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Policing Hate Speech and Extremism: A Taxonomy of Arguments in Opposition

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POLICING HATE SPEECH AND EXTREMISM: A TAXONOMY OF ARGUMENTS IN OPPOSITION

Leonard M. Niehoff*

Hate speech and extremist association do real and substantial harm to individuals, groups, and our society as a whole. Our common sense, experience, and empathy for the targets of extremism tell us that our laws should do more to address this issue. Current reform efforts have therefore sought to revise our laws to do a better job at policing, prohibiting, and punishing hate speech and extremist association.

Efforts to do so, however, encounter numerous and substantial challenges. We can divide them into three general categories: definitional problems, operational problems, and conscientious problems. An informed understanding of these three categories of arguments is indispensable to any effort that seeks to reform the law in ways that will survive constitutional scrutiny.

This Article provides a detailed legal and normative analysis of those arguments and common objections raised to them. It contends that the arguments raised in opposition to more expansive regulation of hate speech and extremist association largely get things right. And it concludes that more expansive regulation could have dire and unintended consequences that would disserve the interests of all, including the groups who advocate for such regulation.

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INTRODUCTION

Justice Holmes's dissent in *Abrams v. United States*¹ provides one of the most influential defenses of the protection of free expression found in Supreme Court case law.² Toward the beginning of that opinion, however, Holmes offers an observation about our natural predisposition toward the suppression of the opinions that we find offensive. "Persecution for the expression of opinions," he wrote, "seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart [then] you [will] naturally express your wishes in law and sweep away all opposition."³

There is currently a great deal of public dialogue about why our laws do not do more to police, prohibit, and punish extremist organizations and the hateful speech that serves as their stock-in-trade. Holmes's insight helps us understand why the impulse to do so seems, on its face, "perfectly logical." After all, what reasonable person could doubt the premise of such an impulse—that such speech and association pose real risks and dangers? Extremist ideologies have been linked to the promulgation of hate toward minority groups,⁴ to violent criminal activity,⁵ and even to efforts to un-

1. *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

2. See Leonard M. Niehoff & Deeva Shah, *The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstinacy of Bias*, 22 MICH. J. RACE & L. 243, 248 (2017).

3. *Abrams*, 250 U.S. at 630.

4. For overviews of extremist organizations and their activities in promoting hate and bias, see *Defining Extremism: A Glossary of White Supremacist Terms, Movements and Philosophies*, ADL, <https://www.adl.org/education/resources/glossary-terms/defining-extremism-white-supremacy> (last visited Aug. 23, 2018); *Extremist Files: Groups*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/groups> (last visited Aug. 23, 2018); see also *White Supremacist Propaganda Nearly Doubles on Campus in 2017-18 Academic Year*, ADL, <https://www.adl.org/resources/reports/white-supremacist-propaganda-nearly-doubles-on-campus-in-2017-18-academic-year> (last visited Aug. 23, 2018).

5. See, e.g., William Parkin, Brent Kline, Jeff Gruenewald, Joshua Freilich, & Steven Chermak, *Threats of Violent Islamist and Far-Right Extremism: What Does the Research Say?*, START (Feb. 22, 2017), <http://www.start.umd.edu/news/threats-violent-islamist-and-far-right-extremism-what-does-research-say>; *Murder and Extremism in the United States in 2017: An ADL Center on Extremism Report*, ADL, <https://www.adl.org/resources/reports/murder-and-extremism-in-the-united-states-in-2017> (last visited Aug. 23, 2018); *With Hate in Their Hearts: The State of White Supremacy in the United States*, ADL, <https://www.adl.org/education/resources/reports/state-of-white-supremacy> (last visited Aug. 23, 2018); A.C. Thompson, Ali Winston, & Darwin BondGraham, *Racist, Violent, Unpunished: A White Hate Group's Campaign of Menace*, PROPUBLICA (Oct. 19, 2017, 2:01 PM), <https://www.propublica.org/article/white-hate-group-campaign-of-menace-rise-above-movement>.

dermine or overthrow the government of the United States.⁶ In addition, it can be argued that a government's failure to condemn and penalize extremism has the effect of normalizing it and thereby making it even more dangerous.⁷ As a result, it seems natural to want "with all your heart" to identify the groups that advance extremist ideologies and engage in hateful speech, to prosecute them, and to put them out of business or otherwise silence them.

And why should we refrain from doing so? Unlike the United States, many other countries have adopted laws that punish hate speech,⁸ a comparative reality captured by the very title of an article called *Hate Speech: The United States Versus the Rest of the World*.⁹ Furthermore, private entities like Facebook, YouTube, and Twitter have implemented policies that ban at least some such communications.¹⁰ These measures by other governments and by influential private parties prompt sensible questions about our hesitancy to incorporate similar provisions in our federal and state laws. Almost a decade ago, two legal scholars tapped into these impulses when

6. For a list of violent extremist groups that includes many with ideologies hostile to the United States government, see *What Are Known Violent Extremist Groups?*, FBI, <https://www.fbi.gov/cve508/teen-website/what-are-known-violent-extremist-groups> (last visited Aug. 23, 2018).

7. See Wajahat Ali, *Deradicalizing White People*, N.Y. REV. BOOKS (Aug. 16, 2018, 12:25 PM), https://www.nybooks.com/daily/2018/08/16/deradicalizing-white-people/?utm_medium=email&utm_campaign=NYR%20Goldberg%20the%20DNC%20Naipaul&utm_content=NYR%20Goldberg%20the%20DNC%20Naipaul+CID_bae1a7a4c2db0e361ae7352a42073b79&utm_source=Newsletter&utm_term=Deradicalizing%20White%20People. It has also been argued, however, that overly harsh government suppression of extremist groups can result in problematic "backlash effects." See Joshua D. Freilich, Steven M. Chermak, & David Caspi, *Critical Events in the Life Trajectories of Domestic Extremist White Supremacist Groups*, 8 CRIMINOLOGY & PUB. POL'Y 497, 521 (2009).

8. See Brian Levin, *Extremism and the Constitution*, 45 AM. BEHAV. SCIENTIST 714, 725–26 (2001) (describing anti-hate-speech statutes that have been adopted in other countries); RICHARD DELGADO & JEAN STEFANCI, *MUST WE DEFEND NAZIS?* 56–59 (1997) (listing efforts by other countries to adopt anti-hate measures); *Comparing Hate Speech Laws in The U.S. and Abroad*, NPR (Mar. 3, 2011 3:00 PM), <https://www.npr.org/2011/03/03/134239713/France-Isnt-The-Only-Country-To-Prohibit-Hate-Speech>; *European Hate Speech Laws*, LEGAL PROJECT, <http://www.legal-project.org/issues/european-hate-speech-laws> (last visited Aug. 23, 2018); John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. ST. U. L. REV. 41, 47 (2008).

9. Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World?*, 53 ME. L. REV. 487 (2001). For a discussion and critique of the comparison of black-letter norms as between the United States and Europe, see Eric Heinze, *Wild-West Cowboys Versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY* 182 (2009) (Ivan Hare & James Weinstein eds.).

10. See, e.g., Jack Nicas, *Alex Jones and Infowars Content Is Removed from Apple, Facebook, and YouTube*, N.Y. TIMES (Aug. 6, 2018), https://www.nytimes.com/2018/08/06/technology/infowars-alex-jones-apple-facebook-spotify.html?emc=edit_th_180807&nl=todaysheadlines&lid=663780750807; Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/technology/twitter-alex-jones-infowars.html?emc=edit_th_180907&nl=todaysheadlines&lid=663780750907.

they titled their book *Must We Defend Nazis?*,¹¹ a question strongly suggesting a negative answer by sheer force of common sense.

This Article, prepared in conjunction with the symposium “Alt-Association: The Role of Law in Combating Extremism” organized by the *University of Michigan Journal of Law Reform*, seeks to identify and describe the principal categories of arguments that have been advanced against government efforts to silence hate speech and to constrain and punish extremist association.¹² While it may seem “perfectly logical” and intuitively clear that our government should have the authority and the means to combat extremism, this Article attempts to provide a taxonomy of the most influential—and, in my view, most persuasive—objections to that logic and those intuitions. A law reform effort that does not take these arguments into consideration is, in my judgment, condemned to failure, or worse, to a success with unintended consequences and ominous implications.

To be clear: I do not doubt that hate speech and extremist association raise serious and legitimate concerns that deserve our attention. Nor do I maintain that we are powerless to address a number of the gravest evils that we associate with these phenomena. I do, however, believe that law reform projects that have sought to address extremism have often failed to account adequately for the contravening arguments they will need to surmount. This Article categorizes and explores those arguments, not in an attempt to frustrate anti-extremism law reform efforts, but in an effort to highlight doctrinal problems, convey cautionary tales, and clarify matters so that we do not waste any more time doing things that do not work, that courts will not uphold, and that could lead to pernicious results.¹³

Arguments against the policing of hate speech and extremist association fall into three categories. The first category includes def-

11. DELGADO & STEFANCIC, *supra* note 8.

12. This Article focuses primarily on government efforts to restrain extremist speech and association through criminal law. The objections raised here apply with equal force, however, to government attempts to curtail such speech and association through other means, such as tort law. The Article does not address those special circumstances where the government has greater latitude to restrict speech under existing First Amendment doctrine, for example, with respect to the speech of public employees.

13. In the interest of full disclosure, I generally subscribe to the principle that the remedy for the speech we hate is more speech. *See* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). This approach has recently been the subject of additional strategic creativity, for example in efforts by minority groups to reclaim certain slurs and derogatory terms. *See, e.g.,* *Matal v. Tam*, 137 S. Ct. 1744 (2017) (involving an Asian-American band’s effort to reclaim “Slant” through the trademark registration process). Still, I acknowledge that some quarters find this response inadequate and will continue to try to work toward other legal solutions to the problems created by hate speech and extremist association.

initional arguments that focus on problems of vagueness and overbreadth. Any effort to use the law to combat extremism calls the question of what “extremism” means, how someone would know if they were doing it, and whether we can target it without sweeping into our net some forms of speech and association that we wish to protect.¹⁴

The second category includes operational arguments. Even if we can arrive at satisfactorily clear and narrow definitions of operative terms, at the implementation stage we may discover that the concept of extremism does not contribute anything of practical utility to the achievement of our underlying public policy goals. In addition, we may not trust government officials to enforce anti-extremist laws in fair and evenhanded ways, particularly given the flexibility inherent in prosecutorial discretion. Finally, we may worry that authorities could use anti-extremism measures in ways that would disadvantage the very groups such laws are often adopted to protect.

The third category includes conscientious arguments that go to the very heart of the anti-extremism project. Even if we can define extremism with sufficient clarity and specificity, and even if we can operationalize the concept of anti-extremism in useful and nondiscriminatory ways, we must still ask whether we really want “the certain result” that will follow from enforcing such laws. Extreme political and religious ideologies are political and religious still, and they therefore implicate matters of conscience and the right to believe what we will, a right that our law generally views as sacrosanct.

14. Throughout this Article, I use the words “extreme,” “extremist,” “extremism,” and “hate speech.” I do so out of necessity. They provide a rough shorthand for a complex collection of phenomena and ideas. I generally use “extremist” terms to refer to any speech, association, or ideology that stands “substantially outside of belief systems more generally accepted in society (i.e., ‘mainstream beliefs’).” *Extremism*, ADL, <https://www.adl.org/resources/glossary-terms/extremism> (last visited Aug. 23, 2018). I do this recognizing that other people use narrower definitions of these terms, for example to refer more specifically to speech, association, and ideologies that are so “offensive to basic societal norms or so disruptive to critical social goals” as to raise the sensible question of whether their costs substantially outweigh their benefits. See Ivan Hare & James Weinstein, *General Introduction: Free Speech, Democracy, and the Suppression of Extreme Speech Past and Present*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 9, at 123, 130. Some people use the terms, more specifically still, to refer to the “hate speech” that we link to groups like the Nazis or the Ku Klux Klan and that targets a specific group because of a characteristic like race, religion, gender, or sexual orientation. *Id.* at 127. This is the sense in which I use “hate speech” here. Finally, some people use extremist terms to describe, yet more specifically, the religious views that we connect with certain radical sects or the anti-government ideologies associated with some militia and anarchist groups. See *What Is Violent Extremism?*, FBI, <https://www.fbi.gov/cve508/teen-website/what-is-violent-extremism> (last visited Aug. 23, 2018). That my definition (or any other) works adequately for purposes of discussion of these issues here does not mean that it suffices as statutory language or other expressions of public policy. My use of these terms therefore should not be taken as an implicit concession that they bear sufficiently clear and specific meanings to serve as bases for statutory proscription and punishment.

Any anti-extremism enterprise requires us to assess the wisdom of putting the government in the business of trying to regulate expressions of human conscience. That may trouble us, even when the expression at issue seems so perverse and morally corrupt that we view it as the equivalent of no conscience at all.

This Article will begin with a discussion of the doctrinal connection between speech and association. It will then examine some basic due process issues and the three categories of arguments discussed above. Along the way, it will consider some of the principal objections that dissenters have raised to these arguments—and will discuss the difficulties with those objections. And this Article will conclude by asking whether—if we could put all of these arguments aside and adopt the sorts of anti-extremism measures that the law currently prohibits—we would be happy with the result. Spoiler alert: I think not.

I. FREE ASSOCIATION UNDER THE FIRST AMENDMENT

Before embarking on a detailed taxonomy of the arguments raised against the suppression of extremism, it is important to recognize the close relationship that exists between freedom of speech and freedom of association. Indeed, throughout this Article I will treat those freedoms as intertwined, even as interchangeable. First Amendment doctrine requires us to think of them as deeply conjoined concepts. For purposes of First Amendment doctrine, it makes no sense to talk about hate speech and extremist association as if they stand apart and raise wholly distinct questions.

The First Amendment expressly addresses six subject matters: the establishment of religion, the exercise of religion, speech, the press, assembly, and petitioning the government.¹⁵ It nowhere mentions a right to association, although the constitutions of some other countries do explicitly provide for one.¹⁶ Many people, and more than a few federal courts, nevertheless mistakenly believe that the First Amendment includes an association clause,¹⁷ perhaps reflecting the logical force of the idea that the rights to practice religion, to speak, to assemble, and to petition must necessarily entail a right to do these things collectively.

Indeed, the Supreme Court inferred the right of free association from the right of free expression. The relevant case law here be-

15. U.S. CONST. amend. I.

16. See, e.g., S. AFR. CONST. Chapter II, § 18.

17. See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 568 (2010).

gins with *NAACP v. Alabama*,¹⁸ where the Attorney General of Alabama sued the NAACP for allegedly failing to comply with certain statutes regulating entities doing business in that state. In the course of the lawsuit, the Attorney General sought the membership list of the Alabama branch of the organization. The Supreme Court held that the production order issued by the trial court carried with it the “likelihood” of a “substantial restraint” on the “right to freedom of association [of the NAACP members].”¹⁹

The Supreme Court grounded this right to freedom of association in the right to free speech; in this sense, freedom of association is a derivative right, implied from the presence of another. The Court noted that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”²⁰ The Court declared that freedom of association “is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”²¹ And the Court described the breadth of this free association right in sweeping terms: “Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.”²² The resulting principle is therefore simultaneously expansive (protecting group association for the purpose of advancing points of view on a vast array of matters) and narrow (protecting group association only if it has that purpose).²³

In the years immediately following the *NAACP* case, the Court considered the argument that this right to freedom of association afforded a defense to members of the Communist Party who were being prosecuted under the Smith Act.²⁴ In two cases decided on

18. *NAACP v. Alabama*, 357 U.S. 449 (1958).

19. *Id.* at 462.

20. *Id.* at 460.

21. *Id.*

22. *Id.*

23. It should be noted that, in recent years, the Court’s freedom of association cases have often involved the correlative right *not* to associate with certain individuals or ideas. *See, e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). Because government restrictions on extremist speech and association do not, in my view, implicate the right *not* to associate, I will not further explore this line of free association case law in this Article. For the same reason, I will not here explore the concept of “intimate association” alluded to by the Court in some cases. *See Roberts*, 468 U.S. at 617–18.

24. Congress passed the Alien Registration Act, commonly known as the Smith Act, in June of 1940. The Act set criminal penalties for advocating the overthrow of the United States government by force or violence. The Court upheld the Act against a constitutional challenge in *Dennis v. United States*, 341 U.S. 494 (1951). In *Yates v. United States*, 354 U.S. 298 (1957), however, the Court distinguished (a) advocacy of the forcible overthrow of the government as an abstract doctrine from (b) advocacy toward action and that specific end, i.e., a form of incitement to violence. The Court held that the Smith Act reached the latter but not the former and reversed the convictions of the fourteen defendants before the Court.

the same day in 1961, the Court held that the Act did not violate that right because it only exposed certain members of the Party to prosecution.²⁵ The Court concluded that the membership clause of the Act did “not make criminal *all* association with an organization that has been shown to engage in illegal advocacy.”²⁶ Rather, it reached only those “active” members who knowingly acted with the specific intent of accomplishing the aims of the organization—the overthrow of the United States government—by resort to violence.²⁷ Combining to achieve this unlawful aim did not amount to a protected association, but to an illegal conspiracy.²⁸ Members who did not so combine could not be prosecuted under the Act by virtue of their membership in the organization alone.

These cases introduce three themes that will inform our taxonomy of arguments against the regulation of hate speech and extremist association. First, they hint at one of the primary difficulties inherent in discussing “extremism”—the subjective, elusive, and culturally (even locally) determined meaning of the term. In 1958, the Attorney General of Alabama, along with many other public officials and private citizens of the state, doubtless viewed the NAACP as an “extremist” organization working to upset the status quo of segregation. It seems unlikely that the same view prevails, for example, in the State of Vermont today. Similarly, after the First and Second World Wars, government and public anxiety around the “extremist” philosophy of Communism drove irrational fears and correspondingly irrational policies. Our present concerns about Russia and China probably have much more to do with election tampering and trade than they do with worries about an ideological “Red Menace.”²⁹ This theme will be especially present in the category of definitional arguments, although we will encounter it in operational and conscientious arguments as well.

Second, these cases make clear that the right to freedom of association exists only in conjunction with the protection of a different and foundational First Amendment right.³⁰ As Justice Brennan

25. See *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961). In *Scales*, the Court affirmed the conviction below; in *Noto*, it reversed.

26. *Scales*, 367 U.S. at 229.

27. *Id.* at 229–30. See also *Noto*, 367 U.S. at 299.

28. See *Scales*, 367 U.S. at 227.

29. In this vein, Robert Post observes that, “Hate speech regulation imagines itself as simply enforcing the given and natural norms of a decent society . . . but from a sociological or anthropological point of view we know that law is always actually enforcing the mores of the dominant group that controls the content of law.” Robert Post, *Hate Speech*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 9, at 130. As Post observes, the current impulse to prohibit hate speech is, in this sense, closely analogous to the historic impulse to prohibit blasphemy. *Id.* at 127.

30. I put aside here the “intimate association” doctrine referenced in note 23, *supra*.

reiterated in a later case, “the Court has recognized a right to associate *for the purpose* of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind,” he added, “as an indispensable means of preserving *other* individual liberties.”³¹ As noted earlier, freedom of association is thus a derivative right, one that depends on the existence of a predicate right to do something else. The reasons for protecting extremist association therefore necessarily intersect with the reasons for protecting extreme speech, extreme religious beliefs and practices, and so on. We will encounter this theme in every category of argument: our thinking about association necessarily entails our thinking about speech, and vice versa.

Finally, these cases may prompt us to wonder what, if anything, the concept of extremism adds to the analysis. For example, if, consistent with the First Amendment, the government has the authority to punish speech that the speaker knowingly and intentionally deploys to incite individuals to imminent lawless and violent action, then labeling the speech as extremist does not seem to do any work. In thinking through our taxonomy of arguments against the suppression of hate speech and extremist association, we will need to bear this issue in mind. After all, if the First Amendment protects extremist beliefs, speech, or religious convictions *simpliciter*, then we must identify the additional factors (for example, the incitement of imminent violence) that allow us to punish it. And if those additional factors self-sufficiently make the behavior in question punishable, then we may conclude that the extremist label contributes nothing to our thinking. We will encounter this theme in our consideration of all three categories of argument, although it will play its greatest role in connection with operational arguments.

These cases introduce these themes. I will return to all of them later.

II. A TAXONOMY OF ARGUMENTS

As noted above, we can divide the arguments raised against the policing of hate speech and extremist association into three categories: (A) definitional arguments, (B) operational arguments, and (C) conscientious arguments. These categories of arguments

31. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (emphasis added).

identify significant problems that efforts to suppress hate speech and extremism necessarily entail. They do not, however, derive their persuasive power from our conviction that any given hateful or extremist position has merit, or serves as a positive social influence, or even makes sense. To the contrary, these arguments apply even where we feel agnostic, or downright hostile, toward the hate and extremism that the government seeks to address.

This means that at least one additional category of arguments exists: substantive arguments in support of specific extremist views. In short, someone might contend that the government should not regulate or punish a given extremist position because that view is right or passes some minimum threshold of defensibility. I have put such arguments aside here, in part because they turn on the facts and merits of individual cases, and in part because when those arguments are right, they dictate an obvious conclusion: the state should not interfere. In contrast, when we advocate against the suppression of forms of extremism that we condemn or about which we at least have deep reservations, the arguments point in less obvious directions and raise much more interesting issues. For purposes of discussing these categories of arguments, I have therefore taken the rightness of any particular hateful or extremist position off the table.³²

A. *Definitional Arguments*

Those who advocate for laws prohibiting and punishing hate speech and extremist association often claim that our First Amendment doctrine goes too far, does not adequately account for the dignity and other interests of the groups that extremism targets, and reflects a regrettable American exceptionalism.³³ In this section, I will offer a sympathetic view of the Supreme Court's First Amendment decisions, particularly with respect to the definitional challenges that anti-extremism and anti-hate-speech laws pose. As I will discuss, the Court's jurisprudence has focused on two types of problems commonly present in such laws: they are unworkably vague, leaving people to speculate whether the statute prohibits the behavior in question, and they are overly broad, encompassing speech and association we want to protect along with

32. This might seem unnecessary with respect to hate, which we may believe we can universally condemn. But I assume here—without taking on the burden of trying to prove—that individuals of good conscience may be morally justified in hating ideas (inequality), institutions (slavery), or even other individuals (tyrants).

33. See, e.g., JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2014).

that we want to proscribe. In an effort to avoid these problems, legislatures have tried to craft laws that focus on the consequences of speech and association rather than on speech and association themselves. As I will show, however, that move has not solved the infirmities of these statutes.

Before reaching these First Amendment principles, however, we need to recognize that such laws also pose serious problems under basic notions of due process—both as a normative concept and as a principle protected by the Fourteenth Amendment. In our dialogues about these issues we tend to stress the distinctive approach that United States courts take to freedom of expression and to ignore entirely the related concerns about due process that also pertain.

1. Due Process

Our concept of due process requires that a law—particularly a penal statute that puts someone’s liberty, property, or life at risk—must meet certain standards of specificity. Thus, in *Connally v. General Constr. Co.*,³⁴ the Supreme Court declared that a “statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.”³⁵ In contrast, a statute that “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”³⁶

At its essence, due process assures that someone being subjected to legal proceedings will receive notice and an opportunity to be heard.³⁷ A statute fails to satisfy even those minimal guarantees, however, if a reasonable individual cannot determine whether his or her conduct runs afoul of the law and cannot discern the kinds of facts and arguments that would rebut an accusation that it did. Franz Kafka’s *The Trial* famously puts the evils of the dilemma on full display: throughout the novel, the protagonist, Joseph K., remains uncertain of the nature of the offense he allegedly committed and therefore finds himself unable to offer any sort of defense—right up until the moment of his execution, “like a dog.”³⁸

34. *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

35. *Id.* at 391.

36. *Id.*

37. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

38. FRANZ KAFKA, *THE TRIAL* 251 (Willa and Edwin Muir trans., Schocken Books 1968) (1937).

A law that does not reasonably inform a person of what he has done wrong, and thereby deprives him of the opportunity to defend, does little for the interests of human agency and dignity. Nor is dignity much advanced by a law whose ambiguity may result in forced silence on the part of those who choose not to act or a wrongful conviction on the part of those who do. That such a law rests on noble ideals or good intentions does not rehabilitate and justify it.³⁹ Again, these concerns—grounded in due process principles—exist independent of those that arise when free expression and association are involved. As we turn to our analysis of laws attempting to regulate extremism, it is critical to remember that they may raise not only First Amendment problems of vagueness and overbreadth, but foundational due process problems as well.

2. Vagueness, Speech, and Association

The concerns raised by vague statutes extend beyond due process when the law implicates speech. In *Grayned v. City of Rockford*,⁴⁰ the Supreme Court listed three concerns raised by such laws.⁴¹ The first is the notice problem just identified: “we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”⁴²

The second concern relates to enforcement: “laws must provide explicit standards for those who apply them,” or those officials may execute them in “arbitrary and discriminatory” ways.⁴³ Like inadequate notice, capricious or biased enforcement poses serious problems with respect to any vague statute. But these concerns become particularly grave with respect to statutes that target speech and association.

I will discuss enforcement issues in greater depth later when I address some of the operational arguments that can be raised against policing hate speech and extremist association. I prelimi-

39. People can reach different conclusions on this point, as is demonstrated by an exchange between the poet Stephen Spender and the philosopher Jean-Paul Sartre at a writer’s conference in 1956. Spender asked Sartre, a champion of Marxism at the time, whether he would allow his friends to campaign for his release from a Communist prison if he had been wrongfully convicted of a crime but his exoneration would injure the Party. Sartre replied that he would not press for his freedom. Spender said: “It seems to me that the only good cause has always been that of one person unjustly imprisoned.” Sartre replied that “perhaps in the modern world ‘injustice against one person is no longer the point.’” SARAH BAKEWELL, *AT THE EXISTENTIALIST CAFÉ* 247 (2016).

40. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

41. *Id.* at 108–09.

42. *Id.* at 108.

43. *Id.*

narily note now, however, that vagueness creates its own serious enforcement problems. Consider, for example, *Herndon v. Lowry*.⁴⁴ In that case, the defendant had pamphleteered on behalf of the Communist Party and, as a result, was convicted under a vague Georgia statute that prohibited “combined resistance to the lawful authority of the State.”⁴⁵ The Supreme Court reversed, declaring that “the statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others”⁴⁶

Vague standards thus allow a law enforcement officer to make an arrest, a prosecutor to bring charges, a judge to find probable cause, and a jury to return a guilty verdict—all because they do not like the speaker or the point of view expressed. In short, vagueness facilitates abuse, allowing for the punishment of unpopular speech. And this offends the very purpose of the First Amendment, because popular speech does not need its protection.

The third concern identified by the Court in *Grayned*—that vagueness will cause people to behave with an abundance of caution—also has special relevance to statutes that restrain and punish speech. “Uncertain meanings,” the Court observed, “inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”⁴⁷ Where the statute “abut[s] upon sensitive areas of basic First Amendment freedoms,” this tendency will necessarily “inhibit the exercise of [those] freedoms.”⁴⁸ In other words, people will respond cautiously when faced with a statute vague in its terms and scope; they will accordingly stay well away from the statute’s ambiguous borders; and, when that statute targets speech, this excessive wariness will have the effect of artificially limiting First Amendment rights and constraining their full exercise. Such a result inverts our expressed priorities under longstanding First Amendment doctrine. In this way, vague statutes take breathing space away from speech and give that latitude to government efforts to regulate or punish expression and association. Under our First Amendment doctrine, which I believe largely gets matters right, this has things exactly backwards.

44. *Herndon v. Lowry*, 301 U.S. 242 (1937).

45. *Id.* at 253.

46. *Id.* at 263–64.

47. *Grayned*, 408 U.S. at 109.

48. *Id.*

Consider, for example, the Court's imposition of constitutional limitations on certain defamation claims in *New York Times Co. v. Sullivan*.⁴⁹ The Court there held that public official plaintiffs in defamation cases must prove by clear and convincing evidence that the defendant acted with "actual malice"—that is, with knowledge of falsity or in reckless disregard of it.⁵⁰ The Court acknowledged that this demanding standard would render some false speech practically unpunishable and therefore protected. But the Court declared that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive."⁵¹ In other words, if we seek to protect *all true* speech then we have to protect *some false* speech as well.

This same concept is reflected in the Court's approach to crafting exceptions to First Amendment protection. The Court has recognized only a few categories of unprotected speech and has shown no interest in creating additional unprotected categories to deal with new issues—like horrifically violent video games that find their way into the hands of minors or films of fetishistic animal torture.⁵² And, more to the point, the Court's definitions of the historically unprotected categories of speech (like obscenity,⁵³ "fighting words,"⁵⁴ and true threats⁵⁵) have a conspicuous narrowness to them, leaving protected a great deal of speech that many of us would find offensive, obnoxious, valueless, and perhaps even dangerous. Our First Amendment jurisprudence has evolved in just this way, with the Court constructing buffer zones around categories of unprotected speech so as to err in favor of free expression. As observed above, vague statutes create uncertain areas of potential punishment—the exact opposite of a buffer zone.

We can imagine two objections to this buffer zone approach and to these arguments about why vague laws that target speech and as-

49. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

50. *Id.* at 279–80.

51. *Id.* at 271–72 (citation omitted).

52. *See* *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799–804 (2011) (striking down a California law banning the sale of certain violent video games to children without parental permission); *United States v. Stevens*, 559 U.S. 460, 468 (2010) (striking down a federal law that criminalized certain depictions of cruelty to animals).

53. *See* *Miller v. California*, 415 U.S. 15, 23–24 (1973) (declaring that the First Amendment does not protect "obscenity" but adopting a three-part test that renders only some sexually explicit material "obscene").

54. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). Although the Court there held that the First Amendment does not protect fighting words, as I discuss *infra*, at pp. 881–82, the Court later substantially narrowed that doctrine.

55. *See* *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (holding that although the First Amendment does not protect a "true threat," it does protect political hyperbole and vehement, caustic, and unpleasantly sharp verbal attacks on public officials).

sociation pose special problems. The first goes to one of the underlying premises—specifically, the behavioral assumption that unclear laws will chill people from engaging in speech that contributes to public discourse. Someone might fairly ask: do we really believe—particularly in this age of ubiquitous and unfettered online communication through social media and other channels—that human beings are so easily cowed?

One answer to that objection focuses on the significance of the speech of any particular person. As Geoffrey Stone has observed, free speech is relatively easily chilled “because our individual act of expression is unlikely to make a difference.”⁵⁶ We therefore tend to believe that the addition or absence of our voice will not matter much, if at all—especially with regard to big issues over which we have no direct control, like public policy. As Stone points out, however, “if many people are individually chilled, the overall impact on public discourse can be quite dramatic. This is why courts formulating First Amendment doctrine generally pay special attention to the dangers of chilling effect.”⁵⁷ Furthermore, while the vigor of expression on the Internet may tell us something about how freely people speak when they do not feel chilled, it tells us nothing about how those same people would respond if our First Amendment doctrine shifted to validate restrictions on and punishments of “extreme” speech.

The second objection to the buffer zone approach goes to the ultimate conclusion of the argument—that incentivizing people to behave cautiously when they speak, and when they associate with others to do so, is a bad thing. Someone might understandably ask: what’s wrong with trying to encourage people to act carefully and responsibly when they speak? Don’t we do that with respect to a host of other activities?

In some cases, the Supreme Court has resorted to a curious stratagem to dispose of this second objection. In essence, the Court has hinted that we can afford to give the speech in question free rein because, well, we can’t take it seriously enough to think it dangerous.⁵⁸ For example, in *Herndon*—the Communist pamphlet-earring case—the Court variously describes the speech at issue as

56. Geoffrey R. Stone, *Chilling Effect*, HUFFPOST (Feb. 16, 2007), https://www.huffingtonpost.com/geoffrey-r-stone/chilling-effect_b_41430.html.

57. *Id.*

58. In the same vein, Roger Shattuck has observed that censorship efforts can “be interpreted as attributing more efficacy, more significance, and therefore more potential risk to ideas and words than does a policy of unrestricted free speech.” In this sense, Shattuck argues, “[t]olerance belittles.” ROGER SHATTUCK, *FORBIDDEN KNOWLEDGE: FROM PROMETHEUS TO PORNOGRAPHY* 27 (1996).

“foolish,” “pernicious,” and “vague.”⁵⁹ And Justice Holmes uses even more dismissive language in the midst of his otherwise rhapsodic defense of free speech in *Abrams*, referring to the “leaflets” before the Court as “poor and puny anonymities” that express a “creed” of “ignorance and immaturity.”⁶⁰

A skeptical assessment of whether the specific speech at issue poses any actual danger to anyone may provide a helpful reality check, but it does not dispose of the general objection that people should act cautiously when speaking. After all, that the speech at hand may seem relatively harmless does nothing to prove that the same holds true for all speech. Indeed, such a claim would lead us into a deep inconsistency, on one hand celebrating the power and importance of free expression while on the other waving it off as ineffectual and insignificant.⁶¹

No, in order to be persuasive, a response to the second objection—the critique that people ought to be more careful with their words—must acknowledge that the speech we want to protect can have serious adverse consequences. And, indeed, our First Amendment jurisprudence protects a great deal of speech that can result in real and substantial harm. To take a straightforward example: the knowingly false and constitutionally unprotected statement described by the Court in *Sullivan* can ruin someone’s reputation and destroy his or her life; but then so can a completely true and constitutionally immunized statement about the same person. In fact, it seems likely that true statements will generally do greater injury to a person’s reputation than false ones—but we protect them anyway.⁶² We therefore might reframe the second objection more precisely this way: *given that words can do real harm*, what’s wrong with having rules that will persuade people to act cautiously—even very cautiously—when they speak?

59. *Herndon v. Lowry*, 301 U.S. 249–50 (1937).

60. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

61. There are contexts in which considering the negligible impact of a given instance of speech is legitimate. Consider, for example, *Pickering v. Board of Education*, 391 U.S. 563 (1968). In that case, a teacher was dismissed from his employment for sending to a local newspaper a letter in which he was critical of the manner in which the school board and superintendent had addressed revenue issues. After conducting a hearing, the board concluded that the teacher’s conduct had been “detrimental” to the school and so terminated him. The Supreme Court held that the dismissal violated the teacher’s First Amendment rights. The Court noted that teachers do not lose their First Amendment right to speak about matters of public importance simply by virtue of their public employment. And the Court further observed that there was no reason to believe that the speech had in fact been detrimental to the school. “So far as the record reveals,” the Court declared, the letter was greeted by everyone but the board with “massive apathy and total disbelief.” *Id.* at 570.

62. In fact, in the early seventeenth century English courts took the position that “even a *true* libel could be criminally punished” and an “oft-quoted maxim” held that “the greater the truth the greater the libel.” GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 42 (2004).

The doctrine responds by recognizing that speech we characterize as incautious can have substantial value. Speech may be viewed as incautious because it insults the powerful, or undermines the status quo, or upsets the dominant paradigm, or sparks outrage. But, in many cases, knowledge advances, freedom is secured, and progress occurs only because the powerful are confronted, the status quo gets upended, the dominant paradigm is replaced, or outrage energizes an otherwise inert people.

We cannot say the same for most other activities in which human beings engage: there is no value, for example, in taking an incautious approach to driving a car, manufacturing pharmaceuticals, introducing your aggressive dog to strangers, or serving alcohol to someone who appears intoxicated. We adopt laws requiring caution when engaging in those activities because that's how we want people and entities to behave when they do those things. In the case of speech, we don't just tolerate greater risk-taking, we encourage it—and in part we do so because expression is so easily chilled for the reasons discussed above.

3. Overbreadth

Laws that seek to punish extremist speech and association raise another kind of definitional problem, which the Supreme Court has addressed through the doctrine of overbreadth. The overbreadth doctrine comes into play when the language of a law reaches speech that the First Amendment does not protect—but also speech that it does. So, for example, a statute that prohibited “visual depictions of naked minors” would apply to child pornography, but it would also apply to a textbook on pediatric medicine or to a folio on Renaissance art. In the same vein, a statute that prohibited “speech that stigmatizes a minority group” would apply to the statements of extremist groups, but also to Shakespeare's *The Merchant of Venice*.

The overbreadth doctrine is both important and problematic. On one hand, the doctrine does essential work in protecting speech. Legislatures have a natural and understandable impulse to overreach: after all, any problem worthy of a legislative solution would seem to demand a broad and thorough one. As I have previously observed, the Supreme Court has had so many occasions to strike down statutes on overbreadth grounds because of a pseudo-Newtonian principle of lawmaking: “For every action, there is an

unequal and opposite overreaction.”⁶³ The overbreadth doctrine forces a course correction as against this impulse. The Court has therefore allowed for its aggressive application, for example creating a special exception to the law of standing in order to permit a plaintiff to attack an overly broad statute even though the plaintiff’s own conduct is “clearly unprotected and could be proscribed by a law drawn with the requisite specificity.”⁶⁴

On the other hand, the Court has recognized that holding a law unconstitutional on overbreadth grounds is “strong medicine” and so should be done only “with hesitation” and “as a last resort.”⁶⁵ We can see why: a declaration of unconstitutional overbreadth can invalidate the legitimate exercise of legislative power right along with the illegitimate. To return to the “naked minor” statute discussed above, application of the overbreadth doctrine brings down the senseless prohibition against pediatric medical texts—but also the sensible prohibition against child pornography. As a result, the Court has fashioned a number of limitations on the doctrine, for instance declining to apply it unless the statute suffers from substantial overbreadth⁶⁶ or if a statute’s facially overbroad language has been narrowed by a definitive judicial interpretation.⁶⁷

For purposes of this article we need not attend to the nuances of the overbreadth doctrine. It suffices to note that statutes that try to suppress hate speech and extremism may extend too far and encompass expression and association that warrant protection. Indeed, laws targeting extremism are particularly prone to such overreach precisely because legislatures will (rightly) conclude that some extremist ideologies and behaviors are gravely worrisome and so (wrongly) assume that those threats demand a correspondingly expansive statutory solution. An ironic result follows: if a legislature sees the dangers as less ominous, then it may have little difficulty crafting a statute that is surgical in its precision; in contrast, if a legislature believes that a category of speech or association presents a grave and meaningful threat, then it may gravitate toward just the sort of vague and overbroad laws that the courts find invalid. The congressional responses to the perceived evils of Communism provide historical cases in point, but the phenomenon is common, as is more recently demonstrated by legislative efforts to regulate violent video games.

63. Len Niehoff, *Doe v. University of Michigan: Free Speech on Campus 25 Years Later*, 71 U. MICHIGAN L. REV. 365, 375–76 (2017).

64. *New York v. Ferber*, 458 U.S. 747, 769 (1982).

65. *Id.*

66. *Id.* at 769–70.

67. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). For further discussion see *infra* text accompanying notes 83–91.

4. Legislative Rationales: Provocation and Injury Consequences

The principles of vagueness and overbreadth explain why labels like “extremist” or “hate speech” have little or no utility in fashioning laws. A law simply forbidding “extremist speech and association,” to take an obvious example, would be so hopelessly vague as to provide no guidance whatsoever as to its meaning and scope. We might understand that such a label encompasses groups that promote norms that our society rejects in its laws and policies—such as segregation, anti-Semitism, racially targeted crime, and genocide. But it arguably also encompasses any group whose views lie outside the mainstream, including groups who expressly reject agendas of violence. A law so vaguely framed might also take in the American Civil Liberties Union, the National Rifle Association, People for the Ethical Treatment of Animals, the American Family Association, and Greenpeace—all groups that (like them or not) have contributed meaningfully to public debate around important issues.

Indeed, legislative efforts to get at the perceived evils of certain speech or association have historically made almost no use of the concept of extremism or the label “extremist.” Instead, they have overwhelmingly focused on addressing the consequences that may follow from particular kinds of speech and expressive association. Those consequences fall into two general categories: (a) those where the speech *provokes* someone—for example, inciting them to respond immediately and violently to what has been said; and (b) those where the speech *injures* someone—for example, by making them feel threatened, attacked, or emotionally wounded. To be clear, these consequences are not mutually exclusive—a person who feels threatened may react violently out of an impulse toward self-defense. But it is helpful to recognize that legislative efforts here generally attempt to address just one of these two kinds of concerns, which this article will call “provocation consequences” and “injury consequences.”

We might think that fashioning laws based on identified consequences, rather than on unclear and expansive labels like “hate” and “extremist,” would yield statutes that avoided vagueness and overbreadth problems. A long history of Supreme Court precedent, however, shows otherwise. Indeed, vagueness and overbreadth issues have plagued, and invalidated, numerous laws that sought to address either provocation or injury consequences.

Consider, for example, the early case of *Terminiello v. Chicago*, which involved a Chicago ordinance prohibiting “disorderly conduct,” which, as the statute defined it, amounted to a provocation

consequence.⁶⁸ In that case, Father Arthur Terminiello, a Catholic priest who had been suspended by his Bishop, gave a ranting anti-Semitic speech to a large, assembled group while protestors picketed and grew increasingly angry outside.⁶⁹ A jury found him guilty under the ordinance, but a majority of the Supreme Court found the law unconstitutional and reversed.

Most of what we know about the actual substance of Terminiello's speech comes from the dissent filed by Justice Jackson. Jackson noted that, although Terminiello disclaimed being a fascist, his speech followed "with fidelity that is more than coincidental, the pattern of European fascist leaders."⁷⁰ His virulent attacks on Jews and Communists drew enthusiastic support from his audience, who sympathetically called out such phrases as "[T]he Jews are all killers, murderers. If we don't kill them first, they will kill us"; "[S]end the Jews back to Russia"; "Kill the Jews"; and religious epithets.⁷¹ Jackson could not help mocking the majority's short and sanitized description of the content and context of Terminiello's speech, charging his colleagues with treating the priest as if he were "a modern Demosthenes practicing his [orations] on a lonely seashore."⁷²

Despite the inflammatory nature of Terminiello's speech—and the response to it—the Court held that his conviction under the ordinance violated the First Amendment.⁷³ Although the Court had not yet formally recognized the overbreadth doctrine, it essentially applied the analysis we associate with it. Of course, the City of Chicago could adopt an ordinance that prohibited disorderly conduct in some forms. Here, however, the judge had instructed the jury that the phrase "breach of the peace" in the ordinance included speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."⁷⁴ As noted above, these are provocation consequences.

The Supreme Court held that the ordinance, so interpreted and applied, reached too far. As the Court observed, a great deal of valuable speech offends, upsets, and antagonizes people. The Court declared that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfac-

68. *Terminiello v. Chicago*, 337 U.S. 1, 3, 5 (1949).

69. *Id.* at 14–15 (Jackson, J., dissenting).

70. *Id.* at 22.

71. *Id.*

72. *Id.* at 13.

73. *Id.* at 5.

74. *Id.* at 4.

tion with conditions as they are, or even stirs people to anger.”⁷⁵ A statute that punishes speech simply because it makes people enraged or agitated encompasses expression that we view as democratically legitimate, indeed indispensable to political change.

Twenty years later, the Court had occasion to review a law that targeted a somewhat narrower class of speech and association, that which specifically advocated for or defended the use of violence—again, a provocation consequence. *Brandenburg v. Ohio*⁷⁶ involved a speech by Clarence Brandenburg, a Ku Klux Klan leader, at a rally of the organization at a farm in Ohio. Dressed in Klan regalia, Brandenburg warned that “some revengeance” might have to be taken in response to government efforts to “suppress the white, Caucasian race” and declared that blacks “should be returned to Africa, the Jew returned to Israel.”⁷⁷ News crews filmed the event and portions of it were broadcast on a local television station and a national television network.

Brandenburg was charged with violating the Ohio Criminal Syndicalism statute, which swept expansively. Among other things, it allowed for the punishment of anyone who advocated for or taught violence as a means of accomplishing political reform, or who justified the commission of such violence, or who assembled with others to engage in such advocacy or teaching.⁷⁸ Again, this case pre-dates the Court’s more formal recognition of the overbreadth doctrine, but the Court held the statute invalid because it reached too far.

Although the statute covered speech that the First Amendment does not protect—specifically, incitement to imminent lawless action—it also encompassed “mere advocacy,” that is, the discussion and promotion of certain ideas without more.⁷⁹ Citing a line of earlier cases, the Court stressed that “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”⁸⁰ The Court continued: “A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.”⁸¹

75. *Id.*

76. 395 U.S. 444 (1969).

77. *Id.* at 446–47.

78. *See id.* at 448.

79. *Id.* at 447–49.

80. *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

81. *Id.* It is worth noting that the Court’s description of a permissible version of such a statute—as one that prohibits groups from preparing for violent action that they begin to

Over the course of the next few decades, legislative attention shifted from the *provocation* consequences of extremist speech to the *injury* consequences. Certainly, concepts like “disorderly conduct,” “syndicalism,” and “incitement” continued to be invoked as bases for punishing extreme speech and association. But, particularly following the passage of federal and state civil rights laws, the emphasis moved decidedly toward protecting the victims of extremism and addressing their injuries, such as fear, alarm, emotional distress, marginalization, and interference with their peaceful enjoyment of rights and privileges. In the process, states, local units of government, and universities adopted laws and policies attempting to get at the evils of what we have come to label “hate speech.”⁸²

One such law that found its way to the Supreme Court was the Bias-Motivated Crime Ordinance adopted by the city of St. Paul, Minnesota in 1990. That ordinance provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.⁸³

We can, without much difficulty, imagine the likely thought process of the St. Paul city council: (a) some symbols, like burning crosses or Nazi swastikas, are intended to provoke anger, outrage, and fear among certain minority populations; (b) those symbols carry great and personal social costs without contributing any offsetting benefits to public discourse; (c) therefore, we should adopt an ordinance that addresses the evils of such symbols and does so comprehensively.

pursue—resembles the territory covered by many laws that bar criminal conspiracies. I will return to this point later when I discuss the operational arguments against trying to restrict extremist speech and the question of whether the concept of extremism adds anything to what we seek to prohibit.

82. One of the earliest forays into the prohibition of “hate speech” on a university campus involved the student code adopted at the University of Michigan, which was held to violate the First Amendment. *See Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). For a discussion of *Doe* and its implications for current discussions around university regulation of student speech, *see* Niehoff, *supra* note 63.

83. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992). The ordinance takes an intriguing approach: it identifies injury consequences (“anger, alarm, resentment”), but wraps them in the language of a provocation consequence (“disorderly conduct”). The ordinance is, however, unmistakably focused on attempting to address the injury consequences of extremism.

Unfortunately, the St. Paul ordinance demonstrates the natural impulse toward over-legislation that I described earlier, resulting in conspicuous problems of vagueness and overbreadth. Consider this example: Let's say that I own a copy of Hitler's *Mein Kampf*, which I keep in the private library of my home. The cover of the book is festooned with images of swastikas. Am I in violation of the ordinance? Well, perhaps: on its face, the ordinance reaches private property and specifically prohibits the display of this symbol. Do I "know" or "have reasonable grounds to know" that the book cover will cause any of the various mental states described on the part of someone who enters my home and sees it? Again, perhaps—but how can I tell? Under what circumstances (if any) should I reasonably expect that someone visiting me might feel angry or resentful upon seeing the cover and those symbols? If the ordinance doesn't extend to my ownership and private display of the book, then how do I know that from its language? And, if it does, then isn't the ordinance overly broad—and absurdly so?

The Supreme Court, considering this ordinance in *R.A.V. v. City of St. Paul*, decided that it did not need to reach these issues.⁸⁴ It so concluded because the Supreme Court of Minnesota had interpreted the ordinance in a way that at least arguably solved its severe overbreadth problem. Specifically, the state's highest court had construed the ordinance to cover only "fighting words"—that is, insulting words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."⁸⁵ This includes "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."⁸⁶

In *Chaplinsky v. New Hampshire*,⁸⁷ the Court had identified such words as lying outside the scope of First Amendment protection. After *Chaplinsky*, however, the precise contours of the doctrine came into question as the Court narrowed it substantially—for example, limiting it to instances of a "direct personal insult" to a targeted individual likely to respond with violence.⁸⁸ In *R.A.V.*, the petitioner and some *amici curiae* urged the Court to revisit the "fighting words" doctrine, to limit it still further, and to declare the ordinance overbroad.⁸⁹ The Court deemed this an unnecessary step and so declined to take it.

84. *Id.* at 377.

85. *Id.* at 381 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

86. *Cohen v. California*, 403 U.S. 15, 20 (1971) (citing *Chaplinsky*, 315 U.S. at 573).

87. *Chaplinsky*, 315 U.S. 568.

88. *See, e.g., Cohen*, 403 U.S. at 20.

89. *R.A.V.*, 505 U.S. at 381.

For present purposes, the critical point is that if the Minnesota Supreme Court had *not* dramatically narrowed the ordinance, then the Supreme Court would certainly have found it substantially overbroad and therefore invalid. Indeed, in order to save the ordinance, the Minnesota court had to perform such dramatic surgery on it as to leave it almost unrecognizable: the actual language of the law bears only the faintest resemblance to the terms of the fighting words doctrine. That the ordinance required such an extensive and imaginative reconstruction says a great deal about its initial overbreadth.

Although the Court did not reach the overbreadth issue, it did find the ordinance unconstitutional on other grounds. The Court observed that the ordinance prohibited only some “fighting words”—specifically, those that insulted people based on “race, color, creed, religion or gender.” But, the Court pointed out, the statute did not proscribe “abusive invective, no matter how vicious or severe,” in connection with the conveying of other potentially offensive ideas—for example, “to express hostility . . . on the basis of political affiliation, union membership, or homosexuality.”⁹⁰ The Court declared that the First Amendment does not permit the government to “impose special prohibitions on those speakers who express views on disfavored subjects”—precisely what St. Paul did through its ordinance here.⁹¹ I will return to this point later, when I discuss the operational and conscientious arguments raised against the regulation of hate speech and extremist association.

The Court again considered laws directed toward the injury consequences of extreme speech and association in *Snyder v. Phelps*.⁹² In that case, the father of a deceased soldier sued members of the Westboro Baptist Church on a variety of theories after they picketed near the memorial service held for his son. Westboro’s adherents believe that the United States has become too tolerant of homosexuality and that God punishes the country for that sin by, among other things, killing off its troops. The signs displayed by the church during their picketing reflected these beliefs, declaring, for example: “God Hates the USA/Thank God for 9/11”; “America is Doomed”; “Don’t Pray for the USA”; “Thank God for IEDs”; “Thank God for Dead Soldiers”; and “You’re going to hell.”⁹³ The jury returned a verdict in the plaintiff’s favor on his claims for intentional infliction of emotional distress, intrusion

90. *Id.*

91. *Id.*

92. *Snyder v. Phelps*, 562 U.S. 443 (2011).

93. *Id.* at 448.

upon seclusion, and civil conspiracy, awarding him compensatory and punitive damages totaling more than ten million dollars.⁹⁴

The Supreme Court reversed. The Court began by noting that the messages on the protestors' signs—while not “refined social or political commentary”—did address issues of public concern: the “political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military,” and other matters.⁹⁵ The Court further observed that the signs plainly reflected the sincerely held beliefs of these individuals.⁹⁶ And, finally, the Court pointed out that the protestors had expressed their views peacefully and at a public place adjacent to a street.⁹⁷ This combination of factors meant that Westboro's speech was entitled to “special protection” under the First Amendment, and could not be restricted simply because it was upsetting or aroused contempt.⁹⁸ In so ruling, the Court did not downplay the injury consequences of the speech and assembly in question; to the contrary, it acknowledged that the protestors' conduct had undoubtedly added still more anguish to the plaintiff's “already incalculable grief.”⁹⁹

The Court expressed particular concern over the state law tort standard for finding intentional infliction of emotional distress, which the trial court instructed the jury to apply: “outrageousness.”¹⁰⁰ The Court noted that this “highly malleable standard” has “an inherent subjectiveness about it.”¹⁰¹ This gives rise to two concerns. First, the standard is so mysterious and expansive as to amount to no standard at all; indeed, it seems clear that if a state adopted a statute penalizing “outrageous speech” the Court would promptly strike it down on vagueness and overbreadth grounds. Second, this “highly malleable standard” gives jurors the vast discretion to punish speech simply because they dislike it; it allows “a jury to impose liability on the basis of the jurors' tastes or views.”¹⁰² I will return to this theme in the next section of the Article when I explore operational problems.

In the course of its long history, the Supreme Court has not struck down every law that targeted extreme speech and association as vague or overly broad. One notable early exception is *Beau-*

94. *Id.* at 450.

95. *Id.* at 454.

96. *Id.* at 455.

97. *Id.* at 456.

98. *Id.* at 458.

99. *See id.* at 456. *See also id.* at 460–61 (noting that the church's speech “is certainly hurtful” and “inflict[ed] great pain”).

100. *Id.* at 458.

101. *Id.* (citation omitted).

102. *Id.* (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988)).

harnais v. Illinois,¹⁰³ where the Court upheld the constitutionality of a statute that bears a close resemblance to the “hate speech” laws for which many people advocate today.¹⁰⁴ In pertinent part, the statute read:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots¹⁰⁵

The Court—applying the law as it existed in the middle part of the twentieth century—upheld the statute by following this line of reasoning: (a) the First Amendment affords no protection to defamatory speech directed against an individual; (b) the defamation of certain racial and religious groups has led to all sorts of evils, including discrimination, property destruction, and violence; (c) therefore, the State of Illinois was free to adopt a law that prohibited the defamation of classes of citizens by reference to their race, color, creed, or faith.¹⁰⁶ This argument is not without its logical force or appeal, and if First Amendment doctrine had stopped evolving in 1952, it would likely still be the law.

As we have seen throughout this section, however, subsequent developments unsettled the reasoning of *Beauharnais*. In *New York Times v. Sullivan*,¹⁰⁷ the Court concluded that state defamation law does not lie entirely outside of the concerns of the First Amendment, which must limit tort principles in order to ensure that speech is adequately protected. In *Brandenburg*,¹⁰⁸ the Court declared that incendiary speech must be likely to incite imminent violence before the state can prohibit it. In *Snyder*,¹⁰⁹ the Court

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

104. See Levin, *supra* note 8, at 725 (noting the similarity between the group libel statute at issue in *Beauharnais* and anti-hate-speech statutes that have been adopted in other countries). See also Pascal Mbongo, *Hate Speech, Extreme Speech, and Collective Defamation in French Law*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 9, at 221 (addressing the French concept of “collective defamation”).

105. *Beauharnais*, 343 U.S. at 277 n.1.

106. *Id.* at 254-61.

107. *N.Y. Times Co. v. Sullivan* 376 U.S. 254 (1964).

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

109. *Snyder v. Phelps*, 562 U.S. 443 (2011).

stressed the “special protection” that attaches to speech on matters of public interest—which can include unpleasantly sharp attacks on groups. Although the Court has never formally overruled *Beauharnais*, these later developments eclipse its reasoning and render it doctrinally obsolete.

Furthermore, a statute like that under consideration in *Beauharnais* could not survive the Court’s current tests for overbreadth and vagueness—at least absent a saving construction. Consider, for example, the recent editorial cartoon by Pat Oliphant viciously lampooning the Catholic Church’s sex abuse scandal: a mob of sex-crazed priests chases a group of children from a sanctuary over the caption “Celebration of Spring at St. Paedophilia’s—the Annual Running of the Altar Boys.” Read literally, the statute would appear to criminalize the drawing, which portrays “depravity, criminality, unchastity, [*and*] a lack of virtue” on a “class of citizens” of a particular “religion,” exposing them to “contempt, derision, or obloquy.”¹¹⁰

The *Beauharnais* statute is also distressingly vague. It leaves members of the public to guess about the meaning of words and phrases like “depravity,” “lack of virtue,” “derision,” and “obloquy.” Consider this: If I express the opinion that members of the white race are condescending toward members of the black, have I violated the statute? Have I impermissibly portrayed a “lack of virtue” on behalf of a class of citizens based on their race in a manner that will “expose them to derision?” Who knows? For all of these reasons, the Court’s early analysis of the anti-hate-speech-style statute in *Beauharnais* offers us little more than a cautionary tale about some of the things that can go wrong when we try to prohibit extremist expression and association.

To sum up: efforts to regulate, prohibit, and punish extremist speech and association necessarily encounter those definitional difficulties that are reflected in our concepts of vagueness and overbreadth—and even in our foundational concept of due process. Because we plainly cannot solve them by using labels like “extremist group” or “hate speech,” legislatures have historically focused on the provocation consequences and injury consequences that they believe likely follow from such speech and association. This has, alas, simply led them into different sets of vagueness and overbreadth problems. As I will discuss in the next two sections, however, these are neither the only nor, perhaps, the greatest challenges that efforts to control extremism face.

110. See *Beauharnais*, 343 U.S. at 251.

B. *Operational Arguments*

In addition to the definitional challenges outlined above, laws targeting hate speech and extremist association can pose significant problems in implementation. One threshold issue here comes from the fact that at the implementation stage we may discover that a law specifically targeting extremism turns out to be unnecessary. Furthermore, in light of the vagueness and overbreadth risks inherent in drafting statutes directed specifically toward extremism, the incremental value of such laws (if any) may be outweighed by the risk of their invalidity. And, ironically, in the implementation process, such laws could end up harming the very populations they were intended to protect.

The cases discussed in the prior section reflect a very low tolerance for vagueness and overbreadth in laws that seek to regulate, prohibit, and punish speech and association. In *R.A.V.*, we also encountered an extremely high doctrinal hostility toward laws that target speech based on its content and viewpoint. Indeed, the Court has historically considered viewpoint discrimination to be among the most serious and unjustifiable of First Amendment violations—a point to which I will return in the next section.

If we accept the rationales that underlie the Supreme Court's keen sensitivity to vagueness and overbreadth, then the legal territory available for restrictions on hate speech and extremist association may appear to be very limited. As noted above, unclear terms of uncertain scope like "hate speech," "hate group," "extremist group," and "alt-association" may have a place in relatively low-definitional high-abstraction public discourse, but they cannot serve to define a legally proscribed category. And, as discussed, vagueness and overbreadth problems will often persist as we move our thinking and language toward the consequences of such speech and association, attempting to address the provocations and injuries they may cause.

That we find ourselves with limited legal territory, however, does not mean that none exists at all. To the contrary, many of the evils we connect with extremism are evils in and of themselves, and the law proscribes them regardless of their ideological origins. Consider, for example, the speech that First Amendment doctrine calls a "true threat." The law can, and does, criminalize the making of a true threat to someone's life or physical well-being, and it can, and will, punish the individual for making the offending statement without any consideration of whether he or she did so because of a political impulse, or a sincerely held religious belief, or a mean streak, or a bad hand at the poker table.

We find an example of this principle in *Virginia v. Black*.¹¹¹ That case concerned a Virginia statute that banned cross burning with “an intent to intimidate a person or group of persons.”¹¹² Although *Black* involved a variety of legal issues and consolidated several different cases, I will focus here on the constitutionality of the principal provision of the statute and on defendants Elliott and O’Mara, because these offer the most useful insights into implementation challenges for our purposes.

These are the salient facts: James Jubilee, an African American, lived next door to Elliott. Elliott apparently used the backyard of his home as a firing range and enjoyed shooting guns there. After Jubilee complained to Elliott’s mother, Elliott and his friend O’Mara decided to take retribution by planting a cross in Jubilee’s front yard and setting it on fire.

Neither Elliott nor O’Mara claimed any affiliation with the Ku Klux Klan, and Jubilee did not discover the partially burned cross until the next morning. Jubilee nevertheless understood the ominous implications of the cross and felt anxious about what it portended. The police identified Elliott and O’Mara as the perpetrators and arrested them. A jury found Elliott guilty of violating the statute and O’Mara pleaded guilty to doing so, reserving the right to challenge the constitutionality of the law on appeal.¹¹³

Justice O’Connor wrote the plurality opinion for the Court. After reciting the facts of the various cases, she provided a detailed account of the history of the Ku Klux Klan and its use of cross burning as “a tool of intimidation and a threat of impending violence.”¹¹⁴ She noted that cross burning had become a “symbol of hate” that was used to “threaten or menace” other people, even by individuals (like Elliott and O’Mara) who had no affiliation with the Klan.¹¹⁵

Turning to legal principles, Justice O’Connor observed that the First Amendment does not protect “true threats,” which she defined as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹¹⁶ The

111. *Virginia v. Black*, 538 U.S. 343 (2003).

112. *Id.* at 347.

113. *Id.* at 350-51.

114. *Id.* at 354.

115. *Id.* at 357. By “no affiliation,” I mean no membership or other formal connection. In my view, someone who burns a cross on the lawn of an African American does indeed “affiliate” with the traditions and symbols of the Klan. For our purposes, however, what matters here is that Elliott and O’Mara were being prosecuted for an act of intimidating cross burning, without any necessity to delve into questions of their individual ideologies.

116. *Id.* at 359.

Virginia statute in question targeted cross burning done with the “intent to intimidate.”¹¹⁷ To this extent, it posed no problem under the First Amendment.

The Court held this provision of the Virginia statute constitutional because it proscribed the use of cross burning to intimidate and threaten, regardless of the politics or ideology that the assaultive gesture also conveyed—if it conveyed any at all. Indeed, as Justice O’Connor noted, the case involving Elliott and O’Mara demonstrated the point: the state prosecuted them under the statute despite the fact that it was “at least unclear” whether they “burned a cross due to racial animus.”¹¹⁸ The statute applied to them even if their sole motivation was to convey to Jubilee that he should make no further complaints about Elliott’s firearms practice and even if they were unaware of his race.

At first blush, it may seem difficult to reconcile the constitutional validity of the anti-cross-burning Virginia statute with the invalidity of the anti-cross-burning ordinance at issue in *R.A.V.* Justice O’Connor explained that the ordinance at issue in *R.A.V.* failed to pass constitutional muster because it punished cross burning only when it reflected particular viewpoints, imposing “special prohibitions on those speakers who express views on disfavored subjects.”¹¹⁹ While the First Amendment generally precludes that kind of “content discrimination,” it does not restrain the state from proscribing speech “based on the very reasons why the speech at issue is proscribable”—for example, because it is a true threat.¹²⁰ The Court offered this example to clarify: the First Amendment does not prevent Congress from passing a law that prohibits true threats against the life of the President of the United States, but the First Amendment *does* preclude it from passing a law that prohibits true threats against the President because of his or her policies toward inner cities.¹²¹ Both address threats, but the latter carves out a disfavored viewpoint for proscription while the former does not.

In a sense, *Black* simply confirms what we already knew: the state has the authority to criminalize and punish true threats. This is an unremarkable proposition. After all, the state can criminalize and

117. *Id.* at 362.

118. *Id.* at 363.

119. *Id.* at 361; *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (“Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”).

120. *Black*, 538 U.S. at 362 (quoting *R.A.V.*, 505 U.S. at 393).

121. *See id.* at 363.

punish many behaviors that usually take place primarily through speech, including blackmail, extortion, bribery, fraud, solicitation, and conspiracy.¹²²

But *Black* has other, more nuanced lessons for us as well. First, note that describing the Virginia statute as an anti-extremism measure adds nothing to the legal analysis—even if the statute proves to be a useful tool against violent extremists.¹²³ After all, by its terms the statute applies with equal force to those who do not seek to advance extremist ideologies, like Elliott and O’Mara, and those who do, like Black—another of the parties to the case and a leader of the Ku Klux Klan whose cross burning took place at a rally filled with racist and anti-Semitic vitriol.¹²⁴ We do not need an “anti-extremism threat law” to get at extremist threats; any old true threat law will permit us to do that, and more.

Second, the Virginia legislature might well have rendered this statute invalid if it had tried to frame the law as a weapon targeted specifically against extremism. Doing so would almost inevitably move the language of the statute away from content that the First Amendment allows the state to proscribe (the threat and intimidation) and toward the content that it does not (the viewpoint and ideology). Expressly focusing a statute on extremism therefore may not just be unnecessary; it may be fatal to the very effort at hand.

Accordingly, we should not equate agreeing with the Supreme Court’s sensitivity to narrowness and overbreadth problems with despairing over our ability to do anything meaningful to combat extremism. We have many tools available to do so. But adding more tools, and explicitly casting them as anti-extremism measures, may be, in Bernard Williams’s trenchant phrase, the

122. For a discussion and partial list of such crimes and related prosecutions, see Levin, *supra* note 8, at 734–35, 749–51. In addition, the state can—without running afoul of the First Amendment—provide civil remedies for some of the evils we associate with extremism, such as assault, battery, conspiracy, trespass, and various forms of discriminatory treatment. *Id.* at 735–36. Of course, what these laws do *not* do is address certain words, phrases, symbols, or ideas as *malum in se*—that is, as sufficiently evil in and of themselves that we need not look for additional social or individual harms in order to prohibit them. It has been argued that one such idea is Holocaust denial. See David Fraser, ‘On the Internet, Nobody Knows You’re a Nazi’: Some Comparative Legal Aspects of Holocaust Denial on the WWW, in EXTREME SPEECH AND DEMOCRACY, *supra* note 9, at 511. In such cases, it might be that we can identify the offensive idea with crystalline specificity and that we can get at a different evil than do existing criminal and other laws. We will, however, still have to contend with the arguments I discuss *infra* in Part II C and the question of whether we want to grant the government the potentially Orwellian authority to ban certain ideas.

123. For a discussion of whether hate speech laws are truly necessary to address the most significant harms of such speech, or are redundant with the work done by existing laws, see L. W. Sumner, *Incitement and Regulation of Hate Speech in Canada: A Philosophical Analysis*, in EXTREME SPEECH AND DEMOCRACY, *supra* note 9, at 204.

124. See *Black*, 538 U.S. at 348–49.

“one thought too many.”¹²⁵ Indeed, it may be the thought that renders the tool invalid and useless.

The passage and existence of anti-hate or anti-extremism laws may have significant symbolic value to affected groups, regardless of whether they actually contribute substantively to the available remedies. Thus, we might advocate for such laws even when they are almost entirely redundant with existing measures. In my view, however, any such strategy has troublesome downsides. First, the strategy is disingenuous, holding out as new something that in fact is not. Second, it reeks of condescension, assuming that affected populations will not detect the ruse. Finally, to the extent that the measure *does* attempt to address hate speech and extremist association in novel and experimental ways, it may wander into fatal problems of vagueness and overbreadth and a court will strike it down. Through this very process, failed hate speech and anti-extremism laws sometimes become an entirely different kind of symbol—a symbol suggesting that the legal system does not take these issues seriously and leaves us with a problem unsolvable through the instruments of the law.

Of course, all of the arguments I just detailed might fail to persuade a person who quarrels with their premise, that is, that the Supreme Court’s low tolerance for vagueness and overbreadth in this area makes sense. Such an individual might say that she thinks that people are not so easily chilled as the Court assumes, that speech and association have shown themselves to be extraordinarily resilient, and that little or no harm to free expression would likely occur if the First Amendment accommodated a less-than-precise law like the St. Paul ordinance. She might even contend that the Court’s hostility toward vagueness and overbreadth reflects an attitude of privilege, the sort of doctrine that could be crafted only by those who will not personally suffer the consequences of providing such expansive protection to extremist expression. If we allowed for more play in the joints here, she might ask, how bad would things be?

I think the answer is: very, very bad. To understand why, let’s assume that the St. Paul ordinance discussed above passed the Court’s tests for specificity and narrowness. Advocates against extremist speech and association would likely see this as a tremendous victory, putting into the hands of law enforcement officers and prosecutors a new instrument to cut some of the most pernicious cancers from our society. If a neo-Nazi swastika-waving group

125. See Bernard Williams, *Persons, Character, and Morality*, in *MORAL LUCK* (James Rachels ed., 1981).

planned to march again in Skokie past the homes of Holocaust survivors, this time around the police could intervene and send them packing or—better still—haul them off to jail.¹²⁶

Laws so ambiguous in meaning and scope, however, make poor surgical instruments. As the Court recognized more than eighty years ago in *Herndon*, once implemented, vague laws introduce an element of unfettered discretion that leaves speech vulnerable to punishment because it is unpopular—not because it poses any real danger or inflicts any actual injury. As noted earlier, vague laws can in this sense turn the animating philosophy of the First Amendment on its head, shielding only the popular speech that doesn't need its protection while allowing for punishment of the unpopular speech that does.

Even precise and narrow laws leave room for abuse. Law enforcement officials and prosecutors have substantial discretion in deciding which individuals should be arrested, charged, given a deal, and taken to trial. Juries—their ostensible duty to follow the court's instructions aside—have substantial discretion in deciding cases. Trial judges have substantial discretion on many fronts, including in deciding evidentiary issues, and the applicable standard of review may give an appellate court the room to forgive a trial court that got something wrong. Again, all these risks exist even when a law does *not* suffer from vagueness or overbreadth issues. They multiply exponentially when a law leaves still more room for irregular and idiosyncratic application.

Vague and overbroad laws can therefore have consequences unintended by their champions. Indeed, the experiments of other countries with amorphous and wide-ranging “hate laws” confirm that this is so. Consider this striking example: “[i]n 2008, film star Brigitte Bardot was convicted by French authorities for placing online a letter to president Nicolas Sarkozy in which she complained about the Islamic practice of ritual animal slaughter. It was her fifth conviction for hate speech.”¹²⁷ It seems wholly implausible that the drafters of this law believed that any significant evils flowed from movie stars expressing their concern, non-violently, productively, and without threat to Muslim people or practices, for the well-being of animals—and, if they did, it seems equally implausible they were right. But the state prosecuted and convicted her anyway—five times.

126. For an exploration of First Amendment theory that uses the Skokie, Illinois case as its launching point and central example, see LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1988).

127. ERWIN CHERMERISNSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 107 (2017).

Indeed, vague and overbroad anti-extremism laws carry with them the substantial risk that they will be used against the very organizations that most aggressively push for political change on behalf of minority populations and against the very minority populations that have been, and remain, the primary targets of extremist ideologies. As Erik Nielsen recently observed, “‘hate’ is a dangerously elastic label, one that has long been used in America to demonize unpopular expression. If we become overzealous in our efforts to limit so-called hate speech, we run the risk of setting a trap for the very people we’re trying to defend.”¹²⁸ Nielsen offered as examples the black nationalists of the 1960s and 1970s, Malcolm X, the Nation of Islam, the Black Panthers, the Boycott, Divestment, and Sanctions (BDS) Movement, and the Black Lives Matter Movement.¹²⁹ The concept of “extremism” is no less elastic. For example, the Anti-Defamation League has pointed out that in its time, the abolitionist movement qualified as “extremist.”¹³⁰ Pushing for laws that punish “hate” and “extremism” may end up arming the opposition.

The wild indeterminacy of the concepts of “extremism” and “hate” is demonstrated by looking at how the Southern Poverty Law Center (SPLC), which identifies “hate” and “extremist” groups and individuals and monitors their activities, has treated the organizations identified by Nielsen.¹³¹ As Nielsen points out, the SPLC identifies the Nation of Islam as a hate group.¹³² On the other hand, some far-right conservative groups have criticized the SPLC for *not* identifying the BDS as such.¹³³ Ironically, one of the leading organizations to voice this concern is the Family Research Council, which the SPLC does identify as an extremist group because of its antagonism toward gays and lesbians.¹³⁴ Is the SPLC itself guilty of spreading hate? A “former Islamic radical,” Maajid Nawaz, appar-

128. Erik Nielson, *If We Silence Hate Speech, Will We Silence Resistance?*, N.Y. TIMES (Aug. 9, 2018), https://www.nytimes.com/2018/08/09/opinion/if-we-silence-hate-speech-will-we-silence-resistance.html?emc=edit_th_180810&nl=todaysheadlines&nid=663780750810.

129. *Id.*

130. See *Defining Extremism: A Glossary of White Supremacist Terms, Movements and Philosophies*, ADL, <https://www.adl.org/education/resources/glossary-terms/defining-extremism-white-supremacy> (last visited Aug. 23, 2018); see also David J. Bodney, *Extreme Speech and American Press Freedoms*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 9, at 598, 599 (“[E]xtreme speech is a highly elastic term, broad enough to encompass the writings of Jefferson, the pages of *Hustler* magazine, and the torch-lit passages of *Mein Kampf*.”).

131. In the interest of full disclosure, the author is a regular donor to the SPLC.

132. Nielson, *supra* note 128.

133. See Caleb Parke, *Report: Southern Poverty Law Center Ignores Anti-Semitic Hate Crimes on Campus*, FOX NEWS (Mar. 7, 2018) <http://www.foxnews.com/us/2018/03/07/report-southern-poverty-law-center-ignores-anti-semitic-hate-crimes-on-campus.html>.

134. *Id.*; *Extremist Files: Family Research Council*, SPLC.ORG, <https://www.splcenter.org/fighting-hate/extremist-files/group/family-research-council> (last visited Aug. 23, 2018).

ently thought so and therefore sued the SPLC for including him in its “Field Guide to Anti-Muslim Extremists”—a lawsuit that resulted in a settlement payment of \$3.375 million by the SPLC, along with an apology.¹³⁵

To sum up, when we arrive at the implementation stage of anti-extremism law, we are likely to encounter fresh problems. Such laws may be unnecessary. In our effort to ensure that they *seem* necessary—that they “add something” to the legal landscape—we may focus them on particular content and viewpoints and thereby invalidate them. And, if we could affect a significant change in First Amendment doctrine so as to give us greater definitional and operational latitude, we might recoil at the way the state ends up enforcing those laws. Having pushed for progressive measures, we could discover ourselves on the receiving end of proscriptions that are indeterminate, unclear, overreaching, and based on the relative unpopularity of our views. Permit me to stress: I offer here not the irrational anxieties of an overwrought imagination, but a historically informed description of the bogeyman that actually lives under the bed.

C. *Conscientious Arguments*

What if we could overcome the objections detailed in the prior two sections? What if we could draft an anti-hate-speech or anti-extremism law that was clear and not overly broad and that somehow avoided the implementation problems described above? Do any arguments against the effort to police hate speech and extremism remain? Yes—and they raise foundational questions about the entire anti-extremism enterprise.

Throughout its history, the Supreme Court has described only one freedom as “absolute”—the freedom to “believe.”¹³⁶ Over and over again, the Court has underscored the special constitutional sanctity of the human conscience. Thus, the Court has declared that “Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions.”¹³⁷ The Court gave us its most famously poetic expression of this idea in *West Virginia State*

135. Marc A. Thiessen, *The Southern Poverty Law Center Has Lost All Credibility*, WASH. POST (June 21, 2018), https://www.washingtonpost.com/opinions/the-southern-poverty-law-center-has-lost-all-credibility/2018/06/21/22ab7d60-756d-11e8-9780-b1dd6a09b549_story.html?noredirect=on&utm_term=.1c403ac8ae66.

136. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

137. *Jones v. Opelika*, 316 U.S. 584, 593–94 (1942).

Board of Education v. Barnette,¹³⁸ when it said that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹³⁹

Having said that the Court has treated an individual’s beliefs as “sacrosanct,” I need to inject two brief clarifications. The first is a practical point. At the risk of stressing the obvious, “[T]he government cannot control individual conscience in any event.”¹⁴⁰ The metaphysical reality at work here prompted Harry Kalven to note wryly that “when belief is silent, it would seem protected not by law, but by the sheer impracticability of policing it.”¹⁴¹ The pragmatic question therefore becomes not whether the government should be able to restrain *conscience* but whether the government should be able to restrain *its exercise or expression*. This is the very subject matter of the First Amendment.

The second point is this: although it is true that the Constitution protects matters of conscience, it is also true that the law often takes account of mental states and that they can affect legal outcomes, such as punishment. Consider, for example, common issues of intentionality. The law may treat the same underlying conduct very differently depending on whether it was done defensively, accidentally, recklessly, or after careful premeditation.

When the law considers intent, however, the government is not punishing acts of conscience—or even mental states—as wrongs in and of themselves. Rather, the government sensibly recognizes that the same act committed with different mental states may reflect different levels of culpability and may inflict different levels of harm. This principle has significance for the crafting of some important anti-extremism and anti-hate laws.

The law at issue in *Wisconsin v. Mitchell* provides an example.¹⁴² In that case, the Court upheld the constitutionality of a Wisconsin statute that enhanced the penalty for criminal offenses where the defendant had intentionally selected the victim because of his or her race, religion, color, disability, sexual orientation, national origin, or ancestry. The Court pointed out that the target of the statute was the underlying conduct (here, a criminal assault), which the First Amendment does not protect. The Court held that the statute could enhance the penalty for that underlying wrong

138. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

139. *Id.* at 642.

140. Leonard M. Niehoff, *What We Believe: Geoffrey Stone’s Perilous Times: Free Speech in Wartime and the Assault on Individual Conscience*, 36 RUTGERS L. REV. 889, 898 (2005).

141. HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 332 (1988).

142. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

where the act was motivated by bias in order to address the greater individual and societal harms that followed as a result.¹⁴³

In the absence of some independent underlying wrong, however, restrictions on the activities protected by the First Amendment are restrictions of the way in which we human beings take our conscience out into the world: through our speech, our religious choices, our political petitions, and our assembling together to get done the things that we care about most deeply. We might think here of John Stuart Mill's formulation. True human liberty, he wrote, demands not just protection for "the inward domain of consciousness . . . conscience in the most comprehensive sense . . . of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological."¹⁴⁴ It also demands "cognate libert[ies]," like speaking, writing, and associating with others to express opinions and convey ideas.¹⁴⁵ Or, as Harry Kalven summarized things, "[f]reedom to believe what one wishes but not to voice those beliefs would be illusory."¹⁴⁶

One of the principal problems with the project of restricting extremism is that the extremism that concerns us directly implicates the individual human conscience. Someone could, of course, hold extremist views about anything, including the benign and the trivial. But the extremism that keeps us up at night involves many of the subject matters—like politics, religion, and morality—that we see as most deeply matters of individual conscience, choice, and identity.

As I noted at the beginning of this article, a book published a number of years ago posed the provocative question *Must We Defend Nazis?* In a responsive essay, Alan Dershowitz contended that the central argument of that book got things completely wrong: it imagines Nazi hate speech as occupying a place on the far borders of First Amendment protection; to the contrary, Dershowitz contends, such speech sits at its center. He writes:

Among the book's most fundamental flaws is its placement of Nazi hate speech at the periphery of the First Amendment, when by any reasonable definition it sits at its very core. Nude dancing, hard-core porn and commercial advertising may be peripheral to the political concerns of the

143. In the same vein, the First Amendment does not bar evidence of beliefs, like racial hatred, in order to show motive or to establish intentionality. See Levin, *supra* note 8, at 743.

144. JOHN STUART MILL, *ON LIBERTY* 71 (Penguin Books 1982) (1859).

145. *Id.*; see also *id.* at 74.

146. KALVEN, *supra* note 141, at 332.

First Amendment. Still, according constitutional protection to these genres of speech may be necessary to build a wall around the core to protect it from the slippery slope. But what could be more central than advocacy by the Nazi Party of a political program for America? Nazi speech is no more peripheral than communist speech. It may be more hateful and more dangerous, but to call it peripheral is to misunderstand the essential purpose of the First Amendment.¹⁴⁷

This argument echoes the view expressed by the Supreme Court in *Snyder v. Phelps* regarding the speech engaged in by the Westboro Baptist Church. That speech—odious and hurtful as it was—did not squeak its way across the borders of the First Amendment into a space that offered only limited and grudging sanctuary. To the contrary, it addressed precisely the sort of matters that afforded it “special protection”—matters of conscience like politics, religion, and the morality of individuals and of a nation.

The Court’s protective approach toward such central matters of conscience has long offered shelter to movements we associate with the political left. We see this dynamic at work in a number of the cases I addressed earlier, including *NAACP v. Alabama*. The Court’s hesitancy to allow the government to meddle in matters of conscience (or to do so itself) is perhaps best illustrated, however, by its approach to the issue of conscientious objectors. Granted, that case law brings into play other areas of legal doctrine, like the free exercise and Establishment clauses of the First Amendment. But the Court’s extraordinary hesitancy to intrude into matters of conscience there should inform our analysis of the laws intended to address extremism that I am discussing here.

*United States v. Seeger*¹⁴⁸ addressed a provision of the Selective Service Act that stated it would not be construed to “require any person to be subject to combatant training and service in the armed forces . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”¹⁴⁹ In pertinent part, the provision went on to define “religious training and belief” as “an individual’s belief in relation to a Supreme Being involving duties superior to those arising from any human rela-

147. Alan M. Dershowitz, *Dubious Arguments for Curbing the Free Speech of Nazis*, Wash. Post (Feb. 1, 2018) https://www.washingtonpost.com/outlook/dubious-arguments-for-curbing-the-free-speech-of-nazis/2018/01/31/495cd256-fc96-11e7-8f66-2df0b94bb98a_story.html?utm_term=.4fa99a64032f.

148. *United States v. Seeger*, 380 U.S. 163 (1965).

149. *United States v. Seeger*, 326 F.2d 846, 847 (2d. Cir. 1964).

tion.”¹⁵⁰ Seeger claimed conscientious objector status under this provision.

At trial, Seeger’s counsel candidly admitted that his client’s “belief was not in relation to a Supreme Being as commonly understood,” and, indeed, Seeger himself said that he preferred to treat the question of the existence of God as an “open” matter.¹⁵¹ As a result, although the government found Seeger’s opposition to war to be strong and sincere (and in every other sense “religious”), it concluded that he did not qualify for exemption under the Act because his objections were not based on his “belief in a relation to a Supreme Being.”¹⁵² Seeger was charged with and convicted of refusing to submit to induction.¹⁵³ His appeal literally presented a question of cosmic dimension: were Seeger’s beliefs a religion? If so, then the Free Exercise Clause of the First Amendment protected them and the Establishment Clause prohibited the government from imposing its own favored and contradictory religious views upon him.

The Second Circuit ruled for Seeger.¹⁵⁴ The court observed that “a requirement of a belief in a Supreme Being, no matter how broadly defined, cannot embrace all those faiths which can validly claim to be called ‘religious.’”¹⁵⁵ The court noted that exceptions include such “well-established religious sects” as Buddhism, Taoism, and Secular Humanism.¹⁵⁶ Belief in a deity is “a belief in some particular kind of religious concept,” the court observed, but it is certainly not the only kind and the state has no authority to institutionalize it in law as the preferred kind.¹⁵⁷ “We are convinced,” the court declared, “that the believer in a Supreme Being is not for that reason alone more entitled to have his conscience respected by a draft board than is Daniel Seeger.”¹⁵⁸

The Supreme Court also ruled for Seeger, although on different grounds. If the Second Circuit blanched at the idea of the government defining a “religion” in a particular way, the Supreme Court had equally little enthusiasm for the idea that the government would tell us the meaning of “Supreme Being.” In a long opinion laced with legislative history and contemporary theology, the Court concluded that Congress did not intend to limit the

150. *Id.*

151. *Seeger*, 380 U.S. at 166-67.

152. *See id.*

153. *See id.* at 166.

154. *Seeger*, 326 F.2d 846.

155. *Id.* at 852.

156. *Id.*

157. *Id.* at 853.

158. *Id.* at 854.

phrase “Supreme Being” to conventional images of God, but rather wanted it to extend to anything that occupies the same place in a person’s life as would a “traditional deity.”¹⁵⁹

The Court ruled that if the draft board had applied *this* test to Seeger it would have reached a different conclusion. Seeger professed a religious belief and faith, did not disavow belief in a Supreme Being, acknowledged that “the cosmic order does, perhaps, suggest a creative intelligence,” and “decried the tremendous ‘spiritual’ price man must pay for his willingness to destroy human life.”¹⁶⁰ The Court concluded by quoting Paul Tillich:

And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, or your ultimate concern, *of what you take seriously without any reservation*. Perhaps, in order to do so, you must forget everything traditional that you have learned about God¹⁶¹

At the risk of reductionism, the Court essentially held that, for purposes of this statute, God is whatever Daniel Andrew Seeger sincerely believes God is.

Barnette and *Seeger* both recognized a fundamental truth: pressure against extremism inherently entails pressure toward orthodoxy. In matters of conscience, the *Barnette* Court saw this as treacherous stuff, observing that history has shown that “[c]ompulsory unification of opinion achieves only the unanimity of the graveyard.”¹⁶² Nor can we make exceptions simply because the nonconforming viewpoint seems pernicious and destabilizing: “freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”¹⁶³ In *Seeger*, the Court saw the strong shove toward orthodoxy created by the Act’s impossible choice: embrace the traditional view of God that you reject and go home, or follow your conscience and go to prison.

Interestingly, the Second Circuit in *Seeger* invoked the “dignity” interest of the individual seeking to exercise his or her individual

159. See *Seeger*, 380 U.S. at 187. I respect the heroic energies at work here to try to save the provision from constitutional infirmity, but the gloss on legislative intent strikes me as conspicuously implausible.

160. *Id.*

161. *Id.* (quoting TILlich, *THE SHAKING OF THE FOUNDATIONS* 57 (1948)) (emphasis added).

162. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

163. *Id.* at 642.

conscience.¹⁶⁴ And, perhaps ironically, the Court framed this point in terms that Seeger would likely have found unpalatable: “we here respect the right of Daniel Seeger to believe what he will largely *because* of the conviction that every individual is a child of God; and that Man, created in the image of his Maker, is endowed for that reason with human dignity.”¹⁶⁵ That Seeger might have bristled over this formulation, however, does not matter; the Court honored the “stern and moral voice of conscience” that he felt compelled to obey.¹⁶⁶

Ronald Dworkin has similarly argued that we do better grounding arguments in favor of free expression in a concept of a basic and universal human right—specifically, dignity—than in instrumentalist models like the marketplace of ideas.¹⁶⁷ He describes free expression as a “basic principle” of human dignity: “it is illegitimate for governments to impose a collective or official decision on dissenting individuals, using the coercive powers of the state, unless that decision has been taken in a manner that respects each individual’s status as a free and equal member of the community.”¹⁶⁸ Dworkin sees such liberty as an essential part of “democratic background”—one of the non-majoritarian preconditions we must have in place for “fair democracy” to run its course.¹⁶⁹

Some have argued—and some other countries have concluded—that policing hate speech and extremism helps safeguard the dignity interests of those who are victimized by extremism’s excesses.¹⁷⁰ We might distinguish here, though, between different kinds

164. *Seeger*, 326 F.2d at 848–49. The Supreme Court has itself often invoked individual dignity as a basis for First Amendment protection. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in . . . the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”).

165. *Seeger*, 326 F.2d at 855.

166. *Id.* at 853.

167. *See* Ronald Dworkin, *Foreword* to *EXTREME SPEECH AND DEMOCRACY*, *supra* note 9, at vii.

168. *Id.*

169. *Id.*

170. Those dignity interests are variously framed, for example in terms of privacy, personality, equality, or self-determination. The argument posits that those interests are distinct from and stand in opposition to the interest of free expression and that the state should “balance” them against each other to achieve “proportionality.” *See, e.g.*, Dieter Grimm, *Freedom of Speech in a Globalized World*, in *EXTREME SPEECH AND DEMOCRACY*, *supra* note 9, at 13; Amnon Reichman, *Criminalizing Religiously Offensive Satire: Free Speech, Human Dignity, and Comparative Law*, in *id.* at 331. European countries and others have moved in this direction. Although space constraints preclude a full discussion of the arguments in opposition to this approach, I will note two significant objections. First, such *ad hoc* balancing has very low predictive value—in each individual case, a person must guess at how a court will ultimately “balance” his or her conduct against competing considerations. No principle besides a vague assurance of “proportionality” informs the analysis. Second, I believe that invocations

of dignity. Perhaps the suppression of the dignity of one person could, in a specific case, advance the dignity of another. Thus, pushing one person away from an extremist ideology and toward orthodoxy might make life meaningfully better for someone else. But it does nothing for the dignity interest of the person being pushed, and we cannot advance the general concept of individual dignity—something we theoretically honor in all persons—through the suppression of the very value it celebrates. Any attempt to do so will consume itself.

Perhaps the state could draft a clear, narrow, and practically workable law against hate speech and extremism. It would have its advantages. But, make no mistake, it would put officials, “high and petty,” in the business of determining what does, and does not, qualify as a forbidden and inexpressible belief. Such an approach puts in play a blunt instrument of perilous potential, and one, history suggests, more easily got than got rid of.

CONCLUSION

Tolerance of hate speech and extremist association comes at a real and substantial cost. Honorable impulses and commonsense intuitions tell us that we need to do something to address them and their consequences. Groups targeted by such speech and ideologies, and those who support and empathize with them, have grown understandably weary of rote observations about how we must bear these costs in furtherance of the paramount interest of free speech. To return to my beginning, the move to reform our laws to do a better job at policing, prohibiting, and punishing hate speech and extremist association is “perfectly logical.”

Nevertheless, it remains true that efforts to suppress extremism must account for the definitional, operational, and conscientious arguments I describe above. And they will need to do so not just because these arguments have a firm basis in law and so will doom any effort that runs afoul of them. But also, reform efforts will need to navigate through these categories of oppositional arguments because they get at fundamental values that we cannot afford to sacrifice under the pressure of current exigencies. Those values include our fundamental commitment to due process and

of “balancing” in this context are useless in our effort to answer the question before us. “Balance” suggests equipoise—that the scales are even. But evenly balanced scales do not tell us what decision to make. In order to make a decision, we must achieve an *imbalance* of the scales—that is, we must decide that for some reason one interest outweighs another. References to “balancing” do not give us the reasons that we are after and that we need to make a decision.

procedural fairness, our wariness about investing government officials with the discretion to punish the unpopular, and our belief in the sanctity of the human conscience. There are good reasons to fear that, if the fight against extremism departs from those norms, it will itself become just another form of extremism, another tool of oppression, and another whipcord driving human hearts and minds toward orthodoxy and, finally, “the unanimity of the graveyard.”

