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There Are No Racists Here: The Rise of Racial Extremism, When No One is Racist

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THERE ARE NO RACISTS HERE: THE RISE OF RACIAL EXTREMISM, WHEN NO ONE IS RACIST

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ABSTRACT

At first glance hate murders appear wholly anachronistic in post-racial America. This Article suggests otherwise. The Article begins by analyzing the periodic expansions of the Supreme Court's interpretation of the protection for racist expression in First Amendment doctrine. The Article then contextualizes the case law by providing evidence of how the First Amendment works on the ground in two separate areas —the enforcement of hate crime law and on university campuses that enact speech codes. In these areas, those using racist expression receive full protection for their beliefs. Part III describes social spaces—social media and employment where slurs and epithets may be used frequently. The final portion of the Article briefly explores two forms of unacknowledged racial violence—violence directed at minorities who move to white neighborhoods and extremist killings. Our inaccurate approach to bias-motivated crime and the culture of protection around racist expression, the Article concludes, leaves American society vulnerable to the danger created by racial extremists.

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INTRODUCTION

All of the racists have died out. There are several powerful examples illustrative of the idea that in contemporary America, no one is a racist. NBA Clippers owner Donald Sterling, whose remarks led the NBA to take the unprecedented action of banning him from NBA ownership, vehemently denies that he is a racist.[1] David Duke, one time Louisiana gubernatorial candidate and former Grand Wizard of the Ku Klux Klan, denies that he is a racist.[2] In avowedly denying that they are racist, Duke and Sterling are not alone. Cross burners and others accused of committing hate crimes also claim they are not racists.[3] The first defense of those accused of hate crimes seems to be to deny that they are racist.[4] When did racism get such a bad name?

Despite the current trend to disavow racism, there are some individuals whose racism seems unassailable—racial extremists who select and murder their victims because of their race. Some of these hate murders are committed by zealots who commit these acts as part of a white supremacist plan.[5] Others seem less scripted. For example in the early morning of June 26, 2011, a group of white men in Brandon, Mississippi were looking

1. Catherine E. Shoichet and Steve Almasy, *CNN exclusive: Donald Sterling insists he's no racist, still slams Magic Johnson*, CNN (May 13, 2014), http://www.cnn.com/2014/05/12/us/donald-sterling-interview.

2. *See*, *e.g.*, Edgar Johnson, *Exposing the Real Racists: A Review of Dr Duke's "Jewish Supremacism,"* DAVIDDUKE.COM (Dec. 26, 2013, 12:33 AM), http://davidduke.com/exposing-the-real-racists-a-review-of-dr-dukes-jewish-supremacism/ (describing Duke's belief that others are, "the real racists").

3. *See* Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses*, 39 HARV. C.R-C.L. L. REV. 335, 370 (2004) (describing cases in which the defendant burden cross as a joke or prank).

4. *See*, *e.g.*, Kevin Sullivan, Mark Berman & Sarah Kaplan, *Three Muslims killed in shooting near UNC; police, family argue over motive*, THE WASHINGTON POST, (Feb. 11, 2015), http://www.washingtonpost.com/news/post-nation/wp/2015/02/11/three-killed-in-shooting-near-university-of-north-carolina/ (family asserting that suspect shot three Muslim students because of a dispute over parking, not because of their religion); Lailia Kearney, *California student charged with hate crime enters not-guilty plea*, REUTERS, (Jan. 6, 2014), http://www.reuters.com/article/2014/01/07/us-usa-california-hatecrime-idUSBREA0604G20140107 (lawyer for a white student at San Jose State University accused of taunting African-American roommate with racial slurs and attempting to hang a bicycle lock around his neck last fall describes his client as "not a racist").

5. *See, e.g.*, Bill Dedham, *Midwest Gunman Had Engaged in Racist Acts at 2 Universities*, N.Y. TIMES (July 6, 1999), http://www.nytimes.com/1999/07/06/us/midwest-gunman-had-engaged-in-racist-acts-at-2-universities.html. (Describing the killing spree of Benjamin Smith, devotee of the World Church of the Creator),

for a group of African Americans to harass and assault.[6] On some occasions they had pelted African Americans with beer bottles.[7] They liked to select intoxicated African Americans, and so chose James Craig Anderson, because he was African American and they believed had been drinking.[8] Several men punched Anderson and he fell to the ground, where one of the men struck Anderson in the face several times.[9] As Anderson was lying on the ground, the men got back in their truck and the driver, Deryl Paul Dedmon deliberately ran over Anderson, causing injuries which killed him.[10]

This Article explores the presence of racial extremism in the context of the social disavowal of expressions of racism. At first glance, racial extremism, seems like an outlier—something wholly anachronistic in a "post-racial" world. In the Article, I suggest otherwise, outlining the surprising supports for this disturbing phenomenon. In Part I of the Article, I discuss protections for racist expression in First Amendment doctrine. In Part II, how the First Amendment works in several areas to allow those using racist expression to receive full protection for their beliefs. In Part III, I address examples of social spaces—social media and employment where slurs and epithets may be used frequently. In Part IV, the final portion of the article, I briefly explore two largely unexamined but pernicious forms of racial violence—violence directed at minorities who move to white neighborhoods and extremist killings. I argue that our inaccurate approach to bias-motivated crime and the culture of protection we have created around racist expression leaves American society vulnerable to the threats created by racial extremists. The Article concludes with a call for increased attention to extremist and other less recognized types of bias-motivated violence.

I. THE FIRST AMENDMENT AND RACIST SPEECH

A. *State Regulation Given a Wide Berth*

The First Amendment of the U.S. Constitution provides: "Congress shall make no law abridging freedom of speech, or the press; or the right of people to peacefully assemble . . . ."[11] Americans may think of the First Amendment as having always provided clear protection for racist speech,

6. Dept of Justice Press Release, Mississippi Man Pleads Guilty for Conspiring to Commit Hate Crimes Against African-Americans in Jackson, Mississippi (Jan. 3, 2010), http://www.justice.gov/opa/pr/mississippi-man-pleads-guilty-conspiring-commit-hate-crimes-against-african-americans-jackson.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. U.S. Const. amend. I.

irrespective of either speaker or context.[12] This characterization ignores some of the Court's first pronouncements in the area of racist speech. In its first several examinations of racist speech, the Supreme Court allowed states to regulate racist speech.[13] The Court's first examination of organizations using racist speech, *Bryant v. Zimmerman*, in 1928 involved a Ku Klux Klan member's challenge to a New York law that required all groups with twenty or more members to register with the state.[14] Bryant, a member of the Buffalo Provisional Klan of the Knights of the Ku Klux Klan was charged under a New York statute for having attended meetings held by an unregistered organization.[15] Bryant argued that by not exempting the Ku Klux Klan (as were labor unions and other benevolent organizations), the statute violated the equal protection clause.[16] The Supreme Court disagreed. Looking to the Ku Klux Klan's history of violence and desire to preserve white supremacy, the Court concluded that the distinction made in the statute was appropriate.[17]

In 1942, the Court created a category of unprotected speech into which hate speech could fall. In *Chaplinsky v. New Hampshire*,[18] Chaplinsky, a Jehovah's Witness, was charged and subsequently convicted of calling a police officer a "God damned racketeer" and a "damned Fascist."[19] Chaplinsky had violated a New Hampshire statute prohibiting the public use of "offensive, derisive or annoying words."[20] Appealing his conviction, Chaplinsky argued that the statute violated the Fourteenth and First Amendments.[21] The Supreme Court disagreed, holding that the statute was a valid exercise of police power because it was designed to punish breaches of the peace caused by a new category of words, "fighting words," which "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[22]

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12. *See generally*, Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963 (2009) (comparing American jurisprudence on racist speech with that several European countries).

13. *See, e.g.*, New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Beauharnais v. Illinois, 343 U.S. 250 (1952).

14. Zimmerman, 278 U.S. at 71. Though it was decided before the development of the modern First Amendment jurisprudence, Bryant is nevertheless understood by scholars in the area to be a case concerning racist speech. *See, e.g.*, SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 26 (1994).

15. *Zimmerman*, 278 U.S. at 71.

16. *Id.* at 73.

17. *Id.* at 76-77.

18. Chaplinsky, 315 U.S. 568.

19. *Id.* at 569.

20. *Id.*

21. *See id.*

22. *See id.* at 572-73.

A decade after *Chaplinsky*, the Supreme Court rendered the last decision in its line of early cases expressing support for restrictions on racist speech: *Beauharnais v. Illinois*.[23] In 1952, the Court rejected a challenge to an Illinois statute by Joseph Beauharnais, the founder of the White Circle League of America.[24] The White Circle League was created to help white residents of Chicago neighborhoods resist housing integration.[25] Beauharnais was convicted for having distributed flyers containing racist language in violation of an Illinois statute[26] which criminalized the public distribution of publications which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" which "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 riots . . ."[27] The flyer distributed exhorted: "The forces of Interracialism that are destroying white neighborhoods will ultimately destroy our White racial identity."[28] It called for the white people of Chicago to organize or risk dire consequences, stating, "If persuasion and the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the Negro, surely will."[29]

Beauharnais challenged the Illinois statute, arguing that it was unconstitutionally vague and violated the First and Fourteenth Amendments.[30] The Supreme Court relied on its decision in *Chaplinsky* and *Cantwell v. State of Connecticut* maintaining, "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[31] It also examined Illinois's history of violent race riots, concluding that the state had a right to punish groups in the manner proscribed by the statute.[32] It was not certain to the Court that the statute would prevent the type of ills that it had in mind when the statute was passed.[33] The Court concluded that the state of Illinois had the power under the Constitution to address the problem, even if its solution was not guaranteed to work.

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

24. *Id*.

25. *See id.* at 252.

26. 38 ILL. REV. STAT. § 471 (1949).

27. *Beauharnais*, 343 U.S. at 251 (quoting ILL. REV. STAT. § 4711).

28. *Id.* at 276 (Black, J., dissenting).

29. *Id.* at 252.

30. *See id.* at 251-52.

31. *Id.* at 256-57 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).

32. *See id.* at 258-61.

33. *Id. at 262*.

B. *Limiting State Regulation*

In many ways, the Court's decision in *Beauharnais* was the high water mark for the Supreme Courts' allowing state regulation of racist speech.[34] Fast forward forty years, however, and the Court is much more wary of the states' intentions, and much less willing to allow it free rein to respond to racist speech.[35] In *R.A.V. v. St. Paul*, in a decision by Justice Scalia, the Supreme Court struck down the conviction of a skinhead who burned a cross on a Black family's lawn. The skinhead, "R.A.V." had been convicted under a statute punishing bias-motivated speech that the Court ultimately found to violate the First Amendment.[36] The statute at issue was St. Paul's Bias-Motivated Crime ordinance.[37] The 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.[38]

In sharp contrast to the approach taken by the Court in *Beauharnais*, where the Court reflected on Chicago's sordid history of race riots, Scalia's opinion in *R.A.V.* mentions neither the statutory history which led to the creation of the St. Paul ordinance nor did he cite the campaign of terror directed at the Jones family, the Black family on whose lawn R.A.V. burned a cross.[39] Though Scalia failed to mention it, as in *Beauharnais*, the ordinance at issue in R.A.V. was created in response to a serious threat.[40] The ordinance's history actually had nothing to do with the sort of situation in which R.A.V. was prosecuted.[41] According to the

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34. *See id.* at 258, 262.

35. *See, e.g.*, R.AV. v. City of St. Paul, 505 U.S. 377 (2010) (striking down a statute attempting to punish bias-motivated speech).

36. *See id.*

37. ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

38. *Id.*

39. *See* R.AV. v. City of St. Paul, 505 U.S. 377, 379. Scalia's discussion of the incident that prompted the case just two sentences long: "In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying."; *see also* Bell, *O Say, Can You See*, *supra* note 3 at 335-337 (a fuller discussion of the incident).

40. *See* Beauharnais v. Illinois, 343 U.S. 250, 253 (1952). ("The statute before us is not a catchall enactment left at large by the State court which applied it . . . It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois . . .").

41. When first created, the ordinance didn't even include race because it was crafted in response to the synagogue attacks. In the early 1980s gender was added to the statute and in the

prosecutor in the case, Tom Foley, the city had created the original ordinance in the early 1970s after many of the city's synagogues were under attack.[42]

The city had further reason to believe that the ordinance might be upheld: in its response to R.A.V.'s First Amendment challenge, the Minnesota Supreme Court interpreted the ordinance to regulate "fighting words," which in *Chaplinsky* the Court had decided were a category of speech lacking First Amendment protection.[43] The Supreme Court was limited to this particular construction.[44] The Minnesota Supreme Court also held that the ordinance was narrowly tailored to address a compelling government interest: protecting the community against possible violence and disorder.[45] The threat to violence and disorder were real in this particular case. As the first Black family to move to a white neighborhood, the Jones' had been subject to a campaign of terror prior to the cross burning.[46]

Despite this history that was strikingly similar to that which had led to the creation of the ordinance the Court had upheld in *Beauharnais*, in *R.A.V.*, the Court struck down the St. Paul ordinance.[47] In doing so, Justice Scalia insisted that the First Amendment prohibited the city from using that particular statute to regulate fighting words.[48] Of course, under the Court's decision in *Chaplinsky* fighting words as a category were not protected speech.[49] The problem with the statute, according to the majority opinion, was that the city had chosen to regulate only a subset of fighting words—those that provoked violence on the basis of race, color, creed, religion, or gender.[50] In regulating only a subset of fighting words, Scalia argued, the city had chosen to "impose special prohibitions on those speakers who express views on disfavored subjects."[51] According to Justice Scalia, invective on other topics such as political affiliation, union mem-

late 1980s race was added. Laura Lederer, *The Prosecutor's Dilemma, An Interview with Tom Foley*, in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 194, 196 (Laura Lederer & Richard Delgado, eds., 1995).

42. *Id*.

43. *In re* Welfare of R.A.V., 464 N.W.2d 507 (Minn. 1991).

44. R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).

45. *Id*.

46. Laura Lederer, *The Case of the Cross Burning: an interview with Russ and Laura Jones*, in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY 30 (Laura Lederer & Richard Delgado, eds., 1995).

47. *Id*.

48. *Id*.

49. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

50. R.A.V. v. City of St. Paul, 505 U.S. 391 (2010).

51. *Id*. at 391.

bership, and homosexuality were not prohibited, thereby signaling the state's disfavoring of the views expressed on a narrow set of subjects.[52]

In a departure from both the Minnesota Supreme Court's analysis, and that made by the Court in earlier cases like *Chaplinsky* and *Beauharnais*, the majority did not accept the city's argument that the St. Paul statute could prevent violence and disorder.[53] The city had argued that it was not trying to regulate disfavored topics but rather the intent of the statute was to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against."[54] In making this argument, the city was suggesting that the ordinance was aimed at regulating their secondary effects of the speech. The majority in *R.A.V.*, with no evidence of discriminatory legislative intent or history, rejected this argument.[55] Justice Scalia made no attempt to distinguish *Chaplinsky* and *Beauharnais*, which had clearly attempted to regulate speech in a similar manner.[56] Instead, Justice Scalia maintained that the statute in *R.A.V.* regulated the primary effects of speech—not the secondary effects—noting, "As we said in *Boos v. Barry* . . . 'Listeners' reactions to speech are not the type of 'secondary effects' we referred to in Renton. . . . The emotive impact of speech on its audience is not a 'secondary effect.'"[57]

C. *Grudging Acceptance For Modest Regulation*

The Court's decision in *R.A.V.* reverberated around the country. In the wake of the decision, citing *R.A.V.*, state courts in Washington, South Carolina, Maryland, Virginia, and New Jersey held cross burning statutes unconstitutional.[58] The year after the decision, the Wisconsin Supreme Court invalidated its hate crime statute in response to a First Amendment challenge.[59] The challenge to the Wisconsin penalty enhancement statute was brought by Todd Mitchell, a Black man who had been convicted under the statute for encouraging others to attack Gregory Reddick, a white youth.[60] Wisconsin's hate crime penalty enhancement statute provided that penalties for crimes against victims or property intentionally selected because of race, religion, color, disability, sexual orientation, na-

52. *Id.*

53. *Id.* at 393-94. Violence and disorder, of course, were secondary effects of the speech the Court had earlier allowed the city to regulate in *Beauharnais*. The primary effects of the speech were the immediate reaction that the speech provokes.

54. R.A.V., 505 U.S. at 394.

55. *Id.* at 394.

56. *See id.*

57. *Id.* at 394.

58. *See* Bell, *O Say, Can You See, supra* note 3 (discussing further the succession of state supreme court cases invalidating cross burning statutes following the *R.A.V.* decision).

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

60. *Id.* at 481.

tional origin or ancestry of the individual attacked could be increased.[61] A jury found that Mitchell had chosen Reddick because of his race and his sentence was increased from two to four years.[62]

In its consideration of *Mitchell*, the Supreme Court upheld Mitchell's conviction under Wisconsin's hate crime penalty enhancement.[63] In *Mitchell*, the Court held that the use of racial motivation as an aggravating factor did not in fact violate the First Amendment, as the defendant had contended.[64] The justification for this was that hate crime penalty enhancement statutes criminalized that racial motivation which the Court denied was part of racist expression. This reasoning was similar to that used by the Court in a 1983 case *Barclay v. Florida*.[65] In *Barclay*, the Court had approved the use of the defendant's racial motivation in allowing the defendant to be eligible for the death penalty.[66]

The Court continued its sideways approach to regulating racist expression in *Mitchell* in the next hate speech case it took, *Virginia v. Black*. In *Black* the Court chose to revisit cross burning, this time considering an appeal by the Commonwealth of Virginia after its cross burning statute had been struck down on First Amendment grounds.[67] *Black* was an appeal of three cross burning cases that had been consolidated by the Virginia Supreme Court.[68] The Virginia Supreme Court struck down Virginia's cross burning statute because it found that the statute was focused on cross burning and therefore, was "analytically indistinguishable" from the statute struck down by the court in *R.A.V.*[69] In *Black* the Court likened burning a cross to other true threats allowing states to regulate cross burnings when undertaken with an intent to intimidate.[70]

Because *R.A.V.* was not overruled by the Court, both *Black* and *Mitchell* must be read as very narrow acceptances of a state's ability to regulate racist expression. In *Black*, the ability to prohibit cross burnings is lim-

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61. *Id.* at 480.

62. *Id.*

63. *Id.* at 490.

64. *Id.* at 479.

65. Barclay v. United States, 463 U.S. 939 (1983) (plurality opinion). In deciding that the state of Wisconsin could criminalize the motivation that the defendant had used, the court in *Mitchell* was doing something quite different than it had in *Beauharnais*. In *Beauharnais* the Court accepted that the importance of the issue was so great that a state was justified in regulating expression. In *Mitchell*, the Court rejects the argument that a physical assault is expressive conduct protected by the First Amendment. 508 U.S. 476. 484.

66. *Id.* at 949. The Court also analogized to other types of situations such as murder for hire as situations in which the motivation for the crime could be punished.

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

68. *Id.*

69. *Id.*

70. *Id.* at 344.

ited to those cross burnings undertaken with intent to intimidate.[71] The Court goes out of its way in *Black* to explicitly protect cross burnings as statements of ideology, as signs of group solidarity or as statements undertaken for artistic expression.[72] Though the Court discusses at length the historical use of cross burning,[73] little mention is made in the opinion of the effect of cross burnings on those targeted. The effects of cross burnings on targets, which are clearly documented, do not constitute a justification for state regulation.[74] This has significant implications for states' ability to deal with the deleterious effects of cross burning. Consider the following hypothetical: If a Ku Klux Klan group, say the Eastern Knights of the Ku Klux Klan, decides to burn crosses solely as a member of group solidarity, they may argue that there is no wish to intimidate anyone. Though such events could terrify African Americans and other minorities living in the area, under Supreme Court's reasoning in *Black*, prosecution against the group should fail.

Like *Black*, *Mitchell* also must be read as fairly narrow support for state's ability to regulate racist expression because the case involved a challenge to a hate crime penalty enhancement law. In other words, unlike *Beauharnais*, the statute involved required the commission of a criminal act s motivated by bias. According to the Court's decision in *Mitchell* the statute did not regulate speech per se; rather, the racist expression that *Mitchell* allowed the legislature to regulate was the discriminatory selection of victims on the grounds of race, religion, gender, and other categories.[75] Its basis for this was also narrow, predicated on the state's ability to regulate motivation in other sorts of cases, rather than being based on secondary effects such as the harm that such crimes cause to victims.[76]

The Court's justification for allowing regulation of racist expression in *Mitchell* and *Black* differs quite sharply from the Court's approach in earlier cases like *Beauharnais*. Recall that in *Beauharnais*, the Court noted the problems of racism—in this case manifested as race riots—and accepted the argument that racist expression was linked to the particular disorder the state was trying to regulate.[77] Acknowledging a connection between racist expression and harm made it possible for the *Beauharnais* Court to accept the state's interest in regulating racist expression, and provided wide latitude for the state to do so.

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71. *Id.* at 362.

72. *Id.* at 365-66.

73. *Id.* at 343-44.

74. *Id.* at 344. Justice Thomas disagreed with this particular move by the Court. *See id.* at 388 (Thomas, J., dissenting); *see also* Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?* 93 GEO. L. J. 575, 608-10 (2005).

75. Wisconsin v. Mitchell, 508 U.S. 476, 480 (1993).

76. *Id.*

77. Beauharnais v. Illinois, 343 U.S. 250, 260-62 (1952).

The Court took a distinctly different approach to allowing regulation in *Mitchell* and *Black*. Though it agreed to allow states to regulate cross burning, the Court refused to overrule *R.A.V.*[78] In striking down the Minneapolis statute at issue in *R.A.V.* the Court explicitly rejected the city's argument that the ordinance came within one of the specific exceptions allowing content discrimination aimed at the secondary effects of speech.[79] In rejecting the City of St. Paul's argument that the St. Paul ordinance only regulated secondary effects, the Court cited *Boos v. Barry*[80] insisting, "[L]istener's reactions to speech are not the type of secondary effects we referred to in Renton." The emotive impact of the speech on its audience is not a secondary effect."[81] By allowing regulation of racist expression in *Mitchell* and *Black*, but leaving *R.A.V.* in place, the Court seems to be accepting of the argument that a city has no place regulating the harm of racist expression.

II. HOW THE FIRST AMENDMENT WORKS ON THE GROUND

A. *Enforcement of Hate Crime Law*

Among academics who write about the First Amendment there was significant worry leading up to the decisions in *R.A.V.* and *Mitchell* that regulations on racist speech would lead to individuals being punished simply for using slurs or epithets.[82] Critics reject the Supreme Court's contention that hate crimes are predicated on evidence of motivation.[83] The use of racist speech, according to such critics, violates the First Amendment because "ordinary" criminal laws already exist, and the mere existence of hate crimes laws signals that they constitute an additional penalty aimed at

78. Virginia v. Black, 538 U.S. 343, 343-44 (2003).

79. R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992). In *Renton v Playtime Theaters* 475 U.S. 41, 54, 106 S. Ct. 925, 932, 89 L. Ed. 2d 29 (1986) adult movie theaters challenged a regulation which restricted the location of adult movie theaters to within 1000 feet of a residential building, church, school, or park. The Court allowed regulation of expressive content on the grounds the regulation was aimed at the secondary effects – the serious problems caused by adult theaters. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986). Trying to invoke the exception of allowed in Renton, in RAV the city of St. Paul had argued that the ordinance was intended, "not to impact on the right of free expression of the accused, but rather to protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that is been historically discriminated against." 505 U.S. 377, 394.

80. Boos v. Barry, 485 U.S. 312 (1988).

81. R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992).

82. *See e.g.*, Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991); Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 CRIMINAL JUSTICE ETHICS 29 (1992).

83. JAMES B. JACOBS AND KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 126 (1998).

racist expression. Hate crime laws therefore, critics insist, punish individuals for thinking biased thoughts.[84]

Critics of hate crime legislation also make empirical claims.[85] There are three main empirical claims made by critics. First, critics often quibble with the idea that the use of racist speech is any indication of what motivated the crime.[86] As one critic of hate crimes legislation writes, "Jurors cannot read into defendant's minds to determine whether the acts were precipitated by bigotry."[87] Critics contend that police will arrest individuals for using hate speech, which is protected under *R.A.V.*, rather than for having committed hate crimes.[88] Finally, critics also insist, that such laws will be used against minority perpetrators of hate crimes.[89] Generally, the support for this last argument is always the same—a story about a Black man in Florida having been arrested for having committed a hate crime after he called a white police officer "a cracker."[90] Charges against the man were dismissed.[91]

With respect to police officers enforcing the law incorrectly, critics are correct in thinking that the Supreme Court created significant enforcement difficulties when *Mitchell* was decided without overruling *R.A.V.*[92] Police officers who enforce hate crime laws must take care not to do so in a manner that infringes on constitutionally protected speech.[93] In *Mitchell*, citing *Dawson v. Delaware*, a case decided the previous year, Justice Rehnquist wrote that a sentencing judge could not consider, "a defendant's abstract beliefs, however obnoxious to most people."[94] Given this pronouncement by the Court, and the language in *R.A.V.* protecting ra-

84. "[T]he only additional purpose in punishing more severely those who commit a bias crime is to provide extra punishment based on the offenders politically incorrect opinions and viewpoints." JACOBS AND POTTER, *supra* note 83, at 128.

85. *See* Jeannine Bell, *Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime,* 4 RUTGERS RACE & L. REV. 33, 34 (2002) (describing critics' concerns regarding hate crime legislation).

86. *See, e.g.,* Gellman *supra* note 82, at 101; Redish, *supra* note 82, at 30.

87. PHYLLIS B. GERSTENFELD, HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES, 49 (2011).

88. Gellman, *supra* note 82, at 364-65.

89. *See e.g.*, Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 279 (1992).

90. *See, e.g.*, Gellman, *supra* note 82, at 361 n.134; Gerstenfeld, *supra* note 89, at 279; Barbara Dority, *The Criminalization of Hatred,* 54 HUMANIST 38 (May/June 1994), *available at* http://ehostvgw11.epnet.com.

91. Gellman, *supra* note 82, at 279.

92. Jeannine Bell, *Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime,* 4 RUTGERS RACE & L. REV. 33, 46-47 (2002) (describing practical concerns for enforcement based on the gap between Mitchell and R.A.V.).

93. *Id.*

94. Wisconsin v. Mitchell, 508 U.S. 476 (1993) at 485 (citing Dawson v. Delaware, 503 U.S. 159 (1992) at 167).

cist ideas[95] it stands to reason that if police officers are arresting individuals for the use of racist speech then they are unquestionably in violation of the First Amendment. The inquiry in cases in which individuals are accused of having committed hate crimes is what motivated the crime. In other words, what drove the individual to commit the crime?

Though many critics of hate crime legislation automatically assume that police fail in their quest to walk the line between hate speech and hate crime,[96] at least one empirical examination of how police actually enforce bias crime law suggests otherwise. My study of the enforcement of bias crime law in "Center City," a large American city, followed police officers trained in the investigation of hate crimes as they grappled with the complicated First Amendment issues involved in separating hate speech from a crime.[97] Rather than behaving as the overeager enforcers that many critics predict, officers respected the line between constitutionally protected racist speech and constitutionally approved regulation of hate crime.[98] Though officers had not been schooled on the specific details of all of the First Amendment cases on which their work touched, when asked about hate speech they clearly stated that it was protected.[99] They knew that motivation was the key to what they should be doing.[100]

One detective was asked how one could tell that a crime was a hate crime and responded in a way that reflected subtlety:

> It's not language alone. You investigate actions. Words are the secondary buttress of actions. They proved the history of the action; prove that they went after someone because of race. You have to put the blinders on. Is this something the perpetrator would've done if the victim were black or white? You have to consider both sides, walk the line.[101]

These statements were bolstered by another of the unit's detectives who commented on the relationship between racist speech and the actions

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95. Justice Scalia suggested that the Court did not agree with R.AV.'s views, but argued that the City of St. Paul may not restrict his expression. "The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree. Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire. " R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 396, (1992).

96. *See, e.g.*, Gellman, *supra* note 82, at 359; Redish, *supra* note 82, at 29, 30. JACOBS & POTTER, *supra* note 83, at 109-10.

97. JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME 147 (2002) [hereinafter BELL, POLICING HATRED].

98. *Id*.

99. *Id*.

100. *Id*.

101. *Id*.

taken by the perpetrator. The detective said, "We look to the totality of the circumstances, criminal action in the words and also at the incident . . . language alerts us to the possibility of bias but it's just the possibility."[102]

The detectives in the Anti-Bias Task Force were a specialized unit who were specially trained to investigate hate crimes.[103] For a variety of reasons the detectives in this unit were committed to the investigation of crimes motivated by bias.[104] Over a 20-year period the unit had received thousands of reports of hate crimes.[105] Several hundred crimes, not all of which were hate crimes, were sent to the specialized unit each year.[106] Slurs and epithets were common occurrences in many of the crimes reported to the unit.[107] Center City is a city with a sizable minority population, and many crimes had perpetrators and victims of different races.[108] Classifying every crime whose initial police report included slurs and epithets with interracial perpetrator/victim composition would not only have been inaccurate, but also would have been unworkable.[109] The large volume of crimes reported that included racist hate speech encouraged the detectives in the unit to focus only on crimes that were actually motivated by bias.[110] Though none of them were lawyers, police detectives in Center City were quite aware of the constitutional protection for protected speech.[111] Their comments suggested that they understood the doctrinal lay of the land and that words in and of themselves were protected. As one detective remarked: "Racial words are very violent. Racial words may be hate incidents, but words are not a crime. He called her nigger? It's not a crime to say that — the First Amendment right may be violated."[112]

Part of the officers' reticence and the care they took with words stem from the fact that police officers were very aware of the consequences of convicting individuals of hate crimes.[113] In this particular jurisdiction, detectives believed that convictions for hate crime charges prevented individuals from being accepted into college and particular types of jobs, like the police or the military.[114] Several detectives talked about having used slurs and epithets themselves in the past and felt that one should only be

102. *Id.*
103. BELL, POLICING HATRED, at 140-41.
104. *Id.* at 141.
105. *Id.* at 31-33.
106. *See id.* at 147.
107. *Id.* at 141.
108. *Id.* at 150-51.
109. BELL, POLICING HATRED, at 151.
110. *See id.* at 155-57.
111. *Id.* at 156-57.
112. *Id.* at 155.
113. *See id.* at 155-157.
114. *Id.* at 157.

charged with a crime in situations in which one had been motivated by bias.[115]

B. *Campus Hate Speech Codes*

Although critics of hate crime legislation insist that it will lead to punishment for the use of racist speech,[116] courts may be more reticent than critics believe to punish individuals for their use of racist speech.[117] An attempt to safeguard the learning environment in the 1980s, universities developed hate speech codes, many of which were created after racist incidents on campus.[118] These incidents range from mobs of white UMass Amherst students who chased and beat Black passersby after the 1986 World Series to incidents involving Black students' dorm doors being defaced with slurs.[119] Stanford University, the University of Wisconsin, the University of Michigan, and scores of other campuses experienced a large number of racist incidents and in response administrators created speech codes.[120]

The codes were quickly challenged as infringing on speakers' First Amendment rights.[121] Michigan's policy—the first to reach the courts—was challenged by a graduate student who mounted a facial challenge to the statute.[122] The student, Doe, was a graduate student who specialized in the area of biopsychology, which he described as involving the study of differences in personality traits and mental abilities.[123] He argued discus-

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115. BELL, POLICING HATRED, at 155-156.

116. *See generally* Terrance Sandalow, *Equality and Freedom of Speech (Eighteenth Annual Law Review Symposium: Demise of the First Amendment? Focus on Rico and Hate Crime Legislation),* 21 OHIO N. U. L. REV. 831 (1995).

117. *See, e.g.*, Jeannine Bell, *The Hangman's Noose and the Lynch Mob: Hate Speech and the Jena Six,* 329 HARV. C. R.-C. L. L REV. 350-51 (2009) (describing cases where the courts had rejected the placement of a noose as part of an allegation of racially hostile work environment).

118. *See, e.g.*, Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345, 371 (2001) (arguing that the speech policies were designed to counteract unpleasant racial incidents on campus); Doe v. Univ. of Michigan, 721 F. Supp. 852, 853 (E.D. Mich. 1989) (describing the adoption of a Policy on Discrimination and Discriminatory Harassment of Students in the University Environment at the University of Michigan in Ann Arbor in an attempt to curb what the University's governing Board of Regents viewed as a rising tide of racial intolerance and harassment on campus).

119. SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 129 (1994) (describing incidents occurring at UMass Amherst, University of Wisconsin, Stanford, and University of Michigan).

120. *Id.*

121. *See, e.g.*, Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1185 (6th Cir. Mich, 1995) (First Amendment challenge to Central Michigan University's "discriminatory harassment policy); The UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. System, 774 F. Supp. 1163 (E.D. Wis. 1991) (challenging the University of Wisconsin's hate speech code).

122. Doe v. Univ. of Mich., 721 F. Supp. 852, 867 (E.D. Mich. 1989).

123. *Id.* at 858.

sion of "controversial" theories on sexual or racial differences in one of his classes might cause offense and lead to a complaint being brought under the policy.[124] In his challenge, Doe maintained that University of Michigan's policy on discrimination and discriminatory harassment was unconstitutionally vague and overbroad and that it chilled speech and conduct in a manner prohibited by the First Amendment.[125] The Michigan policy sanctioned "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam veteran status."[126]

Michigan's policy was struck down by the district court on overbreadth and vagueness grounds.[127] The court first addressed the issue of overbreadth. Statutes that regulate expressive conduct or speech under the First Amendment must be narrowly tailored to address only the particular harm at which the statue is aimed.[128] If a statute regulates a substantial amount of protected expressive conduct or speech in addition to the evil at which the statute is directed, it is overbroad.[129] In reviewing the incidents that had arisen to which the policy had been applied, the court noted that the Michigan policy was not so clearly drawn so it could be interpreted to apply to protected speech.[130] Though no one had been officially sanctioned under it, the court determined that the policy has been applied to protected speech.[131]

Doe also argued that the Michigan policy was impermissibly vague.[132] Unconstitutional vagueness is present in statutes when, "men of common intelligence must necessarily guess at its meaning."[133] To avoid falling afoul of the vagueness doctrine, a statute must give clear guidance regarding which behavior is protected and which is prohibited. With respect to issues of vagueness, writing for the court in Doe, Judge Cohn maintained that the drafters provided clear guidance how one could avoid being penalized by the policy:

> . . .[T]he University never articulated any principled way to distinguish sanctionable from protected speech. Students of common understanding were necessarily forced to guess at whether a comment about a controversial issue would later be

124. *Id.*

125. *Id.* at 856.

126. *Id.* at 853.

127. *Id.*

128. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

129. NAACP v. Button, 371 U.S. 415, 433 (1963).

130. Doe v. Univ. of Michigan, 721 F. Supp. 852, 865 (E.D. Mich. 1989).

131. *Id.*

132. *Id.* at 866.

133. *Broadrick*, 413 U.S. at 607.

> found to be sanctionable under the Policy. The terms of the Policy were so vague that its enforcement would violate the due process clause."[134]

After the Michigan policy was struck down, speech codes at Stanford, Central Michigan University, and the University of Wisconsin were also challenged and struck down.[135]

III. CASUAL RACISM: THE PROLIFERATION OF PROTECTED RACIST EXPRESSION

Courts' rejection of universities' attempt to regulate racist expression on campus may have not solely been a reflection just on how the judges view the First Amendment landscape. It may also have mirrored how expansively American society views one's freedom to use racist speech. Though when accused of racism almost everyone disavows being racist, this section discusses the fact that large numbers of people nevertheless use undeniably racist speech—slurs and epithets—in public venues.

A. *Racist Expression on Social Media*

The Internet has created a proliferation of spaces for racist speech. One such locale is social media outlets such as Facebook and Twitter. Racially charged and clearly racist tweets are so common on Twitter that scholars have analyzed their location and character.[136] In the wake of the Washington Capitals' 2012 playoff victory over the Boston Bruins, hundreds of irate fans lashed out at Capitals player Joel Ward, who is Black, on Twitter. Ward had scored a game-winning goal in overtime. Bruins fans racist tweets included:

> So fucking mad. That fucking nigger scored. . .
>
> WHY THE FUCK ARE YOU SHOWING REPLAYS OF THAT NIGGER SCORING. . .
>
> We lostFalse To a hockey playing niggerFalse What kind of shit is this. . .

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134. *Doe v. Univ. of Michigan*, 721 F. Supp. at 867.

135. Order on Preliminary Injunction, Corry v. Stan. Univ., No. 740309, at *41 (Cal. Sup. Ct. Feb. 27, 1995); Dambrot v. Central Mich. Univ., 55 F.3d 1177, 1185 (6th Cir. Mich, 1995); The UWM Post, Inc. v. Board of Regents of the University of Wisconsin System, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down Wisconsin's hate speech code as vague and overbroad).

136. Ugonna Okpalaoka, *Map Shows South Has Most Racist Post-Election Obama Tweets*, GRIO (Nov. 12, 2012), http://thegrio.com/2012/11/12/map-shows-south-has-most-racist-post-election-obama-tweets/ (reporting on the racist tweets posted after Barack Obama won the 2012 election).

The Nigger scores again we riot.[137]

Sport fans engaged in similar behavior in 2014 when Montréal Canadians player P.K. Subban scored the winning goal against the Boston Bruins in the 2014 Stanley Cup Playoffs.[138] Thousands of racist tweets were directed at Subban, who is also Black.[139]

Racist tweets are not, of course, limited to sports. Thousands of racist tweets occurred in the wake of President Obama's election,[140] and also in response to his Sandy Hook elementary school vigil.[141] In a more local example of government criticism, an investigation by the New York post revealed that Lt. Timothy Dluhos, a Staten Island EMS supervisor, constantly provided a running commentary of his job duties with racist and anti-Semitic tweets.[142] While giving a tour of a Bedford-Stuyvesant area Black neighborhood, which Dluhos referred to as a "hood tour," "he posted photos of a housing project, fried-chicken joints, and a strip club."[143] "Real nasty place," Dluhos tweeted, "I've been there."[144] After a groundhog bit New York City Mayor Michael Bloomberg at a Groundhog Day event, Dluhos tweeted, "Too bad he didn't have rabies or AIDS and too bad he didn't bite King Heeb's face off."[145] Dluhos was not fired. One month after the tweets were publicized, Dluhos resigned.[146]

B. *Racist Expression in the Workplace*

The prevalence of racist expression in casual circumstances like social media is unsurprising. In the workplace, however, the use of slurs or epithets as harassment of an employee can be actionable. Title VII of the Civil

137. *Bruins Fans Calling Joel Ward The N-Word*, CHIRPSTORY.COM (Apr. 26, 2012 10:19 AM), http://chirpstory.com/li/6781. Several of these racist tweets were deleted a few days after the incident but before they disappeared they were compiled and placed on Chirpstory.

138. *Twitter Blows Up With Racist Reactions After P.K. Subban Scores Game Winner In 2nd OT*, CBS DETROIT, (May 2, 2014), http://detroit.cbslocal.com/2014/05/02/boston-strong-racist-reaction-after-subban-scores-game-winner/#.

139. *Id. P.K. Subban Targeted By Thousands Of Racist Tweets After Habs Win* (May 2, 2014), http://www.cbc.ca/news/canada/montreal/p-k-subban-targeted-by-racist-tweets-after-habs-win-1.2629759.

140. Okpalaoka, *supra* note 136.

141. *'Take that N*gger Off TV': Racist Tweets Unleashed During President Obama's Sandy Hook Vigil Speech*, HUFFINGTON POST (Dec. 17, 2012), http://www.huffingtonpost.com/2012/12/17/take-that-nigger-off-tv-racist-tweets-obama_n_2317185.html.

142. Susan Edelman, *FDNY EMS Lt. spews Racist, Anti-Semitic tweets, but cried when confronted*, N.Y. POST (Mar. 24, 2013), http://nypost.com/2013/03/24/fdny-ems-lt-spews-racist-anti-semitic-tweets-but-cried-when-confronted/.

143. *Id.*

144. *Id.*

145. *Id.*

146. Susan Edelman, *Whiner's a Loser—Quits EMS*, N.Y. POST, (April 28, 2013), http://nypost.com/2013/04/28/whiners-a-loser-quits-ems/.

Rights Act of 1964 forbids eligible employers from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of" his race.[147] An employee may establish a violation of Title VII by proving that his or her employer subjected them to a hostile work environment.[148] Courts evaluate whether an objectively hostile work environment exists by weighing whether the harassment the employee alleges is sufficiently pervasive to constitute a violation of Title VII.

Courts have based their determination of whether the conduct meets the standards of racial-harassment by looking to the totality of the circumstances represented by: (1) how often the conduct occurs; (2) the severity of the actions; (3) the level of physical threat or humiliation involved; and (4) the extent to which the behavior affects employee's job performance.[149] Both the frequency and the nature of the slurs are factors in courts' determination that the racial harassment was sufficiently severe.[150] A single allegation of a slur has been held to be not sufficiently severe.[151] Not only that, the use of slurs and epithets must be sustained. For instance, in one case a plaintiff described having heard multiple racial slurs over a fourteen year period.[152] In denying his claim under Title VII, the reviewing court characterized the slurs, which occurred at various points over the plaintiff's tenure, as "isolated and sporadic" because they only occurred a few times each year over the fourteen year period.[153]

Characterizing the use of multiple slurs as not sufficiently severe constitutes part of the space courts have created for the use of racially charged expression in the workplace. The use of the slur "nigger" and racially charged threats like "KKK" have been found by courts to be sufficiently severe[154] while stigmatizing language like the use of "ghetto" to refer to

147. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. 42 U.S.C. § 2000e–2(a)(1) (2014).

148. Kishaba v. Hilton Hotels Corp., 737 F.Supp. 549, 555 (D. Hawai'I 1990).

149. *See, e.g.*, Mendoza v. Borden, Inc., 195 F. 3d 1238, 1246 (11th Cir. 1999), cert. denied, 529 U.S. 1068, 120 S.Ct. 1674, 146 L.Ed.2d 483 (2000).; Bailey v. Final Touch Acrylic Spray Decks, Inc., No. 606CV-1578-ORL-19JGG, 2007 WL 3306749, at *5 (M.D. Fla. Nov. 6, 2007).

150. Mendoza v. Borden, Inc., 195 F. 3d 1238, 1245 (11th Cir. 1999).

151. *See e.g.*, Smith v. N.E. Ill. Univ., 388 F.3d 559, 566 (7th Cir. 2004).

152. Barrow v. Ga. Pac. Corp., 144 Fed. App'x. 54, 58 (11th Cir. 2005).

153. *Id.*; *cf.*, EEOC v. FLTVT, LLC, 6:05-cv-1452, 2007 WL 3047136, at *5 (M.D. Fla. Oct. 18, 2007) (rejecting a hostile work environment claim where numerous racial slurs were used the workplace, but no one employee heard more than a few slurs, and most employees were not aware of the slurs that the other employees heard).

154. *See, e.g.,* Mack, et. al. v. ST Mobile Aerospace Engineering, Inc., 195 Fed. App'x. at 836-38 (11th Cir. 2006) (finding that racial slurs, along with graffiti depicting nooses, swastikas, confederate flags, and the letters "KKK" were "severe"); Perkins v. U.S. Airways, Inc., 8 F. Supp. 2d 1343, 1351 (M.D. Fla. 1998) (finding that "racial . . . pictures" on a bathroom wall, a

African Americans has been viewed as lacking racial overtones and not clearly motivated by racial animus.[155]

Title VII provides some remedy for individuals who experience racial harassment but that does not mean employers are always taken to task for the use of racial slurs in the workplace. There is significant room for employees to exhibit racist expression without being penalized under the law. Courts have rejected occasional use of racial slurs, finding them beyond the reach of Title VII which is aimed at behavior that is pervasive.[156] Racially tinged behavior has been characterized by courts as not significantly severe.[157] Finally, racist language and behavior not directed at an employee may also lie outside bounds of Title VII.[158]

IV. INVISIBLE (RACIST) DANGERS

A. *Hate Crime and its Obscuring Lens*

Part of the difficulty of arguing that racist tweets and racist action in the workplace is problematic has been the creation of the term hate crime. If most Americans were asked about the typical hate crime, my guess is that they would describe the dragging death of a Black man, James Byrd, Jr.[159] This widely publicized crime occurred in June 1998 in Jasper, Texas and involved three white supremacists, Bill King, Russell Brewer, and Shawn Berry, who chained Byrd behind their pickup truck and dragged him to death.[160]

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newspaper article regarding a lawsuit by black employees hung in the break room, and a clay doll with racial overtones were "pervasive"); Hrobowski v. Worthington Steel Co., 358 F.3d 473, 477 (7th Cir. 2004) (repeatedly hearing the word "nigger," including on more than one occasion in which a fellow supervisor suggested that plaintiff talk to an employee "nigger to nigger" was severe and pervasive); Rodgers v. Western–Southern Life Ins. Co., 12 F. 3d 668, 675 (7th Cir.1993); see also Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984).

155. Harrington v. Disney Reg. Entm't, Inc., No. 06-12226, 2007 WL 3036873, at *11-12 (11th Cir. Oct. 19, 2007). In another case, an employee alleged that she suffered numerous discriminatory actions based on her race and gender that created a hostile work environment. As evidence of racial harassment, the plaintiff cited a coworker's comment of "[g]reens for everybody" following President Obama's election. The court found that considered alone, the comment failed to rise to the level of severe or pervasive conduct required to support a case of hostile work environment.

156. Barrow v. Ga. Pac. Corp., 144 Fed. App'x. 54, 57 (11th Cir. 2005).

157. *See, e.g.* Harrington v. Disney Reg. Entertainment, Inc., No. 06-12226, 2007 WL 3036873, *11-12 (11th Cir. Oct.19, 2007 (use of term "ghetto" not sufficiently severe).

158. *E.g.,* Alexander v. Opelika City Schs., 352 F. App'x 390, 393 (11th Cir. 2009) (per curiam) (finding an employee's claim failed in part because supervisor's discussion of how to tie a noose around a person's neck was not directed at the employee).

159. *See* Patty Reinert & Allan Turner, *Jasper killer gets death penalty: A smirking King shows no remorse*, HOUS. CHRON., Feb. 26, 1999, at 1A.

160. *Id*.

Racial violence of this sort is not new, but calling it a "hate crime" is a relatively recent invention.[161] The term "hate crime" came into widespread use after the creation of the 1990 Hate Crime Statistics Act.[162] At first, the flashy term "hate crime" lent attention to racial-motivated crimes, like Byrd's murder, which normally would have escaped the attention of the media. The categories of victims "protected" under hate crime legislation grew as jurisdictions around the country created hate crime legislation with categories including sexual orientation.[163]

With time, the term "hate crime" drew significant fire from scholars opposed to the creation of ANY crime aimed at bias-motivation.[164] In response, many scholars adopted the term "bias crime."[165] This has not fixed the problem; media outlets continue to use the loaded hate crime terminology. Ultimately, the term "hate crime" prevents society from understanding the prevalence and magnitude of important incidents of bias-motivated violence and may also even prevent us from taking seriously the most dangerous forms of bias-motivated violence.

Our failure to deal properly with racist expression has created a host of ills. In addition to society's failure to fully appreciate the harm directed at targets of racist speech as the previous section describes, there are also some unacknowledged dangers. Many of these dangers are seemingly invisible stemming from the structures we have created to address racist violence in the manner we assume it to occur.

The term "hate crime" has big shoes to fill. On its face the term, "hate crime," is violent and splashy, teeming with animus. In many cases to fully satisfy what we expect from the term "hate crime" we are unconsciously looking for a crime that fits the profile of the dragging death of James Byrd, Jr.—a violent dramatic murder committed by white supremacists. To make matters worse, as the previous section suggests we may be reluctant to pay too much attention to less showy crimes where racist speech is used because of our worries about the criminalization of constitutionally protected racist speech. These two difficulties create a perfect storm in which society tends not to see what is happening right

161. *See, e.g.,* Robin Parker, *Bias Crimes In The Schools-An Uncivil Education*, 193 N.J. LAWYER 20 (1998).

162. Hate Crimes Statistics Act, 23 U.S.C. 534 (1993), *as amended by* Act of July 3, 1996, Pub. L.No. 104-155m s. 7, 110 Stat. 1392m 1394 (1996).

163. ANTI-DEFAMATION LEAGUE, ADL APPROACH TO HATE CRIME LEGISLATION (2001), *available at* http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf.

164. *See, e.g.,* Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior,* 10 BEHAV. SCI. & L. 259, 270 (1992).

165. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 4 (1998) (describing the creation of the bias crime term).

underneath our noses. This includes contemporary bias related incidents, of which thousands occur each year.[166]

Though such crimes are underreported, and official statistics remain inaccurate, there are multiple measures of contemporary bias crimes.[167]

The most comprehensive (though not necessarily the most accurate) national list of bias-motivated incidents is compiled each year by the Federal Bureau of Investigation (FBI) from reports submitted by law-enforcement agencies serving in cities and towns around the United States.[168] In 2012, law-enforcement agencies reported 3,297 racially motivated bias crimes to the FBI.[169] Roughly two-thirds of these incidents (66.1 percent) were motivated by anti-Black bias.[170] The Southern Poverty Law Center (SPLC) scans news reports and other media sources for bias-related activities to compile its catalog of hate incidents.[171] The organization's list includes more than 3,000 incidents occurring between 2003 and 2014.[172] These incidents range from vandalism—slurs or epithets scrawled on someone's house, car, or religious institution—to bias-motivated murder.[173] Both the SPLC catalog and the FBI Hate Crime Statistics report only scratch the surface of bias-motivated crime.

B. *Anti-integrationist Violence*

What does contemporary race violence captured within the hate crimes label look like? Consider for example, one particular type of bias crimes anti-integrationist violence—race based incidents directed at minorities who have moved to white neighborhoods. I have created a database of incidents directed at just over 430 non-white families or individuals living in white neighborhoods who have been targeted by anti-integrationist violence—violence directed at non-white families whose clear purpose was getting the targets to move.[174] Such violence was identified in every geographic area of the country in both upscale and working class neighborhoods.[175] These attacks, described in court records and news

166. *See, e.g.,* FED. BUREAU OF INVESTIGATION, INCIDENTS AND OFFENSES - HATE CRIME STATISTICS, 2009, *available at* http://www2.Fbi.gov/ucr/hc2009/incidents.html.

167. *Id*.

168. *Id*.

169. JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF SEGREGATION IN AMERICAN HOUSING 7 (2013).

170. *Id*.

171. *See* SOUTHERN POVERTY LAW CENTER, HATE INCIDENTS, http://www.splcenter.org/get-informed/hate-incidents?year=&state=all (last visited Apr. 17, 2015) (detailing 3937 hate incidents).

172. *Id*.

173. *Id*.

174. For a detailed description of incidents, see BELL, HATE THY NEIGHBOR, *supra* note 169 at 67, 69-72.

175. *Id*. at 69.

articles, occurred between 1990 and 2010.[176] They were directed at racial and ethnic minorities who attempted to move to neighborhoods in which most of their neighbors did not share their race.[177] The incidents catalogued represented a range of offenses including arson, cross burning, physical attack, racist graffiti, threats, and vandalism.[178] Often, families and individuals who were targeted suffered multiple attacks.[179] Though Asian American and Latinos were often attacked, the largest share of violence was directed at African Americans.[180]

Some crimes occurred soon after the target moved to the white neighborhood. Other crimes happened after the target had been living in the area for some time. Irrespective of when the crime occurred, the perpetrators motivation was clear—to get the individuals to leave.[181] In one representative case, Michael Ray Nichols and Shane Greene, who were longtime residents of a neighborhood in Bessemer City, North Carolina, were unhappy that Hispanics and African-Americans had started to move to their (previously) all-white neighborhood.[182] Several individuals recounted that Greene and Nichols screamed racial epithets at Hispanics and African-Americans who lived in the neighborhood.[183] On July 30, 1999, Greene and Nichols attacked a neighbor, Julio Sanchez, and then began walking down the street with a baseball bat and iron pipe yelling, "Go back to Mexico. You done got all our damn jobs."[184] The two men then began breaking windows and doors in the house and vandalizing the cars as well.[185]

C. *The Contemporary Extremist Threat*

Though the vast majority of bias-motivated crime involves low-level violence committed by individuals unaffiliated with hate groups, white supremacists have by no means disappeared. The Southern Poverty Law Center (SPLC), which tracks extremist activity, identified 784 separate active U.S. hate groups—organizations that have beliefs or practices that attack or malign entire classes of people, generally for immutable characteristics—that were active in the United States in 2014.[186] Such

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 67.

181. *Id.* at 69-72.

182. United States v. Nichols, 149 F. Appx 149, 150 (4th Cir. N.C. 2005).

183. *Id.*

184. *Id.*

185. *Id.*

186. *See* SOUTHERN POVERTY LAW CENTER, HATE MAP, http://www.splcenter.org/hate-map (last visited Apr. 17, 2015).

groups were located throughout the United States, in nearly every state, and were engaged in activities ranging from leafleting and publishing to murder.[187]

Many of the 3407 anti-race hate crimes identified by the FBI in 2013 were non-violent offenses—vandalism, simple assault, and intimidation.[188] Extremists tend to be involved in much more violent crimes. Hate murders are frequently committed by those who have some sort of ideological commitment to ridding the world of the type of person attacked—racial, ethnic, religious minorities and gays and lesbians.[189] Hate crimes scholars, Jack Levin and Jack McDevitt, refer to these as "mission" crimes.[190]

1. Massacre at Emmanuel Church

Dylann Storm Roof's mission was clear as the facts emerged regarding his murder of 9 African Americans at Emmanuel African Methodist Episcopal Church on June 17, 2015. Witnesses told police that 21-year-old Roof, joined the church Bible study at approximately 8 PM and then roughly one hour later, pulled out a .45-caliber handgun.[191] Roof told the assembled group, "You are raping our women and taking over our country," before he began firing.[192] He re-loaded the weapon five times according to one witness.[193]

Friends and associates of Roof's confirmed his hatred of blacks.[194] In addition to racist comments expressing support for segregation, Roof's friends said that he spoke of starting a race war.[195] Several friends told reporters that he had described hurting African Americans and doing something "crazy."[196] On Roof's Facebook page his profile picture showed him wearing a jacket with two symbols popular with modern day white supremacists—the flags of white-ruled Rhodesia and that of apartheid-era South Africa.[197] A picture of Roof holding a Confederate

187. *Id*.

188. *See* FED. BUREAU OF INVESTIGATION, 2013 HATE CRIME STATISTICS, TABLE 4 OFFENSES, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013/tables/4tabledatadecpdf/table_4_offenses_offense_type_by_bias_motivation_2013.xls (last visited Apr. 17, 2015).

189. JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 89 (1993).

190. *Id*.

191. Richard Fausset, John Eligon, Jason Horowitz & Frances Robeles, *A Hectic Day at Church, And Then a Hellish Visitor*, N.Y. TIMES, at A1 (June 21, 2015).

192. *Id*.

193. *Id*. at 16.

194. *Id*.

195. *Id*.

196. *Id*.

197. Frances Robles, Jason Horowitz and Shaila Dewan, *Flying the Flags of White Power*, THE NEW YORK TIMES, June 19, 2015, at A1.

flag, along with a racist manifesto, were found on his website, The Last Rhodesian.[198] There was also his choice of clothing. The shirt Roof wore constantly, according to friends, was a long sleeved grey shirt with a Border Patrol logo on one sleeve.[199] Roof wore his Border Patrol shirt to the Emmanuel church massacre.[200]

Contextualizing hate murders, like the Emanuel Church massacre is important. It is worth noting that though these hate murders are horrific, murders are rarer than other forms of bias-motivated violence. That being said, there are reasons beside their brutality that we should pay attention to them. There is some evidence that the number of hate murders may even be increasing, perhaps with a rise in the number of white supremacist groups.[201]

My research reveals that between 1998 and 2012 there were 34 separate racial extremist killing sprees, resulting in more than 38 murders.[202] Though the precise facts of each incident are slightly different, hate murders do share several commonalities. The first is the issue of bias motivation. In the hate murders, the individuals killed were selected because of their race, religion ethnicity, sexual orientation or other protected category. The perpetrator may go to a Black church where he is likely to find the particular type of victim he wishes to target, as Roof did.

In other cases, the perpetrators were looking for a minority to kill, and the victim just happened to be walking by.[203] One excellent example of this was the case of white supremacist Benjamin Smith. On July 2, 1999, Smith shot at several Hasidic Jews in one neighborhood in Chicago. Next, he drove to nearby Skokie, Illinois and shot killed a Black man, Ricky Byrdsong, a former Northwestern University basketball coach. Smith continued on to Urbana/Champaign, Illinois where he fired on a group of Asian-Americans. Smith's killing spree ended on July 4, 1999, in Bloomington, Indiana where he shot and killed a Korean graduate student, Won-Joon Yoon before killing himself.[204]

The case of Benjamin Smith is typical of several other white supremacist shooting sprees. Though Smith was a follower of Matthew Hale, the leader of the World Church of the Creator, a group dedicated to the eradi-

198. Rob Crilly & Raf Sanchez, *Dylan Roof: The Charleston Shooter's racist manifesto*, THE DAILY TELEGRAPH, June 20, 2015, *available at* http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11688675/Dylann-Roof-The-Charleston-killers-racist-manifesto.html

199. *A Hectic Day at Church*, *supra* note 191, at A16.

200. *Id*.

201. Data on file with author.

202. *Id*.

203. *See, e.g.*, R.L. Nave, *3 More Rankin Countians Sentenced for Hate Crime Against Black Jackson Man*, JACKSON FREE PRESS, (Feb. 25, 2015), http://www.jacksonfreepress.com/weblogs/jackblog/2015/feb/25/3-more-rankin-countians-sentenced-for-hate-crime-a.

204. *See Midwest Gunman Had Engaged in Racist Acts at 2 Universities*, *supra* note 5.

cation of people of color, the shooting spree was not part of an organized plan.[205] Smith was a lone wolf.

Several recent hate killing sprees were committed by white supremacists who were "lone wolves"—Eric Rudolph, Buford Furrow, and Sean Gillespie.[206] One very deadly killing spree committed by a lone wolf occurred on August 4, 2012.[207] Army veteran Wade M. Page, a member of various racist rock bands, walked into a Sikh temple in Oak Creek, Wisconsin and opened fire.[208] Six Sikhs worshipping at the temple were killed and three others were wounded.[209] White supremacist organizations use bands as a way of recruiting and furthering their message.[210] The message band members sing is often one not just of hatred, but of violent eradication of Blacks, Jews, and other minorities.[211] According to news reports, Page played in the band the "Blue Devils" and was the leader of the white power band, End Apathy.[212] One of the Blue Devils' songs, "White Victory," included the lines, "Now I'll fight for my race and nation/Sieg Heil!"[213]

At the time of the shooting, Page had been identified by the Southern Poverty Law Center as a member of a band advocating race war, but law enforcement had not had any encounters with him.[214] Page's activities before the shooting were freely unfettered. Mark Potok, a senior fellow at the Southern Poverty Law Center, said that Page had been known by the Center for a decade because of his membership in rock bands known for violent racist lyrics.[215] The center, however, had not passed any information about Page to law enforcement. Potok stated that "Page was just one of thousands . . . . We were just keeping an eye on him."[216]

2. Addressing Right-wing Extremism

Keeping tabs on individuals involved in violent hate groups is at odds with some approaches to the First Amendment. Though it is typical for

205. *See id.*

206. Mike German, *Behind the Lone Terrorist, A Pack Mentality*, THE WASHINGTON POST (June 5, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/06/04/AR2005060400147.html.

207. Erica Goode and Serge F. Kolaveski, *Wisconsin Killer Fed and Was Fueled by Hate Driven Music*, N.Y. TIMES, (Aug. 6, 2012), http://www.nytimes.com/2012/08/07/us/army-veteran-identified-as-suspect-in-wisconsin-shooting.html?_r=0.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

the FBI and Department of Homeland Security to monitor violent extremist websites, this has been criticized.[217] In 2009, several Republicans in Congress expressed opposition to a Justice Department report called "Rightwing Extremism" that suggested that the recession and the election of a Black president could increase threats from white extremists.[218] There had been some cause for concern. After Obama's election there was a significant increase in the number of threats directed at the President. There were so many that it was overwhelming the Secret Service.[219] Despite having an empirical basis for the concerns expressed in the report, Janet Napolitano, then Secretary of Homeland Security, apologized for any mistakes in the report and withdrew it.[220]

Aside from the political problems with monitoring extremists, their new tactics make it more difficult as well. One former FBI undercover agent assigned to fight domestic terrorism, Mike German, suggests that all of these crimes committed by lone wolves who have been exposed to white supremacist ideology are not a coincidence.[221] German was embedded in extremist groups between 1988 and 2004.[222] Explaining the operation of such groups, he writes that extremist group leaders produce a significant amount of literature—now available at hate sites online— that describes "leaderless resistance" and lone wolf terrorism techniques.[223] Such techniques are valuable because they insulate the larger group from legal consequences stemming from the action of the lone wolves. These tactics are especially important in light of Southern Poverty Law Center's civil rights suits bankrupting a number of Ku Klux Klan and white supremacist groups in the 1990s.[224]

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217. *Id*.

218. *Id*.

219. For discussion of this phenomenon, *see generally*, Jeannine Bell, *The Puzzles of Racial Extremism in a 'Post-Racial' World, in* THE NEW BLACK: WHAT HAS CHANGED AND WHAT HAS NOT WITH RACE IN AMERICA (Kenneth W. Mack and Guy-Uriel Charles, eds. 2013).

220. Goode and Kolaveski, *supra* note 207.

221. *Id*.

222. *Id*.

223. *Id*. There is data to such that some Internet hate sites have lots of visitors. One of the most popular hate sites, favored by several who have committed hate murders, Stormfront.org, was estimated to have had between 200,000 to 400,000 American visitors every month over the course of a year. Seth Stephens-Davidowitz, *The Data of Hate*, NEW YORK TIMES, July 12, 2014. http://www.nytimes.com/2014/07/13/opinion/sunday/seth-stephens-davidowitz-the-data-of-hate.html.

224. Sheryl Connelly, *He Used Law To Bankrupt The Klan*, NEW YORK DAILY NEWS, (July 6, 1991), http://articles.philly.com/1991-07-06/news/25784011_1_morris-dees-white-supremacists-steve-fiffer (describing Morris Dees's use of civil rights law to bankrupt the Ku Klux Klan).

CONCLUSION

In an era in which no one admits to being a racist, white supremacists who engage in hate murders seem weirdly anachronistic. In some ways, we only have ourselves to blame for our shock that such incidents can occur. It is our denial of the existence of racism which makes such incidents seem as if they are wholly out of place in contemporary American society. As this Article has suggested, the picture of present-day America as a place in which racism is never expressed is inaccurate. As I have detailed, there is significant First Amendment protection for racist expression, and from social media to college campuses and the workplace there are myriad spaces in which one can engage in racist expression without being legally penalized. There are however, limits. The Court has allowed states to use evidence of racist motivation in the punishment of hate crime.

I argue that we should not feel so comfortable with our approaches to addressing bias-motivated behavior. Our ideas about racial violence are mired in the past. In our current era of racial tolerance, the term "hate crime" has allowed many incidents of racial violence to remain hidden, at least until it is too late. In this Article, I have discussed two ways in which racial violence may be hidden amongst us. Racial violence is hidden in our neighborhoods, as minorities who moved to white neighborhoods are targeted for violence. As a society, we should be much more vigilant against the threat posed by extremist groups. Organizations like the Southern Poverty Law Center that track the activity of supremacist groups suggest that membership in these groups is growing.[225] Though extremist groups do not commit the majority of hate crimes, when the deadliest attacks occur, often the culprit has been a member of an extremist group.[226] For lone wolves like Dylann Roof, internet hate sites provide both support and a forum to spread their views.

It is a mistake to think that because we have hate crime laws on the books, our work addressing hate murders is done. In fact, we do not need hate crime legislation to punish these high profile attacks. Rather, hate crime legislation is needed for the thousands of other bias-motivated attacks that take place without national scrutiny. What might make a difference in preventing horrible hate murders is for the government, and for everyone else, to take much more seriously the dangerous threats posed by racial extremists.

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225. *See* SOUTHERN LAW POVERTY CTR., HATE AND EXTREMISM, http://www.splcenter.org/what-we-do/hate-and-extremism (last visited Apr. 17, 2015) (describing 30 percent increase in the number of hate groups since 2000).

226. *See, e.g.*, ANTI-DEFAMATION LEAGUE, THE CONSEQUENCES OF RIGHT-WING EXTREMISM ON THE INTERNET INSPIRING EXTREMIST CRIMES, *availiable at* http://www.adl.org/assets/pdf/combating-hate/The-Consequences-of-Right-Wing-Extremism-on-the-Internet.pdf (describing hate murders of 9 people, carried out by Benjamin Smith, Richard Baumhammers and brothers Matthew and Tyler Williams).