that create some of the most serious harms [FN13] while recognizing that for the conversation about race to continue, we will have to suffer with outrageous speech and incivility here as in other areas of life. [FN14]

\*658 This, in any event, is the design of this Article. Rather than engaging in abstract argument over the validity of hate speech regulations, I propose to evaluate just one form of "hate speech": racially-motivated threats of violence. In focusing the inquiry in this way, I have chosen a subject in which, at least in theory, First Amendment problems are less serious than in other areas.

Yet, despite the general assumption among scholars that regulating threats of violence does not pose significant First Amendment problems, a number of state courts and some federal courts have struggled to define the limits of racially-motivated intimidation or threats of violence. Many racial intimidation statutes have been challenged, and some have foundered, on First Amendment

grounds. [\[FN15\]](#) These courts have encountered the theoretical and practical dilemmas raised by any proposal to regulate the content of speech: first, how to distinguish a threat of violence from a non-threat, such as vehement opposition to racial integration? And second, how specifically must [\[FN16\]](#) a statute define the prohibitable conduct? The fact that language is malleable and contingent makes highly problematic any effort to regulate speech harms, including harms that stem from violent threats. [\[FN17\]](#) The fact that speech centers \*659 our culture and helps us constitute our multiple communities makes any proposal to regulate it politically charged. [\[FN18\]](#) The fact that at least some "threats" can be spoken rhetorically, emotionally or insincerely makes all threats, even threats of violence, potentially protected by First Amendment principles. [\[FN19\]](#) The legal tools to separate the protected from the unprotected must be attuned to wide divergences in meaning.

Consequently, any attempt to answer the questions over which courts have struggled must comport with underlying First Amendment concerns. Regulating verbal threats is, after all, regulating the content of expression. [\[FN20\]](#) My approach to the questions posed in the courts is to turn from the content of speech to the context in which a given statement was rendered. I argue that it is only through an exploration of such non-content-based factors as the setting in which the communication occurs that we can begin to answer the troubling questions. [\[FN21\]](#)

A contextual inquiry entails examining background facts against which words are uttered in an effort to infer the "meaning" of the communication. Such factors might include the identities of \*660 the speakers and listeners, the current and historical relationship between the parties, the place in which the communication is made, and the method or mode of communication. These factors are all matters which affect, and sometimes control, the meaning of a particular speech act.

The contextual inquiry that I propose in order to decide whether a given communication is a "threat" is analogous to practices in tort law. Practitioners of tort law decide whether someone has committed a tortious act by examining the types of contextual factors suggested above. In this Article I make the linkage explicit, for tort law provides not only a tool to redress the harms represented by racially-motivated threats of violence but also an appropriately sensitive mechanism for weighing the competing interests at stake.

To illustrate these themes, and to situate the discussion in a particular context, this Article proposes to make tortious a limited class of hate speech—namely hate speech that threatens violence. I make this concrete proposal both as a vehicle for exploring some of the difficulties in remedying speech harms, and as an attempt to remedy, in some small respect, the injuries inflicted by some of the worst forms of hate speech. In making this proposal, I argue that, regardless of the position one generally takes on the hate speech controversy, most people would not object to making threats of racial violence tortious. In deliberately side-stepping the passionate but abstract debate over hate speech, I claim that it is not necessary to take a position on the general issues raised by that debate in order to agree with the position I advance in this Article. However, I also believe that, by discussing the question of hate speech in this particular context, threats of violence may help to illuminate some of the key issues in the theoretical debate.

This Article consists of three parts. In Part I, I briefly discuss why a verbal threat of violence is problematic. My approach is consequentialist: I want to hone in on those types of threats that create serious harms in the persons to whom they are directed and to distinguish the harms caused by threats of violence from other consequences of language such as "offense." I conclude that threats of violence are those that are strongly coercive or that demonstrably inflict injury.

In Part II, I offer examples of what might be deemed "racially-motivated threats of violence." My goal is to illustrate a contextual approach to verbal threats and the hate speech debate generally. I then present and evaluate possible First Amendment and policy-based objections to a contextual methodology and its application to communicative activity.

In Part III, I turn to tort law to give a concrete illustration of how a contextual methodology might prove useful in formulating **\*661** strategies for addressing racially-motivated threats of violence. I conclude that current tort law--which presents a potentially powerful mechanism for applying the contextual approach--provides inadequate remedies for this form of hate speech. I then present and address First Amendment issues raised by a new tort of racial intimidation. The crux of the new tort would be the threat of violence directed at a person because of race or ethnicity. My proposal would make relevant certain contextual factors present in the racial threat incidents but ignored under current tort law categories.

It is my hope that bringing tort law perspectives to bear on the subject of hate speech will help illuminate and resolve some of the knotty constitutional issues that surround the debate over regulating such speech. Although the proposed tort is limited in scope, it illustrates an incremental, context-based approach to regulating hate speech that takes into account some of the complexities of the debate. Through tort law, where context is everything, we can impose a narrow remedy consistent with both broad civil rights and free speech principles.

## I. WHAT'S WRONG WITH VERBAL THREATS OF VIOLENCE?

For most writers, criminalizing verbal threats of violence is not constitutionally problematic. Robert Post writes that regulating threats is "not problematic under any theory" of the First Amendment. [\[FN22\]](#) In *Watts v. United States*, the Court upheld the constitutionality of the federal statute making it a crime to threaten the life of the President. [\[FN23\]](#) In *R.A.V. v. City of St. Paul*, [\[FN24\]](#) Justice Scalia's majority opinion assumed that "threats of violence"--including those threats encompassed by the statute in *Watts*--were outside the scope of First Amendment protection. [\[FN25\]](#) Justice White's concurrence in *R.A.V.*, joined by the remaining three justices, also explicitly endorsed the notion that verbal threats could be made the subject of prosecution without violating the First Amendment. [\[FN26\]](#) Thus, all members of the current Court (except Justices Ginsburg and Breyer, who have not had occasion to express an opinion) have agreed in principle that threats of violence constitute unprotected speech.

Despite such authority, there are at least three reasons why it may be helpful to question the assumption that verbal threats of violence should not be constitutionally protected. First, if threats do not even trigger a First Amendment analysis, then we should understand **\*662** why this is so.

Second, institutions of law must perform their sorting function, and thus must know how to

identify and distinguish such a "threat" from a "non-threat." In addition, even if certain behaviors are determined to be "threats" and therefore unprotected under the First Amendment, "[w]hat is a threat [of violence] must be distinguished from what is constitutionally protected speech." [FN27] Focusing on the threat of violence requires that one attempt to define what constitutes a "threat" sufficient to trigger the tort. Not all threats are culpable. Only threats of harm are at issue here.

Third, it may turn out that when one looks at specific cases, what constitutes a "threat" of violence may be as problematic as other forms of content regulation. Thus, if it turns out that threats are properly excluded from protected speech, then a richer understanding of "threat" may help form the justification for speech regulations restricting verbal threats. [FN28] An examination of the reasons for omitting the category of "verbal threats of violence" from the First Amendment may additionally illuminate the limits of the doctrine.

In this section I approach the issue of "what is a threat of violence" obliquely. First, I distinguish between speech that "offends" a listener or violates civility norms and speech that, by virtue of its threatening nature, can be said to "harm" the target of the threat. [FN29] Second, I problematize the general concept of "threats of violence" by showing that because the concept is not self-defining, any attempt to regulate such threats depends upon social understandings and the context in which these threats are made. In the following section, I then explore examples of how such a contextualized approach to regulating threats of racial violence might work.

#### A. Offense and Harm

The fact that words are used, by hypothesis, in issuing verbal threats of violence should give anyone interested in the First Amendment pause. Still, this fact does not mean that the government may not sanction the threat. [FN30] To clarify why the government \*663 has a compelling interest in punishing threats of violence, it is necessary to distinguish between speech that causes definable harms and speech that merely "offends."

In *R.A.V.*, Justice Scalia gave three reasons why "threats of violence are outside the First Amendment." [FN31] The state's interests include "protecting individuals (1) from the fear of violence, (2) from the disruption that fear engenders, and (3) from the possibility that the threatened violence will occur." [FN32] To these three concerns I add two others that apply with special force to racially-motivated threats of violence: that such threats (4) will deprive some members of a community the opportunity to participate equally in the functioning of society, [FN33] and (5) "will have an insidious effect on social relations" among racial groups in the society. [FN34] Many of these general harms are reflected in the incidents described in the next section.

The fear that threats of violence create in their auditors can be great. The fear may stem from the realization that one is vulnerable to great harm, or from the sense that it may not be possible to walk around or live in certain neighborhoods without incurring significant risk of harm. [FN35] It is also frequently difficult--particularly with anonymous threats--to determine the likelihood that the speaker will attempt to carry out the threat. The resulting uncertainty, coupled with the knowledge that one cannot protect oneself at all times, can lead to extreme stress.

This fear and stress, in turn, can cause targets of threats to change their patterns of living. Instead of taking a walk to the park, one might go to a gym. The simple act of moving into a largely white \*664 neighborhood can trigger threats, harassment and other violence. [FN36] The fear of racial threats and violence is regarded as a significant reason why African Americans are reluctant to enter white neighborhoods. [FN37] Instead of exposing oneself to the public, one might be inclined to hide out in "safe" places. But, then, what is a safe place? If the threat is communicated over the phone, or at one's home, it may seem that no place is safe. Threats of violence thus coerce by significantly disrupting one's entire sense of security.

The third of the R.A.V. interests--preventing the threats from actually being carried out--is also important. The victim certainly has a strong interest in preventing the threatened violence from occurring, and the state has a similarly compelling interest in forestalling violence.

The final two interests relate to the state's justifications for singling out racially-motivated threats of violence for special prohibition. The fourth interest is that threats of violence may prevent \*665 minority members from equal participation in the life of a community. This may occur for several reasons. The most obvious is that a threat may discourage victims from exposing themselves to community life. In addition, racially-motivated threats are stigmatizing on account of their association with racial subordination.

Stigmatization is "the process by which the dominant group in society differentiates itself from others by setting them apart, treating them as less than fully human, denying them acceptance by the organized community, and excluding them from participating in that community as equals." [FN38] Stigmatization results from the imposition of a label that defines the marked person as deviant, flawed and undesirable. The stigma is discrediting because it is connected to purportedly deviant dispositions. The discredited characteristics become more significant when the deviant dispositions are seen as enduring and primary and thus part of the stigmatized person's identity. If the target is significantly stigmatized, the stigmatizer becomes incapable of dealing with the target apart from the assumption that the deviant mark is an essential part of the target's identity. [FN39] Thus, persons belonging to a stigmatized group are expected to display the behavior stereotypical of that group. [FN40] Labeling someone as a member of a stigmatized group ultimately serves as the basis for devaluing that person and contributes to that person's negative perception by the entire community.

The badge or symbol which the victim is forced to wear derives its humiliating meaning from historical, societal and cultural contexts, as well as from the way witnesses interpret it. [FN41] Stigma is not an inherent attribute; rather, people are labeled within the context of a particular culture and historical events. [FN42] Racially-motivated threats of violence single out racial groups and imprint them with badges of inferiority. Such threats infect society generally. They falsify the legal ideal of equality and deny the importance of respect for individuals. Because the racial stigmatization that accompanies racially-motivated threats of violence obstructs members of racial minorities from participating equally in community life, the state has a \*666 special interest in prohibiting them. [FN43]

The final interest justifying regulation of racially-motivated threats of violence--preventing the

insidious effects of racially-motivated threats of violence on inter-group race relations--depends for its strength on two factors. The first factor is the extent to which the implicated racial communities are heterogenous. If a given racial community is isolated from other races, then a racial threat may greatly affect that group's perception of the racial community from which the threat issues.

The second factor affecting the impact on race relations is how "public" the threat was or becomes. If the threat is known only to a small group of people, it may have a modest effect on race relations in the society. If a communication is widely known, however, the effect may be dramatic. Consider the effect on race relations stemming from the repeated broadcast of the videotape of the Los Angeles police officers beating Rodney King. Many African-Americans had heard about racist comments made by police officers ("gorillas in the mist") and saw the link between the racist expression and the blows from the officers' batons. [\[FN44\]](#) Both of these factors affect the "credibility" of a threat. When a white person threatens an African-American with violence, the threat is often viewed as presumptively credible due to the history of violence by whites against blacks in this country, as well as the persistence of segregation in daily life. [\[FN45\]](#)

But because racially-motivated threats of violence are racially stigmatizing, they also impede the development of relationships between victim groups and members of other races. [\[FN46\]](#) Racial threats signal to members of other races the individual's inferior status, indicating that the victim is a pariah and diminishing the respect given to the victim's racial group. [\[FN47\]](#)

Members of majority groups may simultaneously feel relief that they are not victimized by such attacks and fear that they will be victimized if seen as racial minority sympathizers. [\[FN48\]](#) Those who associate with stigmatized persons experience "courtesy stigma" by \*667 sharing the disdain shown to the stigmatized individual. [\[FN49\]](#) Racial stigmatization also destroys the victim's ability to behave neutrally with members of other races. Stigma impacts even the victim's relations with members of the same racial group. [\[FN50\]](#) Ultimately, victims may reject their own identity as members of a racial minority group. [\[FN51\]](#) In sum, because racially-motivated threats of violence disrupt social relations among racial groups, the state has a strong interest in controlling such threats.

For purposes of First Amendment analysis, speech that causes the five types of harm described above must be distinguished from speech that is "offensive" or speech that violates civility rules addressing how people should speak to each other. [\[FN52\]](#) By "offensive" speech I mean language, public displays or discomforts associated with communication that triggers an unpleasant emotional response in at least some listeners and that steps over the bounds of perceived good taste. It is possible to define "offensive communications" to include insults, epithets, [\[FN53\]](#) salty language, [\[FN54\]](#) George Carlin's "seven dirty words," [\[FN55\]](#) sex talk on the airwaves, [\[FN56\]](#) commercial advertisements that use scantily-clad women to sell beer to men or cartoonish \*668 camels to sell tobacco to children, [\[FN57\]](#) disgusting "parodies" of public figures like Jerry Falwell, [\[FN58\]](#) playboy pinups on workplace walls, [\[FN59\]](#) public displays of nudity, [\[FN60\]](#) street harassment of women, [\[FN61\]](#) Louis Farrakhan's diatribes against Jews or whites, [\[FN62\]](#) and Nazi marches through Skokie. [\[FN63\]](#) It is also possible to use the term "offensive" to describe speech that is vicious, demeaning, personally-directed and

racist, and that terrorizes the auditor. "Offensive speech," therefore, can be seen as an overarching category of language that includes swearing, insults, and derogatory advertisements as well as intimidating, threatening or harassing speech.

Although some have apparently used the concept of "offensive speech" to describe all of the above types of speech, there is a distinction between speech that offends or violates civility norms and speech that harms in certain specifically-defined ways. Speech that harms must do more than trigger an adverse emotional reaction in a listener. [\[FN64\]](#) There is no constitutional value in libel, [\[FN65\]](#) for instance, because **\*669** libel harms the reputations of individuals in a way that makes it difficult for them to function in society. [\[FN66\]](#) Libel not only "offends," but also harms, the person about whom the libel is disseminated. The harms can include damage to a person's standing in the community, potential ridicule or humiliation, which may make it difficult to work or to carry on other activities. [\[FN67\]](#)

Similarly, incitement to illegal action creates the danger that speech directed toward producing imminent, unlawful action may in fact produce such action, and therefore such speech can be regulated because of the serious risk of harm. It is irrelevant whether or not the speech offends; all that matters is the likelihood that the harm of imminent lawlessness will result. [\[FN68\]](#)

Turning now to threats of racial violence, the harms to which Justice Scalia referred in *R.A.V.* come into clear relief. [\[FN69\]](#) Threats of violence may offend or transgress civility norms, but they do much more; they can cause people endless worry about their physical safety and lead them to alter their lifestyles in order to avoid the possible consequences. Racially-motivated threats can also disrupt the goal of achieving a racially-diverse, peaceful society, in which racial conflicts are resolved without violence. These are harms that go beyond an adverse emotional reaction.

Still, the fact that threats of violence cause harm rather than mere offense does not show conclusively why they, and not other kinds of speech, are outside the First Amendment. Many types of speech said to cause "harm" are nevertheless protected, e.g., the parody in *Hustler*. [\[FN70\]](#) All censors justify regulation under a harm principle. Moreover, even some threats of violence have been held entitled to protection. [\[FN71\]](#) The crucial question is why should this harm in this particular instance warrant regulation?

#### **\*670 B. Problematic Threats of Violence**

Suppose you are a bank teller and someone hands you a note that says "I have a gun. Give me your money. If you trigger the alarm I will kill you." That note is "speech"; it communicates an idea in the form of a threat of violence to you. Unless you are incredibly courageous--or stupid--it also keeps you from speaking. There is no dialogue and no opportunity for discussion. There is no more communication. Now, suppose a government agent proposes to punish the speaker through either arrest and prosecution or allowing you to file a tort action. This is state action in that the agent is using the power of the state to protect you from the power of the speaker.

But what if the speaker now claims that the government is interfering with his First Amendment right of speech? A court faced with such a claim would have to decide two questions: First, is the

threat "speech" within the meaning of the First Amendment? [\[FN72\]](#) The petitioner can point to decisions describing writings as "speech" protected under the First Amendment, and argue that if he is punished for these words, he is being punished for "speaking." And he would be right; if the speaker is punished, we are punishing him for the content of his communication. In order to punish the threat, you need to know what was said--that is, one needs to understand the content of the communication. [\[FN73\]](#)

The second question then arises: If the threatening note constitutes "speech," does the state have a sufficiently strong interest in its regulation? In order to answer this question, a court must have a theory of what purposes are served by the First Amendment. This theory will help the court determine whether to allow government regulation at all, and if so, how strong the government's interest must be to justify the regulation.

If the purpose of the First Amendment is simply to prevent the government from interfering with the speaker, the regulator loses. [\[FN74\]](#) But that principle has never been the primary focus of First Amendment theory. The Court has at times rightly been concerned with limiting the government's power to censor, but limiting government has operated, at most, as a background idea rather than a compelling First Amendment principle. The reason for this is clear: \*671 if limiting government were the primary concern, the First Amendment would impose a barrier to many significant governmental regulations of "private" behavior, particularly in the economic sphere. Much government speech regulation bars one economically-powerful party from committing fraud, blackmail and false advertising, and from lying in commercial affairs. [\[FN75\]](#)

Although the court must decide whether the spoken words are "speech" and, if so, whether the state may regulate them given the strength of the state's interest, my example has obscured a third and most central question to be decided: Do the spoken words, in context, constitute a "threat"? The bank teller receives a sufficiently coercive message that most people would assume is a regulable threat. But, suppose there is no gun, and the speaker says he was joking? [\[FN76\]](#) We might decide that what counts in this circumstance is the perspective of the listener, i.e., the object of the threat.

This was the approach taken by the court in *Allen v. Hannaford*, [\[FN77\]](#) a tort action for assault. The defendant in *Allen*, because of a gun-pointing incident, claimed that the fact that the gun was unloaded deprived the tort of the essential element of imminence. The court held that the plaintiff's perspective counted, and since the plaintiff had no way of knowing the gun was not loaded, the defendant's present inability to carry out her threat of violence was not controlling. [\[FN78\]](#)

Although one who carries an empty gun may still assault another, we can conceive of a "threat" that really is not a threat at all. Suppose the words "if you trigger the alarm I will kill you" are spoken by a small child who clearly does not have access to a gun. At some point on the decisional spectrum the words in context will not amount to a regulable threat. Some language which sounds like a threat cannot be regulated because, in context, it is clear that the language is not, in fact, threatening. What distinguishes a regulable threat from "free speech" within this contextual inquiry is the subject of the next section.

## II. SPECIFICITY AND CONTEXT

This section serves dual purposes: First, it gives content to the notion of racial threats of violence through an exploration of particular\*672 incidents; and second, it exemplifies a contextual methodology, some form of which is necessitated by any attempt to regulate the content of hateful expressions. [FN79] By choice of example, I give credence to the arguments of proponents of hate speech regulation that racially-motivated threats of violence are a means of depriving people of color of fundamental civil rights.

### A. Introduction To A Contextual Methodology For Hate Speech

It may be helpful at the outset to describe what I mean by "meaning" and "context," and to acknowledge the limited nature of this project. First, by using the term "meaning," I intend to state only that, within contemporary American legal culture, one can describe an interpretation of a given speech act which for many people "rings true." If you nearly bump into a stranger while walking on the street, and he yells "fuck you!" at you, I claim only that most people will interpret the yelled words as an insult. I do not argue that there is only one "meaning" of a given speech act, and, given the plasticity of language, such a claim would seem difficult to make. [FN80]

Second, by "context," I mean relevant background facts which, when aligned with the literal words, help us to make sense of language. [FN81] I want to situate words in a place and a time, and to know something about the speaker as well as the auditor. Some examples of contextual factors include: the identities of the speakers and listeners, the intent of the speaker, the current and historical relationship between the parties, the relationships between the "groups" to which each of the parties belongs (or with which each party wishes to identify herself), the place in which the communication is made, the method or mode of communication, and the historical setting in which the communication occurs. These factors are all matters which affect (and sometimes control) the meaning of a particular speech act. [FN82]

But, what is true of "meaning" is also true of "context": there is no one set of contextual "factors" that is relevant in every setting and whose description will tell us what certain words "mean." One cannot establish the definitive set of criteria of contextual factors for \*673 the same reason that one cannot definitively establish the meaning of words without knowing more: languages and contexts are too diverse and malleable. Thus, the factors I have set forth are not part of an unarticulated theory of relevance, although I am clearly operating within a paradigm in which I assume there is a limit to what factors could be pertinent to "context." For example, I would assume that the fact the man you nearly bump in the above example is wearing red shoes would generally be less relevant to understanding the meaning of his shouted communication than the fact that he is on crutches. I could, however, imagine a situation (for example, if the man were dressed like a clown and wore large floppy red shoes) in which the color of someone's shoes might indeed be pertinent to the meaning of shouted words. Consequently, I intend not to construct a new formalism around "context," but to argue for a relevant, appropriate interpretation of language within a given context.

An example of the type of contextual analysis that is necessary to decide whether speech in a given setting is or is not a threat is contained in *Watts v. United States*. [FN83] *Watts* involved the interpretation of the statute making it a crime to threaten the life of the President. After a

public rally against the Vietnam War, a demonstrator was convicted of making a "threat" against the life of the President when he said, "They always holler at us to get an education. I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. . . . They are not going to make me kill my black brothers." [FN84] The Supreme Court reversed Watts' conviction, holding that his only offense was a "kind of very crude offensive method of stating a political opposition to the President." [FN85] Taking the statement in context, which included the fact the statement was made in argument against someone who said the gathered youth should get more education before expressing their views, and the fact the onlookers all laughed after the petitioner's statement, the Court concluded that the statement could not reasonably be taken to represent a threat within the meaning of the statute. [FN86]

#### **\*674 B. The Context of Racial Threats of Violence**

In order to evaluate its application and effectiveness, it may be useful to see how a contextual approach would work in several cases that raise the question: Has someone been the victim of a threat of racial (or ethnic, or homophobic) violence? We now turn to examine the concept of racial threats in specific circumstances.

Incident 1: Albert Nettles is a young black man who grew up in a rural part of North Carolina. Hired into his first real job at age 21, he finds that he is the only worker of color. During his short employment, several of the white employees verbally taunt him and use racist terms when speaking about him to other whites on the job. One of the employees tells Nettles that he is a member of the Klan. Nettles leaves work another day to find his tires slashed. After three weeks, he is fired. Nettles overhears his co-workers using racist terms; and sometimes the white workers use the terms to his face. The job site is located in a rural community in North Carolina. [FN87]

Does the behavior of the white workers constitute a threat? It seems to me that one cannot begin to answer this question without evaluating in turn the meaning of several key facts.

First, what is the significance of the fact that Nettles is of a different race than the other workers? This fact means that Nettles is isolated racially from the others. The categories of "race" and "race difference" have substantial meaning in contemporary culture. One cannot deny that to be isolated racially on a job site places one in a vulnerable position. At least as to speech involving racial matters, the racially-isolated interlocutor is exposed to the risk of harm in a way that the others are not.

Second, what is the significance of the fact that Nettles is black and the other workers are white (as opposed to simply being of a different race)? The answer, again, depends on the peculiar American dilemma of race and racial difference. Here the white workers feel safe in uttering their obscenities. They have no fear that the black worker will have allies among their number that would make them equally vulnerable. Moreover, even if the black worker did have an ally, the prevalence among whites of spoken racial stereotypes about blacks makes it much less likely that the white racist will be challenged in a manner that would risk violence to the speaker. Among white males one can use a racial epithet about nonwhites with impunity. \*675 At worst, one risks a reprimand. But, though exposed as a racist, one instills in his fellows the idea that he

is tough, a man.

Third, does the nature of the job and place make any difference in the meaning of the communication? Here, the jobsite--a construction site--is a place where, in the popular mythology of work, men (and I do mean men) can work out and express their baser instincts without the intermediating influences of women or office civilities. The work is outdoors, where verbal exchanges are less formal and the expectation of civility is less. Those who do not fit the mode of the hard-hatted worker can expect to be ridiculed.

It is also important that the language was spoken in a workplace. People are not as free to walk away from jobs as they are to walk away from an harasser on a street corner. The workplace is a place where, in our society, people are obliged to attend in order to survive. It is not "optional" in the sense that attending functions at a club or a bar can in some senses be described as "optional."

I do not rely here on the related idea, advanced by some, that the fact the jobsite is subject to antidiscrimination rules differentiates the speech from speech made outside the workplace. The meaning of a communication does not change simply because the state has chosen to regulate certain kinds of speech--for example, sexually harassing speech--in the workplace. My point is that the fact the statements to Nettles were made in an inherently coercive environment affects the meaning of the communication, not that the workplace is *prima facie* a regulable environment. It may be true that the government has a greater interest in regulating speech in the workplace (under, for example, captive audience rationales, [\[FN88\]](#) or as an economic regulation of the employment relationship), but the mere fact of regulation does not independently affect the meaning of the utterance. I will address the issue of the strength of the government's regulatory interests below.

The method or mode of communication in this first incident was, except for the tire slashing, all verbal. No one touched Nettles or engaged in physically-threatening gestures such as fistshaking. The fact that his car tires were anonymously slashed, however, puts Nettles in a difficult position. Was he to assume that one of his fellow workers slashed his tires when his back was turned? Why would anyone slash his tires and no one else's if he was not being singled out by somebody for intimidation? The workplace was not in an area he knew, and it would be impossible to determine whether he and his car were subject to "random violence," violence by a friend of a co-worker or by a co-worker. Significantly, however, his co-workers \*676 simply laughed when he told them about the tire slashing.

Thus far, I have been examining the incident without regard to the content of what was said to Nettles. I will shortly focus on the "content" of the speech, but I want to emphasize that "what the spoken words mean" depends to a significant extent on the context in which they were spoken. That Nettles was the only black worker among whites, that the jobsite was rural and isolated and "male," that Nettles was young and trying hard to succeed at his first job, and that the site was located in a southern state where whites resisted integration, all gave him a sense of isolation and vulnerability. These facts made the words spoken to him much more significant--and powerful.

The nature of the speech to Nettles is also threatening--as any black male in the South would find it to be. One does not have to have one's tires slashed to feel the lash of the racial slur spat by a white male at a black male in the presence of other white males who do not protest. The sting of the implied threat remains long after the speech is uttered. If Nettles is looked on as subhuman, will he rise to greet the new day? If a co-worker says he is a Klansman, who is Nettles to question his sincerity? Should he "kid" back: "you're not really a Klansman, you turkey"? Not unless he wants to set in motion forces he cannot control. He knows what the Klan did without ever reading about the Klan in history books. He knows the history that anyone who today claims to be a member of the Klan is invoking. He knows he is in danger without the Klansman writing his name on a burning cross.

In short, the meaning of the "spoken words" depends on context. Words spoken in the context of Nettles' history, the Klansmen's history, the history of the South, the history of slavery and the badges and servitudes that was Jim Crow (all enforced by the searing flames of the Klan's crosses)--these words mean nothing if not in context. Nettles knows about *Brown v. Board of Education*, [FN89] even if he never heard of the case. He knows that whites protested, and he knows that his state set the cornerstone of massive resistance [FN90] to integration. He knows about exclusion and segregation and what happens to blacks if they stray too far from their neighborhood-- America's equivalent of a South African homeland. One word, carefully chosen by his co-worker, lectures Nettles' brain for hours about where he should spend his days if he wants to preserve his sanity, not to mention his life. He wants a job, but from this place he is excluded and silenced. If you do not understand the context in which \*677 these words were spoken, you do not understand what was understood by the co-worker and by Nettles.

We can now begin to answer the question: Did the white workers, or some of them, "threaten" Albert Nettles? My conclusion, which by now is self-evident, is that the white workers did threaten Nettles in a manner which he could reasonably take to encompass violence against him. The reasons for this conclusion are contained in the details of the facts and circumstances surrounding the communications. The meaning of the words depends upon understanding Nettles' vulnerability in relation to the white workers' position of security.

Incident 2: Phillip and Renee Smith, a mixed race couple, agreed to purchase a house. While they were visiting the premises, their future nextdoor neighbor, a man named Talley, built a 4-foot tall cross in his own yard and set it on fire. The neighbor complained to bystanders that "having n---rs next door" would ruin his property value. [FN91]

Have the Smith's been "threatened" Focusing attention on the circumstances of the expression will help answer the question. The place the speech occurred--a residential neighborhood--is a factor that the Supreme Court has acknowledged warrants some shielding from targeted picketing, i.e., directed expression. [FN92] The reason for this, privacy in one's home and the idea that one should be able to escape from targeted communication at least somewhere, applies with similar force to one who has signed a purchase agreement to purchase one's home. But, I have also argued that the meaning of the communication is informed by the place in which it occurs.

Suppose the cross had been burned in front of a shopping center while hundreds of people passed by. How would the two cross-burnings differ? There are at least two differences. First, the

shopping center cross-burning would appear to be directed not toward a particular individual or small group, but, more diffusely, at all those who might historically have been victims of Klan violence. Among these are blacks and whites sympathetic to black concerns. Since this is a large and amorphous group, the determination of whether a shopping center cross-burning is itself a "threat of violence" would seem to depend on how many Klansmen were involved and how strong the Klan sentiment in the community was in relation to the power and the number of potential victims.

All this suggests that a cross-burning targeted at a particular individual or family might have a much more powerful impact on the victim. This reveals first, that the intensity and credibility of the \*678 message might change depending on the number and scope of people who receive the communication. With the residential burning there is no ambiguity in the target. There is no mistaking who is supposed to receive the message. This counsels that victims will be partially screened when the target of vicious messages is ambiguous.

Second, it is at least conceivable that someone who viewed the shopping center burning would be able to leave and still feel at least somewhat distanced from the people who were doing the communicating and the message of the communication. The cross-burners do not, after all, live across the street. But this means that when the cross-burning takes place across the street the burners know who the victims are and where they live. There is no mistaking the persons to whom the message is directed. Nor is there any safety in numbers, as there would be if many people like the intended recipient of the message were present. Therefore, whatever the cross-burning communicates--whatever would be its message in the shopping center--is magnified and focused in the residential context.

The burning cross in the residential neighborhood was targeted at the Smiths. Talley did not burn his cross at just anyone, and he wasn't trying to use it to organize or inspire other racists. His purpose seemed to be to intimidate. This case therefore differs from *Brandenburg v. Ohio*, [FN93] where the Klansmen were burning their crosses and spouting their invective in a place, so far as the record revealed, far away from potential victims. [FN94]

In order to understand the message conveyed to the Smiths, one needs to know something about burning crosses in our culture. How does a burning cross differ from burning a pile of sticks in one's yard? Clearly, the difference lies in the symbolism inherent in a "burning cross." Just now I took two pencils in my hand, and crossed them. Does that action mean anything? If I then attached the pencils at ninety degree angles to each other, would I be burning pencils or burning a "cross" if I lit them afire? This example suggests that whatever is significant in the burning object is significant only in relation to some background information about burning crossed sticks. Whatever the message is, it cannot be understood apart from the history of burning crosses in our culture. The burning cross--especially in front of a black family's house--has been used to intimidate blacks for more than a century. The burning cross has often been followed by a lynching. [FN95] Why should a black, or interracial \*679 family, risk physical harm just to live in a neighborhood of their choosing?

Suppose that when the Smiths arrived Talley had simply pointed an empty gun across the street at them. No one would argue that this was not a threat of violence and that such an act would

constitute an assault because of the imminence of the threatened harm. Why should it make any difference that Talley directed a burning cross at them? The threat of violence is present in both cases. One obvious difference lies in the imminence of the threat with the gun, but this difference explains why the gun-pointer has committed the tort of assault instead of a mere threat, rather than explaining why one act is a threat and the other is not.

In *Wilson v. Wilkins*, [FN96] the plaintiff was told that if he did not leave the community within ten days, a rope would be put around his neck. The court held that these threats constituted a "wrong," without specifying which cause of action they triggered. [FN97] As long as the threats were made and taken seriously, it did not matter that the rope had not yet been purchased, or that the victim had not been dragged to the tree. The serious promise of future harm was sufficient to make out the prohibited threat.

It is also unclear why the threat posed by waving an empty gun is any more serious than a directed cross-burning. Both threaten serious future violence. One answer might be that the victim would not know that the gun was unloaded, and therefore would assume someone had the present ability to carry out the threat, but such a victim would also be unlikely to know whether a crossburner had an imminent means of carrying out his threat.

In the face of the history of cross-burning, is it any wonder that the Smith's decided not to buy the house? What is surprising is that the Washington Supreme Court did not find these facts sufficient to establish "criminal harassment," as defined in the Washington statutes.

Washington State defines criminal harassment to include words or conduct done with malice "and with the intent to intimidate or harass another person" because of race, which "places another \*680 person in reasonable fear of harm to his person or property." [FN98] This harassment may include "(i) cross burning . . . or (iii) written or oral communication designed to intimidate or harass" because of race. [FN99] The statute exempts from this definition "critical, insulting, or deprecatory" speech or acts "unless the context or circumstances" are such as to place the recipient "in reasonable fear of harm." [FN100] Surprisingly, although cross-burning was specifically mentioned by the Washington legislature as intimidating conduct, the Washington courts found that the defendant's conduct did not fall within the prohibitions of the statute. [FN101]

What the Washington Supreme Court failed to see when it evaluated Talley's conduct was exactly what the statute suggested should be examined: the "context or circumstances" which, the state legislature rightly understood, would necessarily have to be taken into account in determining whether given conduct was harassing or intimidating. What is it about Talley's conduct that is not intimidating? The court does not specify further reasons for its conclusion, but one has the sense that it did not fully appreciate the history behind cross-burning, or perceive how a cross-burning conducted by the Klan in front of avowed Klan members in an otherwise deserted field [FN102] is very different from targeted cross-burnings in residential neighborhoods. I would argue that a residential cross-burning such as that conducted by Talley constitutes a clear threat of violence.

Incident 3: A black family enters a coffee shop in a small Texas town. A white man places a card on their table. The card reads, "You have just been paid a visit by the Ku Klux Klan." The

family stands and leaves. [\[FN103\]](#)

What is noteworthy about this incident, reported by Professor Matsuda, is the context in which the incident occurs. Imagine a white man dropping this card on the table of a black family in a black-owned coffee shop in which 99% of the patrons are black, and where the coffee shop is located in the middle of a largely black community in a large urban city. The result is laughable, as Eddie Murphy demonstrated in the movie 48 Hours. [\[FN104\]](#) While "sprung" \*681 from prison to assist the police, Murphy's character found himself in a white "cowboy bar" and made all the patrons jump out of deference to his borrowed badge. This scene happened in a movie, which made it a good laugh because of the juxtaposition of a purported black law officer in an arena in which a black man might be in danger. Likewise, a Klansman would be unlikely to risk personal danger by dropping such a card in the middle of a largely black enclave. For the Klansman, the context means isolation; it means no one is there to help if trouble erupts; it means that he is vulnerable.

What makes the card-dropping incident intimidating, therefore, is the vulnerability of the family. This conclusion may strike some as counter-intuitive, and one might argue that it underemphasizes the words on the card. This argument can be illustrated nicely by two examples. Suppose the message said, "You've just been paid a visit by the Jehovah's Witnesses." Or, suppose the card read, "10% off all supplies at Mort's Hardware! Bring this card to receive discount!" The black family would not be intimidated, and would likely be undisturbed by either the words on the card or the manner in which the card was silently dropped. Thus, the argument might run that the context is irrelevant and all one needs to know is the meaning of the words on the card to know the meaning of the act. The fact that someone dropped a card on the table of a family who happened to be black is not in itself threatening or frightening.

But this argument would misperceive my point about context. While it is certainly true that one needs to know the words on the card to know the meaning of the act, the words in this case take on their threatening character by virtue of the context in which the words were communicated. In this instance, the words on the card act as the triggering mechanism for the panoply of factors that undoubtedly flashed in one second the message of danger to the black family. Someone [(1) a man] of a different race [(2) white] dropped a card on their table and apparently no one else's [(3) thereby singling them out] in a public place [(4) suggesting that the perpetrator(s) are "comfortable" doing this act in a public place, apparently without fear of retribution], in which we infer no other blacks are present [(5) racial isolation in an all-white restaurant], in a small town [(6) the "law" in small towns sometimes offer minorities less protection, especially in the South and especially if few minorities live in the town, and we know from the civil rights movement that in some instances the sheriff and his deputies are themselves members of the Klan [\[FN105\]](#) in Texas [(7) a state with a particular reputation on racial \*682 matters]. The threatening nature of the words, the "message," is given flesh and blood by looking at these other factors.

There is one additional factor that overrides all others in understanding the message of the threat. Having some understanding of the Klan and its history is necessary in order to know what was "said" on the card. Take the Jehovah's Witness example. Would a black family (or any family) be likely to jump up to leave if this card were dropped? Not likely. What if the card said,

"You've been paid a visit by the Jaycees"? This also would not intimidate the family because there is no history of the Jehovah's Witnesses or the Jaycees acting violently towards any other group.

It is this violent history that those who invoke the name of the Klan wish to mirror. [\[FN106\]](#) To many southern whites, the overturn of slavery created frightening disorder. Southerners saw the Klan as a defender of a downtrodden people against black violence. In the predominantly rural and underpoliced South, the slave patrols and vigilante, or "popular," justice had traditionally maintained order. Throughout much of the South after the Civil War, the Klan used beatings, lynchings and harassment to reinstitute the old order, and, in great measure, it succeeded. Klansmen revived the practice of "nightriding," a form of terrorism which dated to the acts of antebellum overseers, who strove to confine slaves within their quarters at night through fear of mounted, sheet-covered "ghosts." As the 1868 elections approached, intimidation escalated into a wave of assault, murder and assassination in an effort to discourage voting by blacks and Republicans. The Klan regalia of white robe, hood and mask served simultaneously to terrorize victims of "whitecapping" (derived from the Klansman's ghostly garb of hood and mask) and "bulldozing" (acts of terrorism committed in an effort to overthrow Republican Party state governments in the South) while concealing perpetrators' identities. [\[FN107\]](#)

**\*683** The Klan typically outnumbered their victims, used death threats, random violence and, finally, systematic torture and murders to instill fear and shock in their victims. Toward black people, including women and children, they purposefully acted in barbaric ways. They did this, first, to instill terror in the home of every black family and impose terrible pressure on the black male voter. Second, treating black families in unspeakably cruel ways was a statement that they were inferior and neither their pain nor death mattered. Klan lynch mobs, led by elected officials, terrorized black communities.

The Klan was an organized conspiracy against the civil rights of a large segment of society. So considerable were its powers of intimidation in many areas that even officials who opposed it were helpless against it. Even Klansmen caught red-handed were released by the justice system and never came to trial. Judges refused to take sworn testimony from black victims and dismissed the words of white Republicans.

Although the first Klan died out in the 1870s, social changes in early twentieth-century America heightened cultural tensions and gave rise to a new Klan with an expanded purpose. In 1905, Thomas W. Dixon published *The Clansman, An Historical Romance of the Ku Klux Klan*. It became a popular play, which D. W. Griffith made into an epic movie, *The Birth of a Nation*. Griffith's movie produced not only most of the modern film techniques, but also a revival of the Klan itself. The Dixon-Griffith melodrama showed the South under the heel of vengeful Radical politicians and brute-like Negroes, but in the end the Klan and the South triumphed. The climax came with Klansmen galloping across the screen to save the heroine, besieged in a cabin by hordes of lust-crazed blacks.

While this film was bringing cheering audiences to their feet in an Atlanta movie house, "Colonel" William Simmons resurrected the Klan in a nocturnal ceremony on nearby Stone Mountain. With all of the paraphernalia of the world of lodges and secret societies which he

knew so well--the sacred values to be protected from outsiders, the robes, rituals, prescripts and oath which he copyrighted, the patriotically raised American flag, the revered Holy Bible and the blazed cross borrowed from Dixon's novel--Simmons initiated his first heroes. Ever since, Klansmen have used the fiery cross, usually a tall telegraph pole and its cross piece, wrapped in burlap, bound on by wire and soaked in kerosene. Lit at the climax of rallies, it is \*684 ritual, warning and advertising. [\[FN108\]](#)

In the hands of hard-sell promoters, the Klan spread like wildfire through the South and across the country. Riding a wave of social fundamentalism, the "Invisible Empire" that formed in 1915 spread far beyond its southern origins. It preached not only white supremacy, but nativism and "puritanical virtue" as well. Its stock in trade were fraternalism, Protestant morality and Americanism. Applying old means to new ends, masked and hooded Klansmen now employed intimidation and violence not only against blacks, but also against Catholics, Jews, "loose women," unfaithful husbands, "labor agitators," "race mixers" and "Bolsheviks." Klan salesmen, called Kleagles, recruited among the Masons and other orders and signed up local ministers and businessmen in a crusade against bootlegging, roadhouse sin and political corruption. [\[FN109\]](#)

The Klan helped to elect governors and senators from Maine to California and, with a membership of more than two million, was a major force in the 1924 presidential election. [\[FN110\]](#) During the period from 1920 to 1925, the Klan was responsible for uncounted acts of terrorism against Jews, blacks and Catholics. But its violence was concentrated largely in the South and was primarily directed at fellow white, native-born Protestants. With Klansmen numerous, masked, politically active, and police often Klan-minded, usually little was done. Hundreds, sometimes thousands of men knelt before flaming crosses in remote fields during night meetings.

By 1926, the Klan's influence was waning in most states. The Klan remained strong in many pockets of the South, especially in Alabama and Mississippi, where lynchings and floggings went unchecked. But elsewhere it was no longer a force.

In the 1950s, however, in the aftermath of Brown v. Board of Education, the "Invisible Empire" talked about and carried out violence. In the first four years after the Supreme Court's decision, there were 530 cases of overt racial violence and intimidation--including 6 murders, 29 shootings, 44 beatings, 5 stabbings and the bombings of 30 homes, 7 churches, 4 synagogues and 4 schools. In the tense battle over desegregation, 17 southern towns were threatened with mob violence. [\[FN111\]](#) The Klan was involved in most.

In the 1950s, the Klan added a new weapon to its arsenal: dynamite. With bombs, the Klan no longer singled out one or two people, but without warning, it could strike at many with murderous effectiveness. Between 1956 and 1963, more than 130 homes, places of \*685 worship and businesses had been destroyed or damaged by explosions. Police either actively colluded in, or passively tolerated, Klan violence on a number of occasions. [\[FN112\]](#)

Unlike the second Klan, but like the first, the modern organization was overwhelmingly southern and anti-Negro. Despite continuing diatribes in Klan speeches and literature against Catholics, Jews and aliens, nearly all action was aimed at preserving segregation and white

supremacy. Attacks upon communism sprang in large part from a belief that civil rights advocates and demonstrators were communist-inspired.

To explain the determination behind the civil rights movement of the 1950s and 1960s, the Klan revived a scapegoat from the 1920s. "The Jewish Conspiracy" helped nourish anxieties and explained how supposedly happy, uneducated, penniless blacks became militantly demanding. Jewish citizens were among the first whites to become prominent supporters of or participants in the black drive for equality. Blacks could not be associated with money, education or power, but Jews could. "Blacks are the arms and legs," and "Jews are the brains," stated a Klan poster. [\[FN113\]](#)

In the 1960s, Klansmen engaged in mob violence against civil rights demonstrators. There were also individual murders. In 1963, the Klan detonated a bomb during a Sunday school class at a church in Birmingham, Alabama, killing four black children. In 1964, just as hundreds of white and black college students began to arrive in Mississippi pursuant to the Student Nonviolent Coordinating Committee's (SNCC) massive educational and voter registration "Freedom Summer," the Klan murdered three student civil rights workers and buried their bodies in a dam. Largely because whites were among the victims, world TV coverage and public outrage met the slayings. Federal agents swept into Mississippi. In 1967, a KKK Imperial Wizard, the county's chief deputy sheriff and five others were sentenced to prison for civil rights violations, two for a maximum of ten years. [\[FN114\]](#)

The Klan sees a world divided between their own kind and "aliens." Even today within the Klavern, special action squads often exist and the talk is continually of guns and killing. At public rallies, speakers on flat-back trucks beneath blazing crosses use the implied threat of violence that "this is the Klan speaking!" The language which draws the greatest response is tough talk, especially references to "n-----." [\[FN115\]](#)

**\*686** Like the earlier invocations of the Klan, people who today identify themselves with the Klan work in semi-public ways to carry out terroristic campaigns against the black population. Members of the Klan have been responsible for at least hundreds and probably thousands of mutilations and lynchings throughout its history. These lynchings have been "public" acts, as they have not been hidden from either the white or the black population. Indeed, it is crucial to their campaign of intimidation that the black population be made aware of the violence against one of their members, violence perpetrated because of race.

Consequently, invoking the name of the "Klan" constitutes a conscious effort to invoke this history of violence and to use it to reinforce the power of one's own threats. The message, now buttressed by a history of violence against a class of people, and knowledge by one's victims of this history, is rendered more powerful because the class of victims knows that in the past, much of what was threatened has come to pass.

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In this context, what is the meaning of the card dropped on the table in the diner? It means that the black family has been warned to leave town or risk violence by the Klan. In light of a history of terroristic activities by groups operating under the name of the Klan, the black family

reasonably understands that it is a target. In short, the family has been threatened with violence. [\[FN116\]](#)

This threatening meaning is independent of the speaker's state of mind. Suppose, for example, that the person who dropped the card did not "intend" to frighten or alarm the black family. Imagine that the black family was sitting with a white man whom the card-dropper knew was a member of the Klan. Assuming that the black family may not know this, the person placed the card on the table to warn the family of their risk. Would the card-dropper now be culpable under my theory? [\[FN117\]](#) It is in this instance that a theory of responsibility is required. My sense is that, if one adopts a consequentialist approach to threats, the speaker's intent is not relevant to the question of whether a threat has been committed. What is relevant are the effects (or consequences) of the behavior.

This is not to argue for a legal standard which ignores the speaker's intent. A speaker's intent may be relevant to the determination of whether the threat should be made criminal or tortious. It \*687 may be that an intent requirement will be built in when legal rules are fashioned. The reason for building in an intent requirement, however, is not because a threat has not been communicated, but rather, to leave space for error, and "breathing room" for free speech. [\[FN118\]](#)

### C. Critiquing The Contextual Approach

Up to now, I have explored the argument that the meaning of a given speech act is substantially derived from the context in which it arises. We can see this in the use of racial epithets. It makes a tremendous difference in meaning to change the identity of the speaker, the medium in which the expression occurs, the place the speech occurs, or the identity of the listener. Compare, for example, a racial slur spoken in a rap song by a black rap group with the same word spoken by a white man to a black man. The same word spoken in different contexts takes on completely different meanings.

Applying this concept to the hate speech debate and the idea of verbal threats, I have attempted to show that whether a given statement is a regulable "threat" is problematic, and can only be answered by examining the context in which the statement was rendered. As I have tried to convey with the three incidents, a full contextual inquiry also necessarily means that we must be willing to hear the voices of those who are powerless, and to perceive a message as threatening when those who are vulnerable perceive it as threatening.

In this section, I briefly address three limitations or potential criticisms of a contextualized approach as applied to the problem of threats of violence. Each limitation stems from the open-ended nature of a contextual approach. One possible criticism is that the general debates over hate speech can be replicated within the parameters of a contextual inquiry into what constitutes a threat of violence. Moreover, all the contending positions could theoretically be brought to bear in any given case. This would mean that all the conflicts (e.g., free speech vs. equality) could be reproduced in the debate over "what is a threat of violence." If the critique is accurate, a further implication is that narrowing the scope of disputes would not have resolved anything.

This critique, while partially accurate, does not render the contextual project hollow. As I have argued above, we don't have a choice about turning to context; it is only through an examination of the particularities of a dispute that we can answer the question--did these events create a threat of violence? The real problem is not \*688 whether to utilize a contextual approach; rather it is in deciding what details are relevant to whether a "threat of violence" was created. And, in deciding what facts are relevant, general principles are properly invoked.

Turning to context to resolve narrow disputes does not require us suddenly to abandon strongly-held principles. Most of those who have struggled over the question of legal regulation of hate speech have pledged their allegiance to principles of both free speech and equality. If such principles were easily cabined, or readily applied, there would be little need for hundreds of law review articles on the subject of hate speech.

Moreover, although general arguments about the importance of speech rights or the centrality of equality norms can be brought to bear on the problem of threats of violence, they are deployed on a smaller field of discourse. Within the confined framework of "threats," the power of "free speech" claims dissipates and the force of "equality" norms increases as the imminence and credibility of the threat grows in magnitude, becomes more specific, and is more targeted. Similarly, the force of equality norms diminishes, and free speech claims increase as the threat becomes more removed, vague, or more generally directed. In contrast, when free speech or equality claims are invoked within an amorphous, general category such as "hate speech," the arguments may appear in equipoise because thinkers often have very different notions of what types of behaviors fall within the category of "hate speech." But when general principles are invoked in a particular case, it frequently becomes easier to sort out which set has greater force in the specific circumstance. Even if the law's sorting function is not made easier by the narrowly focused inquiry, the stakes are smaller. The harms arising from erroneous rulings in close cases are likely to be small.

A second potential concern arising from the open-textured nature of the inquiry into "what is a threat of violence" might focus on what details are relevant to resolving a particular dispute. How wide should we cast the net? What details are not relevant? [\[FN119\]](#) In the preceding sections I have illustrated which factors are likely to be relevant--that is, the current and historical relationship between the two or more parties, the relationships between the "groups" to which each of the parties belongs, the place in which the communication is made, the method or mode of communication, and the historical setting in which the communication occurs. Still, as with the \*689 Supreme Court's approach to the analogous question of what constitutes a sexually discriminatory "hostile work environment," I am inclined to let this be a case-by-case battle (see the tort discussion below), in which common law courts, over time, will decide which facts are particularly probative. Although an attempt to set out relevant "factors" in advance is a mechanism for guiding judgment, these factors are both indeterminate and inexhaustive. [\[FN120\]](#) Over time, however, the common law courts will tend to work out a more complete structure of rules and principles.

A third issue arising out of the open-endedness of a contextual inquiry concerns potential problems of vagueness and unpredictability. Does a contextual approach unduly chill speech? With respect to a vagueness concern, it is difficult to see why a contextual, tort-based approach

would be any more vague than current approaches to threats of violence. The lack of predictability argument seems to replicate the familiar rule/standard debate. "Chilling" of speech may occur, and to the extent that threats of violence are being chilled, that is a desirable result. The most problematic aspect of a contextual approach, however, is that standards may make people fear too much. When I compare my approach to that currently followed in the courts in cases involving threats of violence, I do not see that my approach should trigger any greater concerns about the chilling of speech. [\[FN121\]](#) In fact, by focusing on the narrow category of threats of violence, rather than generally on "hate speech," the risk of unpredictability should be smaller. But, because this issue concerns me, I am inclined to draw the boundaries of any remedy narrowly and impose an intent requirement.

### III. ARE TORT REMEDIES USEFUL IN ADDRESSING HATE SPEECH?

There is at least one arena in which it is common for courts to look at context in interpreting events: tort law. Common law courts \*690 are familiar with case-by-case evolution of doctrine. In evaluating a claim for negligence in the construction of a house, for example, a factfinder might find it useful to know, among other things, the standards in the industry, whether the materials used were standard, whether the house was constructed in accordance with the plans and, if so, whether the plaintiff approved the plans with knowledge of the potential problem. In other words, one cannot evaluate a claim of negligence without knowing a great number of particularities. Given that common law courts routinely evaluate claims of harm by looking to context, tort law might therefore seem a useful place to begin sorting out the potential remedies for a victim of threats of racial violence.

Tort law also consists of incremental adjudication of asserted violations of general rules. It thus offers a mechanism for the finely-attuned, fact-specific inquiry that is necessary to decide whether certain behavior constitutes a threat of violence.

In this section, I first address briefly some differences between tort law and criminal law which suggest the appropriateness of a tort remedy for racially-motivated threats of violence. I then examine current tort law. Under current law in most states, none of the three incidents described in Part II would be likely to result in tort liability. As I argue in this section, a new, contextually-based tort is needed in order to redress harms from racial intimidation without jeopardizing First Amendment freedoms.

#### A. Tort vs. Crime

A victim of a racially-motivated threat of violence should be permitted a tort remedy to redress her injuries. Although I am not opposed to a criminal sanction for such threats, certain features of tort law make this approach attractive.

Initially, tort law can be seen as a tool of empowerment for victims. Victims are in control of the litigation and are not dependent upon the government to prosecute. They can file suit immediately and can, in appropriate cases, obtain preliminary injunctive relief. The burden of proof is lower in a civil case, and discovery rules and other procedural devices make the tort action a tool of investigation.

Additionally, civil rights organizations are often effective in assisting victims with structural litigation against racist groups that threaten violence. The Southern Poverty Law Center (SPLC), for example, has used civil litigation to target racist groups that promote violent acts by others. In one notable case in Oregon, after "skinheads" beat Mulugeta Seraw to death, the SPLC assisted his family in winning substantial damages against Tom and John Metzger and their White Aryan Resistance (WAR) organization for **\*691** encouraging the Portland skinheads to beat "foreigners." [\[FN122\]](#)

Moreover, a tort action permits recovery of compensatory and punitive damages and may, in some instances, permit injunctive or other equitable relief. Recent examples of successful litigation include suits against the Klan for terrorizing Vietnamese fisherman in Galveston Bay, [\[FN123\]](#) and suits by the Southern Poverty Law Center against the Klan and similar organizations in North Carolina. [\[FN124\]](#) In each of these cases, civil rights lawyers used civil litigation to obtain damages or injunctive relief against racists who promoted or engaged in violent actions against minorities.

Although in some instances it might be difficult to collect damages, the possibility of recovering damages for harms has other benefits. Obtaining a civil judgment--even an unenforceable one--against a violence-prone organization provides victim groups with a legal mechanism for investigating the ongoing activities of the organization and the sources of funds used to support the organization's activities.

A civil action also may raise fewer First Amendment concerns than a criminal prosecution. When the state moves against a speaker, there is always a fear of the heavy hand of state repression. Tort law does not raise these concerns to the same degree, particularly since proof of harm is required to recover damages.

## B. Current Tort Law

The most likely torts that could be invoked to redress threats of racial violence are assault, intentional infliction of emotional distress, and in some circumstances, defamation or economic torts.

1. Assault. In order for a victim to prove an assault, she must prove that the defendant's conduct was intentional and put her in apprehension of imminent harmful or offensive contact with her person. [\[FN125\]](#) The most difficult element to prove in cases of racial **\*692** threats is the element of imminence: many racial threats that create apprehension in the victim do not create apprehension of "imminent" contact. To establish a case of assault for threats of violence under the Restatement, it is insufficient to show that the plaintiff was frightened by those threats. For example, if the defendant threatens to shoot someone, and leaves the room to get his pistol, the victim has not been assaulted. [\[FN126\]](#) It would be necessary to prove that the threats would result in immediate violence unless something or someone intervened. [\[FN127\]](#) Similarly, simply saying to someone, "I'm going to kill you," would not result in tort liability unless the speaker took some immediate action (for example, lifting his arm, activating a switchblade, or stepping forward with fist raised) to carry out the threat. [\[FN128\]](#)

As a consequence of the imminence limitation, the tort of assault is of no utility when a threat is of future violence, when the perpetrator makes a conditional threat, or when the threat is said to be "mere words." [FN129] A graphic example of limiting the tort of assault to threats of immediate violence is contained in *Dickens v. Puryear*. [FN130] In *Dickens*, the defendant had participated in beating up the plaintiff for two hours. Moments later, he threatened to kill the \*693 plaintiff unless he went home, pulled his telephone off the wall, packed his clothes, and left the state. The plaintiff was then set free. The court found that this threat was not one of imminent, or immediate, harm, but was a threat for the future, and was therefore "actionable, if at all, as an intentional infliction of mental distress." [FN131]

Similarly, no liability is found where the defendant makes a conditional threat. In *Brooker v. Silverthorne*, [FN132] the male defendant abused a female telephone operator when she was unable to make his connection. He said, "You God damned woman. None of you attend your business. . . . You are a God damned liar. If I were there, I would break your God damned neck." [FN133] The court reversed a jury verdict for the plaintiff because the plaintiff was not in the defendant's presence when he made the statements, and, according to the court, "the words used did not amount to a threat" because there was "nothing in what the defendant said expressive of an intention to go where the plaintiff was and injure plaintiff." [FN134]

In addition, the Restatement authors emphasize that "mere words" do not ordinarily constitute an assault, unless combined with other acts they put the victim in reasonable apprehension of imminent offensive contact. [FN135] For example, yelling at someone while shaking a finger in his face has been found sufficient to create a jury question of whether the defendant's threats created the necessary apprehension of imminent harm. [FN136] However, speaking the words "Let's duke it out" and "I wouldn't be surprised if my wife--if while you're working . . . took a gun and shot you" did not result in liability for assault because the speaker took no overt action to carry out any violence. [FN137]

\*694 It should be noted that threats of violence could easily have been prohibited by the tort of assault, but for an historical accident. When addressing the limited interest served by the tort of assault, the Restatement authors comment on the anomaly of protecting a person's mental state from the threat of imminent blows, but not (until recently, with the advent of the tort of intentional infliction of emotional distress) from other types of emotional disturbances resulting, for example, from threats of future violence or threats directed at a family member. [FN138] That this anomaly can no longer be justified is suggested even by the Restatement authors, who, in noting that words alone cannot make out an action for assault, observe:

This is true even though the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults. [FN139]

Thus, a more serious harm is not penalized, while a harm whose effects are modest does not even require proof of damages.

Assault is not available in any of the three incidents described above because there is no threat of imminent violence. In addition, the plaintiff is not likely to have been found to have

reasonably apprehended imminent violent action. Thus the tort of assault is likely to have only limited utility in actions involving hate speech which threatens violence.

2. Intentional Infliction of Emotional Distress. To make out a cause of action for intentional infliction of emotional distress, most courts require that the plaintiff prove that the defendant (1) engaged in "extreme and outrageous conduct" (2) with the intention to cause (or recklessly causing) (3) severe emotional distress. [\[FN140\]](#) The most difficult elements to prove are that the conduct was sufficiently \*695 outrageous and caused the victim severe emotional distress. [\[FN141\]](#) A few words about the contours of the tort are necessary before proceeding to a discussion of its limited utility in the context of threats of racial violence.

Although the definition of "extreme and outrageous" behavior is, of course, nebulous, both the Restatement authors and numerous courts have emphasized that such behavior does not extend to "mere" insults, indignities, or threats. [\[FN142\]](#) Shouts, loud arguments, or even malicious conduct not rising to the level of "outrageous" is insufficient to satisfy this element of the tort. The conduct must be so "extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." [\[FN143\]](#)

Two examples will illustrate the stringent demands of the outrageousness element even when potentially serious threats are involved. [\[FN144\]](#) First, in *Moses v. Prudential Ins. Co. of America*, [\[FN145\]](#) the plaintiff had received a threatening message from his former boss on his telephone answering machine advising him to quit soliciting his \*696 former employer's customers "or you are going to find your butt in court or your neck broken somewhere." [\[FN146\]](#) This conduct was held not to be sufficiently outrageous to warrant application of the distress tort. [\[FN147\]](#) Second, the Restatement authors use the *Brooker v. Silverthorne* [\[FN148\]](#) facts (involving the telephone operator) to illustrate conduct which "although insulting" is not sufficiently extreme to satisfy this element. [\[FN149\]](#)

To make out an intentional infliction claim, it is also necessary that the plaintiff demonstrate that she experienced severe emotional distress. It is insufficient that the plaintiff simply worry and suffer. "It is only where [the distress] is extreme that the liability arises." [\[FN150\]](#) The distress must be so severe that "no reasonable man (sic) could be expected to endure it." [\[FN151\]](#)

With respect to threats of racial violence, the tort of intentional infliction of emotional distress is likely not to be very useful, largely because of the restrictive way in which courts have interpreted the tort's elements. Initially, the question will be whether the "threat" is considered sufficiently "outrageous" to satisfy the first element. In general, I would argue that a threat of racially-inspired violence should meet this part of the test, but that whether courts will regard it as meeting the requirement is not at all clear.

There are at least two reasons why a threat of racial violence should be treated as satisfying the "outrageousness" element. First, the Restatement authors themselves suggested that a person's special vulnerability could "up the ante" on conduct that might otherwise be offensive but not "outrageous." The Restatement authors may have been referring to a situation such as a physically disabled person being subjected to rowdy conduct and suffering severe distress while

a person without such a disability might have suffered distress but not severe distress. [\[FN152\]](#) A principle of special vulnerability could easily extend to a victim of a racial threat in certain contexts. For example, in an incident reported by my colleague, Lydia Nayo, a white motorcyclist felt safe enough to utter his obscenities at a black woman, even though she was driving a jeep and he a motorcycle. [\[FN153\]](#) \*697 He did not feel vulnerable to physical injury, although the black woman did. Minority racial status in this society necessarily makes a person of color vulnerable to racial attacks. In addition, it leads the majority person to think he is less vulnerable in relation to the "other." [\[FN154\]](#)

Second, our society has a dismal history of racial violence against minorities. Threats of racial violence all too often lead to violence. [\[FN155\]](#) A cross-burning not only intimidates and threatens, but often precedes intense violence. [\[FN156\]](#) It is against this backdrop that threats of racial violence must be considered. It is not at all unusual in tort law to consider the social relationships between the parties when deciding whether certain conduct subjects the actor to liability. For example, in deciding whether a man who touches a woman's armpit has committed a battery, it is important to know whether they are strangers to each other or smooching on a date, or whether he is her teacher or her plumber. It may also be important to know whether they are children on a playground, or whether an older man is preying on an inexperienced young woman.

When deciding whether conduct is "outrageous" under the Restatement, the power relationship between the parties can be central to the decision. [\[FN157\]](#) For example, in *Agis v. Howard Johnson Co.*, [\[FN158\]](#) the manager of the defendant's restaurant called all the waitresses together, informed them that "some stealing" was going on, and stated that until he learned who was responsible he would begin firing all the waitresses in alphabetical order, starting with the plaintiff. [\[FN159\]](#) He then fired Agis. In upholding a cause of action for intentional infliction of emotional distress, the court emphasized the fact that the manager held power over the waitresses and had abused his power. [\[FN160\]](#) Similarly, the racial status of parties to each other at the \*698 time of the disputed events is one of those factors that can aid a court in determining the seriousness of a racial threat. Racial difference is a factor that should be considered when deciding whether racist speech is "outrageous."

But even if racial threats of violence were considered sufficiently "outrageous," the tort of intentional infliction of emotional distress would still be ineffective in redressing the harms from such threats. This is because the reasons for protecting someone from racially-motivated threats of violence have to do with preventing the fear such threats generate and reducing the limitations on the plaintiff's freedom of action, rather than protecting the plaintiff against only those actions that create serious emotional harm. In cases involving threats of violence, requiring a plaintiff to prove that she suffered serious emotional distress largely limits the utility of this tort. Indeed, while many people may suffer severe emotional distress upon receiving a single, racially-motivated threat, the harms that justify regulation of a violent, racist threat do not necessarily involve such serious psychological harm. Racist threats of violence create fear and stress in their victims, disrupt daily lives, create a risk that the threat will be consummated, interfere with equal opportunities for a healthy social life, and endanger inter-group relations. [\[FN161\]](#) These harms often will be present even if the victim cannot prove that she suffered severe emotional distress. [\[FN162\]](#)

3. Defamation. If words result in injury to the plaintiff's reputation, then the plaintiff may have a cause of action for defamation. In order to have an actionable case of defamation, the plaintiff must prove that the statements made about him are capable of being proven true or false. [\[FN163\]](#) However, the statements made to the plaintiff typically do not purport to be assertions of fact, and usually the \*699 statements are meant to insult, offend or outrage the victim rather than communicate some false statement of fact about the plaintiff's reputation to a third party. Consequently, abusive language, no matter how offensive, is not actionable as defamation. [\[FN164\]](#) Moreover, threats of violence--and in particular threats of racial violence--do not usually trigger claims of defamation since the interest at stake lies in peace of mind rather than reputation.

4. Economic Torts. Where the statements or actions interfere with the plaintiff's economic or property interests, several economic torts are potentially available. For example, intentional interference with contractual relations has been invoked to protect an employee from racial or sexual harassment that results in his or her discharge. [\[FN165\]](#) Although potentially useful in job bias claims against fellow employees, these torts cannot address much hate speech.

Some other potential remedies are directed at economic torts that infringe on civil rights. For example, where the defendant trespasses on the plaintiff's property by, for example, writing anti-semitic slurs on synagogue walls, the federal statute that creates a civil action for racially-motivated property crimes may be invoked. [\[FN166\]](#) But, again, these civil rights statutes only come into play in certain circumstances.

In sum, many of the torts which could potentially be used to protect victims of racial threats from the harm that befalls them are limited in some significant fashion. Although courts have, on occasion, allowed the torts of assault or intentional infliction of emotional distress to be used in circumstances analogous to what I propose here, it is preferable to create a tort that is explicitly available to address threats of racial violence.

#### D. A New Tort?

None of these torts appear to provide sufficient protection for the crux of the complaint about racially-motivated threats of violence: the threat of violence that is not imminent or that is merely \*700 implicit. That is, none of the traditional torts will lead courts to consider relevant some of the contextual factors that are particularly connected to the three racial threat incidents discussed above. Thus, I propose developing a tort of racial intimidation. The tort would consist of personally-directed verbal or other conduct that is reasonably taken to encompass threats of violence. [\[FN167\]](#)

The tort of racial intimidation (or racial threat) would be defined as follows:

##### Threats of Racial Violence:

An actor is subject to liability to another for threats of racial violence if:

a. he acts intending to cause another apprehension of violence to his person or to the person of another;

- b. his actions are motivated by racial animus; and
- c. the other person is thereby reasonably put in fear of violence to her person or that of another.

Thus, the tort would specifically allow recovery to one who could show she was threatened by another with violence, that the threats were motivated by racial animosity, and that she reasonably feared the violence. Below I examine some of the benefits as well as the limitations of the tort.

**\*701** 1. Contours of the tort. Several features of the proposed tort of racial intimidation (or racial threat) are worth noting:

- a. First, I am not proposing a general tort of "threatened violence." [\[FN168\]](#) It may be that such a tort should be adopted. However, my purpose is to argue that there are special considerations governing racial threats, and that courts should adopt a tort of racial intimidation regardless of whether it is a good idea to adopt a more general tort theory involving threats of violence.

Nevertheless, adopting the proposed tort rather than a more general one does raise substantial First Amendment concerns in light of *R.A.V. v. City of St. Paul* [\[FN169\]](#) and *Wisconsin v. Mitchell*. [\[FN170\]](#) In *R.A.V.*, the Supreme Court called into question regulatory mechanisms that treat the subcategory of racist fighting words differently from other fighting words where the distinction is drawn on the basis of the content of the communication. *R.A.V.* involved the prosecution of a teenager who burned a cross on the lawn of a black family. The City of St. Paul had enacted an ordinance which, as narrowed by the Minnesota Supreme Court, banned the expression of "fighting words" (i.e., "conduct that itself inflicts injury or tends to incite immediate violence") that insulted or provoked violence "on the basis of race, color, creed, religion or gender." [\[FN171\]](#) The Court held that because the ordinance punished only the subcategory of fighting words that involved racist and other kinds of hate speech, it was an impermissible content-based regulation of speech. [\[FN172\]](#) Accordingly, the teenager could not be prosecuted under this ordinance.

After *R.A.V.*, many commentators worried about the constitutionality of other civil rights statutes that prohibited racist speech which caused detrimental consequences. For example, "hate crime" statutes around the country punished crimes motivated by race, among other things, more severely than crimes not so motivated. In several law review articles and in a series of court cases, commentators and judges called into question the constitutionality of these statutes in light of *R.A.V.* [\[FN173\]](#) The basic argument was that these statutes punished "thought crimes," since they punished crimes conducted with "racial motivation"--a thought process--more severely than the same crimes conducted without such bias.

However, in *Mitchell*, the Court held that such penalty-enhancement statutes were valid under the First Amendment, and **\*702** distinguished *R.A.V.* on two grounds. First, the ordinance in *R.A.V.* was "explicitly directed at expression (i.e., 'speech' or 'messages') [while] the statute in this case is aimed at conduct . . . ." [\[FN174\]](#) Second, the Court accepted Wisconsin's argument that bias-motivated crimes created greater individual and social harms such as higher risk of

retaliatory violence, distinct emotional harms to their victims, and incitement of community unrest. [\[FN175\]](#)

The speech/conduct distinction [\[FN176\]](#) drawn by Chief Justice Rehnquist would not assist a state seeking to make racially-motivated threats of violence tortious, for by hypothesis the threats are "verbal." Thus, upholding differential treatment of such threats would seem to depend on whether the harms justify singling out racially-motivated threats. [\[FN177\]](#)

An analysis of the Court's treatment of threats against the President may provide a basis for finding a special sanction against racial threats of violence constitutional. In *Watts v. United States*, [\[FN178\]](#) the Court, in upholding the facial validity of a federal statute criminalizing threats against the life of the President, concluded that the nation had an overwhelming interest in "protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." [\[FN179\]](#)

This statute was also used by Justice Scalia in *R.A.V.* to illustrate his argument that the government could only discriminate **\*703** within categories of proscribable speech if the reason for the discrimination was the same reason that justified the categorical exclusion in the first place. [\[FN180\]](#) In explaining why the federal government could single out for special sanction threats against the life of the President, Justice Scalia contended that the reasons why threats of violence generally were outside the First Amendment have "special force when applied to the person of the President." [\[FN181\]](#)

Therefore, one might distinguish *R.A.V.* from the present tort proposal by arguing that the reasons why threats of violence are regulable (i.e., they coerce victims, inflict emotional harm, undermine civil rights, and raise the possibility of retaliatory violence) have "special force" when applied to bias-motivated threats of violence. [\[FN182\]](#) Some of these concerns, however, were also present in the fighting words context, yet the Court struck down the St. Paul ordinance in *R.A.V.* By rejecting this "special force" argument when applied to fighting words and the St. Paul ordinance, the *R.A.V.* Court seemed to signal an unwillingness to allow the state to conclude that the special harms of hate speech justified special regulation. Although, in *R.A.V.*, the Court found the interest in ensuring basic human rights "compelling," the Court also concluded that the differential treatment on the basis of the content of bias-speech was "unnecessary" to achieve the city's purpose. [\[FN183\]](#)

Thus, if singling out bias-motivated threats of violence for special attention will survive the current Court's scrutiny, it will have to stem from the Court's willingness to allow a state to find that the harms of such threats are sufficiently different from other threats to warrant special attention. As I have argued above, the special harms of racially motivated threats would justify singling out such threats. [\[FN184\]](#)

**\*704** b. Second, the tort combines features of an assault action with features of the tort of intentional infliction of emotional distress. I adapt the prima facie case of assault, but substitute "threats of violence" for "imminent harmful or offensive contact." One consequence of this shift is to move the action back in time so that if harm is threatened, but the threatened violence is not imminent, the intended victim will still have a cause of action. This provides broader protection

for a plaintiff's interests in emotional security.

The tort also borrows from the emotional distress claim by articulating a narrow definition of what might be termed "outrageous" conduct: namely, conduct that threatens violence. As a result, the amorphous category of "outrageousness" is replaced in the tort of racial threat by a more focused inquiry into threatening conduct. However, the new tort would not require proof of severe emotional distress as part of the prima facie case. The reason, as noted previously, is that the interests protected by the two torts are very different. The crux of the harm from racial threats of violence is not severe emotional distress, but rather, fear, coercion and restraint of freedom. It is for this reason that "hate speech" regulations which require a victim to prove that she suffered severe emotional distress as an element of liability seem misguided. [\[FN185\]](#)

Limiting the tort to threats of violence means that, at least for present purposes, many types of vituperative racist language would not be made tortious. Insults, epithets, and language that demeans or offends on grounds of race would not be penalized, so long as it does not result in intimidation. [\[FN186\]](#) Racist speeches [\[FN187\]](#) or publications, [\[FN188\]](#) scurrilous lies [\[FN189\]](#) and public marches by Nazis through Skokie [\[FN190\]](#)--a community in which many Jewish survivors of the holocaust live--would not be targeted by the tort, unless they encompassed personally-directed threats of violence. Limiting the tort in **\*705** this fashion might be criticized because it does not address many of the concerns with racist speech that critical race theorists have identified. [\[FN191\]](#) As I have acknowledged, this approach is indeed limited, but it does leave open the possibility that with proper justification, another tort could be developed that addresses other egregious, personally-directed, racist invective. However, any such expansion to other forms of expression should be done on a case-by-case basis, with consideration of the sorts of general principles discussed in this Article.

One consequence of this sort of limitation is that many people of color who experience all racist speech as implicating threats of violence against them will not recover under this tort. The problem is not a lack of harm; rather, consistent with the First Amendment and policy considerations, some space must be left for society and individuals within society to work out continuing accommodations in race relations through speech.

Turning to the specific elements of the tort of racial threat, the following observations should be made:

Element (a) requires proof of personally-directed threats. This would not, for example, include arguments or attacks directed to or about a larger audience, unless the statements were clearly directed at a particular individual (or small group of individuals) who reasonably feared they were subjected to violent threats. [\[FN192\]](#) Thus, this tort should not be used to address speech that has commonly been termed "group libel." [\[FN193\]](#)

Element (c) refers to attacks "reasonably" taken to encompass threats of violence against the individual. This adopts the "victim's perspective," which has been utilized in recent civil rights decisions to evaluate the impact of intentionally harmful behavior. Why the victim's perspective? First, as with the tort of assault and battery, it is unimportant that the perpetrator intend the consequence of injury; **\*706** he need only intend that there be contact/attempted contact. Second,

as with the assault tort, it does not matter that the defendant did not have the present ability to carry out the threat. It only matters that the victim perceives that the defendant has the apparent ability to carry out the assault/threat and that the plaintiff apprehends harmful contact. [\[FN194\]](#) What matters is what the victim understands. [\[FN195\]](#)

I do not deny the importance of the speaker's intent and motive. In fact, element (a) of the tort requires proof that the speaker intended to threaten the recipient, and element (b) requires that the speaker be motivated by "racial animus." But once such intentional behavior and racial motivation are present, the greatest significance is that the speaker was successful in bringing about the fear and intimidation experienced by the auditor.

Finally, as element (c) reflects, there is no requirement of proof of likelihood of violent response. This tort does not depend on the Supreme Court's definition of "fighting words," [\[FN196\]](#) or on some possibility of retaliatory violence. A threat of racial violence may, of course, be sufficient to trigger retaliation. If so, then a court will likely need to consider whether the threat constituted provocation, or whether it justified self-defensive preemptory attacks. [\[FN197\]](#) However, this tort would not require that the plaintiff prove the defendant's threat carried a likelihood of violence. There are three reasons for this.

First, the crux of the tort is the fear and intimidation such threats create in the listener, and not the remote possibility that the listener will react violently. While the possibility of retaliatory, or preemptive, violence is one type of harm that may arise from threats of violence, it is not the only or even the principal type of harm likely to result.

Second, threats of racial violence are often made under conditions in which the person making the threat feels secure, while the victim feels vulnerable. Consider, for example, the black family that was given the Klan's "calling card" in the Texas coffee shop. [\[FN198\]](#) There \*707 is no reason to treat the fact that this particular black family got up and left the restaurant instead of violently attacking the white man as a reason not to punish the threat. [\[FN199\]](#) Similarly, to weigh probabilities that a mixed-race couple will, in the face of serious threats, react with violence towards the perpetrator is to misunderstand the harms--of coercion, emotional trauma and destruction of equal rights to housing--that are truly at issue. As Kent Greenawalt puts it in another context, the inquiry "should not concentrate on the perceived capacity of a particular victim to respond physically." [\[FN200\]](#)

Third, some people are not inclined to fight or to risk further abuse, even if they are deeply threatened by the words. One may imagine that children when verbally attacked by adults, women when threatened by men, or a single people set upon by several others bearing threats, are not likely to retaliate with violence of their own. [\[FN201\]](#) Accordingly, the prospect of retaliation should not be a factor in determining whether the conditions of this tort have been satisfied.

2. Comparison with other proposals. A number of other commentators have made proposals that are broader than the proposal advanced here. [\[FN202\]](#) I do not intend to take a position on these proposals, but would point out some key differences between my proposal and some proposals made by others. Richard Delgado, for example, has proposed an action for racial

insult, in which the plaintiff must show that " I language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult." [\[FN203\]](#)

Delgado's proposal is broader in several ways than the proposal set forth in this Article. He would make the crux of the tort language **\*708** that "demean[s] by reference to race." My proposal is not designed to address generally demeaning or insulting language, but only to target language which creates a threat of violence. Thus, Delgado's proposal would almost always make racial epithets actionable, while my proposal would make such an epithet actionable only if the speaker intended it to be taken as a threat of violence and if, in context, the listener perceived it as threatening violence.

Second, Delgado's proposal can be read to encompass public speeches--not targeted at a particular individual--which insult or demean listeners on grounds of race. Consider recent cable programs that feature rabid Nazis or militant black nationalists who "direct" their venom at blacks, whites or Jews. [\[FN204\]](#) A listener of such a program would likely have a cause of action under Delgado's proposed tort. But under the instant proposal, the listener would have to prove that the words were "personally directed," as well as personally threatening, and not directed generally toward persons of her race.

Mari Matsuda has extended Delgado's proposal to include prosecution by the state. Matsuda identifies three characteristics of speech which, in her view, should subject the perpetrator to criminal prosecution: the message (1) is of racial inferiority; (2) is directed against a historically oppressed group; and (3) is persecutory, hateful and degrading. [\[FN205\]](#)

My proposal reflects three key differences with Matsuda's. First, Matsuda, like Delgado, would target all messages of racial inferiority, while I would propose targeting only messages threatening violence. Second, Matsuda does not require that the message be "personally directed." Instead, she suggests that a claim that particular groups are inferior, made in a context of hatefulness, and endorsing persecution of the targeted group, could be the subject of prosecution. [\[FN206\]](#)

Third, Matsuda would limit the type of actionable messages to those that are directed against "historically oppressed group[s]." My proposal would not limit the tort in this way. Several critical race theorists have powerfully argued that persons of color--subordinated groups--have a different status than whites when expressing racist hate. According to Matsuda, for example, because verbal racist attacks from subordinated persons are "not tied to the perpetuation of racist vertical relationships," such attacks are generally less troubling than attacks by dominant group members on subordinated **\*709** persons. [\[FN207\]](#)

In theory, this is a difficult argument to meet, especially if one shares the view, as do I, that law derived from a particular historical consciousness cannot abandon a racist past merely by proclaiming it is, henceforth, colorblind. The force of Matsuda's argument lies in its claim to an historical narrative that connects the past of racism with the present reality that people of color continue to struggle to achieve equality. Moreover, one needs little empathy to recognize that

being in a privileged racial and economic class isolates one from the worst of targeted abuse. [\[FN208\]](#)

Still, adopting a proposal such as Matsuda's creates thorny problems, which include determining which groups may claim the status of subordinated persons, [\[FN209\]](#) whether privilege in one context (e.g., economic or professional status) trumps subordination in another (e.g., gender or ethnicity), and how to deal with hate speech directed by one subordinated group member to a member of another subordinated group. With respect to this last problem, one need look no further than the acute inter-group conflicts between some Korean-Americans and some African-Americans in Los Angeles. [\[FN210\]](#) In addition to these concerns, there is also the indelicate problem of \*710 defining the racial categories (identifying who has standing to sue, and who may be sued) without slipping into the trap of accepting a particular social construction of "race." [\[FN211\]](#) It is impossible to resolve these deep theoretical conflicts using formal rule structures like those Matsuda proposes. [\[FN212\]](#) Attempting to do so would, at best, foment conflict between socially-constructed racial groups over the pointless question of which group has the most repressed past. [\[FN213\]](#) Consequently, I would not make the availability of the tort rest upon a formal finding of the plaintiff's subordinated racial status.

There is, however, an additional reason not to limit the tort: threats of violence undermine the ability of anyone to function as a communicative human being. This result is justified by more than an appeal to formal equality, a common argument made in allowing whites (or, in the case of sex harassment, men) to bring suits under various civil rights statutes. [\[FN214\]](#) Rather, my argument is that racially-motivated threats of violence are sufficiently severe and disabling for all who face them. Recognizing that it is possible for whites as well as non-whites to be subjected to serious threats of racial violence, I would not limit the protections of the tort to members of subordinated groups.

\*711 Nonetheless, racial difference might enter into consideration of how "threatening" a given threat is. [\[FN215\]](#) The word "honkey" directed at a white person carries a lot less baggage and force-value than the word "n----" directed at a black person. [\[FN216\]](#) Because of the history of Klan activity in this country, and the fact that a black person is a racial minority, one may conclude that the fear a black person might harbor as a result of a racial threat might indeed be more severe than a similar threat leveled against a white person. [\[FN217\]](#) Consequently, while my proposal is "symmetrical" in form, in practice--and consistent with the emphasis on context--those who should be most benefitted are those who are subjected to the most serious threats. [\[FN218\]](#)

## CONCLUSION

There are great virtues in shifting the debate over hate speech from the question whether to institute "politically correct" speech to a question of whether to regulate assaultive speech that threatens violence. The question, "should speech with racist content be restricted?" is very different from the question, "assuming threats of violence can be sanctioned, is the following threat of sufficient magnitude to warrant regulation by the state?" The first question generates much abstract argument which, in the end, merely reproduces the competing paradigms that underlie the hate speech debate. The second requires consideration of specific circumstances that may or not warrant regulation. Making the discussion specific or particularized does not resolve

the hate speech dilemma, but it allows one to engage in debate over the relevance of particular factors to the resolution of a concrete, narrowly-defined problem. In other words, this Article illustrates how one might think about other types of hate speech regulation.

**\*712** Thus, I have suggested that the debate over hate speech should be structured in a way that both narrows the inquiry and permits specific circumstances to be brought into play. Even if one limits the inquiry (as I have done in this Article) to racist speech of a threatening nature, one cannot decide whether certain speech is sufficiently threatening, harassing or intimidating without evaluating the speech in context. [\[FN219\]](#) Evaluating speech on this basis requires a case-by-case approach that does not lend itself to universal rules stated in advance, then mechanically applied. Indeed, regulating speech is one arena in which it would seem that the more general and abstract the regulatory proposition, the more likely it is to be wrong. [\[FN220\]](#)

A contextual methodology is a means to bridge the gap between the opposite poles of the hate speech debate. The point of the approach is to focus on specific situations and specific factors, both in determining whether a certain kind of (hate) speech should be outside the First Amendment or subject to some form of regulation, and in determining whether there has been a violation (i.e., resolving the question whether something is a threat of violence). I have proposed resort to tort law as the best (and most familiar) mechanism for putting into practice this methodology. The proposed tort requires that courts evaluate specific incidents (looking at factors made relevant by the tort itself) and determine, based on context, whether there is a racially-motivated threat of violence. Consistent with the contextual emphasis of the proposed tort, I have not generalized to other kinds of racist speech (e.g., speech directed to a crowd rather than personally directed, speech that is merely a racial epithet), but remain open (though presumptively opposed) to creation of new torts if a specific inquiry reveals the need for further expansion.

The complexity of carrying out an inquiry into speech regulation—even one as narrow as this one—leads to a further reflection on the process by which any hate speech regulations beyond verbal threats of violence might be adopted. My caution about speech regulations generally, coupled with my faith in (or hope for) communicative rationality, leads me to distrust proposals that justify broad speech regulation. So, from my perspective, any regulations of hate speech should propose narrow, incremental changes that can be **\*713** justified and that can be cabined. An incremental method can be a principled approach to speech problems, particularly in a highly contested arena such as hate speech. As we saw with racially-motivated threats of violence, the significant countervailing principles (equality vs. free expression) makes principled judgment among larger categories of speech difficult. Since our system is pledged to remain faithful to both principles, it is not possible simply to choose one principle over another.

Moreover, we inevitably have trouble predicting how far general rules will carry us, especially when the rules involve inherently-malleable communications. A priori rules appear superficially attractive, particularly to those who want to avoid speech regulations that distinguish among classes of speech based on content. However, since threats of violence are currently subject to regulation because of their compelling harms, the question of whether similarly serious harms would justify further content restrictions on hate speech cannot simply be dismissed as fanciful.

Finally, an incremental approach seems desirable because the decisionmaker's attention would be focused on a narrow category of speech in which the competing concerns can be thoughtfully assessed. The risk of a bad decision is thereby lessened; but even if a bad decision is made, the resulting harm to norms of either equality or free speech is reduced.

In sum, because of the inherent complexity and ambiguity of speech, [\[FN221\]](#) I am distrustful of a theoretical approach that would either a priori establish all regulation of the content of violent speech to be invalid, or generally set racist speech into a category of its own for special regulation. Although the ambiguity of speech makes any restriction on speech problematic, the difficulty of anticipating how [\[FN222\]](#) a regulation will be used, and delineating its limiting principles, is dramatically increased when the regulation is stated at a higher level of abstraction. This is why I find a pragmatic, problem-specific approach--as reflected in the proposed tort of racially-motivated threats of violence--much more appealing in addressing the hate speech dilemma: it is not that scholars like the critical race theorists are wrong; it is that their brush is too broad to accommodate all the significant constitutional and practical considerations.

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[\[FNaa1\]](#). The [Freedom of Speech](#), 102 *YALE L.J.* 1293, 1310 (1993).

[\[FNaaa1\]](#). [Towne v. Eisner](#), 245 U.S. 418, 425 (1918).

[\[FNaaaa1\]](#). L. Nayo, "A Benign Tuesday Afternoon in April" (essay on file with the author).

[\[FN1\]](#). Dozens of articles have addressed this problem. See, e.g., [Cynthia Grant Bowman, Street Harassment and the Informal Ghettoization of Women](#), 106 *HARV. L. REV.* 517 (1993); Richard Delgado, [Campus Antiracism Rules: Constitutional Narratives in Collision](#), 85 *NW. U. L. REV.* 343 (1990) [hereinafter Delgado, *Campus Antiracism Rules*]; Kent Greenawalt, [Insults and Epithets: Are They Protected Speech?](#), 42 *RUTGERS L. REV.* 287 (1991) [hereinafter Greenawalt, *Insults and Epithets*]; Thomas C. Grey, *Civil Rights v. Civil Liberties: The Case of Discriminatory Verbal Harassment*, *SOC. PHIL. & POL'Y*, Spring 1991, at 81; Thomas David Jones, *Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 *HOW. L.J.* 429 (1980); David Kretzmer, [Freedom](#)

[of Speech and Racism](#), 8 [CARDOZO L. REV.](#) 445 (1987); Kenneth Lasson, Racial Defamation as Free Speech: Abusing the First Amendment, 17 [COLUM. HUM. RTS. L. REV.](#) 11 (1985); Charles R. Lawrence III, [If He Hollers Let Him Go: Regulating Racist Speech on Campus](#), 1990 [DUKE L.J.](#) 431 [hereinafter Lawrence, *If He Hollers*]; Frederick M. Lawrence, [Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech](#), 68 [NOTRE DAME L. REV.](#) 673 (1993); Toni M. Massaro, [Equality and Freedom of Expression: The Hate Speech Dilemma](#), 32 [WM. & MARY L. REV.](#) 211 (1991); Frank Michelman, [Universities, Racist Speech and Democracy in America: An Essay for the ACLU](#), 27 [HARV. C.R.-C.L. L. REV.](#) 339 (1992); Martha Minow, [Speaking and Writing Against Hate](#), 11 [CARDOZO L. REV.](#) 1393 (1990); Rodney A. Smolla, [Rethinking First Amendment Assumptions About Racist and Sexist Speech](#), 47 [WASH. & LEE L. REV.](#) 171 (1990); Nadine Strossen, [Regulating Racist Speech on Campus: A Modest Proposal?](#), 1990 [DUKE L.J.](#) 484.

[FN2]. See generally DEREK BELL, [AND WE ARE NOT SAVED](#) (rev. ed. 1989); John O. Calmore, [Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multi-Cultural World](#), 65 [S. CAL.L.REV.](#) 2129 (1992); Kimberle Williams Crenshaw, [Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law](#), 101 [HARV. L. REV.](#) 1331 (1988); David Hall, [The Constitution and Race: A Critical Perspective](#), 5 [N.Y.L. SCH. J. HUM. RTS.](#) 229 (1988); Charles R. Lawrence III, [The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism](#), 39 [STAN.L. REV.](#) 317 (1987) [hereinafter Lawrence, *The Id, the Ego, and Equal Protection*]; Judy Scales-Trent, [Black Women and the Constitution: Finding Our Place](#), [Asserting Our Rights](#), 24 [HARV. C.R.-C.L. L. REV.](#) 9 (1989); Patricia J. Williams, [Alchemical Notes: Reconstructing Ideals From Deconstructed Rights](#), 22 [HARV. C.R.-C.L. L. REV.](#) 401 (1987); Robert A. Williams, Jr., [Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law](#), 31 [ARIZ.L.REV.](#) 237 (1989).

Mari Matsuda defines racism as "the structural subordination of a group based on an idea of racial inferiority." Mari J. Matsuda, [Public Response to Racist Speech: Considering the Victim's Story](#), 87 [MICH.L.REV.](#) 2320, 2358 (1989). She argues that racist speech is "harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship." Id; see also MARI J. MATSUDA ET AL, [WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT](#) (1993).

[FN3]. Compare Hadley Arkes, [Civility and the Restriction of Speech: Rediscovering the Defamation of Groups](#), 1974 [SUP. CT. REV.](#) 281; Donald A. Downs, [Skokie Revisited: Hate Group Speech and the First Amendment](#), 60 [NOTRE DAME L. REV.](#) 629 (1985); Mary Ellen Gale, [Reimagining the First Amendment: Racist Speech and Equal Liberty](#), 65 [ST. JOHN'S L. REV.](#) 119 (1991); Cass R. Sunstein, [Free Speech Now](#), 59 [U. Chi. L. Rev.](#) 255 (1992) with LEE C. BOLLINGER, [THE TOLERANT SOCIETY: FREE SPEECH AND EXTREMIST SPEECH IN AMERICA](#) (1986); William Shaun Alexander, [Regulating Speech on Campus: A Plea for Tolerance](#), 26 [WAKE FOREST L. REV.](#) 1349 (1991); Charles Fried, [The New First Amendment Jurisprudence: A Threat to Liberty](#), 59 [U. CHI. L. REV.](#) 225 (1992); David Goldberger, [Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech](#), 56 [BROOK. L. REV.](#) 1165 (1991).

[FN4]. See, e.g., [Robert C. Post, Free Speech and Religious, Racial, and Sexual Harassment:](#)

[Racist Speech, Democracy, and the First Amendment](#), 32 WM. & MARY L. REV. 267 (1991) [hereinafter Post, Free Speech]; see also [Kingsley Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment](#), 52 OHIO ST. L.J. 481 (1991), Goldberger, supra note 3; Kenneth L. Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1990 U. ILL.L.REV. 95.

[FN5]. See, e.g., Delgado, Campus Antiracism Rules, supra note 1, at 345-46; see generally Massaro, supra note 1. Much of what I say in this Article applies equally to speech that attacks people because of their gender, ethnicity, sexual orientation, or religion. However, the issues involving these other kinds of discriminatory speech involve different cultural and historical backgrounds, and so, consistent with my emphasis upon context, this Article is focused upon racial- and not on other types--of threats.

[FN6]. See BOLLINGER, supra note 3.

[FN7]. I spent most of the 1980s as a civil rights lawyer litigating cases that directly raised questions about what some people could say and do to others without violating the civil rights laws prohibiting discrimination in employment, housing or voting. Many of the people I represented--usually people of color, but sometimes women and older white men raising age discrimination claims--spoke passionately about discrimination that frequently was conducted through words: harassing speech, threatening speech, "we-don't-hire-your-kind" type speech, "whites only" signs, or comments that evidenced a stereotypical attitude towards people of a certain background, and the like. These types of speech were perceived as exclusionary--the victims immediately recognized that its purpose was to exclude them from equal opportunities in employment, housing or voting. It was not just that speech accompanied discrimination; speech constituted the discrimination. Threats of violence that cause African-Americans to move out of a neighborhood may be expressed through words, but those words in themselves function as discrimination.

For this reason, I cannot agree with the argument that those who are concerned with fighting racism should focus their energies on "racist acts" which they suppose are the opposite of racist "speech." See, e.g., [Thomas W. Simon, Fighting Racism: Hate Speech Detours](#), 26 IND.L.REV. 411 (1993); Henry Louis Gates, Jr., Let Them Talk, 37 THE NEW REPUBLIC, Sept. 20, 1993, at 37, 43; see also FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 26-35 (1993) (distinguishing generally between acts which discriminate and racist speech). Distinguishing racist speech from discriminatory conduct may be appropriate in some contexts and for some forms of discriminatory speech--such as stereotyped comments uttered in a university environment--but when hate speech intimidates people of color from purchasing homes in white neighborhoods, the argument that fighting racism means fighting some other battle is misplaced. See [State v. Talley](#), 858 P.2d 217 (Wash. 1993) (involving a mixed race couple who withdrew from house purchase after a neighbor burned a cross).

[FN8]. By "national discussion about race," I mean to include statements about everything related to race, including issues like racism, the link between racism and poverty, affirmative action, David Duke's racist past and present, and attacks by members of the Nation of Islam upon whites.

[FN9]. Robert Post has demonstrated the importance of public discourse to the functioning of a democratic society. See generally [Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell](#), 103 HARV. L. REV. 601 (1990) [hereinafter, Post, Public Discourse]; Post, Free Speech, supra note 4. See also Karst, supra note 4 (describing tradition of marginalized groups challenging orthodoxy through uncivil language); Lawrence B. Solum, [Freedom of Communicative Action: A Theory of First Amendment Freedom of Speech](#), 83 NW. U. L. REV. 54 (1989).

[FN10]. See generally Matsuda, supra note 2.

[FN11]. See, e.g., Fried, supra 3, at 228 n.15; Richard Warner, [Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory](#), 1993 U. ILL. L. REV. 535, 544.

The point made in the text has also been made by Charles R. Lawrence III and Frederick Schauer. See Lawrence, If He Hollers, supra note 1, at 461; Frederick Schauer, The Phenomenology of Speech and Harm, 103 ETHICS 635, 652 n.32 (1993).

Similarly, by ritually invoking "slippery slope" and "line drawing" arguments, one side in the debate over campus speech codes seems oblivious to the fact that tremendous speech regulation already takes place in an academic setting: faculty regulate classroom discussions, evaluate papers, grade exams-- presumably rewarding good speech and penalizing bad speech. Some on the other side have seemed unable or unwilling to articulate any limits to a totalizing theory of race--or gender--oppression, which would seemingly justify extraordinary speech regulations. See, e.g., CATHERINE MACKINNON, ONLY WORDS (1993). My point is not that these arguments are necessarily meritless in every context, but that they oversimplify an intensely complicated problem.

[FN12]. Michelman, supra note 1, at 339 (defining racially stigmatizing speech). Matsuda would permit regulation of hate speech where the message is of racial inferiority, and it is persecutorial, hateful, degrading, and directed against an historically oppressed group. Matsuda, supra note 2, at 2357. See infra text accompanying notes 200-03.

[FN13]. See Post, Free Speech, supra note 4, at 270.

[FN14]. As cogently pointed out by critical race theorists, however, members of minority groups who are the subject of the national discussion about race may be more vulnerable to those discussions. See, e.g., Lawrence, If He Hollers, supra note 1, at 459. This is the dilemma to which this Article is addressed.

[FN15]. See [Wisconsin v. Mitchell](#), 113 S.Ct. 2194 (1993) (holding that penalty enhancement statute did not violate First Amendment); [Richards v. State](#), 608 So. 2d 917 (Fla. Dist. Ct. App. 1992) (holding Florida's penalty enhancement statute void for vagueness), rev'd, 638 So. 2d 44 (Fla. 1994); [Dobbins v. State](#), 605 So. 2d 922 (Fla. Dist. Ct. App. 1992) (upholding constitutionality of Florida's penalty enhancement statute), aff'd, 631 So. 2d 303 (Fla. 1994); *People v. Justice*, No. 1-90-1793 (Mich. Dist. Ct. 1990) (holding Michigan's ethnic intimidation statute unconstitutional on both vagueness and First Amendment grounds); [People v. Dupont](#), 486 N.Y.S.2d 169 (N.Y. App. Div. 1st Dept. 1985) (voiding harassment penal statute for being impermissibly vague and overbroad); [People v. Miccio](#), 589 N.Y.S.2d 762 (N.Y. Crim. Ct.

[1992](#)) (finding punishment enhancement statute constitutional); [People v. Mulqueen, 589 N.Y.S.2d 246 \(N.Y. Crim. Ct. 1992\)](#) (sustaining New York Civil Rights anti-harassment against First Amendment challenge); [People v. Grupe, 532 N.Y.S.2d 815 \(N.Y. Crim. Ct. 1988\)](#) (upholding New York's ethnic intimidation statute against First Amendment and equal protection challenges); [State v. Wyant, 624 N.E.2d 722 \(Ohio 1994\)](#) (sustaining Ethnic Intimidation Act against First Amendment challenge); [State v. Plowman, 838 P.2d 558 \(Or. 1992\)](#) (upholding Oregon's intimidation statute against vagueness and First Amendment challenges), cert. denied, [113 S.Ct. 2967 \(1993\)](#); [State v. Beebe, 680 P.2d 11 \(Or. Ct. App. 1984\)](#) (invalidating Oregon's ethnic intimidation statute on equal protection grounds), appeal denied, [683 P.2d 1372 \(Or. 1984\)](#); [State v. Talley, 858 P.2d 217 \(Wash. 1993\)](#) (upholding Washington hate crimes statute as neither regulating speech nor impermissibly vague). See also [Johnson v. Hugo's, 974 F.2d 1408 \(4th Cir.1992\)](#) (en banc) (examining evidence, under Virginia law, which might suggest acts of harassment or intimidation).

[FN16]. Or "may"; see [R.A.V. v. City of St. Paul, 112 S.Ct. 2538 \(1992\)](#); see discussion infra part III.D.1.a.

[FN17]. The same words can have multiple dimensions and divergent if not conflicting meanings. Consider, for example, three different "meanings" of a single racial slur: (1) spoken by a white police officer to a person of color; (2) spoken by a member of the group to which the slur purportedly refers to another "in group" member; or (3) incorporated into a highly-publicized song of a performance group comprised of "in group" members. Consider the "easy" case of threats of violence, which most people assume are clearly outside First Amendment protections. In this regard, consider insincere, joking or emotional threats: "I could just kill Henry for stepping on the daffodils!" How much "threat" is enough to justify its prohibition may not be easily resolved. See, e.g., [Watts v. United States, 394 U.S. 705 \(1969\)](#).

[FN18]. See [Henry J. Hyde & George M. Fishman, The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy, 37 WAYNE L. REV. 1469 \(1991\)](#). The hate speech debate on campus has often triggered the criticism of those objecting to what they view as the out-of-hand sway of "political correctness." See, e.g., [Ronald J. Rychlak, Civil Rights, Confederate Flags and Political Correctness: Free Speech and Race Relations on Campus, 66 TUL.L.REV. 1411 \(1992\)](#); Suzanna Sherry, [Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech, 75 MINN.L.REV. 933 \(1991\)](#); Nicholas Wolfson, [Free Speech Theory and Hateful Words, 60 U. CIN. L. REV. 1 \(1991\)](#); Richard Bernstein, The Rising Hegemony of the Politically Correct, N.Y. TIMES, Oct. 28, 1990, § 4, at 1; Chester E. Finn, The Campus: "An Island of Repression in a Sea of Freedom," COMMENTARY, Sept. 1989; Watch What You Say--Thought Police: There's a Politically Correct Way to Talk About Race, Sex and Ideas, NEWSWEEK, Dec. 24, 1990, at 48.

[FN19]. See, e.g., [Watts v. United States, 394 U.S. 705 \(1969\)](#); [State v. Harrington, 680 P.2d 666 \(Or. Ct. App. 1984\)](#).

[FN20]. See, e.g., [R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 2554 \(1992\)](#) (holding that regulation based on content of "fighting words" is subject to strict scrutiny).

[FN21]. A number of scholars have called for renewed attention to context in legal decisionmaking. See, e.g., Martha Minow & Elizabeth V. Spelman, In [Context](#), *63 S.CAL.L.REV.* 1597 (1990); Catherine Wells, [Situating Decisionmaking](#), *63 S.CAL.L.REV.* 1727 (1990). See also BEN-AMI SCHARFSTEIN, *THE DILEMMA OF CONTEXT* (1989).

[FN22]. Post, Free Speech, *supra* note 4, at 306 n.187.

[FN23]. [394 U.S. 705 \(1969\)](#).

[FN24]. [112 S.Ct. 2538 \(1992\)](#).

[FN25]. [Id.](#) at 2546.

[FN26]. [Id.](#) at 2553-54 (White, J., concurring).

[FN27]. [Watts](#), *394 U.S.* at 707.

[FN28]. There is a rich philosophical literature on the concept of "threat," a full discussion of which is beyond the scope of this Article. See, e.g., JOEL FEINBERG, *HARM TO OTHERS* (1984); ALAN WERTHEIMER, *COERCION* (1987); Ken Simons, *Offers, Threats, and Unconstitutional Conditions*, *26 SAN DIEGO L. REV.* 289 (1989).

[FN29]. For convenience, throughout this Article I use the terminology of oral communications, but I assume that there are many circumstances in which non-oral communications could constitute a "threat." Such non-oral communications might include flag-waving or the "calling card" of the Klan.

[FN30]. Akhil Amar, [Comment, The Case of the Missing Amendments: R.A.V. v. City of St. Paul](#), *106 HARV. L. REV.* 124 (1992).

[FN31]. [112 S.Ct. 2538, 2546 \(1992\)](#).

[FN32]. [Id.](#)

[FN33]. Michelman, *supra* note 1, at 343.

[FN34]. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 143 (1989) [hereinafter GREENAWALT, *USES OF LANGUAGE*].

[FN35]. A quick review of significant cases in the federal courts reveals just a small proportion of the cases involving threats of racial violence and illustrates some of the effects on the victims. See, e.g., [R.A.V. v. City of St. Paul](#), *112 S.Ct. 2538 (1992)*; [United States v. Lee](#), *6 F.3d 1297 (8th Cir.1993)* (cross-burning), cert. denied, *114 S.Ct. 1550 (1994)*; [U.S. v. McAninch](#), *994 F.2d 1380 (9th Cir.1993)* (defendant sent article describing death of Ethiopian youth, oath pledging allegiance to KKK, and photograph of confederate statue with swastika to couples believed to be interracial), cert. denied, *114 S.Ct. 394 (1993)*; [U.S. v. Skillman](#), *922 F.2d 1370 (9th Cir.1990)*

(cross-burning), cert. dismissed, [112 S.Ct. 353 \(1991\)](#); [United States v. Gilbert](#), 813 F.2d 1523 (9th Cir.1987) (flyers threatening death, threats with car, and spitting), cert. denied, [484 U.S. 860 \(1987\)](#), appeal after remand, [884 F.2d 454 \(9th Cir.1989\)](#), cert. denied, [493 U.S. 1082 \(1990\)](#); [United States v. Redwine](#), 715 F.2d 315 (7th Cir.1983) (threats of burnings, racial epithets, throwing rocks and bottles), cert. denied, [467 U.S. 1216 \(1984\)](#); [Evans v. Tubbe](#), 657 F.2d 661 (5th Cir.1981) (racial epithets, blocked access to newly purchased home).

[FN36]. States that collect data on the location of hate crimes report that most hate crimes occur at the residence of the victim. See ASSOCIATION OF STATE UNIFORM CRIME REPORTING PROGRAMS & CENTER FOR APPLIED SOCIAL RESEARCH, NORTHEASTERN UNIVERSITY, HATE CRIME STATISTICS, 1990: A RESOURCE BOOK 6 (1992). In 1991, of 4,558 bias-motivated offenses reported to the FBI, 1,614 involved incidents of intimidation. Hate Crime Data, FBI L. ENFORCEMENT BULL., Mar. 1993, at 4; Brief for the Crown Heights Coalition et al. as Amici Curiae, at 1A-7A, [Wisconsin v. Mitchell](#), 113 S.Ct. 2194, 2198 n.4 (1993). The data in the FBI report is supplied by law enforcement agencies in thirty-two states and is the first available from the FBI's statistical program on hate crimes. The program is implemented by law enforcement agencies across the nation and was initiated in response to the Hate Crimes Statistics Act of 1990, which directs the Attorney General to collect data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Id. The reported figures are based on information provided on a voluntary basis from law enforcement agencies. Only 2,771 agencies took part in the effort, which falls far short of the 16,000 police agencies that provide information to the FBI for its Uniform Crime Reports. See Hate Crimes; First-time FBI Report Reveals Prevalence of Malice, HOUSTON CHRON., Jan. 11, 1993, at A12. In the 1992 study, 6,180 law enforcement agencies in 41 states reported, though, according to Harper Wilson of the FBI, this study "only covers half of the population." The report counted 8,075 hate crimes. Broken down by race, 2,882 (36 percent) of the crimes were against blacks and 1,664 (21 percent) were against whites. The type of hate crime most frequently reported was intimidation by physical threat. Paul Leavitt et al., Hate-Crime Report: Blacks Targeted Most, USA TODAY, Mar. 7, 1994, at 3A.

[FN37]. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 232 (1993); Reynolds Farley et al., Barriers to the Racial Integration of Neighborhoods: The Detroit Case, 441 ANNALS AM. ACAD. POL. & SOC. SCI. 97 (1979); James E. Rosenbaum et al., [Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?](#) 71 N.C. L.REV. 1519, 1526 (1993).

The FBI reported that during 1991, 4,558 bias-motivated offenses were committed. These included 1,614 incidents of intimidation, 1,301 incidents of vandalism, 796 simple assaults, 773 aggravated assaults, and 12 murders. Hate Crime Data, FBI L. ENFORCEMENT BULL., Mar. 1993, at 5; see also [Mitchell](#), 113 S.Ct. at 2198 n.4.

[FN38]. Lawrence, The Id, the Ego, and Equal Protection, supra note 2, at 350; see also [Kenneth L. Karst, Why Equality Matters](#), 17 GA.L.REV. 245, 248- 49 (1983) (citing ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 1-9 (1963)).

[FN39]. See EDWARD E. JONES ET AL., SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS 6-9 (1984).

[FN40]. See EDWIN H. PFUHL & STUART HENRY, THE DEVIANCE PROCESS 157-60 (3d. ed. 1993).

[FN41]. See Lawrence, The Id, the Ego, and Equal Protection, *supra* note 2, at 351.

[FN42]. See THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA 4 (Stephen C. Ainlay et al., eds., 1986).

[FN43]. See [Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling](#), 17 HARV. C.R.-C.L. L. REV. 133, 137 (1982) [hereinafter Delgado, Words That Wound].

[FN44]. Ralph M. Semien, In Today's America, Justice is Still Deferred, L.A. TIMES, August 6, 1993, at B7; see also Paul Hoffman, [Double Jeopardy Wars: The Case for a Civil Rights "Exception,"](#) 41 UCLA L. REV. 649, 685 (1994); Laurie L. Levenson, [Change of Venue and the Role of the Criminal Jury](#), 66 S. CAL.L.REV. 1533, 1567-58 (1993).

[FN45]. See, e.g., MASSEY & DENTON, *supra* note 37, at 97.

[FN46]. See Delgado, Words That Wound, *supra* note 43, at 142.

[FN47]. See Lawrence, The Id, the Ego, and Equal Protection, *supra* note 2, at 351.

[FN48]. See Susan Gellman, Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 30 UCLA L. REV. 333, 342 (1991); see also Matsuda, *supra* note 2, at 2338-39.

[FN49]. See PFUHL & HENRY, *supra* note 40, at 157-60, 178.

[FN50]. See Delgado, Words that Wound, *supra* note 43, at 137.

[FN51]. See Matsuda, *supra* note 2, at 2337 & n.87; see also Gellman, *supra* note 48, at 341.

[FN52]. On civility rules and the First Amendment, see Post, Free Speech, *supra* note 4, at 285-88. A number of commentators have not distinguished between speech that merely . causes offense and speech that causes legally cognizable harm. See, e.g., [Lauri A. Ebel, University Anti-Discrimination Codes v. Free Speech](#), 23 N.M. L. REV. 169 (1993); Thomas L. McAllister, [Rules and Rights Colliding: Speech Codes and the First Amendment on College Campuses](#), 59 TENN.L.REV. 409 (1992); Cary Nelson, Symposium on Race Consciousness and Legal Scholarship: [Hate Speech and Political Correctness](#), 1992 U. ILL. L. REV. 1085; Evan G.S. Siegel, Comment, [Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities](#), 39 EMORY L.J. 1351 (1990).

[FN53]. See Greenawalt, *Insults and Epithets*, supra note 1 (arguing that regulating insults such as "you stupid bastard" or epithets such as "wop" on the basis of their general offensiveness may be sound in some narrow settings).

[FN54]. See [Gonzalez v. Comm'n on Judicial Performance, 657 P.2d 372 \(Cal. 1983\)](#) (holding that "salty" courtroom comments consisting of blatant ethnic slurs allegedly made in jest are apt to offend minority members and are sanctionable as wilful misconduct).

[FN55]. See [FCC v. Pacifica Found., 438 U.S. 726 \(1978\)](#) (affirming restriction of broadcast containing indecent language).

[FN56]. See [In re Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd. 2705 \(1987\)](#) (holding portions of explicitly sexual Howard Stern talk show actionable). But see Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. OF LAW & SOC. CHANGE 49 (1993) (advocating deregulation of broadcast indecency in light of the dangers of FCC regulation of any "[s]exual . . . reference that the 'average' broadcast viewer or listener would find 'patently offensive'").

[FN57]. See *Bikini Ad Prompts a Sexual Harassment Suit*, N.Y. TIMES, Nov. 9, 1991, at L11 (describing suit by five female workers claiming that Stroh brewery created an environment tolerant of harassment by permitting suggestive graffiti and calendar photos of nude women in the workplace); Shari Roan, *All Fired Up: Critics Call Tobacco Industry's Anti-Cigarette Messages for Teens Inappropriate, Misleading*, L.A. TIMES, Aug. 16, 1992, at E1 (reporting anti-smoking advocates' accusation that tobacco industry devised advertisement strategies such as R.J. Reynolds' Joe Camel cartoon character to appeal to children).

[FN58]. See [Hustler Magazine v. Falwell, 485 U.S. 46 \(1988\)](#) (holding that public figures cannot recover damages for intentional infliction of emotional distress claim unless it is shown "the publication contains a false statement of fact which was made with 'actual malice'").

[FN59]. See [Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 \(M.D. Fla. 1991\)](#) (holding that sexually explicit pictures "are not protected speech because they act as discriminatory conduct in the form of a hostile work environment").

[FN60]. See [Barnes v. Glen Theatre, Inc., 501 U.S. 560 \(1991\)](#) (holding that although offensive to many people, nude dancing contains expression protected by the First Amendment).

[FN61]. Cynthia Grant Bowman, [Street Harassment and the Informal Ghettoization of Women](#), 106 HARV. L. REV. 517 (1993).

[FN62]. See *Don Terry, Farrakhan: Fiery Separatist in a Sober Suit*, N.Y. TIMES, Mar. 2, 1994, at A2 (reporting that Farrakhan has "attracted attention" for attacks against whites and Jews).

[FN63]. See *Collin v. Smith*, 578 F.2d 1108 (7th Cir.1978) (holding that trauma likely to be created by Nazi march in Skokie, Illinois, home to large numbers of holocaust survivors, inadequate to support prohibition of parade).

[FN64]. See [Goldberger](#), *supra* note 3.

[FN65]. In [New York Times v. Sullivan](#), 376 U.S. 254 (1964), the Court held that under certain circumstances libelous utterances would be protected under the First Amendment. The Court has pointed out, however, that it offers such protection not because there is constitutional value in libel *per se*, but because some libelous utterances (against, for example, public officials and public figures) must be permitted to allow "breathing room" for free-flowing discussions and debate on public issues. [Id.](#) at 271.

[FN66]. See, e.g., [Seth Goodchild, Note, Media Counteractions: Restoring the Balance to Modern Libel Law](#), 75 GEO. L.J. 315, 317-18 n.18 (1986) (observing that "words that tended to expose one to public hatred, shame, obloquy, ridicule or contempt, or words that impaired one's standing in the community were considered defamatory").

[FN67]. In [Gertz v. Robert Welch, Inc.](#), 418 U.S. 323 (1974), the Supreme Court held that in order to recover, private persons who are defamed about matters of public concern must show actual injury, including "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." [Id.](#) at 350. Rodney Smolla observes that libel actions serve to provide legal redress for both harm to reputation and psychological injury. Rodney A. Smolla, [Let the Author Beware: The Rejuvenation of the American Law of Libel](#), 132 U. PA. L. REV. 1, 18 (1983).

[FN68]. See [Brandenburg v. Ohio](#), 395 U.S. 444 (1969).

[FN69]. See discussion *infra* part III.D.1.a.

[FN70]. [Hustler Magazine v. Falwell](#), 485 U.S. 46 (1988); see *supra* note 58 and accompanying text.

[FN71]. See, e.g., [NAACP v. Claiborne Hardware, Co.](#), 458 U.S. 886 (1982).

[FN72]. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

[FN73]. Some might try to label this event "conduct," not "speech," and thus escape the First Amendment problem. However, it seems pointless to manipulate the speech-conduct distinction in this way without explaining why one speech act falls under the "speech" prong, and another the "conduct" prong. For one effort to grapple with this set of problems, using speech act theory, see GREENAWALT, *USES OF LANGUAGE*, *supra* note 34. For a description of the classification problem, see Schauer, *supra* note 72.

[FN74]. See [Fried](#), *supra* note 3.

[FN75]. See generally GREENAWALT, *USES OF LANGUAGE*, *supra* note 34.

[FN76]. Events such as this have reportedly occurred at airport security checks.

[FN77]. [244 P. 700 \(Wash. 1926\)](#).

[FN78]. [Id. at 701](#); see also [Lowry v. Standard Oil Co., 146 P.2d 57, 60 \(Cal. Ct. App. 1944\)](#) (stating that "[t]he pointing of a gun at another in a threatening manner is sufficient to cause fear of personal injury unless it is known by the person at whom the weapon is pointed that the gun is in fact unloaded").

[FN79]. This methodology is necessary, I argue, because the "meaning" of what is often termed "hate speech" can only be understood in context.

[FN80]. See generally PAUL CHEVIGNY, *MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY* (1988).

[FN81]. See generally Minow & Spelman, *supra* note 21.

[FN82]. There is a substantial and complex literature on meaning and language, an exploration of which is beyond the scope of this Article. See, e.g., ELEANOR ROSCH, *COGNITION AND CATEGORIZATION* (1978); FRANCISCO J. VARELA, *THE EMBODIED MIND: COGNITIVE SCIENCE AND HUMAN EXPERIENCE* (1991). See also PAUL CHEVIGNY, *supra* note 80, at 27-72.

[FN83]. [394 U.S. 705 \(1969\)](#).

[FN84]. [Id. at 706](#).

[FN85]. [Id. at 708](#).

[FN86]. *Id.* The Supreme Court has also recognized the validity of such a contextual approach in other circumstances. For example, in deciding whether a series of incidents constituted sexual harassment under Title VII, the Court recently announced that lower courts must balance a variety of factors:

whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

[Harris v. Forklift Sys., Inc., 114 S.Ct. 367, 371 \(1993\)](#). Such an approach, involving "looking at all the circumstances," is also necessary if one is attempting to evaluate the content of communication.

[FN87]. I served as counsel to Mr. Nettles. Albert Nettles is a pseudonym.

[FN88]. See generally [Marcy Strauss, Redefining the Captive Audience Doctrine, 19 HASTINGS CONST. L.Q. 85 \(1991\)](#).

[FN89]. [347 U.S. 483 \(1954\)](#).

[FN90]. See [Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61 \(1988\)](#).

[FN91]. This incident is based on [State v. Talley, 858 P.2d 217, 220 \(Wash. 1993\)](#).

[FN92]. See [Frisby v. Schultz, 487 U.S. 474 \(1988\)](#).

[FN93]. [395 U.S. 444 \(1969\)](#).

[FN94]. This distinction is suggested by Justice White's concurring opinion in [R.A.V. v. City of St. Paul, 112 S.Ct. 2538, 2554 n.4 \(1992\)](#).

[FN95]. See generally DAVID M. CHALMERS, HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN (1981); JAMES RIDGEWAY, BLOOD IN THE FACE: THE KU KLUX KLAN, ARYAN NATIONS, NAZI SKINHEADS, AND THE RISE OF A NEW WHITE CULTURE (1990); PATSY SIMS, THE KLAN (1978).

[FN96]. [25 S.W.2d 428 \(Ark. 1930\)](#). See generally Reynolds C. Seitz, *Insults-Practical Jokes-Threats of Future Harm-How New as Torts?*, 28 KY. L.J. 411, 422 (1940) (suggesting that threats of future harm should be actionable).

[FN97]. See also [Lyons v. Smith, 3 S.W.2d 982 \(Ark. 1928\)](#) (holding defendant liable for trespass when he prevented worker from cultivating plaintiffs field by threats and intimidation).

[FN98]. [WASH. REV. CODE ANN. § 9A.36.080\(1\) \(West Supp.1994\)](#).

[FN99]. *Id.* A separate section held cross burning to constitute a per se violation of the section. *Id.* [§ 9A.36.080\(2\)](#).

[FN100]. *Id.* [§ 9A.36.080\(1\)\(b\)](#).

[FN101]. The Washington Supreme Court's complete disposition of the Talley case was: "We affirm . . . [the] dismissal of charges against Mr. Talley. While Talley targeted his victims within the meaning of [the statute], his other conduct did not constitute criminal harassment, assault, or property damage. Despite Talley's odious behavior, his actions do not fall within the prohibitions of [the statute]." [Talley, 858 P.2d at 231](#).

[FN102]. Cf. [Brandenburg v. Ohio, 395 U.S. 444 \(1969\)](#).

[FN103]. Matsuda, *supra* note 2, at 2320.

[FN104]. 48 HOURS (Paramount Pictures 1982).

[FN105]. The fact the restaurant is located in a small southern town itself provokes

generalizations that are subject to question. Isolated? Conservative? Hometown of the Grand Wizard himself? Because we lack exact information about this particular town, stereotypes take over. But this does not alter the argument in the text, for it is unlikely that the black family has accurate information about this town either. The family is likely to act out of stereotypical information about small southern towns, plus whatever specific information they might have about this particular town. As a result, absent particularized information, the family is likely to assume that the risk of danger is high based on their general knowledge about small southern towns.

[FN106]. The material on the Klan that follows is based on research by Melanie Oxhorn, a 1994 graduate of Harvard Law School. The principal sources for the following discussion are DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* (3d ed. 1981); JAMES RIDGEWAY, *BLOOD IN THE FACE: THE KU KLUX KLAN, ARYAN NATIONS, NAZI SKINHEADS, AND THE RISE OF A NEW WHITE CULTURE* (1990); PATSY SIMS, *THE KLAN* (1978); and JOHN TURNER, *THE KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* (2d ed. 1986).

[FN107]. In the weeks leading up to the 1868 elections, approximately 2000 blacks were murdered in Louisiana alone, while 109 were killed in Alabama and 75 in Georgia. The general goal of the Klan was to drive blacks and Republicans out of politics, and for this, the Klan paraded, threatened, flogged, rioted and murdered. See CHALMERS, *supra* note 106, at 8-21; TURNER, *supra* note 106, at 9-10.

[FN108]. See CHALMERS, *supra* note 106 at 22-27; RIDGEWAY, *supra* note 106 at 34-35.

[FN109]. See CHALMERS, *supra* note 106, at 28-38.

[FN110]. See *id.* at 213-15.

[FN111]. See *id.* at 349-50.

[FN112]. See TURNER, *supra* note 106, at 20, 26-27.

[FN113]. See CHALMERS, *supra* note 106, at 351-52.

[FN114]. See TURNER, *supra* note 106, at 28.

[FN115]. See SIMS, *supra* note 106, at 57-76.

[FN116]. Cf. [Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 \(1941\)](#) (stating that "utterances in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force").

[FN117]. I am grateful to David Cope for suggesting this problem.

[FN118]. Frank Michelman has helped me clarify this point.

[FN119]. Martha Minow and Elizabeth Spelman have said that the "call to look at context typically represents a call to focus on some previously neglected features. It does not, however, mean focusing on all possible features." Minow & Spelman, *supra* note 21, at 1629.

[FN120]. See [Harris v. Forklift Sys., Inc., 114 S.Ct. 367, 371 \(1993\)](#) (stating that whether an environment is "hostile" can be "determined only by looking at all the circumstances [which] . . . may include [listing factors] . . . . But . . . no single factor is required") (emphasis added).

[FN121]. For instance, the Fair Housing Act prohibits several forms of discriminatory speech: (1) discriminatory ads, [42 U.S.C. § 3604\(c\) \(1988\)](#); (2) "blockbusting" (i.e., scaring people into selling their homes by suggesting that property values will decline due to blacks moving into the neighborhood), [id. § 3604\(e\)](#); and (3) coercive or intimidating speech designed merely to discourage someone from exercising housing rights, [id. § 3617](#). Courts have enforced these provisions with proper attention to First Amendment claims. See, e.g., [Ragin v. New York Times, 923 F.2d 995 \(2d Cir.1991\)](#) (holding that the prohibition of real estate advertisements indicating a racial preference does not violate the First Amendment), cert denied, [112 S.Ct. 81 \(1991\)](#); [Spann v. Colonial Village, Inc., 899 F.2d 24 \(D.C. Cir.1990\)](#) (finding liability against landlords and newspapers for using ads with only white models since they express a racial preference).

[FN122]. [Berhanu v. Metzger, 850 P.2d 373 \(Or. Ct. App. 1993\)](#).

[FN123]. [Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 543 F.Supp. 198 \(S.D. Tex. 1982\)](#).

[FN124]. See, e.g., [Person v. Miller, 854 F.2d 656 \(4th Cir.1988\)](#) (involving class action suit against the Carolina Knights of the Ku Klux Klan alleging that defendants had engaged in series of violent and intimidating acts intended to prevent black citizens from freely exercising their constitutional rights); [Berhanu v. Metzger, 850 P.2d 373 \(Or. Ct. App. 1993\)](#) (involving Southern Poverty Law Center's wrongful death action against White Aryan Resistance).

[FN125]. See [RESTATEMENT \(SECOND\) OF TORTS § 21 \(1964\)](#) [hereinafter SECOND RESTATEMENT]. The defendant must have acted "(a) . . . intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension." *Id.*

[FN126]. *Id.* § 29, illus. 4. It is possible that such actions would satisfy the element of outrageousness for intentional infliction of emotional distress. The plaintiff, of course, would be required to prove the other elements of that tort. See *infra* part III.B.2 for discussion of the tort of intentional infliction of emotional distress.

[FN127]. Thus, even though the harm that occurs when someone has been threatened with violence may be imminent in the sense of creating psychic harm at the moment the recipient perceives the threat, the perception is not of imminent harmful contact and is not remediable as an assault.

[FN128]. See [O.D. v. State, 614 So. 2d 23 \(Fla. Dist. Ct. App. 1993\)](#) (holding that yelling across a street, "before I'm twenty-one, you will be dead" is not a criminal assault because the threat is not imminent and no overt act is directed at victim). See also [Cucinotti v. Ortmann, 159 A.2d 216, 218 \(Pa. 1960\)](#) (finding no assault where defendants were alleged to have threatened plaintiffs with violence unless they moved out of the neighborhood; holding based in part on fact that plaintiffs did not allege defendants took some overt action to carry out the threats). Cf. [Johnson v. Brooks, 567 So. 2d 34 \(Fla. Dist. Ct. App. 1990\)](#) (holding that defendant who called victim on phone several times, telling her she would burn in hell, and that defendant was attempting to locate victim's son, coupled with fact defendant had previously harmed others, was not sufficient to constitute criminal assault).

[FN129]. [Dickens v. Puryear, 276 S.E.2d 325, 331 \(N.C. 1981\)](#) (holding that "[a] mere threat, unaccompanied by an offer or attempt to show violence, is not an assault"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 10, at 40 (5th ed. 1984) (stating that "[t]hreats for the future . . . are simply not present breaches of the peace, and so never have fallen within the narrow boundaries of [assault]"). See also SECOND RESTATEMENT, supra note 125, at § 31, cmt. a, illus. 1 ("A, known to be a resolute and desperate character, threatens to waylay B on his way home on a lonely road on a dark night. A is not liable to B for an assault . . .").

[FN130]. [276 S.E.2d 325 \(1981\)](#).

[FN131]. [Id. at 336](#). See also [Cucinotti, 159 A.2d at 218](#) (finding no assault where defendants were alleged to have threatened plaintiffs with violence unless they moved out of the neighborhood).

[FN132]. [99 S.E. 350 \(S.C. 1919\)](#).

[FN133]. [Id. at 351](#).

[FN134]. [Id. at 352](#). See also CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 23 (2d ed. 1980) (noting that an assault cannot be committed over the telephone because the speaker cannot immediately carry out the threats). Cf. [Johnson v. Brooks, 567 So. 2d 34 \(Fla. Dist. Ct. App. 1990\)](#) (finding telephone threats not assault because defendant did no act to suggest violence was imminent).

[FN135]. SECOND RESTATEMENT, supra note 125, at § 31. See also [Cucinotti, 159 A.2d at 218](#) (finding no assault where defendants were alleged to have threatened plaintiffs with violence unless they moved out of the neighborhood because "[w]ords in themselves, no matter how threatening, do not constitute an assault"). See generally PROSSER ON TORTS, supra note 129, at 57-65.

[FN136]. [Allen v. Walker, 569 So. 2d 350 \(Ala. 1990\)](#).

[FN137]. [Bollaert v. Witter, 792 P. 2d 465, 466 \(Or. Ct. App. 1990\)](#). See also [Cucinotti, 159](#)

[A.2d at 219](#) (holding that plaintiffs' allegations that defendants threatened them with immediate beatings insufficient to make out assault unless defendants displayed the weapons in such a manner as to amount to an offer to hit the plaintiffs).

[\[FN138\]](#). SECOND RESTATEMENT, *supra* note 125, at § 24, cmt. c. See also § 29 and comment. In part, the historical accident appears to have stemmed from the early common law regulating violence between men [sic]. The early actions, trespass for battery and trespass for assault, protected men from the immediate infliction of damage. Either form of trespass was sufficient to trigger the right of self-defense. The law of assault "worked on the assumption that unless a man was threatened by the immediate application of force, he had no cause to fear because if he were allowed an interval, he could take steps to protect himself from the actual consummation of a battery." Seitz, 28 Ky. at 422. For example, in *Tuberville v. Savage*, 1 Mod. Rep. 3 (1669), the defendant put his hand to his sword and said, "If it were not assize time, I would not take such language from you." The defendant's behavior was offered into evidence to prove a provocation justifying the plaintiff's responsive violence. *Id.*

[\[FN139\]](#). SECOND RESTATEMENT, *supra* note 125, at § 31 cmt. a.

[\[FN140\]](#). *Id.* § 46 (1965).

[\[FN141\]](#). It is sometimes difficult to show that the defendant, while intending to cause the plaintiff emotional disturbance, intended to create in the plaintiff "severe emotional distress." See, e.g., [Kentucky Fried Chicken Nat. Mgt. Co. v. Weathersby](#), 607 A.2d 8 (Md. 1992).

[\[FN142\]](#). SECOND RESTATEMENT, *supra* note 125, at § 46 cmt. d.

[\[FN143\]](#). *Id.* One case in which the court found this element satisfied is [S & W Seafoods v. Jocor Broadcasting](#), 390 S.E.2d 228 (Ga. Ct. App. 1989). In that case, a radio broadcaster conducting a restaurant review became enraged at the manager of a restaurant. During his broadcast, he urged listeners to "[g]o by and see this guy . . . [and t]ell him he stinks", "go by and spit in his face for me", and "[g]o by there today and give a little five fingers in the face . . . to [him]." *Id.* at 230. The court found that these comments were incitements to others to do violence to the manager (citing [Brandenburg v. Ohio](#), 395 U.S. 444 (1969)), and reversed the lower court's grant of summary judgment against the manager on his claim of intentional infliction of emotional distress. *Id.*

[\[FN144\]](#). For examples of these stringent demands, see [Vance v. Southern Bell Tel. & Tel. Co.](#), 983 F.2d 1573 (11th Cir.1993) (holding that employer's racially hostile misconduct to black employee, including placement of nooses at her work station, did not rise to level of outrageousness required for intentional infliction of emotional distress claim); [Sterling Drug, Inc. v. Oxford](#), 743 S.W.2d 380 (Ark. 1988) (holding that employer's sustained conduct designed to force suspected whistleblower to resign, including elimination of job, re-assignment to lower position, repeated criticism of job performance and reprimands for acts he had not done insufficient to support finding of tort of outrage); [Hogan v. Forsyth Country Club Co.](#), 340 S.E.2d 116, 123 (N.C. Ct. App. 1986) (holding that manager's conduct "was not so extreme and outrageous" as to give rise to a claim for intentional infliction of mental or emotional distress).

when he "refused to grant [female employee] a pregnancy leave of absence, directed her to carry heavy objects . . . , cursed at her . . . , [refused her request] to leave work to go to the hospital . . . [and] terminated her" when she went anyway); [id. at 122-23](#) (holding that male co-employee's conduct in screaming at female employee, interfering with her supervision of waitresses, and throwing menus at her not sufficient to find intentional infliction of emotional distress).

[\[FN145\]](#). [369 S.E.2d 541 \(Ga. Ct. App. 1988\)](#).

[\[FN146\]](#). [Id. at 542](#).

[\[FN147\]](#). [Id. at 544](#).

[\[FN148\]](#). [99 S.E. 350 \(1918\)](#); see supra notes 132-33 and accompanying text.

[\[FN149\]](#). SECOND RESTATEMENT, supra note 125, at § 46 cmt., illus. 4.

[\[FN150\]](#). [Id. § 46 cmt. j](#).

[\[FN151\]](#). [Id.](#) The comment also notes that, while the distress must be severe, "the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." [Id.](#) This comes close to saying that emotional damage may be presumed in cases in which the conduct is severe.

[\[FN152\]](#). The defendant's knowledge that plaintiff is particularly susceptible to emotional distress is a special factor. See, e.g., [id. cmt., illus. 9-13](#).

[\[FN153\]](#). See supra note \*\*\*\* and accompanying text.

[\[FN154\]](#). See, e.g., [Thomas Huff, Addressing Hate Messages at the University of Montana: Regulating and Educating, 53 MONT.L.REV. 157, 169 \(1992\)](#).

[\[FN155\]](#). See [Montana Outrage Stalls Skinheads, N.Y. TIMES, Feb. 20, 1994, § 1, at 38](#) (reporting a rising series of incidents as related by the Billings, Montana chief of police). See also [Matsuda, supra note 2](#). In presenting what she calls "hard cases" involving racist speech, Matsuda discusses the long history of subordination and violence minority groups have experienced, arguing that there needs to be "clarity about the historical context in which racist speech arises" in order to "lift us out of the neutrality trap." [Id. at 2361, 2374](#).

[\[FN156\]](#). See, e.g., [State v. Talley, 858 P.2d 217 \(Wash. 1993\)](#); see generally [United States v. Hayward, 6 F.3d 1241 \(7th Cir.1994\)](#); [United States v. Lee, 6 F.3d 1297 \(8th Cir.1993\)](#); [United States v. McDermott, 822 F.Supp. 582 \(D.C. Iowa 1993\)](#).

[\[FN157\]](#). See SECOND RESTATEMENT, supra note 125, at § 46 cmt. e. See generally [LEE LINDAHL, MODERN TORT LAW--LIABILITY & LITIGATION § 32.03, at 133- 135 \(rev. ed. 1988\)](#); [STUART M. SPEISER ET AL., 4 THE AMERICAN LAW OF TORTS § 16.21, at 1094 \(1987\)](#).

[\[FN158\]. 355 N.E.2d 315 \(Mass. 1976\).](#)

[\[FN159\]. Id. at 317.](#)

[\[FN160\]. Id.](#); see also SECOND RESTATEMENT, *supra* note 125, at § 46, cmt. e. (explaining that extreme and outrageous character of the conduct may arise from abuse of position or power); [S & W Seafoods v. Jocer Broadcasting, 390 S.E.2d 228 \(Ga. Ct. App. 1989\)](#) (including the power of radio broadcaster as a factor in determining outrageousness); [Agarwal v. Johnson, 603 P.2d 58 \(Cal. 1979\)](#) (emphasizing fact employee's supervisor had power over him, and this power was a significant factor in determining the "outrageousness" of the supervisor's conduct).

[\[FN161\]. See supra part I.A.](#)

[\[FN162\].](#) The fact that serious harms can accompany verbal sexual harassment on the job, even in the absence of severe emotional distress, prompted the Supreme Court to reverse a lower court's requirement that a victim of sexual harassment had to prove that her "psychological well-being" had been "seriously affected" by the harassment. Instead, the Court pointed to other harms, namely, an abusive work environment that can detract from the employee's job performance, cause victims to quit, or interfere with their advancement. [Harris v. Forklift Sys., Inc., 114 S.Ct. 367, 370-71 \(1993\).](#)

[\[FN163\]. See Milkovich v. Lorain Journal Co., 497 U.S. 1 \(1990\); see also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 \(1988\).](#)

[\[FN164\].](#) RODNEY A. SMOLLA, LAW OF DEFAMATION § 6.12[10] at 6-67 (1986). Smolla notes that these decisions are reached sometimes because such accusations are considered "opinion", but sometimes because "mere epithets are not considered to carry a defamatory meaning." *Id.*

[\[FN165\]. See, e.g., Guyette v. Stauffer Chemical Co., 518 F.Supp 521 \(D.N.J. 1981\)](#) (holding that employees alleging sex discrimination stated claim for interference with contractual relations); [McHugh v. University of Vermont, 758 F.Supp 945 \(D. Vt. 1991\)](#) (holding that employee stated cause of action based on intentional interference with contractual relations against co-worker who allegedly harassed employee on account of her sex and religion), *aff'd*, [966 F.2d 67 \(2d. Cir.1992\).](#)

[\[FN166\]. 42 U.S.C. § 1982 \(1988\).](#)

[\[FN167\].](#) Many states have adopted criminal statutes in which threats of violence are the crux of legal liability. A number of states have statutes that prohibit ethnic intimidation, harassment or threats. See, e.g., [N.Y. PENAL LAW § 240.26](#) (Consol. Supp.1993) (penalizing a person who "attempts or threatens" to "strike, shove, kick or otherwise subject [another] person to physical contact" or "engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose"); [Wash. Rev. Code Ann. § 9A.46.020](#) (West 1988) (penalizing threats which "by words or conduct" convince a reasonable

person that a threat will be carried out). Other statutes penalize threats made in interstate commerce; see, e.g., [18 U.S.C. § 875 \(West 1984 & Supp.1993\)](#); [18 U.S.C. § 1951\(b\)\(2\) \(1984 & Supp. 1994\)](#); or threats which involve using the mails, see, e.g., CONN. GEN. STAT. ANN. tit. 53a, § 182(b) (West Supp.1994). Threats made over the telephone are prohibited, see, e.g., [GA. CODE ANN. 16-11-39 \(West 1992\)](#), as are threats of violence that are part of a blackmail scheme, see, e.g., [UTAH CODE ANN. § 76-10-501\(2\)\(e\) \(1993\)](#).

The common law has also recognized, in other contexts, that threats of violence can be made the subject of liability. In determining whether someone has been unlawfully confined for purposes of the tort of false imprisonment, for example, nearly all courts recognize that even without actual force, confinement can be obtained by "means of threats of force or other means of intimidation or fear of violence." FOWLER V. HARPER ET AL., THE LAW OF TORTS § 3.7, at 293 (2d ed. 1986); see also [Gust v. Montgomery Ward & Co., 136 S.W.2d 94 \(Mo. 1939\)](#) (holding that restraint of one's liberty may occur through threats of force, and words alone may suffice to restrain someone against their will); [State Rubbish Collectors Ass'n. v. Siliznoff, 240 P.2d 282 \(Cal. 1952\)](#) (recognizing a cause of action where the defendant intentionally subjected another to "serious threats to his physical well-being" regardless of whether the threats constituted a technical assault).

[FN168]. See generally Seitz, *supra* note 96, at 422.

[FN169]. [112 S.Ct. 2538 \(1992\)](#).

[FN170]. [113 S.Ct. 2194 \(1993\)](#).

[FN171]. [R.A.V., 112 S.Ct. at 2541](#).

[FN172]. [Id. at 2547-48](#).

[FN173]. See, e.g., Gellman, *supra* note 48.

[FN174]. [Mitchell, 113 S.Ct at 2201](#) (citation omitted).

[FN175]. *Id.* The Court said that the state's reference to the additional harms "provide[d] an adequate explanation" for the enhancement provision for bias-motivated crimes "over and above mere disagreement with offenders' beliefs or biases." *Id.*

[FN176]. This distinction has been severely criticized by numerous constitutional law scholars as conclusory. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 827 (2d ed. 1988) (stating that "any particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit"); see also [John H. Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 HARV. L. REV. 1482, 1494-96 \(1975\)](#) (stating that "burning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression").

For criticisms of the distinction as applied in *Mitchell*, see Morton J. Horwitz, Forward, The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 HARV. L. REV. 32, 116 (1993); Frederick M. Lawrence, [Resolving the Hate Crimes/Hate Speech Paradox:](#)

[Punishing Bias Crimes and Protecting Racist Speech](#), 68 NOTRE DAME L. REV. 673 (1993); and Cass R. Sunstein, [WORDS, CONDUCT, CASTE](#), 60 U. CHI. L. REV. 795 (1993).

[FN177]. Put in Mitchell's terms, the question would be whether the "State's desire to redress [the] perceived harm [] provides an adequate explanation" for treating racially-motivated threats more severely. [Mitchell](#), 113 S.Ct. at 2201. This formulation suggests that, at least in Mitchell, the Court did not require the state to offer a "compelling" justification, but only an "adequate" one.

[FN178]. [394 U.S 705 \(1969\)](#).

[FN179]. [Id. at 707](#).

[FN180]. [R.A.V.](#), 112 S.Ct. at 2542-47.

[FN181]. [Id. at 2546](#).

[FN182]. Indeed, in at least two respects, Watts is an even harder case to justify under First Amendment principles than the proposal here. First, the federal statute at issue in Watts does not require that the threat be made personally to the President. That statute is now found at [18 U.S.C. § 871\(a\) \(1988\)](#). Second, the case for allowing vituperative and abusive commentary about the functioning of the government--and anything involving the President is of such a nature--is stronger than the case for allowing vituperation and abuse to be directed at someone not affiliated with a position of such power. Cf. Post, Public Discourse, supra note 9; see also [New York Times v. Sullivan](#), 376 U.S. 254, 270 (1964) (stating that "debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

[FN183]. [112 S.Ct. at 2549-50](#). The Court held that since St. Paul could ban all fighting words, including those words subject to the ordinance, it was required to exercise that option rather than singling out racist fighting words for special prohibition. *Id.*

[FN184]. See supra notes 31-51 and accompanying text.

[FN185]. See, e.g., the University of Texas hate speech regulation, which requires proof of severe emotional distress before the complaining party's allegations will be treated seriously. PRESIDENT'S AD HOC COMM. ON RACIAL HARASSMENT, THE UNIV. OF TEX. AT AUSTIN, REPORT OF THE PRESIDENT'S AD HOC COMMITTEE ON RACIAL HARASSMENT (1989), cited in Post, Free Speech, supra note 4, at 274 n.38.

[FN186]. Compare the approaches taken by Delgado and Jean Love. Delgado, Words that Wound, supra note 43; and Jean C. Love, [Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress](#), 47 WASH. & LEE L. REV. 123 (1990).

[FN187]. See, e.g., [Brandenburg v. Ohio](#), 395 U.S. 444 (1969).

[FN188]. See, e.g., [Beauharnais v. Illinois](#), 343 U.S. 250 (1952).

[FN189]. For example, denying the existence of the holocaust. See [Eric Stein, History Against Free Speech: The New German Law Against the 'Auschwitz'--and Other--'Lies'](#), 85 MICH.L.REV. 277 (1986).

[FN190]. [Collin v. Smith](#), 447 F.Supp. 676 (N.D. Ill. 1978), aff'd., 578 F.2d 1197 (7th Cir.1978), cert. denied, 439 U.S. 916 (1978); [Village of Skokie v. National Socialist Party](#), 366 N.E.2d 347 (Ill. Ct. App. 1977), aff'd in part and rev'd in part, 373 N.E.2d 21 (Ill. 1978).

[FN191]. See, e.g., Matsuda, supra note 2.

[FN192]. Thomas C. Grey, Discriminatory Harassment and Free Speech, 14 HARV. J.L. & PUB. POL'Y 157, 160-61 (1991).

[FN193]. Another preliminary issue concerns the reaction of bystanders to the threat of violence. Although I do not make it part of my current proposal, I would be inclined to follow the Restatement position on bystander reactions to intentionally inflicted emotional distress.

Initially, it should be made clear that a "bystander" who is personally subjected to a threat is not really a bystander; she is an immediate victim. So, the true bystander is one to whom the threat was not directed. The Restatement treats immediate family members differently than bystanders who are unrelated to the victim. Under the Restatement provisions involving infliction of emotional distress, immediate family members have a cause of action similar to that of the victim, if they show they suffered distress. Under the proposed tort, family members would have a cause of action if they can show they reasonably suffered fear of violence for their relative.

[FN194]. See, e.g., HARPER ET AL., supra note 167, at 282.

[FN195]. There is also an analogy to the "reasonable woman" standard in sex harassment cases. It does not matter that the male "perpetrator" did not "intend" to harm; what matters is how the victim understood the behavior. [Harris v. Forklift Sys., Inc.](#), 114 S.Ct. 367 (1993).

[FN196]. See, e.g., [Chaplinsky v. New Hampshire](#), 315 U.S. 568, 572 (1942) (defining, in dicta, fighting words as those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[FN197]. Cf. [Tuberville v. Savage](#), 1 Mod. Rep. 3 (1669), in which the plaintiff claimed the defendant provoked his response.

[FN198]. SIMS, supra note 106, at 167-72.

[FN199]. Several other commentators have noted the "male-centeredness" of the fighting words doctrine. See, e.g., [Note, The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Internment](#), 106 HARV. L. REV. 1129 (1993); Lawrence, If He Hollers Let Him Go, supra note 1.

[FN200]. Greenawalt, *Insults and Epithets*, supra note 1, at 297-98. See also Delgado, *Words That Wound*, supra note 43; GREENAWALT, *USES OF LANGUAGE* supra note 34 (discussing "situation-altering" speech, such as conspiracies, orders, manipulative threats and offers, and distinguishing them from ordinary assertions of fact and value); Note, "[The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Internment](#)," 106 *HARV. L. REV.* 1129 (1993).

[FN201]. See, e.g., Greenawalt, *Insults and Epithets*, supra note 1, at 293.

[FN202]. See, e.g., Delgado, *Words That Wound*, supra note 43; Love, supra note 186; Matsuda, supra note 2; Brian Owsley, "[Racist Speech and 'Reasonable People': A Proposal for a Tort Remedy](#)," 24 *COLUM. HUM. RTS. L. REV.* 323 (1993).

[FN203]. Delgado, *Words That Wound*, supra note 43, at 179.

[FN204]. See Richard Zoglin, *All You Need is Hate*, *TIME*, June 21, 1993, at 63.

[FN205]. Matsuda, supra note 2, at 2357.

[FN206]. Matsuda would presumably disagree with the Court's decision in [Brandenburg v. Ohio](#), 395 U.S. 444 (1969) (reversing syndicalism conviction of Klan leader).

[FN207]. Matsuda, supra note 2, at 2361-62.

[FN208]. See Greenawalt, *Insults and Epithets*, supra note 1, at 300.

[FN209]. There is, in addition, the fundamental problem that Matsuda does not address: the social construction of race. If, as I read Matsuda, "subordinated persons" is to be a legal category, and not just rhetorical play, one will soon confront conflicts among different groups in which the validity of the claim to legal redress hinges on proof of subordinated status. Which group member can claim the status? A person of Korean ancestry or a person of Chinese ancestry? Can a Polish American claim subordinated status with respect to Italian-Americans? Can a Chinese-American who speaks Cantonese claim subordinate status vis-a-vis Mandarin Chinese-Americans? See Gates, supra note 7, at 37.

[FN210]. One of the principle ethnic conflicts in Los Angeles has been between black and Korean individuals, which has spawned inter-community conflict. See Bill Boyarsky, *Racial Conflict Brutalizes L.A. Politics*, *L.A. TIMES*, Oct. 14, 1992, at B2 (stating, "[t]rapped by poverty and without much hope, the races engage in combat they see as their only way out"); Stephen Braun & Ashley Dunn, *View of Model Multiethnic City Vanishes in Smoke; Relations: Disturbances Bare a Simmering Racial Anger that Community Efforts Never Fully Quelled*, *L.A. TIMES*, May 1, 1992, at A1, A28 (reporting exacerbated tension in wake of riot and because groups "are all jockeying for position in the scramble to win a limited supply of jobs, dwellings and economic opportunities"); Jake Doherty, *Black-Korean Alliance Says Talk Not Enough, Disbands*, *L.A. TIMES*, Dec. 24, 1992, at A1 (reporting that group dedicated to easing ethnic tension between African Americans and Korean Americans disbanded because members decided

that the group's focus on dialogue was not enough to improve relationship between the communities); Andrea Ford, Koreans, Blacks Try to Forge Alliance, L.A. TIMES, Nov. 9, 1992, at B1 (reporting that, in aftermath of riots, community activists seek to transcend hardened racial attitudes and great ethnic divide); Susan Moffat, Splintered Society: U.S. Asians; The L.A. Riots Highlighted Tensions Among Asian-American Groups, Split by Longstanding Enmities and Generational Conflict. A Search is Underway for a Common Voice, L.A. TIMES, July 14, 1992, at A1.

[FN211]. See, e.g., MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960'S TO THE 1980'S 3 (1986); Clara E. Rodriguez and Hector Cordero-Guzman, Placing Race in Context, 15 ETHNIC AND RACIAL STUDIES 523 (1992) (asserting that "race" is a fluid term the meaning of which continually shifts from one context to another). On these questions, I have benefitted from research by Danny Chou, a 1994 graduate of Harvard Law School.

[FN212]. Formal rule structures do not lend themselves to resolving legal problems in which a matrix of competing or contradictory factors must be balanced against each other to achieve a result, and no single factor must be minimally satisfied. See, e.g., Louis Kaplow, Rules Versus Standards: An Economic Analysis, 1992 DUKE L.J. 557. For an account and critique of judicial balancing of interests and values in response to the shortcomings of legal formalism in constitutional law, see [T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 \(1987\)](#).

[FN213]. Gates, *supra* note 7, at 41-42.

[FN214]. The Court has held that [42 U.S.C. § 1981](#) and Title VII of the Civil Rights Act of 1964 allow suits charging racial discrimination to be brought by either white or non-white plaintiffs. Sex discrimination suits may also be brought by either men or women. See [Diaz v. Pan American World Airways, 442 F.2d 385 \(5th Cir.1971\)](#), cert. denied, [404 U.S. 950 \(1971\)](#); [Wright v. Methodist Youth Services, Inc., 511 F.Supp. 307 \(N.D.Ill. 1981\)](#). Similarly, equal protection challenges may be undertaken by either whites or non-whites and by either men or women. *Craig v. Boren*, 429 U.S. 140 (1976). In some cases of so-called "reverse discrimination" the Court has allowed members of the dominant group to challenge affirmative action programs. See [Richmond v. Croson, 488 U.S. 469 \(1989\)](#) (subjecting race-based affirmative action plans to the same strict scrutiny as governmental actions that intentionally discriminate against racial minorities); [University of California Regents v. Bakke, 438 U.S. 265 \(1978\)](#) (sustaining equal protection challenge by white male to special admissions programs for minority applicants to the Medical School of the University of California at Davis).

[FN215]. For a similar approach, analyzing Stanford's "fighting words" regulation, see [Thomas C. Grey, Discriminatory Harassment and Free Speech, 14 HARV. J.L. & PUB. POL'Y 157 \(1991\)](#).

[FN216]. See Greenawalt, *Insults and Epithets*, *supra* note 1, at 300. In his book, Greenawalt makes the same point about personally directed racial slurs: "Those who rest secure in a majority and favored status can accept the denigrating terms and appraisals that apply to their privileged

position with much more equanimity than those who feel that the terms reflect widespread distaste for the group to which they belong." GREENAWALT, USES OF LANGUAGE, supra note 34, at 147-48.

[FN217]. Compare the tort of intentional infliction of emotional distress, in which the relative position of power of the victim versus the perpetrator is one factor to be taken into account in determining how "outrageous" the behavior is. See supra part III.A.2.

[FN218]. See Grey, supra note 215, at 162-63 (discussing racially disparate impact of Stanford's speech code).

[FN219]. In a university setting, for example (which is a setting that, in turn, is different from a workplace or public park), a court might evaluate a rule made for the dormitories much differently than a rule made for the classroom (in session), or for communications outside buildings on sidewalks. As the circumstances differ, the strength of the regulatory interests differs.

[FN220]. See supra part II.C addressing First Amendment concerns raised and met by a contextual approach. See also [Steven Shiffrin, The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment, 78 NW. U. L. REV. 1212, 1254 \(1983\)](#).

[FN221]. See CHEVIGNY, supra note 80.

[FN222]. Or against which groups. See, e.g., Karst, supra note 4, at 109-16; Strossen, supra note 1, at 556.