1999

# Dissent, Free Speech, and the Continuing Search for the Central Meaning of the First Amendment 2000 Survey of Books Relating to the Law

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# DISSENT, FREE SPEECH, AND THE CONTINUING SEARCH FOR THE "CENTRAL MEANING" OF THE FIRST AMENDMENT

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THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY. By *Stephen L. Carter.* Cambridge: Harvard University Press. 1998. Pp. xi, 167. Cloth, $20.50; paper, $12.95.

DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA. By *Steven H. Shiffrin.* Princeton: Princeton University Press. 1999. Pp. xiv, 204. $29.95.

> Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[1]

Since the Warren Court's expansive construction of the Free Speech Clause of the First Amendment, there has been no shortage of legal scholarship aimed at justifying the remarkably broad protections afforded the freedom of speech under landmark cases such as *Brandenburg v. Ohio*,[2] *New York Times Co. v. Sullivan*,[3] and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[4] At the same time, in recent years, a growing chorus of free speech skeptics have made their voices heard.[5] These legal scholars have

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1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

2. 395 U.S. 444 (1969).

3. 376 U.S. 254 (1964).

4. 425 U.S. 748 (1976).

5. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (1997); STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND IT'S A GOOD THING, TOO (1994); CATHARINE A. MACKINNON, ONLY WORDS (1993); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Charles R.

questioned why a commitment to freedom of expression should displace other (constitutional) values such as equality, community, or citizenship.

This spirited challenge to the Warren Court's free speech orthodoxy has given rise to a kind of free speech counter-Reformation. Defenders of the free speech tradition have joined the fray, challenging those who question the value of racist, sexist, or homophobic expression.[6]

The debate has taken place against the backdrop of a longstanding controversy about the "central meaning"[7] of the First Amendment's Free Speech Clause. Since Justices Holmes and Brandeis began forcefully applying the Free Speech Clause to provide broad protection to political speech activity,[8] scholars have been deeply divided over the precise rationale for according speech protection when the speech imposes significant social costs on the general community. Classic theories of free speech, such as Alexander Meiklejohn's "democratic deliberation" thesis,[9] have competed with newer rationales for protecting free expression, such as the pursuit of truth, self-realization, or per-

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Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

6. *See, e.g.*, Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484; Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009 (1996) [hereinafter Volokh, *Freedom of Speech and Appellate Review*]; Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

7. *See* Harry Kalven, Jr., *The* New York Times *Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

8. *See* Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting). The Supreme Court formally embraced the Holmes/Brandeis vision of the First Amendment in *Brandenburg* and has not looked back since. Brandenburg v. Ohio, 395 U.S. 444, 446-49 (1969). *But see* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (holding that Title VII permits a cause of action based on a "hostile work environment," an environment that might be created and maintained through speech activity); Aguilar v. Avis Rent A Car Sys., Inc., 980 P.2d 846 (Cal. 1999) (upholding an injunction against manager's use of racist language, free speech objections notwithstanding); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563 (1995).

9. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT (1948) (arguing that speech should be protected only insofar as it facilitates democratic deliberation within the community) [hereinafter MEIKLEJOHN, FREE SPEECH]; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 [hereinafter Meiklejohn, *The First Amendment*]. Harry Kalven continued the Meiklejohn project, *see* Kalven, *supra* note 7, and Owen Fiss carries the torch today, articulating forcefully the democratic-deliberation theory of the Free Speech Clause, *see* OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996) [hereinafter FISS, LIBERALISM DIVIDED]; Owen M. Fiss, *Why the State*, 100 HARV. L. REV. 781 (1987).

sonal autonomy.[10] Other scholars have suggested more practical rationales for protecting free expression, such as avoiding social disorder by permitting disgruntled elements of the community to vent their frustrations peacefully.[11]

Two recent books, one by Professor Steven Shiffrin[12] and the other by Professor Stephen Carter,[13] propose a renewed focus on protecting dissent as the central value of the First Amendment. Both works posit that the government's response to dissent should serve as the key to evaluating the overall effectiveness of the Supreme Court's free speech jurisprudence. Professor Shiffrin states his thesis as follows: "[T]he First Amendment spotlights a different metaphor than the marketplace of ideas or the richness of public debate; instead, it supports the American ideal of protecting and supporting dissent by putting dissenters at the center of the First Amendment tradition" (p. 128). Professor Carter sounds a similar theme arguing that "[c]ivic life requires dissent because it requires differences of opinion in order to spark the dialogues from which the community thrives and grows" (p. 16). Carter goes even further, positing that the legitimacy of a government's demand of loyalty from its citizens should be a function of its treatment of those who dissent from its laws and policies: "[T]he justice of a state is not measured merely by its authority's tolerance for dissent, but also by its dissenters' tolerance for authority."[14]

A dissent-based theory of free speech has a great deal of superficial appeal. After all, who could be against dissent in a society ostensibly dedicated to permitting freedom of speech? Moreover, the Supreme Court of the United States has taken great pains to emphasize that facilitating political dissent is a core project of the Free Speech Clause.[15] These observations notwithstanding, there are rea-

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10. *See, e.g.*, MARTIN REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11-14 (1984); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 2.03, at 2-24, 2-25 (1994); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1525 (1997) (reviewing FISS, LIBERALISM DIVIDED, *supra* note 9).

11. *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970); Steven Shiffrin, *Defamatory Non-Media Speech and the First Amendment Methodology*, 25 UCLA L. REV. 915, 949 (1978).

12. Professor of Law, Cornell Law School.

13. William Nelson Cromwell Professor of Law, Yale Law School.

14. P. 97; *see also* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 882-84 (1963) (arguing that the First Amendment should facilitate broad-based participation in government decisionmaking and noting that "[o]nce one accepts the premise of the Declaration of Independence — that governments derive 'their just powers from the consent of the governed' — it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment").

15. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414-20 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-60 (1985) (plurality opinion); Cole v. Richardson, 405 U.S. 676, 680 (1972);

sons for skepticism about the federal courts' ability to devise and enforce a viable dissent-based theory of free speech.

First, and perhaps most importantly, there are serious definitional difficulties associated with determining whether or not speech constitutes "dissent." Speech that is hostile to the actions of one branch of the government might be supportive of the actions of another.[16] To a large degree, "dissent" is in the eyes of the beholder.[17] As Professor Richard Delgado has observed, "[a]lthough Shiffrin, to his great credit, invented the dissent theory, neither he nor someone else comparably progressive will be able to dictate the manner in which courts will apply it."[18] If citizens engaged in dissent have cause to fear being marginalized by prosecutors and judges drawn from the majority culture, they would have even more cause to fear being silenced under a regime that makes full First Amendment protection wholly contingent on the goodwill of a state functionary possessing the discretion to apply or withhold a talismanic label.

In addition, the social costs of speech activity do not necessarily track whether speech constitutes "dissent." Indeed, some of the most potentially disruptive speech activity imaginable at least arguably constitutes dissent — activities such as shooting physicians who provide abortion services or bombing federal facilities.[19] Less extreme examples of dissenting expressive conduct include flag burning or the burning of draft cards.[20] One need not even rely on expressive conduct to illustrate the point: Nazis in Skokie represent a kind of dissent, yet the nature and context of this speech activity impose very high social costs on the community.[21] The Supreme Court's rhetoric to

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Cohen v. California, 403 U.S. 15, 24-26 (1971); West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943); Cantwell v. Connecticut, 310 U.S. 296, 310-11 (1940).

16. For example, a group of people protesting the Nixon administration's efforts to avoid delivering Oval Office tape recordings to the Special Prosecutor were "dissenting" from the Executive Branch's policies, but arguably, cheering on the federal judiciary. *See generally* United States v. Nixon, 418 U.S. 683 (1974). Whether such speech constitutes dissent depends on whether one views the question from the perspective of the Executive or Judicial Branch of the federal government. *See infra* notes 49-51 and accompanying text.

17. *See infra* notes 47-65 and accompanying text.

18. Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 784 (2000) (reviewing DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA).

19. To his credit, Professor Carter openly acknowledges that wholly unacceptable acts of violence against the community arguably constitute a form of dissent. Pp. 60-61, 73-78, 81-84. Even when government may constitutionally regulate expressive conduct, it may do so *despite* its communicative value and not because of it. *See* United States v. O'Brien, 391 U.S. 367, 376-77, 381-82 (1968).

20. *See Johnson*, 491 U.S. at 406 (flag burning); *O'Brien*, 391 U.S. at 376 (draft card burning).

21. *See* Smith v. Collin, 436 U.S. 953 (1978); Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978), *aff'g* 477 F. Supp. 676 (N.D. Ill.), *cert. denied*, 436 U.S. 953 (1978); *see also* American Booksellers Ass'n, Inc., v. Hudnut, 771 F.2d 323, 327-30 (7th Cir. 1985) (discussing the

the contrary notwithstanding, much contemporary First Amendment case law reflects direct cost/benefit analysis of proposed speech activity.[22] As Justice White once put the proposition,

> it is not rare that a content-based classification of speech has been accepted because it may be more appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.[23]

It seems unlikely that the Justices would abandon such an approach in favor of a more absolute protection for speech activity denominated "dissent" (even if the definitional difficulties could be overcome, which is doubtful).

These objections to a dissent-based theory of the First Amendment do not, however, undermine the utility of Shiffrin's or Carter's efforts. Shiffrin's project constitutes a sustained effort to bring the free speech apostates (generally scholars of the Left) back into full communion with the free speech tradition. This is an important project and should spark debate between the free speech doubters and believers. If the Roman Catholic Church and the Lutheran Church can resolve their theological differences and create the promise of a return to full communion,[24] Shiffrin is right to push for a reconciliation between free speech traditionalists and the free speech critics.

Professor Carter's emphasis on dissent serves a very different project: empowering religious minorities within the larger political community. His work constitutes a sustained plea for more secular citizens and policy makers to take seriously the concerns of religiously motivated dissenters.[25] To the extent he suggests that the community,

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social costs of speech activity), *summarily affirmed*, 1001 U.S. 475 (1986); DELGADO & STEFANCIC, *supra* note 5, at 8-10, 32-37, 49-56, 126-28.

22. *See* Connick v. Myers, 461 U.S. 138, 150-54 (1983) (balancing employee speech on matters of public concern against the cost of disruption in a government workplace); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509-14 (1969) (balancing student speech rights against the risk of "material and substantial" disruptions in the school); *O'Brien*, 391 U.S. at 376-82 (balancing burden on expressive conduct against achievement of "important" or "substantial" government objective via a narrow tailoring requirement); *see also* Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141.

23. New York v. Ferber, 458 U.S. 747, 763-64 (1982); *see also* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 485 (1985) ("Of course, ad hoc balancing has long been an integral feature of first amendment doctrine for many types of disputes.").

24. *See* Gustav Niebuhr, *Vatican Settles A Historic Issue With Lutherans*, N.Y. TIMES, June 26, 1998, at A1; Peter Steinfels, *After Four and a Half Centuries, Lutheran and Catholic Officials Affirm a Consensus On an Issue That Sparked the Protestant Reformation*, N.Y. TIMES, Oct. 30, 1999, at A13; Charles Trueheart, *Faiths Heal Ancient Rifts Over Faith: Catholics, Lutherans End Doctrinal Dispute*, WASH. POST, Nov. 1, 1999, at A1.

25. *See infra* section III.C & Part IV.

always and unfailingly, owes religious extremists a careful and concerned audience, he overstates the case of religiously motivated dissenters. On the other hand, to the extent that religiously motivated dissenters seek breathing room from the civil state in order to honor the dictates of conscience, Professor Carter offers a powerful argument for listening to what the dissenters have to say.

## I. DISSENT AS IDEOLOGY: DISSENT, INJUSTICE, AND THE ROLE OF DISSENT IN PROGRESSIVE POLITICS

Professor Shiffrin's work represents an effort to give leftists and progressives — often free speech critics — a reason to rethink their hostility to the free speech project. He offers both practical and philosophical reasons for the doubters to return to the one true church:

(1) "Like it or not, the free speech principle is here to stay" (p. 129).

(2) "[T]here is insufficient reason to suppose that the left acts against its interests in supporting the free speech principle even assuming that the principle were laissez-faire.... To the extent that leftist politics depends on social movements and grassroots protests and activities, the free speech principle is vital" (p. 125).

For reasons that I will develop more fully below, it is highly unlikely that the free speech critics will agree to rejoin the free speech congregation. Moreover, free speech traditionalists are likely to balk at the compromises that Shiffrin proposes as an incentive for the free speech critics to renounce their heresies and embrace the free speech principle.

### A. *Some Definitional Problems with Shiffrin's Vision of Dissent*

Before one evaluates Shiffrin's larger, and ambitious project, one must first meet and overcome two practical difficulties with Shiffrin's rather unusual definition of "dissent." The first is definitional and the second is operational.[26]

#### 1. *Defining Dissent*

Shiffrin defines dissent, in large part, by reference to the identity of the speaker. "By dissent, I mean speech that criticizes existing customs, habits, traditions, institutions, or authorities" (p. xi). Even Soviet Russia ostensibly embraced constructive self-criticism (*samokritika*);[27] accordingly one would be hard pressed to object strenuously

26. Frankly, these objections would likely apply to *any* dissent-based theory of free speech. In this sense, then, my objections are not unique to Shiffrin's theory.

27. *See* ELLEN PROPPER MICKIEWICZ, MEDIA AND THE RUSSIAN PUBLIC 49, 67-68 (1981).

to this baseline proposition, (i.e., so far so good). Of course definitional issues abound with this definition of "dissent" because the concept is largely relational. Thus, almost immediately storm clouds begin to form on the horizon: "Commercial advertisers, however, are not dissenters" (p. xii). Tobacco advertising, in particular, merits no special solicitude under Shiffrin's dissent-based vision of the First Amendment. Thus, it would seem that, under Shiffrin's theory, large corporate entities, such as tobacco companies, cannot engage in dissent even if they oppose the views of either the government or the general community. Dissent, for Shiffrin, appears to be the exclusive prerogative of disempowered cultural minorities who are victimized by the hierarchy and racism of the contemporary United States. Simply put, corporations need not apply. Corporate speech might have some communicative value, "but it does not deserve the full value that should be afforded to more classic instances of dissent."[28]

### 2. *Excluding Speakers Based on Viewpoint*

One might think that reactionary groups, like the Ku Klux Klan or John Birch Society, would fit the "more classic" paradigm of dissent. One would be mistaken. Although "[t]he Ku Klux Klan would also claim to be dissenters, social outcasts who challenge the foundations of the system . . . the Klan arguably silences those who would otherwise be dissenters" (p. xii). Accordingly, "a focus on dissent in this context would not offer clear-cut guidance — which perhaps helps to explain why many see the hate speech issue as a difficult problem" (p. xii). Racist dissent "should be not a case for celebrating our glory as a nation but an occasion for shame" (p. xiii).

### 3. *Dissent in Service of Ideology*

As this preliminary analysis shows, Professor Shiffrin's conception of dissent is rather one-sided. The flag-burning Gregory Johnson presents a paradigm of dissent; he is entitled to the broadest protections afforded under the Free Speech Clause (pp. 10-11). This is so because "[i]f we must have a 'central meaning' of the First Amendment, we

28. P. xii. Professor Shiffrin does not attempt to distinguish between corporations engaged in commercial speech and noncommercial speech: "I think it better to make decisions about the general category without resort to ad hoc decisions within it." P. 41. Theoretically, one could distinguish between corporations attempting to sell a product and corporations attempting to contribute to the process of democratic deliberation. *Compare* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (invalidating a statute that prohibited corporations from making expenditures to influence voters) *with* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (invalidating a regulation that banned a utility from advertising to promote use of electricity). Although the Supreme Court has recognized this distinction, Professor Shiffrin does not place any reliance upon it when developing his dissent-based model of free speech. *See, e.g.*, p. 119.

should recognize that the dissenters — those who attack existing customs, habits, traditions, and authorities — stand at the center of the First Amendment and not at its periphery" (p. 10). Once one moves from a disaffected leftist burning a flag to a disaffected rightist preaching race hatred, however, Shiffrin's commitment to dissent seems considerably weaker.

For Professor Shiffrin, dissent serves the ends of progressive politics by empowering cultural and political minorities to challenge "injustice." "The dissent model assumes that in large-scale societies powerful interest groups and self-seeking politicians and bureaucrats are unavoidable" (p. 17). In consequence, "[d]issenters and the dialogue that follows will always be necessary" (p. 17). "The value of dissent, then, in this context is not that it fosters individual development or self-realization, or even that it exposes injustice and brings about change" (p. 18). Rather, it is a kind of "cultural glue" that binds the political community together. This is all well and good until we learn that this "cultural glue" does not provide any adhesive value to right-wingers and corporate entities that are engaged in speech activity opposing official government policies that enjoy broad-based community support.

In the context of commercial speech, Professor Shiffrin submits that "[c]ommercial advertisers are not dissenters" (p. 41). Because commercial advertisers "encourage people to consume products that cause needless death and suffering" (p. 48), they cannot assume the mantle of dissent.[29] Here, we see the strongly content-laden conceptualization of dissent that Professor Shiffrin proposes:

> Tobacco advertising is not an instance of the individual striking out against the current. Instead, it is an example of the powerful influencing the market rather than one of dissent by the less powerful. Tobacco advertising is no part of a social practice that challenges unjust hierarchies with the prospect of promoting progressive change. Thus, it may have some First Amendment value in the dissent mold, but it does not deserve the full value that should be afforded to more classic instances of dissent. [pp. 41-42]

29. Some of these conclusions appear related to Professor Shiffrin's assumption that government enjoys a relatively free hand in regulating commercial speech. Pp. 33-37. For better or worse, Professor Shiffrin's efforts at prognostication have failed. Although it is true that *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), and *Edge Broad. Co. v. FCC*, 509 U.S. 418 (1993), supported some of his assertions about government regulation of commercial speech, more recent cases indicate quite clearly that the tide has turned in favor of affording commercial speech remarkably broad First Amendment protection. *See* Greater New Orleans Broad. Ass'n v. United States, 119 S. Ct. 1923 (1999); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). With each passing term, the Justices seem to be moving closer and closer to the position that commercial speech enjoys the same measure of First Amendment protection as noncommercial speech. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

This is a remarkable limitation on the scope of dissent, not just for commercial or corporate speakers, but for any person or entity whose speech fails to "challenge[] unjust hierarchies with the prospect of promoting progressive social change" (p. 42). This ideologically bound definition of dissent invites legislators and judges alike to pick free speech winners and losers based on both the identity of the speaker and the viewpoint of the speaker.[30]

Unfortunately, this is not an aberrational statement. A few pages later, Shiffrin reports that "[t]he dissent perspective would argue that policies, prescriptions, and privileges of the elite need to be challenged on a regular basis by enough people to make a difference" (p. 45). Again, Shiffrin is openly associating dissent with a particular set of partisan or ideological outcomes. It is difficult to take such a theory very seriously, for it openly invites government censorship of disfavored speakers (i.e., "elites," corporate entities such as tobacco companies, and Neanderthal right-wingers spouting racist messages).[31] Indeed, this model of the dissent perspective has more in common with contemporary free speech jurisprudence in the People's Republic of China[32] than in the United States:

30. Ironically, Professor Shiffrin faults Professor Owen Fiss and other devotees of Professor Alexander Meiklejohn's democratic deliberation model of free speech for inviting judicial personnel to make subjective decisions about whether speech activity encourages or facilitates democratic deliberation. Pp. 19-22. Shiffrin argues that, under the Fiss model, "[j]udges would be deciding on an ad hoc basis which issues need to be discussed on the national agenda and which have been comparatively marginalized." P. 20. Yet, if judges face such difficulties in deciding whether speech enhances or debases democratic deliberation, are they going to have any easier time deciding whether particular speech activity constitutes "dissent"? Moreover, Shiffrin's exclusion of corporate and right-wing speakers from his model of "dissent" embraces the exact sort of judicial subjectivity that he faults Fiss for embracing. Professor Shiffrin cannot have it both ways: either judges are capable of fairly exercising discretion, or they are not.

31. Indeed, if taken to its logical extreme, under Professor Shiffrin's dissent theory, the Republican Party and its candidates might not merit the broadest protections of the First Amendment to the extent that the party's platform fails to "challenge unjust hierarchies" (at least as defined or understood by Professor Shiffrin). After all, the Republican Party platform opposes abortion on demand, supports minimalist government, opposes the welfare state, and generally supports tax relief for corporations and upper-income taxpayers — all policies unlikely to fit Shiffrin's definition of "dissent." Were the federal courts to embrace Professor Shiffrin's dissent theory, to the extent one opposes change, insufficiently advocates "progressive" change, or supports "hierarchy" of "the elite," one could claim only a reduced share in the protections afforded by the First Amendment's Free Speech Clause.

32. *See* XIANFA [Constitution] art. 3 (1982) ("Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."); *id.* art. 51 ("The exercise by citizens . . . of their freedoms . . . may not infringe upon the interests of the state, of society, or of the collective."); *cf.* Erik Eckholm, *A Quiet Roar: China's Leadership Feels Threatened By a Sect Seeking Peace*, N.Y. TIMES, Nov. 4, 1999, at A10; Seth Faison, *Followers of Chinese Sect Defend Its Spiritual Goals*, N.Y. TIMES, July 30, 1999, at A4; Elisabeth Rosenthal, *China Reportedly Detains 2,000 Members of Falun Gong Sect*, N.Y. TIMES, Feb. 11, 2000, at A14; Cindy Sui, *Falun Gong Holds Jail Hunger Strike; Sect Members Resist China's Crackdown*, WASH. POST, Feb. 15, 2000, at A17.

> [w]hen legislatures seek to regulate the speech of the powerful on grounds of political equality, a dissent perspective would not suggest that the courts should pull out a rubber stamp. On the other hand, courts should be generous in assessing such regulations because the legislature seeks to advance important constitutional goals. [p. 47]

Thus, dissent is the exclusive prerogative of a speaker "challenging the insensitive exercise of power by a person she believes is carrying hierarchy to excess," and "not a corporation hawking its wares or seeking to dominate the election process" (p. 48).

This, of course, begs contemporary political reality. Tobacco companies are in full retreat, and smokers are an increasingly marginalized and disfavored subgroup within the community. California has enacted taxes on the sale of tobacco products, with a portion of the revenues generated used to fund advertising campaigns aimed at destroying the market for tobacco products.[33] This principle of "tax and destroy" raises serious general First Amendment problems; if government may tax an entity to subsidize government speech aimed at its ultimate destruction, government essentially can monopolize the marketplace of ideas.[34] A tobacco company engaged in speech activity protesting this arrangement seems squarely in the role of dissent and, moreover, would be defending important generic free speech principles.[35]

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33. *See* CAL. REV. & TAX. CODE §§ 30,121-30,130 (West 1994) (also known as "Proposition 99"); Kennedy Wholesale, Inc. v. State Bd. of Equalization, 806 P.2d 1360, 1362-67 (Cal. 1991) (upholding constitutionality of Proposition 99); *see also* RICHARD KLUGER, ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTES WAR 703-05 (1996); Paul A. LeBel, *"Of Deaths Put On By Cunning and Forced Cause": Reality Bites the Tobacco Industry*, 38 WM. & MARY L. REV. 605, 635-47 (1997) (reviewing STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996), PHILLIP J. HILTS, SMOKESCREEN (1996), and KLUGER, *supra*). Massachusetts and Arizona followed California's lead, enacting schemes taxing tobacco products and using the funds to provide health care services and also advertising campaigns aimed at driving smoking out of existence. *See* ARIZ. REV. STAT. ANN. §§ 42-3251 to -3253 (West 1999); MASS. GEN. LAWS ch. 29, § 2xx (Supp. 1999); ch. 64C, § 7C (1998).

34. *See* EMERSON, *supra* note 11, at 697-716; MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983); John E. Nowak, *Using the Press Clause to Limit Government Speech*, 30 ARIZ. L. REV. 1 (1988); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 589-95 (1980); William W. Van Alstyne, *The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes*, 31 LAW & CONTEMP. PROBS. 530 (1966); Edward H. Ziegler, Jr., *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578, 614-17 (1980); Jay S. Bloom, Comment, *Unconstitutional Government Speech*, 15 SAN DIEGO L. REV. 815 (1978); Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980); Mark V. Tushnet, *Talking to Each Other: Reflections on Yudof's* When Government Speaks, 1984 WIS. L. REV. 129 (book review); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). *But cf.* Keller v. State Bar, 496 U.S. 1, 12-13 (1990) (stating that government officials can legitimately be expected to express the views of the majority of their constituents).

35. *See* Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589 (1996); *see also* Martin H. Redish & Howard M. Wasserman, *What's Good For*

Turning to racist speech, Professor Shiffrin straightforwardly rejects hate speech as an integral member of the dissent family. "In my view, the argument that First Amendment values (such as truth, autonomy, self-expression, and liberty) dictate that racist speech cannot be regulated is ultimately indefensible" (p. 50). Given the exclusion of commercial speech from the universe of "dissent," this is hardly a surprising move. Shiffrin ultimately questions the utility of hate speech regulation, not because such regulations violate the First Amendment, but rather because "the racist character of our society" probably would make such regulations ineffective at protecting the interests of racial and cultural minorities (pp. 50, 80-86).

In Shiffrin's view, hate speech should not be protected "to safeguard the liberty of the speaker or because it is valuable" (p. 85). Because "dissent" is intrinsically valuable and lies at the heart of the First Amendment, a careful reader must conclude that hate speech, in Shiffrin's view, does not constitute "dissent." The government should not proscribe such speech only because "American society may be so thoroughly racist that nontargeted racist speech regulations would be counterproductive" (p. 85). Shiffrin takes pains to emphasize that if his cost/benefit analysis proves to be wrong, "I would presently support punitive measures against public instances of racial vilification even when not targeted against individuals."[36]

Plainly, Professor Shiffrin's viewpoint-based definition of dissent leads to some deeply counterintuitive results: although both Ward Connerly and Clarence Thomas are members of a historically disempowered racial minority, they arguably are not engaged in "dissent" when they take positions that do not combat "injustice" or "challenge unjust hierarchies" (at least as some would define those terms).[37] Likewise, although David Duke and Matthew Hale espouse racist viewpoints rejected by most citizens,[38] they too are not engaged in dissent because their speech potentially silences disempowered minorities. Presumably, minorities who espouse racist or anti-Semitic viewpoints, such as Louis Farrakhan or Leonard Jeffries, also are not "dissenters."

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*General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).

36. P. 85. In addition, Professor Shiffrin endorses providing tort remedies to the victims of targeted hate speech. Pp. 80-87, 161 n.161.

37. Of course, Mr. Connerly and Justice Thomas undoubtedly would claim that their professional efforts are aimed *precisely* at "challenging unjust hierarchies" and facilitating "progressive" change. Professor Shiffrin's strongly left-leaning definitions of "progress" and "challenging hierarchy" are contestable and undoubtedly would be contested if his dissent theory ever gained any ground in the federal courts.

38. *See infra* notes 68-71 and accompanying text; *see also* Christi Parsons, *White Separatist Denied Law License*, CHI. TRIB., Feb. 9, 1999, § N, at 1 (describing the Illinois Bar Association's decision to refuse admission to Matthew Hale because of his support of racist viewpoints and organizations, including the World Church of the Creator).

Historically, the Supreme Court has placed viewpoint neutrality at the very core of the First Amendment.[39] Government attempts to take sides based on a speaker's position on a given issue of the day are presumptively unconstitutional.[40] Even when speech is otherwise proscribable, government may not pick and choose among speakers based on viewpoint.[41] Shiffrin's vision of the First Amendment does not appear to be viewpoint neutral, because a speaker's ability to claim the full protection of the First Amendment is, at least in some circumstances, contingent on the substance of the speaker's message. Nor is his definition of dissent speaker neutral — a speaker's characteristics might define whether or not she (or it) can lay claim to the strongest protections of the First Amendment. For example, no matter what the issue, commercial enterprises cannot engage in dissent.[42]

This certainly represents a new twist on First Amendment theory. Governments historically have cared less about the identity of a speaker than the content of a speaker's message. Hence, in the early part of the twentieth century, a person advocating the necessity of a proletarian revolution faced official censorship and punishment for advocating such ideas.[43] More recently, those espousing views sympathetic to Soviet-style Marxism-Leninism have faced persecution for their ideological commitments.[44] The identity of the speaker was quite

39. *See* United States v. Eichman, 496 U.S. 310, 317-18 (1990); Texas v. Johnson, 491 U.S. 397, 414-16 (1989); Board of Educ. v. Pico, 457 U.S. 853, 870-71 (1982) (plurality opinion); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 689 (1959); Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951).

40. *See* Schact v. United States, 398 U.S. 58, 62-63 (1970); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 510-11 (1969); Bond v. Floyd, 385 U.S 116, 132, 136-37 (1966); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 11-13, 167-71, 239-40 (1993).

41. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 512 n.20 (1996); Board of Educ. v. Pico, 457 U.S. 853, 878-80 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

42. Consider, for example, Benetton's recent and controversial advertising campaign featuring death row inmates. *See* Stuart Elliot, *Benetton Ads Offer Tour of Death Row*, N.Y. TIMES, Dec. 27, 1999, at C8; Hank Stuever, *Radical Chic: Benetton Takes On the Death Penalty*, WASH. POST, Jan. 25, 2000, § C, at 1. Although Benetton undoubtedly wishes to sell clothing, it is difficult to understand why this speech activity should not be deemed "dissent." *Cf.* p. 41 ("There is a serious question whether judges should be asked to make ad hoc decisions about whether particular advertisements are or are not dissenting. I think it better to make decisions about the general category without resort to ad hoc decisions within it.").

43. *See* Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schenk v. United States, 249 U.S. 47 (1919); Abrams v. United States, 250 U.S. 616 (1919). Even celebrated labor leaders fell victim to the government's censorial appetites. *See* Debs v. United States, 249 U.S. 211 (1919).

44. *See* Kleindienst v. Mandel, 408 U.S. 753 (1972); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Barenblatt v. United States, 360 U.S. 109 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Dennis v. United States, 341 U.S. 494 (1951); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

irrelevant to the analysis; membership in a particular social or cultural minority would not affect the outcome of a case. Eleanor Roosevelt stood on the same First Amendment ground as Marcus Garvey or J. Edgar Hoover.

A speaker-based theory of the First Amendment seems deeply problematic. As a practical matter, if the United States is as profoundly racist as Shiffrin suggests (pp. xii-xiii, 76-87), it is difficult to imagine police, prosecutors, courts, and jurors applying a speaker-based vision of the First Amendment in a just fashion (although some might suggest that the task itself is inherently unjust). One might think that, assuming Shiffrin's assertions about the unremittingly racist nature of the contemporary United States are true, the opportunity to make vindication of speech rights contingent on the identity of the speaker would leave minority culture speakers less well off than they are under current First Amendment jurisprudence. Indeed, the project of viewpoint neutrality is meant to ensure that unpopular speakers are not censored simply because the speaker's message offends the dominant forces within the community. Speech regulations must be viewpoint neutral precisely because police, prosecutors, judges, and jurors are highly likely to hold strong preexisting opinions about the proper ordering of the community. To counter this trend, reviewing courts require the government to censor all speakers or censor none. Moreover, with respect to public property, the government may censor speakers only through viewpoint neutral, reasonable time, place, and manner regulations[45] and, with respect to private property, the government may proscribe speech only when the speech raises a clear and present danger of imminent lawlessness.[46]

### B. *More General Problems with a Dissent-Based Model of Free Speech*

Even if one were to reject Shiffrin's troubling definition of dissent, a more generalized dissent-based model of the First Amendment would still present serious operational difficulties. Whether speech constitutes dissent is a highly subjective matter. Suppose, for example, that a street protestor supports a national missile defense but opposes the deployment of the Patriot missile? Is such a person engaged in dissent against the government's defense policies, or is such a person effectively supporting the government? Undoubtedly, different people would characterize the speech in divergent ways, depending on

45. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); United States v. Grace, 461 U.S. 171, 177-78 (1983); Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Hague v. CIO, 307 U.S. 496, 515-16 (1939).

46. *See* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969).

whether they viewed the Patriot missile as an essential component of the government's defense program.

It really should not matter whether the speech effectively supports or opposes contemporary government defense policy. If the speech relates to an issue of public concern about which the government must establish and enforce a policy, then the speech should enjoy the most robust protection that the First Amendment can afford.[47] Judges should not attempt to engage in a preliminary characterization of the speech as "dissent" or "non-dissent" to determine the burden on the government in suppressing the speech activity.[48]

The problem of identifying dissent is infinitely more difficult than this preliminary analysis would suggest. The "government" is not a monolithic entity. For example, the Reagan Administration opposed the Supreme Court's ruling in *Roe v. Wade*[49] and consistently urged the Supreme Court to overrule this precedent. On the anniversary of *Roe*, President Reagan regularly spoke, via telephone, at a pro-life rally held in Lafayette Park, directly across the street from the White House.[50] The protestors opposed the Supreme Court's ruling in *Roe*, viewing it as a condonation of murder, a position embraced by the Executive Branch of the federal government (through the Department of Justice and the President himself).[51] Were these pro-life protestors

47. *See* MEIKLEJOHN, FREE SPEECH, *supra* note 9, at 22-27; Emerson, *supra* note 14, at 882-86; Kalven, *supra* note 7, at 205-13.

48. One might suggest that any speech the government seeks to suppress constitutes dissent. Although this definitional fix has some superficial appeal, it really would not solve the problem. Government regulations regarding the use of public property for speech activity are often generic — whether one can use a particular park or street for speech activity is not contingent on the message one seeks to propagate. *See* Clark v. Community For Creative Non-Violence, 468 U.S. 288 (1984). Accordingly, limitations on speech activity might well apply to persons wishing to support some aspect of government policy.

49. 410 U.S. 113 (1973).

50. *See* Ruth Marcus & Victoria Churchville, *Antiabortion March Nears; Protestors Arrive By the Busload*, WASH. POST, Jan. 20, 1985, at A1; Ruth Marcus & Steven Heilbronner, "Reagan to Address Abortion Foes, WASH. POST, Jan. 19, 1985, at A1; Robin Toner, *Rally Against Abortion Hears Pledge of Support By Reagan*, N.Y. TIMES, Jan. 23, 1987, at A10 [hereinafter Toner, *Rally Against Abortion*]; Robin Toner, *Reagan Exhorts Foes of Abortion at Capital Rally*, N.Y. TIMES, Jan. 23, 1986, at D25 [hereinafter Toner, *Reagan Exhorts*]. After succeeding President Reagan, President Bush continued the Reagan Administration's abortion policies. *See* Steven V. Roberts, *"Nominee of Bush's Is Said to Oppose Banning Abortion*, N.Y. TIMES, Jan. 24, 1989, at A1:

> Mr. Bush pleased opponents of abortion today when he spoke by telephone to a rally protesting the Roe v. Wade decision and made one of his strongest statements to date on the highly emotional issue. "I know there are people of good will who disagree, but after years of sober and serious reflection on the issue, this is what I think.... I think the Supreme Court's decision in Roe v. Wade was wrong and should be overturned."

51. At various times, President Reagan vowed to "end this national tragedy," Toner, *Rally Against Abortion*, *supra* note 50, and pledged to "continue to work together with members of Congress to overturn the tragedy of Roe v. Wade," Toner, *Reagan Exhorts*, *supra* note 50. Moreover, Reagan emphasized that the Executive Branch had decreased the incidence of abortion by "restrict[ing] the use of Federal funds to perform abortion" and by

engaged in dissent, or merely supporting the position of the federal government? The answer depends on whether or not one views the question from the perspective of the federal judiciary rather than the Oval Office.

Undoubtedly, protecting dissent is an important function of the Free Speech Clause of the First Amendment. The Supreme Court routinely has indicated that this is so.[52] Accordingly, Shiffrin's desire to build a free speech framework on the construct of dissent is perfectly understandable. Given the definitional and operational difficulties, however, dissent is better protected through a project of strict viewpoint neutrality.

Because of the potential for bias in any system of free speech protection contingent on the characterization of speech by government officials, requiring that all speech be treated equally serves as a far better means of effectively protecting dissent than a theory that invites would-be government censors to make the protection of speech to some degree contingent on a label easily withheld because of antipathy toward the message (or the messenger). Prohibiting the government from officially taking sides on questions of the day and then silencing all opposition best ensures that contrary voices are heard.

Take, for example, anti-abortion protestors. It is difficult to imagine a viable dissent-based model of the First Amendment that would not encompass this group. Survey data show that a clear majority of U.S. citizens believe abortion should be legal, at least in some circumstances.[53] At the same time, a substantial plurality of citizens view unborn fetuses as possessing personhood from conception and, therefore, the destruction of a fetus as a form of murder.[54] President Clinton and Congress, unsurprisingly, have sided with the majority, enacting laws that, as applied by some federal and state courts, severely restrict the ability of anti-abortion protestors to engage in peaceful anti-abortion protests outside abortion clinics.[55] The federal

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"den[ying] Government funds to organizations overseas that perform or promote abortion." Toner, *Rally Against Abortion*, *supra* note 50.

52. *See supra* note 15 and accompanying text.

53. *See* Carey Goldberg & Janet Elder, *Public Still Backs Abortion But Wants Limits, Poll Says*, N.Y. TIMES, Jan. 16, 1998, at A1; Andrew M. Greeley, *How Do Catholics Vote?: Not As Pawns of the Church*, N.Y. TIMES, Aug. 12, 1984, at E21. Father Greeley reports that even clear majorities of Roman Catholics do not oppose abortion under all circumstances. *See id.*

54. *See* Goldberg & Elder, *supra* note 53; *see also* Pamela Constable & John W. Fountain, *Abortion Foes in Grim Profusion: Protest Marks 25th Anniversary of Roe v. Wade Decision*, WASH. POST, Jan. 23, 1998, at B1.

55. *See, e.g.*, Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248 (1994)). Several U.S. Courts of Appeals have sustained the Access Act against First Amendment challenges. *See* American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 55 (1995); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

judiciary generally has blessed this legislation and endorsed the creative use of injunctions to restrain protestors who are communicating messages to women attempting to enter and leave abortion service providers.[56] In short, the full power of the federal government has been brought to bear against pro-life, anti-abortion protestors who wish to demonstrate outside abortion clinics.

Whether or not one agrees with the pro-life movement's assertions about the nature of unborn human fetuses, these protestors are plainly engaged in a form of dissent. Moreover, this dissent is highly unpopular, in part because of the crude methods often utilized by the anti-abortion protestors (e.g., the use of graphic depictions of aborted fetuses and other ghastly props in making their point). Shiffrin never mentions anti-abortion protestors as a model of dissent. Indeed, given his speaker- and viewpoint-based limitations on what constitutes "dissent," it is far from certain that they would even meet his definition.[57]

Of course, one might object that it is also far from certain that the protestors will fare any better under the viewpoint-neutrality project. A law that prohibits all persons from engaging in speech activity within so many feet of an abortion clinic restricts the speech activities of all persons without regard to their viewpoint on abortion. This ignores the reality that pro-life demonstrators are far more likely to engage in protest activity outside abortion clinics than pro-choice activists. The facially neutral restriction cuts more deeply against one side of the debate, and does so quite intentionally in consideration of the rights of those seeking to enter and leave family planning clinics.[58]

This does not demonstrate the failure of the viewpoint-neutrality project so much as the failure of the federal judiciary to apply First Amendment principles to a group of very unpopular protestors who engage in discourse that is highly offensive to many persons within the community. In any event, it does not seem likely that anti-abortion protestors would fare any better under a free speech regime vesting

56. *See* Hill v. Colorado, 120 S. Ct. 2480 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474, 479-88 (1988); Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or. 1999); *see also* Lawson v. Murray, 119 S. Ct. 387 (1998) (Scalia, J., concurring in denial of cert.); Williams v. Planned Parenthood of Shasta-Diablo, Inc., 520 U.S. 1133 (1997) (Scalia, J., dissenting from denial of cert.); Lawson v. Murray, 515 U.S. 1110 (1995) (Scalia, J., concurring in denial of cert.).

57. Suppose that the anti-abortion protestors were all heterosexual, upper-middle class, caucasian males, employed by a non-profit corporation whose officers oppose abortion on demand (for example, priests and lay members of the Roman Catholic Church). Given that this group does not suffer the ill effects of the pervasive racism and patriarchy Shiffrin believes to plague the contemporary United States, a district court judge utilizing Shiffrin's dissent theory might well deny the protestors the full protection of the First Amendment.

58. *See generally* Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Use of Subject Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-15 (1978) (arguing that subject matter restrictions, although facially neutral, often mask official antipathy toward particular messages and speakers and, therefore, should be viewed skeptically).

judges with the ability to pick and choose speakers based on either the content of their messages or the demographic and economic makeup of their groups.

### C. *Shiffrin's Defense and Its Shortcomings*

Shiffrin anticipates the objection that his theory is viewpoint, and perhaps speaker based: "To be sure, some might accuse my analysis of tracking my political preferences too closely, so that left-wing dissenters get protected while people I do not like (corporations and right-wingers) do not" (p. 129). This disclaimer appears on the penultimate page of the book and scarcely recalibrates the preceding 128 pages, in which Shiffrin consistently defines "dissent" in terms of the ideological perspective of the speaker: dissent constitutes speech activity by the less powerful challenging the more powerful to redress "injustice" (rather a value-laden concept, not to put too fine a point on the matter) (pp. xi-xiii, 10-12, 17-18, 20, 41-42, 45, 47-48, 75-76, 80, 85, 91-93, 112, 120). Having consistently defined the free speech project in value-laden, ideological terms, a disclaimer on the next to the last page really does not present much of a counterweight.

Nevertheless, Professor Shiffrin maintains: "In an important sense, however, this accusation is wrongheaded. Rules under my approach are fashioned to protect dissent without regard to the politics of the dissenters" (p. 129). This simply is not so, at least with respect to openly racist speakers like Matthew Hale and the World Church of the Creator:

> Because both aggressors and victims can be characterized, with some accuracy, as dissenters, the dissent story underscores the difficulty of the First Amendment status of racist speech. On the one hand, the dissent perspective seeks to protect those with popularly disdained views and, in an important respect, this includes those who publicly express racist views. On the other hand, the dissent perspective seeks to assure that those who are out of power or lower in a hierarchy have the means to protest their status and to combat the inevitable abuses of power by higher-ups. A regime that is blind to the importance of assuring that disadvantaged groups are not intimidated will contain, as its status quo, substantial corruption and abuse. [p. 77]

Plainly, Shiffrin is saying that Matthew Hale and David Duke are not entitled to the same level of free speech protection as Jesse Jackson or Hillary Rodham Clinton. Just in case there might be doubt about this, Shiffrin later emphasizes that "my contention should be clear. I am not arguing that racist speech should be protected to safeguard the liberty of the speaker or because it is valuable" (p. 85). As to the Ku Klux Klan, for instance, "the Klan says in public what many millions of white individuals think or come close to thinking in private" (p. xii), hence the Klan's message is, at best, a redundancy.

Moreover, the Klan "silences those who would otherwise be dissenters" (p. xii). In consequence, "a focus on dissent in this context would not offer clear-cut guidance" (p. xii), meaning that the Klan's speech activities do not constitute "dissent" for purposes of Professor Shiffrin's theory of the Free Speech Clause.

Nor is Professor Shiffrin's objection to censoring racist speech related to "a chilling effect in the marketplace of ideas (though some marginally valuable speech could be lost); nor . . . the vagueness of working out standards case by case (though vagueness is of course not a virtue)" (p. 85). Thus, dissenters who oppose workplace speech regulations, or affirmative action programs, or equal civil or political rights for racial minorities are *outside* Shiffrin's dissent-based model of the First Amendment — their opposition to the existing status quo may be discounted, because it is offered in support of a political agenda inconsistent with Shiffrin's notions of redressing "injustice." Indeed, such speech can be seen as seeking to increase the frequency of racial injustice in the United States.

Racist dissent merits protection only because efforts to eradicate such speech through government regulation might backfire. Shiffrin tells us that "[i]f I thought such regulation would be effective *on balance* in combating racism, I would presently support punitive measures against public instances of racial vilification even when not targeted against individuals" (p. 85). He limits this proposal only by noting that he would abandon this position if "[p]eople of color . . . think that the tangible benefits of deterrence and the symbolic importance of this legislation outweigh the speculative possibilities of nondeterrence, evasion, and increased racial hostility; that, in short, the advantages of taking a stand outweigh the costs."[59]

Given Shiffrin's absolute exclusion of racist speech from his concept of "dissent," one must conclude that, his assertion to the contrary notwithstanding, his theory of free speech *is* viewpoint-based. A viewpoint-neutral, dissent-based theory of the First Amendment

59. P. 85. One wonders how a federal district court judge would go about ascertaining the answer to this question. After all, it seems doubtful that all members of a given racial minority group would share identical views on the desirability of hate speech regulation — such a proposition is highly essentialist. *See* Carter, p. 69 ("Now, you might have noticed my use of the term 'black community.' Let me make clear that I do not claim — and I do not believe — that there exists an identifiable set of black 'meanings,' as there often is, for example, in a religious community; that is, I do not believe in the existence of such a thing as the 'black point of view.' "). Moreover, it also seems likely that different racial minority groups might have different attitudes about hate speech regulation. Does Shiffrin mean that, if a bare majority of a given racial group supported hate speech regulation, it should be deemed both constitutional and desirable? What about those who dissent from this point of view *within the minority group*? The problem seems hopelessly complex and, therefore, the suggestion that government simply should defer to the wishes of racial minorities is not particularly helpful. *Cf.* Carter, p. 69 ("So I am not in that sense an essentialist, and I quiver whenever smart professors who should know better assert that there is a unique 'black perspective' (which they, of course, are uniquely able to identify).").

would extend the strongest protections of the Free Speech Clause to all speech in opposition to existing government programs and policies — even if the opposition seems terribly wrongheaded, misguided, or hate-inspired. Such dissent merits protection not because the general community derives substantial benefits from these proposals, but because a government empowered to silence racist dissenters is equally empowered to silence progressive dissenters.[60]

Indeed, given Shiffrin's repeated assertion that "American society may be so thoroughly racist that nontargeted racist speech regulations would be counterproductive" (p. 85), not to mention his earlier assertion that "our country is racist to the core" (p. xiii), one wonders why he would trust the presumably racist government to enforce hate speech codes in a fair and even-handed fashion. Professor Nadine Strossen has reported that Canada's experiment in regulating "degrading" erotic speech has not stopped the flow of "mainstream" heterosexual pornography into the country, but *has* led to the censorship of gay and lesbian erotica.[61] Simply put, the average male, heterosex-

60. Shiffrin's doctrinal defense of hate-speech regulation also merits a brief mention. Professor Shiffrin mounts an extended attack on both Justice Scalia's majority opinion and Justice White's concurring opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). Pp. 51-76. His basic objection rests on the idea that existing free speech jurisprudence already makes a number of important distinctions based on the content of speech activity. Pp. 57-58. Citing to commercial speech cases, Shiffrin argues that "point-of-view" discrimination is a permissible feature of government speech regulation in some circumstances and, given this state of affairs, regulations subjecting racist points of view to civil or criminal liability should be sustained against First Amendment objections. P. 57-63. Later on, Shiffrin shifts his ground and characterizes Justice Scalia's objection to the St. Paul ordinance as a problem involving content discrimination. *See* pp. 57-67. Essentially, Shiffrin uses the concepts of "point-of-view" discrimination and "content discrimination" interchangeably. Of course, viewpoint-based discrimination and content-based discrimination are not the same thing.

A local ordinance permitting candidates for public office — but not commercial advertisers — to place signs on utility polls owned by the city would constitute content discrimination. Contemporary free speech jurisprudence generally permits government to regulate different kinds of speech activity differently, although this is not universally the case. *See, e.g.*, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 419-21, 430-31 (1993) (striking down a ban on commercial news racks, noting blurred distinction between commercial and other speech); William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1638-48 (1996) (noting a recent trend to treat commercial speech like any other speech). Viewpoint-based discrimination, on the other hand, picks and chooses free speech winners and losers within a particular kind of speech activity. For example, a municipal ordinance permitting Proposition 200 supporters to place signs on city-owned utility polls but denying the same permission to Proposition 200 opponents would constitute viewpoint-based discrimination. The government would be picking a preferred point of view from within the marketplace of ideas and advancing this viewpoint through its sovereign powers. *R.A.V.* involved an ordinance that mandated both viewpoint-based discrimination and content discrimination. *See R.A.V.*, 505 U.S. at 391-95. This makes all the difference in the world for purposes of free speech analysis.

61. *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 234-44 (1995); *see also* Mary Williams Walsh, *Chill Hits Canada's Porn Law*, L.A. TIMES, Sept. 6, 1993, at A1 (describing government raid of a lesbian bookstore).

ual Canadian customs agent does not find *Penthouse* or *Hustler* unduly offensive (or "degrading") but does find Robert Mapplethorpe's photographs sufficiently "degrading" to justify official government suppression.

Shiffrin never comes to terms with the inherent contradiction of positing a society that devalues and disrespects cultural and political minorities with a free speech doctrine that invites the state to pick free speech winners and losers. To be fair, his defense of free speech against postmodern critics rests on the idea that marginalized political groups obtain needed breathing room through the exercise of free speech rights. "To the extent that leftist politics depends on social movements and grassroots protests and activities, the free speech principle is vital" (p. 125). In the absence of the free speech principle, "government could squelch antiwar protestors and civil rights protestors."[62] The problem is that Shiffrin's refusal to credit right-wing and corporate speech activity as dissent opens up the very real possibility of government censorship of liberal or progressive speech activity.[63]

Professor Shiffrin undoubtedly recognizes these seeds of contradiction in his argument. His project is not so much to convert the free speech absolutists, but the free speech critics coming from the New Left.[64] By attempting to marginalize the free speech prerogatives of reactionaries and corporations, he makes the free speech principle potentially more attractive to the postmodern critics. This is, of course, a difficult tightrope to walk.[65]

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62. P. 125; *see also* Schact v. United States, 398 U.S. 58 (1970); Watts v. United States, 394 U.S. 705 (1969); Bond v. Flogel, 385 U.S. 116 (1966); NAACP v. Button, 371 U.S. 415 (1963); Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

63. *See* STROSSEN, *supra* note 61, at 222-24 (describing the widespread use of hate speech regulations to silence racial minorities and women for speech critical of the dominant culture). Professor Strossen reports that, under the University of Michigan speech code, "there were more than twenty cases of whites charging blacks with racist speech." *Id.* at 223. Moreover, "the only two instances in which the rule was invoked to sanction racist speech (as opposed to other forms of hate speech) involved punishment of speech by or on behalf of black students." *Id.*; *see also* Strossen, *supra* note 6, at 506-07, 556-59 ("The general lesson that rules banning hate speech will be used to punish minority group members has proven true in the specific context of campus hate speech regulations."); Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 987 (1995) ("Using the state to change culture before power in an unequal world can often backfire, for example, if speech codes are applied to students of color, or antipornography laws to gay erotica."). *But cf.* Lawrence, *supra* note 5, at 450 n.82 (arguing that hate speech regulations should not be applied to protect members of the "dominant majority groups").

64. *See infra* notes 82-99 and accompanying text.

65. Evidently, at least one member of the Critical Race Theory movement has been enticed by Professor Shiffrin's efforts to vest a greater share of the First Amendment's stock with cultural minorities favoring progressive causes. *See* Delgado, *supra* note 18, at 779 ("Steven Shriffin's *Dissent, Injustice, and the Meanings of America* is a welcome addition to this emerging 'First Amendment legal realism' vein of scholarship.").

### D. *The Social Costs of Speech Activity Do Not Necessarily Track Viewpoint or Content*

Even if the considerable definitional difficulties could be overcome successfully, a dissent-based model of the First Amendment would still not work. To put the matter plainly, the social costs of speech activity do not necessarily correlate with whether the speech constitutes "dissent" (however defined). Indeed, the bombing of the Oklahoma City federal building arguably constituted the most powerful statement of dissent in the last decade. To that, one might add Theodore Kaczynski's mail bomb letters to the purveyors of technology and the anti-abortion zealots' murders of abortion clinic personnel.[66]

Shiffrin might respond that acts of violence do not constitute speech activity, but rather criminal conduct, and therefore do not constitute dissent.[67] Fair enough. The point still remains that the groups most likely to engage in dissent also impose some of the highest costs on the community.

Consider, for example, Matthew Hale and the World Church of the Creator. Hale and his church preach a brand of white supremacy that is highly destructive of building and maintaining a viable pluralistic community.[68] Indeed, his racist tracts motivated Benjamin Smith to go on a multi-state rampage, murdering two minorities and wounding nine others in the process.[69]

The official policy of the United States government is to promote and secure the full civil rights of all persons. The policy appears in myriad federal laws and regulations and enjoys the support of all ma-

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66. For a list of the physicians and staff members murdered and wounded since 1993, see Michael A. Fletcher, *Sniper Kills Abortion Doctor Near Buffalo*, WASH. POST, Oct. 25, 1998, at A1. Since Dr. David Gunn's murder on March 10, 1993, in Pensacola, Florida, anti-abortion protestors have killed five additional clinic personnel and wounded yet another five. *See id.* "Since 1977, there have been over 1,700 attacks against abortion providers, according to the National Abortion Federation." *Id.*

67. *See* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993); United States v. O'Brien, 391 U.S. 367, 376 (1968).

68. *See* Rosemary Radford Ruether, *How Did the Creator Become A White Racist?*, CHI. TRIB., July 18, 1999, at C17; Kirsten Scharnberg, *A Gospel of Hatred*, CHI. TRIB., July 11, 1999, at C1. Professor Ruether believes that, rather than affording racist churches a respectful hearing, Christians of good will

> need to take responsibility for more mainstream patterns of thought that feed racist extremism: namely belief in a God who ordered creation as a hierarchy that sacralizes the power of dominant groups over others, who favors some nations and religions against others and who mandates war and violence as a way to establish God's reign on Earth.

69. *See* Edward Walsh, *Midwest Gun Spree Suspect Is Dead*, WASH. POST, July 5, 1999, at A1; Edward Walsh, *Racial Slayer Killed Himself in Struggle*, WASH. POST, July 6, 1999, at A1; *see also* Eric Bailey, *2 Brothers Indicted in Synagogue Fires*, L.A. TIMES, Mar. 18, 2000, at A19 (describing the various acts of terror James Tyler Williams and Benjamin Matthew Williams have committed against Jews, racial minorities, and homosexuals, including arson and murder, all in the name of maintaining and enforcing "biblical law").

jor political parties. No serious mainstream person in contemporary American politics advocates conditioning the civil rights or liberties of citizens on race. Consequently, Hale and his followers have placed themselves in opposition to the official position of the government; they are engaged in dissent.

Whether or not courts openly admit the practice, they routinely engage in utilitarian cost/benefit analyses when deciding free speech claims.[70] Hence, indecent erotic speech enjoys less First Amendment protection than a candidate's stump speech under the theory that the community reaps greater benefits from the latter than the former and, accordingly, the government enjoys less of an ability to restrict political speech than non-obscene erotica.[71]

Some of the most costly speech activity constitutes dissent.[72] This does not necessarily mean that government should enjoy a relatively free hand in censoring the speech of unpopular political minorities, but it does suggest that the problem of hate speech requires more than simply determining whether or not the speaker is engaged in dissent and, if so, letting the speaker have his say.

In fact, Shiffrin largely abandons his focus on dissent when discussing the problem of hate speech. In rather direct terms, he advocates a kind of utilitarian calculus in determining whether or not to tax the costs of such speech activity against the community in order to facilitate the speech activities of hate mongers: "The basic problem with the autonomy argument [in favor of protecting hate speech] is that it cannot show that the value of individual autonomy outweighs the harm caused by racist speech" (p. 79). Shiffrin also questions whether "the idea of respect for persons demands any particular weighing of the competing values in this context," and concludes that "[a]ny confidence that the value of free speech in this context outweighs the harm requires placing a thumb on the scales" (p. 79).

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70. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763-64 (1982) (carving out an exception to the *Miller* obscenity test in order to allow regulation of child pornography). *But cf.* Blasi, *supra* note 23, at 485 ("The realistic goal must be to contain such balancing, not eliminate it; even Justice Black recognized in disputes over the timing and location of demonstrations an appropriate sphere for a case-by-case judicial comparison of communicative and regulatory interests.").

71. *Compare* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), *and* City of Ladue v. Gilleo, 512 U.S. 43 (1994), *with* Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), *and* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

72. *See* Smith v. Collin, 436 U.S. 916, 916-19 (1978) (Blackmun, J., dissenting from denial of cert.) (giving the history of the Skokie case, which involved a Nazi march through a Jewish community); *see also* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1165 (2000); Lee C. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617 (1982) (reviewing ARYEH NEIER, DEFENDING MY ENEMY (1979)).

This practical cost/benefit analysis makes a great deal more sense than application of a reflexive "dissent = protected speech" calculus. Because the social costs of hate speech are so great, courts should weigh carefully whether the benefit to the project of democratic deliberation justifies absorbing the corrosive effects of hate speech.[73] As Professor Richard Delgado has put the matter, "A realist approach would regard *both* individual and social costs and benefits as daily weighing in the balance."[74] In consequence, such a theory "would deal with both the effects of hate speech on the life of a single individual as well as its impact across large groups."[75]

In this regard, it bears noting that virtually all Western democracies have adopted hate speech codes — including Canada, France, and Germany. Those nations have performed the cost/benefit analysis and concluded that the potential harm associated with hate speech outweighs its potential social value. Thus, in Canada, a candidate calling for a race war would find himself in jail, not on the ballot.[76]

Given the consensus in other industrial democracies, that hate speech constitutes a social harm worthy of proscription, Shiffrin's utilitarian approach has much to recommend it. He also reaches a defensible result: hate speech should be protected not because it is intrinsically socially valuable, but rather, because government is incapable of fairly administering a speech code. Rather than using the rhetorical shell of "dissent," Shiffrin would have advanced his case more convincingly if he simply had made a direct argument for social cost/benefit analysis in contemporary free speech jurisprudence.[77]

## II. DISSENTING FROM SHIFFRIN'S VISION OF DISSENT

Even a sympathetic reader will find it difficult to overlook a fundamental objection to Professor Shiffrin's theory of the First Amend-

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73. *See* Kunz v. New York, 340 U.S. 290, 307-08 (1951) (Jackson, J., dissenting) ("The vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests."); *see also* Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding a criminal conviction based on Beauharnais distributing racist leaflets on the streets of Chicago, Illinois, under an Illinois statute prohibiting group libel).

74. Delgado, *supra* note 18, at 789.

75. *Id.*

76. *See* Criminal Code, R.S.C., ch. C-46, § 319 (1985); Canadian Human Rights Act, R.S.C., ch. H-6, § 13 (1985); Regina v. Zundel, [1992] 2 S.C.R. 731; *In re* Keegstra, [1990] 3 S.C.R. 697, 744-49; *WF Party v. Canada, Report of the Human Rights Committee*, UN GAOR, 38th Sess., Supp. 40, at 231, U.N. Doc. No. A/38/40 (1983); *see also* Kathleen E. Mahoney, *The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography*, 55 LAW & CONTEMP. PROBS. 77 (1992); Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 792 n.17, 804-05.

77. *See* Delgado, *supra* note 18, at 785-91.

ment: Shiffrin's unrelentingly ideological definition of the dissent-based free speech project. For Shiffrin, dissent is not about democratic deliberation, or personal autonomy, or any of several other well-established theories of free speech. Instead, "dissent" constitutes criticism of the existing social structures by select members of disgruntled cultural minorities seeking to slay "hierarchy" and "injustice" in a quest to achieve fundamental social change (of a sort consistent with progressive/radical ideals of government):

> Dissent attacks existing customs, habits, traditions, institutions, and authorities. It spies injustice and brings it to light. This does not mean that dissent is always effective; indeed, much dissent does little to bring about effective change. Nor is dissent always fair. It may often be distorted by envy of those higher up in a particular hierarchy.... For all its occasional faults, dissent is indispensable. Without it, unjust hierarchies would surely flourish with little possibility of constructive change. If the truth about the presence of injustice is to be spread, social institutions must be constructed in a way that nurtures critical speech. [p. 93]

This conceptualization of dissent, although undoubtedly welcome by those who question the importance of speech relative to equality or community,[78] runs strongly against the grain of prevailing free speech norms.

### A. *Dissent Comes from Across the Ideological Spectrum*

The problem, obviously enough, is that much contemporary dissent involves what "progressives" may view as implicitly encouraging or embracing racist, sexist, anti-Semitic, or homophobic attitudes and behaviors; even more dissent explicitly seeks to *preserve* "existing customs, habits, traditions, institutions, or authorities" (p. 93) in the face of powerful erosive forces. Simply put, there is no reason to suppose that dissent, as a social phenomenon, unfailingly redounds to the support of liberal or radical candidates, policies, or causes. Shiffrin's conceptualization of dissent is, at best, highly romanticized and, at worst, hopelessly naïve. It is probably true that "we are a long way off from a society that is committed to encouraging dissent in an effort to combat injustice" (p. 112). That said, it seems far from clear that more dissent necessarily will advance the cause of social justice. It is just as conceivable that reactionary forces might carry the day.[79]

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78. *See* Delgado, *supra* note 18, at 782-95.

79. Certainly, the recent trend in favor of state initiatives banning or prohibiting voluntary affirmative action efforts would suggest that dissent from existing government policies does not always redound in favor of positions supported by liberals or progressives. It also would be a mistake to assume that state governments support the passage of such anti-affirmative action initiatives. This was certainly not the case in Washington State, where virtually every state-wide elected officer from the Governor on down actively campaigned against the passage of Initiative 200. *See* Sam Howe Verhouek, *In a Battle Over Preferences, Race and Gender Are at Odds*, N.Y. TIMES, Oct. 20, 1998, at A1. Thus, supporters of Initia-

For persons who subscribe to Holmes's marketplace of ideas metaphor or to Meiklejohn's conception of free speech[80] as a necessary incident of the project of democratic self-government, who wins or loses the debate is far less important than the fact of the debate itself.[81] Shiffrin comes dangerously close to suggesting that freedom of speech is the exclusive prerogative of one segment of the community — liberals, progressives, and radicals. Given the lack of electoral success of such persons in recent times, one might well ask whether a theory of the First Amendment that invites viewpoint or speaker-based government censorship will redound to the benefit of Shiffrin's preferred class of speakers.[82]

Of course, Professor Shiffrin does not absolutely condition First Amendment protection on speech constituting dissent. Vague references to the protection of "political speech" and "commercial speech" exist in the text — although the reader is left at sea as to precisely what these protections should be (p. xii). Shiffrin's enthusiasm for free speech is plainly focused on a particular subset of speech that advances a specific ideological vision for the community; those who fail to advance that agenda, such as tobacco companies or the purveyors of alcohol, appear to be left at the gate (pp. 41-42).

When tobacco companies espouse radically unpopular opinions at substantial variance from the existing policies of the government, it is difficult to understand why a federal court concerned for dissent should withhold the full protection of the First Amendment. After all, most theories of dissent are positional: one defines dissent in relation to the existing policies and practices of the community. Hence, in a state like California with fairly draconian public smoking statutes, a tobacco company or restaurant owner seeking the repeal of such laws to permit customers to smoke on the restaurant's premises would be *dissenting* from the official policies of the government, policies that enjoy the support of a contemporary majority of California voters.

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tive 200 were positioned in opposition to the established political hierarchy in Washington State (i.e., they were dissenters).

80. *See supra* note 9 and accompanying text.

81. As Justice Holmes explained, "[e]very idea is an incitement," and "[e]loquence may set fire to reason." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Accordingly, the process of democratic deliberation does not guarantee any particular ideological outcome: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Id.*

82. As Shiffrin himself notes, pp. 121-22, many scholars of the Left have abandoned both free speech and rights talk, more generally, as social structures that tend to reify rather than challenge existing social, economic, and political conditions. *See, e.g.*, Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984); Robert A. Williams Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, 5 LAW & INEQ. 103 (1987).

Similarly, during the Prohibition years,[83] the liquor industry found itself in the position of dissenting from the official policies of the federal and state governments (an effort that finally bore fruit with the adoption of the Twenty-first Amendment).[84]

"The dissent perspective would argue that the policies, prescriptions, and privileges of the elite need to be challenged on a regular basis by enough people to make a difference" (p. 45). It is difficult to fathom precisely what this means, or how a federal district judge would go about implementing this mandate. "Elite" positions on questions of the day are far from self-evident. Do elites favor or oppose abortion on demand? How about school vouchers that may be used at pervasively sectarian primary and secondary schools? Should federal courts commission polling data or appoint the Gallup Organization as a special master to determine which viewpoints merit robust First Amendment protection and which do not? It is difficult to disagree with Shiffrin that "[p]rotection for dissent is a necessary feature of any respectable democracy" (p. 45), but I am not at all sure that any respectable democracy could embrace Shiffrin's definition of dissent while claiming to maintain more than a mere theoretical commitment to the freedom of political speech.

Professor Shiffrin seems to recognize that problems might inhere in implementing his dissent-based vision of the First Amendment. Nevertheless, he suggests that courts should accord progressive speech regulations broad deference. "[C]ourts should be generous in assessing such regulations because the legislature seeks to advance important constitutional goals" (p. 47). If a particular regulation represents an imperfect solution to the problem of empowering the marginalized voices within the community or silencing the voices of corporations, so be it. "Regulations designed to secure justice in the polity need not be perfect. Justice should not be delayed because non-viable alternatives are conceivable" (p. 47). Shiffrin admonishes that "[a] dissent-based approach proceeds from a moral condemnation of unjust hierarchies wherever they may be inside or outside of government — whether or not they relate to 'public issues' " (p. 48).

An unsympathetic reader might ask precisely *who* will identify the "unjust hierarchies" in order to sustain otherwise impermissible viewpoint or speaker-based speech regulations. Presumably, this task will fall upon some official within the government, perhaps a judge or prosecutor. If one accepted Shiffrin's suggestion that the United States "is racist to the core" (p. xiii), and dominated by "elite" perspectives, it is difficult to understand how his theory of free speech could be successfully implemented absent an intervening revolution.

83. *See* U.S. CONST. amend. XVIII.

84. U.S. CONST. amend. XXI.

Because persons holding significant positions of power undoubtedly would be selected with great care and sophistication by the evil elites calling all of the shots, is there really any reason to believe that these officials would embrace more than superficially a theory of free speech that privileges their mortal enemies while silencing their dearest friends? There is, thus, a certain amount of inconsistency in the theory between the continued state supervision of speech, the guidelines supposedly directing such supervision, and the underlying assumptions about authority's willingness to obey such guidelines — assumptions that created the need for progressive dissent in the first place.

In this regard, consider the case of Missouri Supreme Court Justice Ronnie White. The United States Senate refused to give its consent to Justice White's appointment to the U.S. federal district court in St. Louis, Missouri, allegedly because he was "pro-criminal" and "activist."[85] The evidence supporting this characterization largely consisted of Justice White's voting record in death penalty cases — he had the temerity to vote to reverse death sentences in approximately thirty percent of the cases that had come before him.[86] For this perceived failure of judgment, the Senate voted to reject his nomination on a straight party line vote of fifty-four Republicans voting against the nomination versus forty-five Democrats voting in favor of the nomination. Justice White's story is but a single part of a larger phenomenon: women and racial minorities have greater difficulty obtaining confirmation in the contemporary Senate than do heterosexual white men.[87]

If a majority of the Senate is prepared to reject a nominee for registering dissent from his colleagues on ultimate matters of life and death, it seems unlikely that the Senators will prove more willing to embrace judicial nominees who register political dissent on other controversial issues, such as drug policy. The implications for a dissent-based theory of free speech should be clear: If Justice Ronnie White cannot engage in principled dissent when matters of life and death are at stake without rendering himself unfit for federal judicial office, is it really plausible to think that the "system" would tolerate officials who consistently reach out to protect highly unpopular, marginalized dissenters, thereby affording them the broadest protections of the First Amendment's free speech guarantee? If contemporary American so-

85. *See* Charles Babington & Joan Biskupic, *Senate Rejects Judicial Nominee*, WASH. POST, Oct. 6, 1999, at A1 (describing the circumstances surrounding the Senate's rejection of the nomination and quoting Missouri GOP Senator John Ashcroft as describing Justice White as "pro-criminal" and "activist").

86. *See id.*

87. *See* Ben White, *Deepening Rift over Judge Vote*, WASH. POST, Oct. 7, 1999, at A3 (describing the Senate's higher rejection rate for minority judicial nominees than for nonminority nominees during the Clinton administration).

ciety suffers from as many racial, gender, and class biases as Professor Shiffrin suggests and elected officials fairly and accurately implement the wishes of their constituents, there is not much cause to be optimistic about these questions. Indeed, Justice White's experience suggests that the price of registering dissent can be staggeringly high, even when the underlying policy position at issue enjoys broad support within a plurality of the community.

The abject failure of campaign finance reform provides another cautionary note for any dissent-based account of free speech. In *Buckley v. Valeo*,[88] the Supreme Court accepted the proposition that money equals speech and protected unlimited direct spending to elect or defeat a particular candidate.[89] Moreover, the *Buckley* Court also embraced a financing scheme for presidential elections that effectively institutionalizes the Democratic and Republican parties, a system that, moreover, hobbles independent and third-party presidential candidates.[90] Despite widespread alienation and cynicism about the contemporary electoral process, there appears to be little hope for securing meaningful campaign finance reform anytime soon. Even if the Supreme Court were to rethink its "speech equals money" logic, it is doubtful that incumbent members of Congress would act against their own collective self-interests by enacting meaningful campaign finance reform in order to empower political dissenters. In this fashion, then, candidates who wish to bring nontraditional programs or platforms before the American public systematically are disfavored (and thereby silenced).[91]

Professor Shiffrin undoubtedly would agree with this description of the current state of electoral affairs, but probably would argue that the proper response is swift adoption of meaningful campaign finance reform legislation (pp. 111-12). This begs the fact that we have not arrived in our present situation by mere happenstance. The system marginalizes and silences dissent not by accident, but by design.[92] Neither the Democratic nor Republican parties are likely to embrace any

88. 424 U.S. 1 (1976).

89. *See* Buckley v. Valeo, 424 U.S. at 12-23, 39-59; *see also* Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1055-62, 1071-73 (1999) (critiquing the *Buckley* decision and offering up rationales for sustaining comprehensive campaign finance reform legislation).

90. *See Buckley*, 424 U.S. at 85-108; *cf. id.* at 290, 291-94 (Rehnquist, J., concurring in part and dissenting in part) (arguing that the public funding provisions "enshrined the Republican and Democratic Parties in a permanently preferred position, and has established requirements for funding minor-party and independent candidates to which the two major parties are not subject").

91. *See* Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2478-82 (1997).

92. For an extended discussion of the relationship between wealth and free speech, see *Free Speech and Economic Power: A Symposium*, 93 NW. U. L. REV. 1053 (1999).

program of reform that disserves their short and long term institutional interests.[93]

To the extent that dissent presently does not seem to enjoy any special call on executive, legislative, or judicial consciences, making all speech claims contingent on a subjective label bids fair to legitimate greater, not less, suppression of politically marginal speakers. Thus, absent some revolutionary change in government (which seems, at best, highly unlikely), a system of free speech protection focused primarily on dissent likely would have the perverse effect of further stifling meaningful opposition to existing governmental and economic policies and institutions.

The related problem of ascertaining precisely what constitutes "injustice" also exists. Throughout his work, Professor Shiffrin emphasizes the importance of dissent to combating successfully "injustice." Describing the proper mission of the public schools, he argues that

> our educational system must educate not only autonomous thinkers prepared to reject the habits, customs, and traditions of the larger society but also citizens who generally regard dissent against injustice as virtuous behavior.... For example, students in large and small groups could be assigned projects of challenging injustices they collectively perceive within their local communities. [pp. 113-14]

Such activity should be encouraged because "[t]he practice of challenging injustice should not only instruct them in the present but also encourage them to do so in the future" (p. 114). This is all well and good, so long as one leaves undefined the scope and content of "injustice." Once a teacher, principal, administrator, or school board member begins attempting to identify "injustices" within the community, things are likely to get very complicated very quickly.

Shiffrin is undoubtedly correct to suggest that injustices exist within our society at the national, state, local, and neighborhood level. The problem, of course, is that in a diverse and pluralistic society with myriad ideological, religious, and social traditions and commitments, one person's injustice is another person's tradition.[94] It is not at all clear that having the government attempt to identify and define "injustice" for purposes of applying the First Amendment's Free Speech

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93. *See* JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 44-47, 86-105 (1997) (describing public choice theory, the idea that legislators, given a free choice, systematically will make decisions that advance their own perceived self-interest, with particular attention to the problem of federal campaign finance reform).

94. *See, e.g.*, Lawrence M. Friedman, *The War of the Worlds: A Few Comments on Law, Culture, and Rights*, 47 CASE W. RES. L. REV. 379, 379-83 (1997); Leslye Amede Obiora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275, 278-79, 332-45, 371-78 (1997).

Clause represents a sound jurisprudential approach to vindicating free speech claims.[95]

### B. *The Measure of Dissent*

Professor Shiffrin has undertaken an incredibly difficult task: he is attempting to square postmodern free speech critiques with a revised and renewed liberal free speech tradition. Rather than simply admitting defeat for the liberal conception of free speech and ceding the field to the CLS, Critical Race Theory, Feminist Jurisprudence, and Law & Sexuality critics, he attempts to construct a multi-cultural and postmodern theory of free speech that relocates free speech as a bulwark for the protection of oppressed and marginalized cultural minorities. Instead of entrenching the position of existing elites, Shiffrin's vision of the First Amendment would make the Free Speech Clause a powerful weapon for dispossessed political and cultural minorities to challenge what they perceive to be "injustice."

His definition of dissent demonstrates his commitment to this project: it is viewpoint and speaker-based precisely because a viewpoint and speaker-based approach is essential to meeting and refuting the critique of the Left. By vesting the strongest protections the Free Speech Clause has to offer with the strongest critics of the post-*Brandenburg* tradition, he hopes to create a free speech paradigm that is acceptable to all. Shiffrin's project is incredibly ambitious, and he deserves a great deal of credit for the strength and power of his arguments. One also should note that he self-consciously embraces the role of agent provocateur: "I am trying to open a dialogue rather than provide the last word" (p. 112). His effort at reconciling the free speech tradition with the critique of the New Left is terribly important if the social consensus in favor of free speech as a preferred value is to be maintained. In other liberal democracies, when these values come into conflict, the social commitment to free speech has given way in the face of demands that adequately securing values associated with equality and community be given a higher priority than protecting free speech.

Professor Shiffrin argues that "there is insufficient reason to suppose that the left acts against its interests in supporting the free speech

95. For example, the government of South Carolina does not seem to view the continued display of the Confederate battle flag over the state capitol building "unjust," even though many African-American South Carolinians seem to so view the matter. *See* David Firestone, *46,000 March on South Carolina Capitol to Bring Down Confederate Flag*, N.Y. TIMES, Jan. 18, 2000, at A14; Bob Herbert, *In America: Of Flags and Slurs*, N.Y. TIMES, Jan. 20, 2000, at A19. If minorities in South Carolina cannot convince the state government to remove an emblem long-associated with racist causes from the seat of state government, should they have any confidence that state functionaries would credit their efforts to engage in dissent combating other forms of injustice?

principle even assuming that the principle were laissez-faire" (p. 125). Free speech facilitates grass-roots organizing and protest, which challenges the status quo and facilitates reform; accordingly, liberals, progressives, and radicals should embrace free speech (pp. 124-27). Viewed through this prism, the free speech principle "has a strong political tilt against the unjust exercise of power" (p. 128). Moreover, "[l]ike it or not, the free speech principle is here to stay" (p. 129). As a matter of political pragmatism, progressives and radicals should acknowledge that "[it] is better political strategy to claim it than to hold out oneself as an enemy of a cherished right" (p. 129). Thus, if arguments based on principle do not convince, a frank appeal to practical political considerations might get the job done. If neither approach succeeds, try to scare the free speech apostates back into the fold with the prospect of damnation: a sustained attack on free speech "promises to guide the left into outer darkness" (p. 130).

The New Left is badly divided on the value and importance of free speech to the progressive cause. A growing number of critics reject rights talk in general[96] and the value of free speech in particular.[97] Thus, Shiffrin's project represents a sustained and cogent effort to bring the free speech schismatics back into the fold.

Ultimately, however, even Justice Brennan, the great conciliator, would not have been able to reconcile these contending factions. Free speech traditionalists are certain to object to Shiffrin's effort to make the identity of the speaker — not to mention the content of the speaker's message — an important component in determining the First Amendment status of speech activity. This aspect of the program rends asunder the viewpoint-neutrality project, an essential tenet of the traditional First Amendment faith.

Free speech critics also are unlikely to be convinced.[98] Shiffrin has attempted to give them a greater stake in the First Amendment by vesting disempowered cultural minorities with enhanced claims to free speech protection. So long as the instrumentalities of government remain in the majoritarian hands, however, the critics will not be satisfied.[99] After all, even if cultural minorities enjoyed some greater call

96. *See* Gabel, *supra* note 82; Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 707 (1992); Robert Williams, *supra* note 82, at 114-21. *But cf.* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404-06 (1987); Williams, *supra* note 82, at 121-34.

97. *See* Delgado, *supra* note 5, at 140-41; Andrea Dworkin, *Pornography Is a Civil Rights Issue for Women*, 21 U. MICH. J.L. REFORM 55 (1987/88); Mari Matsuda, Lecture, *in* Alan Borovoy et al., *The James McCormick Mitchell Lecture: Language as Violence vs. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337, 360 (1988/89).

98. *But see* Delgado, *supra* note 18, at 782-87, 795-98, 802.

99. *See* E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES.

on the Free Speech Clause, the contingency of this claim on courts staffed overwhelmingly by members of the majority would breed intense skepticism (with some good cause).[100]

### C. *Enhancing Democratic Deliberation in the Name of Dissent*

It would be a mistake, however, to disregard Shiffrin's call for a renewed dialogue about the centrality of dissent to the free speech project. Even if one contests his definition of "dissent" and his insistence that "dissent" consistently seeks to overcome "injustice," his proposals for facilitating improved public deliberation have great merit and deserve serious consideration.

Shiffrin is surely correct to suppose that the Free Speech Clause should facilitate dissent from disaffected individuals and groups within the society. Moreover, many of his proposals for enhancing the role and visibility of dissent within the body politic are quite sensible. Professor Shiffrin suggests four broad reform projects that might improve the quality and quantity of public deliberation:

> Any society that encouraged dissent would have to meet four conditions: (1) its system of public education would need to promote attitudes and to teach skills that would assist in creating a substantial body of citizens with the talent and the will to challenge injustice in appropriate circumstances; (2) channels of communication for expressing dissent would need to be open; (3) legal barriers to dissent would need to be held to a minimum; an (4) social and governmental institutions would need to be designed to make information available to those who wish to dissent. [pp. 112-13]

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L. REV. 275, 286-90 (1999) [hereinafter Spitko, *Gone But Not Conforming*]; E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 81-89 (1997); E. Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1067-69, 1072, 1075-77 (1999) [hereinafter Spitko, *Judge Not*]. Professor Spitko's utter distrust of majoritarian adjudication of the legal rights of cultural minorities in the public courts has led him to call upon cultural minorities to establish their own, quasi-private courts through voluntary arbitration. *See id.* at 1077-83; Spitko, *Gone But Not Conforming*, *supra*. Although he has never written on First Amendment doctrine, I strongly suspect that he — and others like him — would object strongly to any free speech theory that potentially vests judges and juries with more, rather than less, discretion because, in his view, such discretion inevitably will come to be exercised consistently in a fashion that marginalizes cultural minorities. To the extent that data on the question exist, it does seem to support such fears. *See* Spitko, *Gone But Not Conforming*, *supra*, at 278-86.

100. *See* Spitko, *Gone But Not Conforming*, *supra* note 99; Spitko, *Judge Not*, *supra* note 99. As Dean Kathleen M. Sullivan has explained:

> Thus, I believe that a number of the new arguments for speech regulation with a postmodern twist have a massive non sequitur at their core. Why trust the state — the very source of some of the bad, old social structures — to get the new ideology right? There might be strong reasons to distrust the state in reordering our ideological preferences, even if we trust it to solve other problems in our collective life.

Sullivan, *supra* note 63, at 987.

Each of these proposals not only would advance a dissent-based vision of the Free Speech Clause, but also would advance the project of democratic deliberation more generally. In this sense, then, one wedded to a different operational paradigm for the Free Speech Clause might still agree with the substance of Professor Shiffrin's program of reform.

It would be difficult to disagree with Professor Shiffrin's assertion that the public schools should prepare students for active participation in the life of the community. Given the apathy and lack of participation by young people in contemporary electoral politics,[101] it would appear that the schools are failing to foster in the nation's youth a spirit of civic duty and a corresponding obligation of participation in the project of democratic self-government. To be sure, the task of preparing young Americans for participation in our democracy does not fall solely on the shoulders of teachers and school administrators. Nevertheless, the apathy of younger citizens toward the electoral process at all levels of government is a problem[102] that the schools should address. As Professor Shiffrin puts it, "an educational system committed to producing active citizens with a sense of justice can produce a more active citizenry" (p. 113). Undoubtedly, "in educating for democracy in public and private realms, our schools could do more to encourage dissent."[103] Were they to do so, perhaps young citizens would be less apathetic about actively participating in the project of self-governance.

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101. *See* LINDA J. SAX ET AL., AMERICAN FRESHMAN: NATIONAL NORMS FOR FALL 1997, at 2-4 (1997); Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1433-35 (1999); *see also* Richard Harrington, *Giving a Rap About Voting*, WASH. POST, Apr. 15, 1992, at F7 ("Since 1971, young people's voting participation has declined with each presidential election (36 percent in 1988)."); Rene Sanchez, *College Freshmen Have the Blahs, Survey Indicates; Academic, Civic Apathy Reach Record Levels*, WASH. POST, Jan. 12, 1998, at A1 (reporting on minimal interest of entering college freshmen in civic participation, with "[o]nly about 17%" expressing interest in " 'influencing the political structure' " and a mere 21% indicating that they regularly vote in student elections); Rene Sanchez & Audrey Gillan, *Outnumbered, Outvoted, Out of Clout on the Hill*, WASH. POST, Aug. 1, 1997, at A1 ("Some analysts say the percentage of young adults who vote in presidential elections, which has never been high but showed new signs of growth in 1992, tumbled below 30% last year.").

102. *See Panel Discussion: Civic Education*, 62 ALB. L. REV. 1451, 1459, 1462 (1999) (reporting that only 20% of young adults voted in the last federal election and warning that "[t]he participation of young people in voting and other forms of civic association appears to be in a free-fall. We can expect the lowest voting turnout yet among 18-to-25-year-olds in the next presidential election."); Steven A. Holmes, *The Melting Pot Politics of 2000 Are Truly Soupy*, N.Y. TIMES, Feb. 13, 2000, § 4, at 1 ("Despite efforts like MTV's 'Rock the Vote,' young people continue to be among the most politically apathetic groups in the country.").

103. P. 114. Ironically, students currently enjoy very limited free speech rights on campus and, therefore, their opportunity to engage in dissent is more apparent than real. *See* S. Elizabeth Wilborn, *Teaching the New Three Rs — Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 120-21 (1995) (noting that "core political speech is no more protected in the public schools than a dirty limerick scrawled in a bathroom stall").

Professor Shiffrin's second reform proposal deals with access to the media (pp. 115-17). He criticizes broadcasters for caring too much about maximizing profits and too little about facilitating democratic deliberation (including, of course, dissent) (pp. 115-17). His suggestions for improving the mass media's contribution to public discourse include increasing candidate access to the media, creating opportunities for the public to access media outlets to communicate their ideas with the larger community, and a renewed commitment to noncommercial broadcasting (pp. 116-17). All of these proposals would materially improve the process of democratic deliberation in this country and should receive serious consideration.[104]

Professor Shiffrin's failure to address the Internet as a potential platform for dissent is puzzling. Although television broadcasters and cable system operators presently deliver programming to mass audiences on a more reliable basis than the Internet, technological changes will chip away at the existing broadcast media's monopoly on mass audiences. Accordingly, the need to ensure accountability from broadcasters and cable system operators may be reduced as the Internet makes programming content-on-demand a reality.[105] This is not to say that established media cannot or should not do a better job of facilitating democratic deliberation. Rather, their continuing failure to take action may be less important over the long term than Shiffrin suggests.

Professor Shiffrin also proposes reforms aimed at reducing the opportunity costs (pp. 117-18) and transaction costs (pp. 118-20) associated with engaging in dissent. Again, even if one were to dispute or reject Professor Shiffrin's definition of "dissent" as unduly limited, his proposals for reducing the potential liabilities associated with speech activity on matters of public concern would enhance the ability of average citizens to participate in the project of democratic deliberation. In other words, limiting the liability associated with engaging in public debate and enhancing the access of average citizens to the means of participating in public debate would be wise policies under any plausi-

104. Having previously endorsed many of the same proposals, I hardly can be heard to object to Shiffrin's call for a renewed commitment by the mass media to facilitating the project of participatory democracy. *See* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1236-48 (1996); Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2134-38 (1997) (book review) [hereinafter Krotoszynski, *The Inevitable Wasteland*].

105. There might still be a need for government-subsidized educational programming in the age of the Internet. Although the Internet will provide a platform for delivering programming content to a mass audience, one must still hire writers, producers, and actors to create the content. The history of public access cable stations suggests that providing a platform for the delivery of programming content will not ensure a reliable supply of high quality programming. *See* Krotoszynski, *The Inevitable Wasteland*, *supra* note 104, at 2128-29.

ble conception of free speech in a democratic society.[106] As with the proposals associated with broadcasting, one wonders why Professor Shiffrin does not explore the possibilities of the Internet for facilitating democratic deliberation and dissent. Although broadcast media remain critically important to the process of elections and public debate, new media are going to play an increasingly important role in democratic deliberation. A reform program aimed at securing regulations that promote the dissent-enhancing possibilities of the Internet, a relatively new medium for mass communication, might possess greater potential for success.[107]

Professor Shiffrin is right to challenge the legal community to think creatively about ways in which to secure greater and more representative public participation in the project of democratic deliberation. In the end, Professor Shiffrin undoubtedly is correct to assert that with respect to encouraging public participation in self-government: "[w]e can do better. We cannot do enough" (p. 120).

## III. DISSENT IN THE SERVICE OF THE LORD: RELIGIOUSLY MOTIVATED DISSENT AND THE SECULAR STATE

Professor Stephen Carter, like Professor Shiffrin, presents a dissent-based model for conceptualizing the freedom of speech. And, like Shiffrin, Carter has a particular set of speakers in mind when arguing that dissent should play a greater role in contemporary political debate. "Mainstream politics, with its arrogant rejection of religious argument and traditional religious values, has alienated tens of millions of voters, and by no means are all of them hard-line conservatives" (p. 9). Carter's thesis is an elaborate argument in favor of taking religiously motivated dissent more seriously.

Invoking traditional Enlightenment conceptions of the state, Carter argues that a government retains its legitimate claim to the allegiance of its people only so long as it remains responsive to their needs, wants, and desires (pp. 7-19). Traditionally, these ideas are expressed in the maxim that just governments derive their legitimacy from the consent of the governed, a consent that is ongoing and freely given.[108] Professor Carter suggests modifying the maxim by placing greater emphasis on the government's responsiveness to the *dissent* of the governed (pp. 4-7). Invoking language in the Declaration of Inde-

106. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 860-65, 876-83 (2000).

107. *See id.* at 892-904, 944-46.

108. *See* JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES ON GOVERNMENT ¶¶ 89-94, 95-99, 123-31, 134-42, 211-43 (Peter Laslett ed., 1960) (1690); JEAN JACQUES ROSSEAU, *Of the Social Contract*, *in* THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 48-54 (Victor Gourevitch ed. & trans. 1997) (1762).

pendence complaining that "[o]ur repeated Petitions have been answered only by repeated Injury,"[109] Carter argues that legitimacy should be as much a function of how a government responds to dissent as it is about creating and sustaining programs that enjoy broad majoritarian support:

> Perhaps governments — good and fair ones anyway — do not after all derive their powers from the *consent* of the governed. Perhaps they derive their powers instead from the *dissent* of the governed. For the fairness and decency of any state should be assessed not alone through a study of whether its majorities examine it and find it good, but through a study of whether its minorities examine it and find it good. Another way to look at the matter is this: the justice of a state is not measured merely by its authority's tolerance for dissent, but also by its dissenters' tolerance for authority. [p. 97]

Carter, like Shiffrin, sees dissent as essential to the construction of a just polity. "Civic life requires dissent because it requires differences of opinion in order to spark the dialogues from which the community thrives and grows."[110] Yet, "[i]n contemporary America . . . the nation is all too full of people and groups who insist that the political sovereign does not hear their voices" (p. 18). If something is not done to correct this state of affairs, Carter warns that "disaffection may turn to disallegiance" (p. 18).

### A. *Community, Power, and the Importance of Dissent*

Majorities naturally attempt to inculcate a common set of values as part of an ongoing effort to maintain community identity. Sometimes these efforts are benign, and sometimes they are not. Carter provides a historical sketch of the use of the public schools as a tool in forging a single, Protestant concept of American citizenship (pp. 19-45). In many respects, this effort was less about ensuring universal education and civic participation than about destroying pre-existing ties to Old World institutions, such as the Roman Catholic Church.

> One study of textbooks concluded that the aim of the public schools by the turn of the century was to replace the love of what was viewed as a foreign God with a love of America as a country — very much the Know-Nothing program, long after the party itself vanished from the scene. [pp. 44-45; footnote omitted]

Carter believes that a project of using the public schools to inculcate Protestant values has now evolved into a project of teaching purely secular values, including open disrespect for religion and religious institutions (pp. 44-49). He warns that the government sows the "seeds of disallegiance" when "our 'free' society counts among the powers of

109. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

110. P. 16; *see also* Emerson, *supra* note 14, at 883-84.

government the power to use education as the lever to eradicate unwanted religious traditions" (p. 47).

Unlike Shiffrin, Carter's vision of dissent is completely viewpoint- and speaker-neutral. "It is very much in the nature of the tools of democratic dissent that they may be used by the bad guys as well as the good guys" (p. 120). Carter recognizes and embraces the idea that robust protection of dissent undoubtedly will mean that some parents inculcate immoral and unjust ideas in their children. "The freedom of the family to make religious choices — a freedom that is essential if religious communities are to be able to survive by projecting their narratives over time — must include the freedom to make choices other than the best" (p. 48). Freedom necessarily encompasses "the privilege of making mistakes" (p. 48). If the state attempts to replace parental values with the government's values, parents will respond first with dissent and, if this proves unavailing, with disallegiance.

Professor Carter pursues this idea to its logical conclusion: a right of revolution in the face of an unresponsive government (pp. 53-99). In his view, we increasingly run the risk of forcing loyal, but dissenting, citizens to consider this alternative because of the community's refusal to take seriously their objections to a number of current social policies (most notably including legalized abortion). Pointing to the Supreme Court's contemporary free exercise jurisprudence as a case in point, Carter suggests that the government's effective message to religious minorities is "it doesn't matter if the secular sovereign makes it difficult for you to practice your religion, because there are lots of other religions out there, and you can choose one of the others instead" (p. 57). Returning to his theme of dissent, Carter posits that although "[i]t is, of course, vital to the notion of witness that the witnesses can be seen and heard" the secular authorities nevertheless have sanctioned the "remov[al] of pro-life protestors from defined zones in front of clinics where abortions are performed" (p. 60).

Properly understood and implemented, a meaningful commitment to free speech values, at one time or another, will prove vexing to all constituencies within the community. "This is perhaps the principal glory of our First Amendment tradition: properly understood, it frustrates *everybody* — or at least everybody possessing the will to censor debate and the political power with which to do it" (p. 65). The problem, as Carter sees it, is that religiously motivated dissent is no longer taken seriously by either the government or the secular cultural majority. This then forces religiously motivated dissenters to consider resorting to political crimes in order to bring their concerns to the attention of the community and provoke some kind of response (pp. 67-78).

Thus, if a government meets repeated petitions with "repeated Injuries," the government loses its right to command the allegiance of the dissenters (pp. 9-13). At the same time, problems arise because governments and dominant community groups often equate dissent

with disallegiance or disloyalty (pp. 16-19). The problem is exacerbated when religious communities attempt to establish themselves as separate communities within the larger whole (pp. 67-86). Carter acknowledges that some self-constituted groups engage in grossly antisocial behaviors, like murdering physicians who perform abortions or bombing federal buildings. Nevertheless, "[o]ne must not make the mistake of assuming that the violence and perhaps paranoia of these groups is an argument against the ideal of self-constituted communities; it is simply evidence, were any needed, that there is wickedness everywhere" (p. 83).

### B. *Reaffirming the National Commitment to Dissent*

Significantly, Carter's arguments are aimed far less at fringe groups than traditional liberals, whose commitment to free speech principles has been wavering of late.[111] "[I]f we are to preach more tolerance, it is not sufficient to preach it to intolerant, divisive religionists, of which there are many; we must preach it as well to intolerant, divisive secular liberals, many of whom seem to value diversity across every spectrum except the religious" (p. 85). He further posits that the success of the liberal agenda has created ambivalence about the use of state power to squelch dissent. "This is a greater problem for liberalism in the 1990s than it was in the 1960s because liberalism has won so many political battles in the intervening decades that it has developed a troubling moral complacency, particularly with respect to the tough questioning of authority that was once its glory" (pp. 85-86). This "complacency" has led to free speech backsliding:

> It is indeed a bit embarrassing, given the 1960s, but when today's liberals talk about, say, protests at abortion clinics, one can hear, echoing down time's corridors, the terrifying logic of the silencing slogan of the silent majority days: "America — Love it or Leave It!" Which means, of course, "*Our* America — do it our way or go to jail!" [p. 86]

How then, should free speech theory attempt to address the phenomenon of religiously motivated dissent? Professor Carter argues for a "dialogue" based model in which dissent is not ignored or deval-

111. To the extent Professor Carter's intended audience encompasses leftists and radicals, his proposals are likely to receive a decidedly frostier reception than Professor Shriffrin's dissent thesis. This is because Professor Carter's paradigmatic dissenters — religiously motivated opponents of abortion rights — are a group potentially silenced (or at least muzzled) under Professor Shriffin's dissent theory of free speech. Although one should not overgeneralize, most leftists and radicals within the legal academy support efforts to reduce gender subordination and enhance feminist agency, and therefore, would view women's potential loss of control over reproduction as a serious setback to the cause. In this way, Professor Carter's model of dissenters illustrates a potential objection to Professor Shiffrin's theory, at least if one believes (as most liberals do) that the viewpoint of a speaker generally should not prefigure whether particular speech activity merits or enjoys constitutional protection.

ued merely because the speaker happens to possess religious motivations, or uses overtly religious arguments, for advancing her position. Such an approach would "mean that there is nothing about the *religious* source of their convictions that should bar them from public dialogue — a terrible rule, and one which, as I have mentioned, would have destroyed or severely disabled the moral arguments of both the Abolitionist movement and the civil rights movement" (p. 93).

Professor Carter lodges his complaint not so much against Congress and the Executive Branch of the federal government, but rather against the federal judiciary, which, in his view, has been insufficiently protective of religiously motivated dissenters within the community. He believes the federal courts are overconfident of their analytical capabilities; the project of judicial review (or judicial supremacy) "rests on the foundational point that the courts are far wiser than anybody else (sovereign or citizens) and thus must be obeyed, always and everywhere and by everyone. Period" (p. 110).

In a move reminiscent of Abraham Lincoln's scathing critique of the then-recent *Dred Scott*[112] decision during the Lincoln-Douglas debates,[113] Professor Carter questions whether judicial decisions should be obeyed if they reject or betray the fundamental moral commitments of the community. "[I]t is not obvious that people will obey judicial opinions that are wrongheaded, and even less obvious that they should" (p. 114). Contemporary liberal reverence for the courts, suggests Carter, is a lingering shadow of the civil rights movement.

> But that history is of use only if we suppose it to prove that judges will usually be wiser than politicians. At times they are — but over the long run, the human beings who judge are every bit as capable of error and wickedness as the human beings who legislate or carry the laws into execution. [p. 131]

Professor Carter is undoubtedly correct. The same Supreme Court that gave us *Brown v. Board of Education*[114] also gave us *Dred Scott v. Sandford*[115] and *Plessy v. Ferguson*[116] (not to mention *Korematsu*[117] and *Bowers v. Hardwick*[118]). Simply put, there is no reason to believe that

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112. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

113. *See* The First Joint Debate at Ottawa (Aug. 21, 1858), *in* THE LINCOLN-DOUGLAS DEBATES 40, 74-77 (Harold Holzer ed., 1993); The Third Joint Debate at Jonesboro (Sept. 15, 1858), *in* THE LINCOLN-DOUGLAS DEBATES, *supra*, at 136, 168-72; The Fifth Joint Debate at Gatesburg (Oct. 7, 1858), *in* THE LINCOLN-DOUGLAS DEBATES, *supra*, at 234, 262-64; The Seventh Joint Debate at Alton (Oct. 15, 1858), *in* THE LINCOLN-DOUGLAS DEBATES, *supra*, at 321, 360-62.

114. 347 U.S. 483 (1954).

115. 60 U.S. (19 How.) 393 (1856).

116. 163 U.S. 537 (1896).

117. Korematsu v. United States, 323 U.S. 214 (1944).

118. 478 U.S. 186 (1986).

the courts alone possess the ability to engage in virtuous or just policymaking, or that they will do so on a consistent basis.[119] Of course, judges, unlike members of Congress or the President, do not face regular democratic accountability (i.e., the need to seek and obtain reelection to office). Institutionally, at least, they are better positioned to interpose themselves between the wishes of the majority and the rights of an unpopular minority.[120] Although Professor Carter rightly questions whether the federal judiciary's decisions routinely promote justice, in some respects he fails to credit the judiciary for its moral victories.

For example, Professor Carter makes much of the fact that the Supreme Court upheld "breach of the peace" convictions against Martin Luther King, Jr. and other members of the Southern Christian Leadership Conference for marching in Birmingham, Alabama on Easter Sunday without a permit.[121] He does not mention that the pivotal moment of the civil rights movement — the Selma-to-Montgomery March — took place under the protection of a federal court order issued by district judge Frank M. Johnson, Jr.[122] Given the scope, scale, and duration of this mass protest activity, it is rather difficult to imagine how it could have taken place without the formal sanction of law.

The Selma March ignited the conscience of the national community and led to the passage of the landmark Voting Rights Act of 1965.[123] More than any other mass-protest action, it changed the face of the nation. Federal judicial intervention sustained the march against the entrenched opposition of every element of the state government.[124] Professor Carter's unqualified slashing attacks on the federal judiciary give insufficient credit to the personal and professional sacrifices of judges like Frank M. Johnson, Jr., J. Skelly Wright, Elbert P. Tuttle, John R. Brown, John Minor Wisdom, and Richard T. Rives.[125]

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119. *See* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 49-60 (1998); *cf.* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3-13, 123-50, 232-70 (1994).

120. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

121. Pp. 105-10. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

122. *See* Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965); *see also* Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411 (1995).

123. *See* Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 (1994)); Krotoszynski, *supra* note 122, at 1412, 1427-28.

124. *See Williams*, 240 F. Supp. at 105-09.

125. *See* JACK BASS, UNLIKELY HEROES (1981).

Professor Carter's attack on the judiciary is really in the service of a subsidiary point, however. Given that the judiciary is not infallible, it is entirely reasonable to suppose that citizens might profoundly disagree with a particular decision of the federal courts. In his view, *Roe v. Wade*[126] presents a good example of this phenomenon. Carter argues that *Roe* rests not on constitutional principle, but rather on the "moral instincts" of the Justices composing the Supreme Court's majority in favor of the result (p. 136). Given this state of affairs, he asks: "Would it be so unreasonable for an aroused citizen — or an aroused majority of citizens — to wonder why the judges' moral instincts are a better extra-constitutional source than the moral instincts of the people themselves?" (p. 136). His answer: "Clearly not; nor can the judges themselves provide a persuasive response, unless the response indicates a willingness to engage in that conversation — not monologue — of which Bickel wrote."[127]

Only by taking seriously the dissent of cultural, racial, or religious minorities can the nation lay a valid claim to respecting democratic pluralism. "In all of this, my concern has been for the autonomy of the many communities — particularly, but not exclusively, religious communities — into which democratic citizens organize themselves" (p. 142). Respect for democratic pluralism means respecting opinions that may seem wrongheaded, or even evil: "That the mores of some communities may seem to be morally objectionable or simply bizarre only fortifies the point, for it is only through the willingness to accept these differences that we become truly democratic" (p. 142). Rather than using law to disperse and destroy these self-constituted communities, government "should more properly serve as a means to preserve the diversity among our communities of meaning" (p. 142).

### C. *Making the Case for According Religiously Motivated Dissent Greater Solicitude: Mixed Motives and the Need to Recognize the Difference Between Jihad and Community Survival*

One would be hard-pressed to disagree with Professor Carter's plea that we take the opinions of religiously motivated dissenters seriously. Undoubtedly, such speakers often fail to secure a meaningful hearing because many object to the idea of imposing public policies on the general community based on a particular set of religious commitments. Indeed, when John Kennedy ran for president in 1960, many commentators worried about whether Kennedy would make inde-

126. 410 U.S. 113 (1973).

127. P. 136. *See* BICKEL, *supra* note 120, at 26, 65-72, 117, 127-33, 205-06, 235-43, 261; ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 110-11 (1975); *see also* Barry Friendman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586-90, 653-80 (1993); Krotoszynski, *supra* note 119, at 46.

pendent policy determinations free and clear of Vatican influence.[128] More recently, New York governor Mario Cuomo wrestled with the problem of squaring his official duties with his Catholic faith, particularly with regard to the abortion issue.[129]

At the same time, there is something disturbing about a particular religious sect's attempting to use the levers of secular power to achieve sectarian aims. For example, the recent controversy in Kansas over the teaching of evolution strongly suggests that religious dissenters do not merely want a hearing, they want to win the debate and implement their policy views on the entire political community.[130] The Kansas state school board's decision to remove evolution from the state-mandated science curriculum was not an isolated event — across the nation, religious fundamentalists are working daily to take over local and state school boards, often with tremendous success.[131]

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128. *See* LAWRENCE H. FUCHS, JOHN F. KENNEDY AND AMERICAN CATHOLICISM 172 (1967); THEODORE H. WHITE, THE MAKING OF THE PRESIDENT, 1960, at 259-62 (1961); John F. Kennedy, Jr., *Remarks on Church and State*, N.Y. TIMES, Sept. 13, 1960, § 1, at 22, *reprinted in* CHURCH AND STATE IN AMERICAN HISTORY 190 (John F. Wilson & Donald L. Drakeman eds., 2d ed. 1987); *see also* Paul J. Weithman, *John Courtney Murray — Do His Ideas Still Matter?*, AMERICA, Oct. 29, 1994, at 17; *Catholicism and the Campaign*, 72 COMMONWEAL 507-08 (1960). In an earlier presidential campaign, the election of 1928, New York Governor Al Smith, the Democratic nominee, came under sharp attack because of his membership in the Roman Catholic Church and, like John F. Kennedy, found himself forced to defend his religious associations. *See* Arthur Schlesinger Jr., *O'Connor, Vaughan, Cuomo, Al Smith, J.F.K.*, N.Y. TIMES, Feb. 2, 1990, at A31.

129. *See* Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (1984); *see also* Ari L. Goldman, *New York's Controversial Archbishop*, N.Y. TIMES, Oct. 14, 1984, § 6 (Magazine), at 38; Sam Roberts, *Cuomo to Challenge Archbishop over Criticism of Abortion Stand*, N.Y. TIMES, Aug. 3, 1984, at A1. Catholic scholars have noted the potential difficulties of remaining faithful to the teachings of the Church while discharging a civil function. *See, e.g.*, John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998); John H. Garvey, *The Pope's Submarine*, 30 SAN DIEGO L. REV. 849 (1993).

130. *See* Pam Belluck, *Board for Kansas Deletes Evolution from Curriculum*, N.Y. TIMES, Aug. 12, 1999, at A1; Jacques Steinberg, *Evolution Struggle Shifts to Kansas School Districts*, N.Y. TIMES, Aug. 25, 1999, at A1. The Kansas School Board came under sharp criticism for its decision. Noted Harvard paleontologist, Stephen Jay Gould, described the decision as "like saying '[w]e're going to continue to teach English, but you don't have to teach grammar,' " and predicted that the citizens of Kansas "would be profoundly embarrassed by the stupidity of the ruling" and "would vote that school board out of office the next year." Claudia Dreifus, *Primordial Beasts, Creationists, and Mighty Yankees*, N.Y. TIMES, Dec. 21, 1999, at F3.

131. Hanna Rosin, *Creationism Evolves*, WASH. POST, Aug. 8, 1999, at A1 ("In the last four years, school boards in at least seven states — Arizona, Alabama, Illinois, New Mexico, Texas, Kansas, and Nebraska — have tried to remove evolution from state science standards or water down the concepts, with varying degrees of success."); *see also* Sandra Blakeslee, *In Schools Across the Land, a Group Mounts Counterattacks on "Creation Science,"* N.Y. TIMES, Aug. 29, 1999, § 1, at 20; Hanna Rosin, *Creationism, Coming to Life in Suburbia*, WASH. POST, Oct. 5, 1999, at A1. Dr. Stephen Jay Gould blames this state of affairs on apathy toward school board elections:

> The only reason it [the Kansas decision to remove evolution from the state's science curriculum] happened is that nobody votes in school board elections anymore. Thus, determined minorities can take over. It took this fundamentalist group three election cycles to

There is something inherently destructive of political community when one group of citizens attempts to impose theologically grounded public policies on citizens who do not share the same set of theological commitments.[132] It is one thing to say that feeding the hungry makes for good public policy; it is another to say that, because Jesus commands the feeding of the hungry, those who oppose the policy will surely burn in hell.[133] "Competition among religions for position within government must be avoided so that none need fear any other, as each might otherwise seek its own establishment through government or within government."[134]

Indeed, Chief Justice Burger elaborated on these concerns in his landmark opinion in *Lemon v. Kurtzman*.[135] He argued that "[o]rdinarily political debate and division, however vigorous or even

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take over in Kansas. They only have a one-vote majority, 6-4. Four are up for election next year.

Dreifus, *supra* note 130.

132. *See* Cuomo, *supra* note 129, at 16-20. As Governor Cuomo puts the matter:

> I protect my right to be a Catholic by preserving your right to believe as a Jew, a Protestant or non-believer, or as anything else you choose. We know that the price of seeking to force our beliefs on others is that they might some day force theirs on us. This freedom is the fundamental strength of our unique experiment in government. In the complex interplay of forces and considerations that go into the making of our laws and policies, its preservation must be a pervasive and dominant concern.

*Id.* at 16; *see also* James Madison, The Memorial and Remonstrance Against Religious Assessments, June 20, 1785, *reprinted in* 8 THE PAPERS OF JAMES MADISON 298, 301-02 (Robert A. Rutland et al. eds., 1973) (warning against the infusion of sectarian argumentation in public policy debates "[b]ecause it will have a . . . tendency to banish our Citizens" (i.e., utterly alienate them from the project of democratic discourse on the basis of religion.)). *But cf.* Ronald Reagan, *Politics and Morality Are Inseparable*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7 (1984) (arguing in favor of active efforts by people of faith to seek legislative reforms incorporating their faith-based policy preferences).

133. *See* Cuomo, *supra* note 129, at 19-20. As Justice Jackson stated the matter:

> This freedom [freedom from "establishments" of religion] was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.

Everson v. Board of Educ., 330 U.S. 1, 26-27 (1947) (Jackson, J., dissenting). Justice Jackson plainly believed that overt efforts to inject questions of faith into public policy debates might bring about highly divisive church/state relationships that would undermine confidence in the civil state and risk the autonomy of communities of faith. Of course, Professor Carter is not arguing for the creation of John Calvin's Geneva, but he is arguing that those who advocate such arrangements receive a full and fair hearing from the general community. At least arguably, encouraging overt efforts to give greater weight to those who generally reject a strict separation of church doctrine and matters of state risks the advent of irreconcilable divisions within the community. One need look no further than modern day Northern Ireland to see the potential negative effects of overtly evangelized politics.

134. William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770, 777-78.

135. 403 U.S. 602 (1971).

partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[136] In Burger's view, "[t]he potential divisiveness of such conflict is a threat to the normal political process."[137] This does not mean, of course, that religiously motivated dissent should not enjoy First Amendment protection. Rather, it suggests that, in a pluralistic community, constituted by individuals possessing myriad racial, cultural, and religious identities, overt efforts to impose public policies based on faith-based understandings of appropriate human behavior might not represent the best course of action for the community. In public policy terms, efforts to inject facially theological arguments into policy debates (i.e., "God commands that abortion be treated as murder") run a serious risk of ending, rather than facilitating, the conversation. Moreover, it is far from clear that a law passed solely in order to satisfy religious scruples (or primarily for that purpose) would pass muster under Establishment Clause analysis.[138]

Professor Carter makes strong arguments for the benefits of religiously motivated dissent, and posits some rather nasty consequences of completely ignoring such speakers, but he never really attempts to present or consider the other side of the question. Is self-consciously religiously motivated public policy sustainable in a pluralistic democracy? This is a question that Carter never asks, much less answers.

Consider, for example, anti-abortion protestors. Professor Carter consistently uses anti-abortion protestors as his paradigm of ignored, slighted, and legally marginalized religiously motivated dissenters. He argues strongly that the general community must engage such dissenters on the merits of their position in an ongoing "dialogue" about community values (pp. 20, 60-61, 74-81, 90-95, 134-36). The problem, of course, is that the most committed anti-abortion protestors view abortion as murder — no different than randomly shooting a passerby on the street. Carter seems to be aware of this faction of the pro-life movement:

> After all, if a pro-life protester is persuaded by his religious understanding that fetuses are human, that abortion is murder, and that physicians

136. *Id.* at 622; *see also* Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) ("While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall.").

137. *Lemon*, 403 U.S. at 622.

138. *See id.* at 612-13 (holding that a "statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion' " (citations omitted)). A law passed in order to satisfy the religious convictions of a particular religious sect arguably lacks a secular purpose and, moreover, directly advances a particular religion's social objectives.

> who perform abortions are thus, literally, baby-killers, why (other than moral cowardice, a fear to face the judgment of the society) should he not kill the doctors? [p. 74]

The question that begs to be asked is: How can one sustain a meaningful dialogue with such a person? Although Carter faults secular liberals for dismissing, out-of-hand, the viewpoints of religious dissenters, he fails to acknowledge the unwillingness of many religious dissenters to compromise. Compromise, of course, is the mortar of democratic self-government.

Thus, a careful reader might lodge a rather basic objection to Professor Carter's theory of free speech: he seeks a dialogue with persons unwilling to compromise what they believe to be divinely ordered resolutions to hotly contested questions of public policy. A person who believes that God has commanded a particular result is unlikely to strike a deal that involves anything short of total victory.

As the existential philosopher, Soren Kierkegaard, explained so eloquently, faith ceases to be faith when one has reasons for holding a particular belief.[139] In Kierkegaard's view, real faith requires the crucifixion of reason and the embrace of the "absurd" — strongly held, entirely intuitive convictions that one simply cannot justify through rational explication.[140] Thus, the very idea of rational dialogue about matters of faith confronts a difficulty: faith does not subsist on reason,

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139. *See* SOREN KIERKEGAARD, *Concluding Unscientific Postscript to the "Philosophical Fragments": An Existential Contribution by Johannes Climacus, reprinted in* A KIERKEGAARD ANTHOLOGY 190, 214-216 (Robert Bretall ed., 1946) (1843) [hereinafter Kierkegaard, *Postscript*]; SOREN KIERKEGAARD, *Fear and Trembling: A Dialectical Lyric, reprinted in* A KIERKEGAARD ANTHOLOGY, *supra*, at 116, 130-34 [hereinafter Kierkegaard, *Fear and Trembling*]. As Kierkegaard puts the matter:

> Without risk there is no faith. Faith is precisely the contradiction between the infinite passion of the individual's inwardness and the objective uncertainty. If I am capable of grasping God objectively, I do not believe, but precisely because I cannot do this I must believe. If I wish to preserve myself in faith I must constantly be intent upon holding fast to objective uncertainty, so that in the objective uncertainty I am out "upon the seven fathoms of water" and yet believe.

KIERKEGAARD, *Postscript*, *supra*, at 215.

140. *See* KIERKEGAARD, *Postscript*, *supra* note 139, at 255 ("Faith is the objective uncertainty along with the repulsion of the absurd held fast in the passion of inwardness, which precisely is inwardness potentiated to the highest degree."). In this regard, it bears noting that Abraham serves as Kierkegaard's archetype of faith because Abraham was prepared to violate all universalist ethical prescriptions by murdering his son, Isaac. *See* KIERKEGAARD, *Fear and Trembling*, *supra* note 139, at 130-34. Abraham possessed such faith that he was willing to murder his own son because he believed that God required him to do so. *See id.* Of course, one longs to ask the question: "What if Abraham was wrong about God's will?" As Kierkegaard aptly notes, "[t]herefore, although Abraham arouses my admiration, he at the same time appalls me." *Id.* at 133. Abraham's story represents an individual transcending traditional notions of morality because faith requires him to do so. "The story of Abraham contains therefore a teleological suspension of the ethical." *Id.* at 134. Abraham transcends the universal — "[i]f such is not the position of Abraham, then he is not even a tragic hero but a murderer." *Id.* Accordingly, "[f]aith is a miracle, and yet man is not excluded from it; for that in which all human life is unified is passion, and faith is a passion." *Id.*

but belief. There is little cause to suppose that a dialogue challenging someone's most fundamental teleological commitments will prove fruitful: "to him who follows the narrow way of faith, no one can give counsel, him no one can understand."[141]

In light of the bitter disagreements associated with knowing "God's will," the history of theocratic states has not been particularly happy, and the admixture of religion and politics has led to a great deal of bloodshed throughout human history.[142] As Professor William Van Alstyne has explained, "The idea of a civil nation of free people, diverse in their thoughts, equal in their citizenship, and with none to feel alien, outcast, or stranger in relation to civil authority, remains powerful and compelling."[143] The problem boils down to this: How does one maintain a meaningful dialogue with a person who, by divine ordinance, cannot compromise her demands of the secular state? Professor Carter does not offer much help on this aspect of the problem.

Moreover, given that the secular state permits citizens to organize into separate "communities within the community," the state's tolerance for a particular behavior does not effectively mean that all citizens must engage in the behavior. If a particular religious community rejects homosexual sodomy as an abomination in the sight of God, it is quite free to maintain that belief and its members are free to conduct their sexual lives in accordance with it. The group's members may teach this value to their children and remove them from the public schools in order to ensure that secular authorities do not inculcate contrary values.[144] Beyond this, however, I am not sure what claim of right the self-constituted religious community should have over the rest of the community.

That is to say, if a majority of citizens embrace sexual autonomy as an official state policy, I do not think that a religious dissenter has a right to demand the reenactment of the proscription against sodomy. I do not disagree with Carter that a person seeking such a legislative change ought to be permitted to speak in favor of a return to traditional morals,[145] but a failure on the part of the community to act on that suggestion, or even to afford the religiously motivated dissenter a polite audience, would not justify acts of terrorism against the state by the religious dissenter.

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141. KIERKEGAARD, *Fear and Trembling*, *supra* note 139, at 134.

142. The Thirty Years' War is one example; the present dysfunctions in Northern Ireland provide yet another. When religionists attempt to use the secular state as a tool of indoctrination (whether voluntary or not), those who are not co-religionists are likely to respond negatively (not to put too fine a point on the matter).

143. Van Alstyne, *supra* note 134, at 787.

144. The Constitution certainly would privilege such a decision. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

145. *See* Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951); Cantwell v. Connecticut, 310 U.S. 296, 308-10 (1940).

Thus, if the community affords greater opportunities for religious dissent, but nevertheless rejects the positions advanced by the religious dissenters, I am not at all convinced that the religious dissenters will let the matter go. To put the matter in Carter's nomenclature, after the "repeated petitions" of the anti-sodomy religious dissenters fail to achieve meaningful social and legal reforms, are they then free to proclaim their "disallegiance" from the community and take up armed resistance?[146] Portions of Professor Carter's book suggest that this result is not untenable (pp. 19-27, 73-89).

At bottom, Professor Carter offers up a consequentialist vision of free speech: take seriously dissent from disaffected members of the community, be prepared to defend the existing social ordering on the merits, or face the growing possibility of dissenters renouncing their loyalty to the government and seeking change through an inherent right of revolution. At the same time, he emphasizes that "I am not insisting that the ability of a community to define itself must be without limits" (p. 89). Nevertheless, Carter concludes that:

> in a society founded on a Declaration of Independence that warns against the rejection of repeated petitions of the citizenry, those limits should be few, and we must avoid the totalizing tendency to treat all of our deeply held values as principles by which not only the national sovereign but every community, no matter how constituted, must be bound. [p. 89]

The problem, of course, is that religious dissenters not only want to be self-regulating (to a large extent they already are), but rather that they wish to impose a theocratically inspired set of health, safety, and morals regulations on everybody else!

Again, I do not disagree with Professor Carter's suggestion that religious dissenters bent on imposing "totalizing" theocratic visions on the body politic should have their say; the First Amendment should, at a minimum, debar government from picking and choosing free speech winners and free speech losers.[147] Religiously motivated speakers

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146. Actually, Mr. Eric Robert Rudolph appears to have jumped the gun. In the last three years, he allegedly has bombed the Atlanta Olympic festivities, a lesbian bar, and several abortion clinics. *See* Thomas B. Edsall, *Clinic Bombing Probed For Link to Rudolph*, WASH. POST, Mar. 14, 1999, at A20; Sue Anne Pressley, *Carolinians Doubt Rudolph Is Hiding In Their Mountains*, WASH. POST, Mar. 31, 1999, at A3. No serious person could argue that Mr. Rudolph's actions are justified because the general community decided to hold an international athletic competition that celebrates international cooperation, tolerates bars catering to a predominantly lesbian clientele, and permits abortion services. *But see* Carolyn Tuft & Joe Holleman, *Inside the Christian Identity Movement*, ST. LOUIS POST-DISPATCH, Mar. 5, 2000, at A8 (describing the rise of the Christian Identity movement and the penchant of some adherents to use violence when less drastic approaches fail to achieve social change).

147. *See* Cantwell v. Connecticut, 310 U.S. 296, 310 (1940); *see also* Kunz v. New York, 340 U.S. 290 (1951). *But cf.* Hill v. Colorado, 120 S. Ct. 2480 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Womens' Health Ctrs, Inc., 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474 (1988).

should (and do) enjoy the same free speech rights as those engaged in nonreligiously motivated speech activities.[148] That said, I worry about the implications of Professor Carter's theory when the religious dissenters fail to convince the general public to embrace their vision for a virtuous community. Perhaps he seriously believes that a polite audience will satisfy religious dissenters, even if they inevitably fail to secure meaningful reforms. One would have reason to believe, however, that Jehovah might demand something more than democratic discourse, if democratic discourse fails to get the job done.

With respect to homosexuality, Professor Carter suggests that meeting religious objections would be a relatively simple task:

> So, even though, for reasons I have already noted, it is foolish and historically naive to meet religious objections to homosexuality by asserting that religionists cannot impose their moral judgments on anybody else, it strikes me as fairly easy to meet the objections on the merits, that is, to defend the privacy right that covers sexual conduct. [p. 91]

It might be easy to make logical arguments about the benefits of living in a society that respects sexual autonomy as an integral aspect of personal autonomy, or personal privacy. It is quite another thing to believe that such arguments would prove persuasive to someone who takes Leviticus literally, and believes Leviticus to be the divine word of God made known to man. Indeed, if the argument were so self-evident and easy to make convincingly, one might ask Professor Carter to explain the seeming anomaly of *Bowers v. Hardwick*,[149] a case in which the Chief Justice of the United States invokes the "Judeao-Christian" proscription against homosexual sodomy as a sufficient reason for sustaining a Georgia law prohibiting it.[150]

The fact of the matter is that reasoned discourse stands little chance against the divine word of God. Thus, it seems hopelessly naïve to suggest that

> [o]ne triumphs, in other words, by doing that which I have stressed elsewhere is the only democratic way to meet religious claims of morality in the public square: to argue against them on the merits, by presenting the case for defeating them in terms independent of the religious source of the values in question. [p. 91]

But why is there any reason to believe that reasoned discourse will be at all convincing to a person who sincerely believes she is attempting to do God's will? Indeed, a person who devoutly believes that, by ob-

148. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392-95 (1993) (prohibiting viewpoint discrimination against religiously motivated speakers wishing to use school facilities after-hours for a film series); *see also* Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Niemotko v. Maryland, 340 U.S. 268 (1951).

149. 478 U.S. 186 (1986).

150. *See id.* at 196 (Burger, C.J., concurring).

taining (or, as is often the case preserving) a proscription against a particular sexual activity, she will be "saving" potential sinners from their own base appetites is unlikely to be moved by policy arguments, no matter how artfully constructed. It is more than ironic that Professor Carter would call for respect and tolerance of people who, in many instances, do not accord similar respect and tolerance to sexual minorities. How does the Christian so-called "formerly gay" movement fit into Professor Carter's moral universe? Why should a gay man or lesbian take seriously someone who views their most basic life choices as an abomination, something to be "fixed," whether voluntarily or not?

Perhaps anticipating these criticisms, Professor Carter notes that "[a]s a scholar and citizen who is a Christian, I worry about the obsession of some members of my faith with rules to govern sexuality" (p. 91). With all due respect, tell that to the parents of Matthew Shepard. Moreover, please explain to them why the anti-gay protestors at Matthew's funeral merit careful and solicitous consideration, as these zealots chant that their son burns in hell because "God hates fags."[151] The remarkable cruelty of some "religious dissenters" toward sexual minorities has become so extreme[152] that even religious leaders long

151. Associated Press, *Protest Greets Meeting on Antigay Violence*, N.Y. TIMES, Oct. 24, 1999, at A30. Among the anti-gay protests were signs reading "Matt is in hell and God hates fags," Scott Simon & Mark Roberts, *Matthew Shepard Funeral*, NPR Weekend Saturday, Transcript No. 98101703-214 (Oct. 17, 1998), "No Fags in Heaven" and "No Tears for Queers," Tom Kenworthy, *A Gentle Spirit Mourned*, THE RECORD, Oct. 17, 1999, at A1. In a circus-like atmosphere, anti-gay protestors screamed that "fags, if you don't repent, he will burn in hell right now," "it's the word of God," Simon & Roberts, *supra*, "God don't live by Sodom and Gomorra," "He lived in shame, he died in shame," Dennis Shepard et al., ABC Nightline, Transcript # 98101601-j07 (Oct. 16, 1998), and "Matthew was wicked!," Registers Wire Service, *Nation Grieves for Shepard*, DES MOINES REGISTER, Oct. 17, 1999, at 1. Just in case, the protestors also "blanketed the local media with profane leaflets to make sure that they were noticed." Shepard et al., *supra*. Surely National Public Radio commentator, Scott Simon, got it exactly right when, in opening a report on Matthew Shepard's funeral, he began by noting that "[t]he greatest tragedy that life can call upon a parent to experience is to bury a child." Simon & Roberts, *supra*. To expose Mr. and Mrs. Shepard to homophobic taunts and jeers at the funeral of their murdered son represents an almost unimaginable capacity for cruelty.

152. Religiously motivated bigots regularly picket political meetings of gay and lesbian organizations, *see* Peter Baker, *Clinton Equates Gay Rights, Civil Rights*, WASH. POST, Nov. 9, 1997, at A18 (reporting that during a Human Rights Campaign fundraiser featuring President Clinton, a "small cluster of people holding signs saying 'God Hates Fags' " stood outside the hotel); at religious celebrations of gays and lesbians, *see* Rene Sanchez, *At Gay Wedding, Methodists Take A Vow Against Church Ban*, WASH. POST, Jan. 17, 1999, at A3 (reporting that outside a convention center where two lesbians were being married by a Methodist minister, "the mood was tense. Under the close watch of police officers on horseback, about a dozen protesters who were kept across the street railed against homosexuality, waving signs such as 'God Hates Fags' "); and even, sadly, at the funerals of gay men who die of AIDS or at the hands of bigots, *see* Associated Press, *Protest Greets Meeting on Antigay Violence*, N.Y. TIMES, Oct. 24, 1999, at A30 (noting that Rev. Fred Phelps and other Christian protesters "taunted gays at the funeral of Matthew Shepard"); Annie Gowen, *Holy Hell*, WASH. POST, Nov. 12, 1995, at F1 ("Phelps pickets funerals of AIDS victims."). Given the utter incivility of these religiously motivated speakers, it is difficult to un-

associated with anti-gay speech activities have taken great pains, of late, to show that they hate the sin but love the sinner.[153]

The infamous Reverend Fred Phelps, of Topeka, Kansas, provides a useful illustration. Rev. Phelps regularly pickets churches in Topeka (and elsewhere) that he deems insufficiently committed to eradicating homosexuality, welcoming worshippers with greetings such as "Sodom! That's a *sodomite* church!," and "It's a leper colony. Unclean! Unclean!"[154] Phelps and his supporters told a local Episcopal minister that he "drink[s] anal blood at the altar of the sphincter" and chanted "Rectum Bob, smells like his name."[155] Then, there are the good old standbys on signs, placards, and t-shirts: "Thank God for AIDS," "Fags Burn in Hell," and "God Hates Fags."[156] Phelps is an apostle of hate, who nevertheless claims that his mission has divine sanction because "God hates them [homosexuals] too."[157] Professor Carter cites Reverend Martin Luther King, Jr. as a paradigm of the religiously motivated dissenter. The problem, of course, is that not all religious dissenters will pursue a more just ordering of the community — witness Rev. Phelps.

At an even more extreme position from Rev. Phelps, consider Benjamin Matthew Williams, another deeply committed person of faith who, in July 1999, shot and killed a gay couple in Sacramento, California. In an interview with a reporter from a local newspaper, Williams explained that "I'm not guilty of murder." Why? "I'm guilty of obeying the laws of the Creator . . . . So many people claim to be Christians and complain about all these things their religion says are a sin, but they're not willing to do anything about it."[158] Obviously, it would be grossly unfair to characterize all religious dissenters as having a common cause with persons like Rev. Phelps or Mr. Williams. Nevertheless, people like Phelps and Williams are engaged in relig-

derstand why Professor Carter believes that the general community owes them anything more than a polite hearing on the merits of their positions.

153. *See* Frank Rich, *Has Jerry Falwell Seen the Light?*, N.Y. TIMES, Nov. 6, 1999, at A17. As Rev. Falwell recently put the matter, "Many of us pastors like to talk about loving the sinner but hating the sin . . . [but] unfortunately, that statement has often become a meaningless cliche . . . [because] we too often fall short of the mark of . . . truly loving the sinner." *Id.* (last omission in original). Rev. Falwell explained that "[a]dmittedly, evangelicals have not exhibited an ability to build a bond of friendship to the gay and lesbian community. We've said to go somewhere else, we don't need you here [at] our churches." *Id.* (alteration in original).

154. Gowen, *supra* note 152.

155. *Id.*

156. *Id.*

157. *Id.*

158. Rich, *supra* note 153; *see also* Bailey, *supra* note 69 ("Benjamin Williams said the slaying of the gay couple was justified as an execution because they had violated biblical law. He said his defense in the murder case will be based on his belief that the Bible condemns homosexuality as a crime punishable by death.").

iously motivated dissent.[159] To the extent that Professor Carter could be understood to seek a careful hearing of the views expressed by such folk and their ilk, he asks far too much of the community in general and sexual minorities in particular.[160] The First Amendment might require that people who cheerfully assert that "Fag is a good Bible word, don't forget,"[161] be free of direct government censorship.[162] It does not require that the community take them or their views seriously.

Professor Carter makes frequent reference to anti-abortion protestors as models of those engaged in religiously motivated dissent (pp. 19-21, 60-61, 80-81, 89-95, 134-36). As with anti-gay protestors, the tactics of some in the pro-life movement breach even the most minimalist expectations of civility. Although "[p]eaceful picketing has routinely occurred outside clinics, with demonstrators carrying signs or placards expressing their viewpoint that abortion is murder," anti-abortion protest activities have gone well beyond relatively passive picketing efforts "to [include the] disruptive use of bullhorns, the forming of a 'gauntlet' through which patients must pass, the photographing of patients, and the taunting of clinic personnel."[163] Some pro-life activists engage in "sidewalk counseling," which can involve anything from attempts to engage a patient in a conversation about her abortion decision to threats and physical intimidation. "Over the years and recently with greater frequency, clinic protest has escalated

159. The Supreme Court has made clear that expressive conduct constitutes speech, even if it is not constitutionally protected under all circumstances. *See* Texas v. Johnson, 491 U.S. 397, 402-06 (1989); United States v. O'Brien, 391 U.S. 367, 376-78 (1968).

160. In this regard, it is difficult to find much moral fault with the "angry mob" that pelted Phelps and his disciples "with eggs and excrement" as they attempted to protest at the funeral of gay writer Randy Shilts, who died of AIDS. *See* Gowen, *supra* note 152. As a legal matter, Reverend Phelps is, of course, entitled to the fullest protection that the First Amendment has to offer. *See* Niemotko v. Maryland, 340 U.S. 268, 271-73 (1951); *see also* Board of Educ. v. Pico, 457 U.S. 853, 875, 878-80 (1982) (Blackmun, J., concurring in part and concurring in the judgment). As Justice Frankfurter succinctly put the matter, "The State cannot of course forbid public proselytizing or religious argument merely because public officials disapprove the speaker's views." *Niemotko*, 340 U.S. at 282 (Frankfurter, J., concurring).

161. Gowen, *supra* note 152 (quoting Rev. Phelps).

162. *See* Cantwell v. Connecticut, 310 U.S. 296, 306-11 (1940); *see also* Niemotoko v. Maryland, 340 U.S. 268, 271-73 (1951); *id.* at 273, 282-89 (Frankfurter, J., concurring). As Justice Blackmun explained in *Pico*, "our precedents command the conclusion that the state may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons." Board of Educ. v. Pico, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring in part and concurring in the judgment).

163. Laurence J. Eisenstein & Steven Semeraro, *Abortion Clinic Protest and the First Amendment*, 13 ST. LOUIS U. PUB. L. REV. 221, 222-23 (1993); *see* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 171 (1990) (reporting that the pro-life movement's tactics "have included picketing clinics and the homes of clinic staffs, shouting at women who seek abortions, pelting pregnant teenagers with plastic replicas of fetuses, harassing clinic employees, chaining themselves to doors, and lying motionless in streets and driveways").

in scale and intensity."[164] "For many women and teenage girls, Operation Rescue's blockades have turned the experience of seeking an abortion into a nightmare of jeering demonstrators, a spectacle that in turn attracts the added horror of media coverage of this intensely personal decision."[165] Moreover, speech activity has given way to violent expressive conduct: "More violent methods of protest, such as firebombing and arson, are not uncommon occurrences at clinics that provide abortion and family planning and referral services."[166]

In light of the increased passion of pro-life protestors, state and federal courts have proved willing to limit pro-life protestors' speech activities, issuing injunctions that limit not only attempts to impede physical access to clinics, but also prohibiting sidewalk counseling and requiring "that protestors act in a non-threatening manner (e.g., no more than two protestors may approach a patient), remain reasonably quiet, and cease their counseling if the patient expresses a desire not to hear it."[167] To be sure, behavior sufficient to constitute an assault, even if engaged in for the purpose of registering opposition to legalized abortion, should not enjoy constitutional protection. That said, it is difficult to square basic free speech theory with restrictions that require protestors to cease speaking when asked to stop or that require protestors to remain "reasonably quiet." It is unthinkable that such restrictions would be sustained against protestors objecting to racial discrimination.[168] Although courts have responded to the fact of ongoing clinic violence with increasingly broad injunctive relief, fringe pro-life groups have pledged to continue using force to stop the provision of abortion services, up to and including murdering physicians providing abortions and their staff members.[169]

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164. Eisenstein & Semeraro, *supra* note 163, at 225.

165. TRIBE, *supra* note 163, at 172.

166. Eisenstein & Semeraro, *supra* note 163, at 225; *see also* FREEDOM OF ACCESS TO CLINIC ENTRANCES ACT OF 1994, S. REP. NO. 636, at 6-10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 699, 703-707 (describing the growing problem of violence at abortion clinics).

167. Eisenstein & Semeraro, *supra* note 163, at 231.

168. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

169. *See* Arianne K. Tepper, Comment, *In Your F.A.C.E.: Federal Enforcement of the Freedom of Access to Clinic Entrances Act of 1993*, 17 PACE L. REV. 489, 492-95, 535-40 (1997). Roy McMillan, a member of the Mississippi Abortion Abolition Society, frames the issue in very plain language:

> It is justifiable to shoot abortionists. It would be immoral *not* to do so when all else has failed. The tide's been turning for the past year and a half. People are realizing that violence, violent tactics and shootings are becoming more effective. I have no problem predicting that more doctors will be killed. It's the biblical mandate to protect the innocent unborn.

Marc Cooper, *The Changing Landscape of Abortion*, GLAMOUR, Aug. 1995, at 251 (inset box). A Mobile, Alabama Roman Catholic priest, Rev. David Trosch, has gone so far as to predict that politicians who support abortion rights will be assassinated: "Perhaps, even probably, the lives of those politicians who fail to strongly oppose abortion will be at risk." Tepper, *supra*, at 494.

The Reverend David C. Trosch, a defrocked Roman Catholic priest from Mobile, Alabama, teaches that the murder of abortion providers is morally justified: "[W]e will see the beginning of massive killing of abortionists and their staffs" because killing those involved in providing abortions constitutes "justifiable homicide."[170] In his view, "[d]efending innocent human life is not murder,"[171] and "Catholic theology is very clear that the innocent are to be protected. And the death of an assailant, if warranted, is commendable."[172] Another zealot, Don Treshman, argues that "[w]e're in a war" and "[t]he only thing is that until recently the casualties have only been on one side. There are 30 million dead babies and only five people on the other side, so it's really nothing to get all excited about."[173]

Allowing that anti-abortion protestors have fared worse than anti-gay protestors in Congress and in the courts,[174] the same question raised in the context of anti-gay protests applies with full force in this context: how does one engage in a dialogue with someone who sincerely believes that God commands an immediate end to abortion services on demand (and by any means necessary)? The more extreme members of the pro-life movement openly promise to use violence if they fail to achieve political results within a time certain and no amount of dialogue is likely to alter their point of view.

Of course, it might be desirable for members of the community to attempt to engage these angry citizens — just as such an intervention might be useful with Rev. Phelps or Mr. Williams. Undoubtedly, some members of the pro-life movement might be open to compromise or, having been given a respectful audience, might agree to abjure violence in support of the pro-life cause. To this extent then, attempts at dialogue could produce some positive results on a case-by-case basis. It seems hopelessly optimistic to think, however, that Rev. Trosch (and others like him) will agree to accept any outcome other than total victory.[175] Moreover, clinic patients, staff, and physicians — the usual

170. Laurie Goodstein, *Suspended Priest Preaches "New Theology" of Antiabortion Homicide*, WASH. POST, Aug. 5, 1994, at A3; *see also* Gustav Niebuhr, *To Church's Dismay, Priest Talks of "Justifiable Homicide" of Abortion Doctors*, N.Y. TIMES, Aug. 24, 1994, at A12.

171. Niebuhr, *supra* note 170, at A12.

172. Colman McCarthy, *Kennedy, the Church and Dissent*, WASH. POST, Oct. 18, 1994, at B11.

173. Catherine S. Manegold, *Anti-Abortion Killing: The Movement*, N.Y. TIMES, Jan. 1, 1995, at A26.

174. That is to say, no federal statute authorizes injunctive relief against anti-gay protests, nor have courts issued injunctions to limit the antics of Rev. Phelps and his merry band.

175. *See, e.g.*, John Kifner, *Finding a Common Foe, Fringe Groups Join Forces*, N.Y. TIMES, Dec. 6, 1998, § 4, at 3 (describing the activities and attitudes of violent anti-abortion protestors, including Neal Horsley, "who maintains an anti-abortion Web site with a logo of dripping blood and a list of doctors who perform abortions — their names are crossed out if

audience for such speech activities — have no moral or civic obligation to attempt such an effort and their failure to attempt a dialogue should not be construed as an excuse for violence.[176]

Neither the criminal activities nor the gross and anti-social behavior of some anti-abortion protestors should lead courts or legislatures to conclude that all anti-abortion speech activities — even disruptive protests at the clinics themselves — should be unprotected. Simply put, anti-abortion protestors should not be subjected to viewpoint-based legislative and judicial limits on their speech activities. That said, one would understand completely if a clinic patient or staff member faced with a fetus-wielding protestor were to abjure any efforts at dialogue and engagement.

In short, Professor Carter is undoubtedly correct to assert that religious dissenters should enjoy the same free speech privileges as those who base their dissent on secular grounds. He also is correct to note that religiously motivated speakers have led important social reform movements, including both the abolition and civil rights movements. At the same time, one should not forget that religiously motivated speakers also led witch hunts, the Inquisition, and the Crusades. So, just as federal judges do not possess perfect moral vision, one should not suppose that religiously motivated dissenters always support justice (or, to use the language of belief, properly understand God's will).

To the extent that one does not share a religious dissenter's theological commitments, and to the extent that the religious dissenter's

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they are killed"). Mr. Horsley seems to bear out Professor Carter's dire predictions; he justifies the murder of clinic personnel as follows:

> The Federal government made up its mind to block any nonviolent attempt to stop abortion.... The Federal Government literally drove men mad, moved them to execute abortionists. When a Federal monolithic government begins to crush the rights of a minority, if the issues truly matter, fighting men rise up and do the things that fighting men do. In the life and death struggle to stop this unjustified slaughter, Christian men are looking down the barrel of a rifle.

*Id.* Of course, given Mr. Horsley's description of his intended object — "stopping abortion" — anything short of a total ban or prohibition on abortions would not be acceptable.

176. One should note that Professor Carter never embraces or endorses violence as a consequence of failing to take religiously motivated dissenters seriously — he simply predicts that a failure to maintain a meaningful dialogue increases the probability of a resort to violence, without reaching any definitive conclusions about the moral or legal status of such a response. Pp. 9-13, 73-78, 80-86. In my view, dissatisfaction with the results of the political process in the contemporary United States should almost never serve as an excuse to engage in acts of political terrorism. *See* Judge Frank M. Johnson, Jr., *Civil Disobedience and the Law*, 44 TUL. L. REV. 1, 3-9 (1969) (arguing that "strong moral conviction is not all that is required to turn breaking the law into a service that benefits society," noting that "civil disobedience necessarily involves *violation of the law*, and the law can make no provision for its violation except to hold the offender liable for punishment," rejecting, in unqualified language, the use of violence in aid of any political, social, religious, or economic objective, and concluding that, in the contemporary United States, one should embrace "an almost irrebutable presumption that civil disobedience is not justified"). Although Professor Carter does not embrace violence as a response to marginalizing religious dissent, he does not squarely denounce it. Pp. 75, 77-78.

position rests on these commitments, I disagree with Professor Carter that merely pointing out that fact fails to constitute an adequate response by the community. If a religious dissenter asserts that "God hates fags" and therefore sodomy laws should be strictly enforced, it is more than an adequate response to assert that "my God does not hold such an attitude toward sexual minorities." Religious dissenters do not have a right to force the general community to defend autonomy-enhancing legal norms by merely asserting that "God commands thus." To the extent that Professor Carter suggests otherwise, he makes an unreasonable demand on the general community.[177]

Dissent implies an opportunity to make your case, nothing more and nothing less. Religious dissenters should enjoy the same rights of access as those who offer secular reasons for their dissent. The Supreme Court's recent cases involving protests at anti-abortion clinics represent an important and unfortunate derogation from this general principle.[178] But a right to make your case does not imply a right to win, should your case prove unpersuasive to the community. Moreover, just as the state cannot prescribe the manner in which one presents her case, the state should not attempt to prescribe the manner in which citizens decide to respond to the arguments of religiously motivated dissenters.[179]

Finally, one might question the overall accuracy of Professor Carter's assertion that government ignores the concerns and sensibilities of traditionally religious citizens. During the current election season, both Vice-President Al Gore and Texas Governor George W. Bush have been at great pains to share their personal relationships with Jesus with the general electorate.[180] When asked to name his "fa-

177. *See* Kent Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352, 401 (1985) ("[T]o demand that other people act in accord with dominant religious beliefs is to promote or impose those beliefs in an impermissible way.").

178. *See, e.g.*, Hill v. Colorado, 120 S. Ct. 2480 (2000); Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474 (1988). Indeed, Justice Scalia has established a pattern of voting against granting certiorari in abortion protest decisions because "experience suggests that seeking to bring the First Amendment to the assistance of abortion protesters is more likely to harm the former than help the latter." Lawson v. Murray, 119 S. Ct. 387, 388 (1998) (Scalia, J., concurring in denial of a writ of certiorari); *see also* Lawson v. Murray, 515 U.S. 1110, 1116 (1995) (Scalia, J., concurring in a denial of a writ of certiorari) ("Last Term's decision in *Madsen*... has damaged the First Amendment more quickly and more severely than I feared," but opposing review because "clarification of *Madsen* is... unlikely to occur in another case involving the currently disfavored class of antiabortion protesters."). *But see* Williams v. Planned Parenthood of Shasta-Diablo, Inc., 520 U.S. 1133 (1997) (Scalia, J., dissenting from denial of a writ of certiorari).

179. In this regard, a careful reader should note that Professor Carter's arguments are not constitutional in nature, but rather represent policy-based recommendations about how private citizens should respond to the phenomenon of religiously based dissent.

180. *See* Maureen Dowd, *Playing the Jesus Card*, N.Y. TIMES, Dec. 15, 1999, at A23. "About 74 percent of those polled described themselves as religious people." John Herbers, *Religion Enters A Political Revival*, N.Y. TIMES, Aug. 12, 1984, § 4, at 1. With numbers like

vorite political philosopher," Governor Bush responded "Christ, because he changed my heart."[181] Gore, anxious to establish his religious credentials, has proclaimed himself to be a "born-again Christian" on "60 Minutes" and told columnist Sally Quinn that he regularly asks himself "W.W.J.D."[182] This evidence strongly suggests that religiously motivated speakers should have little to fear from Washington. As syndicated columnist Maureen Dowd astutely observed, "When the Kansas board of education removed evolution from the science curriculum testing to make way for creationism, neither Mr. Gore nor Mr. Bush could bring himself to utter a word in defense of scientific truth."[183]

In a recent book examining the increasing political muscle of religious conservatives, Wendy Kaminer argues that complaints about marginalization to the contrary, religiously conscious citizens wield more and more secular power.[184] After all, Congress and state legislatures are busily trying to *post* the Ten Commandments in schools and courthouses, not remove them.[185] In a similar vein, Professor William Van Alstyne has suggested that the problem is not the marginalization of religiously motivated citizens, but rather a creeping risk of theocracy:

> A constitutional neologism has nearly displaced the much different figure of speech, that of a "wall of separation" between church and state, which Thomas Jefferson once used in commemorating the ratification of the first amendment. The neologism is that insofar as most persons are religious, it is altogether natural that government should itself reflect that fact in its own practices. Thus according to this neologism, it is not helpful to regard the First Amendment as having emplaced a wall separating the practices of religion from the practices of government, for it is not walls, but bridges, that the first amendment contemplates.[186]

Van Alstyne's argument is that religiously motivated activists threaten the secular state, rather than vice-versa. Considered from this perspective, Professor Carter's thesis that pious citizens are sys-

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that, it seems highly unlikely that members of mainstream religious groups face a serious prospect of being either silenced or ignored.

181. Dowd, *supra* note 180.

182. *Id.* This acronym translates to "What would Jesus do?" *See id.*

183. *Id.*; *see also* Dan K. Thomasson, *Religion and Politics: A Volatile Mix*, SUN HERALD (Biloxi, MS), Dec. 28, 1999, at B2 (quoting the author's father as warning him to "[b]e careful of those who wear their religion on their sleeves or who find the need to certify themselves as true believers. They can be dangerous to the rest of us").

184. *See* WENDY KAMINER, SLEEPING WITH EXTRA-TERRESTRIALS: THE RISE OF IRRATIONALISM AND THE PERILS OF PIETY (1999).

185. *See* Angie Cannon, *Civics or Religion?: Commandments Clash*, U.S. NEWS & WORLD REP., Feb. 28, 2000, at 36 (describing various legislative proposals for posting the Ten Commandments in public schools and other public buildings).

186. Van Alstyne, *supra* note 134, at 771.

temically ignored or disempowered, represents a disconnect from contemporary political realities — at least insofar as traditional (or "mainstream") denominations are concerned.

## IV. THE COMPELLING CASE FOR ACCOMMODATING RELIGIOUSLY MOTIVATED DISSENT AIMED AT SECURING GREATER RESPECT FOR CULTURAL PLURALISM

Professor Carter essentially describes two fundamentally different kinds of dissent associated with religious minorities. Religious minorities sometimes enter general public policy debates in an attempt to ensure that the civil code reflects their subjective religious commitments. In many respects, religious minorities engaged in protest against abortion rights or gay rights fit this profile. Throughout much of *The Dissent of the Governed*, Professor Carter expressly embraces this kind of dissent aimed at recreating the general community, comprised of both believers and non-believers, in a religious community's own image (pp. 89-95).

On the other hand, Professor Carter correctly posits that members of religious communities voluntarily submit to an authority wholly independent of the secular state. "[S]elf-constituted communities of meaning, unlike the Constitution-bound political sovereigns, may censor both the words and acts of their members" (p. 87). In creating self-constituted communities of meaning, religious organizations require the ability to make and enforce demands of their adherents. "A community that is unable to adopt and enforce its own vision of harm, based on its own epistemology, quickly ceases to be a community that can engage effectively in acts of self-definition" (p. 89). Here, Carter is not talking about religious minorities imposing their views on the general community, but rather enjoying some measure of self-definition within their own self-constituted communities, communities that exist within the larger, general community. This is a huge distinction.

Professor Carter attempts to claim the same First Amendment status for both kinds of religiously motivated dissent (pp. 89-99). Nevertheless, arguments in favor of creating legal breathing room for religious minorities stand on a very different footing than his pleas for the general community to consider seriously dissent aimed at establishing a theocracy. Dissent in the service of securing legislation accommodating religious practice does not represent an attempt to hijack the institutions of the civil state in the service of *jihad* or pose any serious threat to the maintenance of a pluralistic democracy (pp. 122-30). Both kinds of dissent register disagreement with the policies of the general community, but it seems to me that the general community ought to treat quite differently offensive and defensive species of religiously motivated dissent.

When a religious minority group complains that a general law unduly burdens the ability of its members to meet their obligations of conscience, the community has an obligation to listen. By stipulation, discrete religious minorities are unlikely to enjoy broad representation within democratically elected state legislatures or in the federal Congress. Accordingly, the effects of general laws on discrete religious communities might well fail to register on the political radar screen when a legislative body enacts a general proscription against a particular behavior or an administrative agency enacts a rule regulating a particular kind of behavior.[187]

The Supreme Court has refused to interpret the Free Exercise Clause as excusing members of religious minorities from compliance with general laws.[188] Thus, the ability of religious minorities to obtain exemptions from highly burdensome laws is entirely contingent on their ability to make their case to the general community in an attempt to build a coalition of support for legislatively modifying the general rule that impedes their ability to practice their faith.[189] In this sense, then, an appeal to the body politic constitutes the only potential route of securing effective relief from general, but highly burdensome, laws affecting the ability of a given religion's adherents to practice their faith in deed as well as word.[190]

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187. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *see also* Carolene Prods. Co. v. United States, 304 U.S. 144, 153 n.4 (1938) (noting, but not deciding, that the effect of laws on fundamental liberties, such as freedom of speech and on "discrete and insular minorities" might require a "more searching judicial inquiry" especially if the law at issue might "tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"); ELY, *supra* note 120, at 73-88, 93-94, 101-16, 135-79 (arguing that the federal courts should carefully consider the effect of their decisions on racial and cultural minorities and should, to the extent feasible, construe constitutional text to further the process of "representation reinforcement" (i.e., enhance the relative political voice of permanent racial and cultural minorities within the political community)).

188. *See* Employment Div. v. Smith, 494 U.S. 872 (1990); Reynolds v. United States, 98 U.S. 145 (1878); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997).

189. Of course, if a legislative body enacted a facially neutral general law, but harbored animus toward a particular religious group when enacting the law, such that the law's real purpose was to burden the religious community, the Free Exercise Clause would provide a source of relief. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Undoubtedly, some general laws are the product of religiously motivated animus or hatred; most, however, are not. Moreover, there is no reason to believe that the most burdensome laws to a given religion necessarily will be laws enacted in an effort to burden the group. Thus, benign neglect can be just as deadly to religious minorities as intentional discrimination. Indeed, because instances of benign neglect will not support a free exercise claim under the ruling in *Smith*, 494 U.S. at 878-79, they constitute a much more important impediment to the existence of self-defining religious communities.

190. *See generally* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEXAS L. REV. 209, 212-17 (1994); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 7-10, 30-39, 41-59; William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 304-06 (1996); Eugene Volokh, *A Common Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1481-89 (1999).

Before the community denies a religious community the ability to observe the dictates of the members' collective consciences, it ought to afford the members a fair hearing. When a religious community seeks to establish a system of voluntary rules for its own governance, the community's rules might well run afoul of existing general laws.[191] Perhaps the best recent example involves the Native American Church's practice of ingesting peyote incident to a sacred rite. Many jurisdictions — not to mention the federal government — classed peyote as an addictive, anti-social drug worthy of complete proscription. The facts are a great deal more complicated: peyote is not particularly addictive; it happens to be a powerful emetic, limiting its intrinsic appeal to a general audience; no general street traffic in peyote exists; and the use of peyote is integral to the religious rites of the Native American Church.[192]

On these facts, the case for prohibiting the Native American Church's members from ingesting peyote is incredibly weak. Applying a general policy against the use of psychotropic drugs for recreational purposes simply does not make sense in these circumstances, unless the general society is committed to enforcing its notions of morality on a discrete and insular religious minority simply because it has the raw power to do so. Over time, most jurisdictions have enacted legislation abandoning their prohibitions against peyote, at least if used incident to religious rites by the Native American Church.[193] A dialogue about the necessity of applying general anti-drug laws and policies to peyote facilitated a reasonable accommodation of a religious minority. This is the First Amendment at its best. Moreover, if Professor Carter is correct to suppose that "repeated injuries" will be met at some point with armed resistance (perhaps justifiably), it is far better to engage in a dialogue in the hopes of reaching an arrangement that meets the needs of both the general community and the religious minority.

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191. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding against a free exercise claim, an Air Force regulation prohibiting non-uniform headgear, including yarmulkes); Volokh, *supra* note 190, at 1483-84 (describing how general laws against carrying weapons in public, arguably preclude Sikhs from wearing religiously mandated ceremonial daggers, or *kirpans*, and the potential application of zoning laws to prohibit a religious group from meeting in a private home located in a residential area); Eugene Volokh, *Intermediate Questions of Religious Exemptions — A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 655-56 (1999) (describing the potential effects of ordinary and seemingly reasonable government decisions on persons with nondominant cultural or religious obligations). *But cf.* Cheema v. Thompson, 67 F.3d 883, 885-86 (9th Cir. 1995) (applying the then-valid Religious Freedoms Restoration Act and holding that Sikh school children may wear *kirpans* to school, subject to some elementary safety concerns).

192. *See* Garrett Epps, *To an Unknown God: The Hidden History of* Employment Division v. Smith, 30 ARIZ. ST. L.J. 953, 963, 983 (1998) [hereinafter Epps, *Unknown God*]; Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563, 579-80 (1998) [hereinafter Epps, *Free Exercise*].

193. *See* Epps, *Unknown God*, *supra* note 192, at 999.

In this sense, then, Professor Carter's call for the general community to respect religious dissenters and engage in dialogue with them makes a great deal of sense. When religious minorities are seeking to preserve their very existence — rather than attempting to impose particular theistic commitments on the general community — they must be heard. Of course, it probably would be asking too much of government to create a First Amendment jurisprudence that drew a line between religious speech seeking accommodation and religious speech seeking to establish theocracy. And, as Professor Carter notes, religious communities engage in speech aimed at both objectives.

The only plausible response is to afford all religious dissent a serious hearing. When the object of the dissent is a heartfelt desire to impose a theocratically inspired rule on the general community, a polite "thanks but no thanks" is all the response that religious minorities can rightly demand. Just as a Jehovah's Witness has no general right to occupy a private individual's living room, religious communities have no general right to hijack the institutions and agencies of the civil state in order to implement a particular version of God's will. As the maxim teaches, the road to hell is paved with good intentions. No matter how well-intentioned, overtly religiously inspired, general community regulations raise very serious problems in a pluralistic society.

On the other hand, when religionists seek an accommodation to preserve their very existence or identity, the community should be put to the task that Professor Carter proposes: in these circumstances, the community should be required to offer reasons in support of the application of the general rule to the religious community. Make no mistake, this is not an argument about some absolute right of the religious community to an exemption from a generally applicable law. Instead, it is an argument that religious communities deserve reasons from their fellow citizens when law severs the ability of a believer to put faith into action.

It is, of course, far easier "to say, simply, Do this — and have it done, like the servants of the centurion in the Gospel parable" (p. 99). As Professor Carter cautions, "[t]hat is the sense in which power tends to corrupt, even in a democracy: when one possesses power for too long, law becomes less the glue that knits us together than the name that we give to the conclusions for which we would rather not offer arguments" (p. 99). Carter rightly denominates as a dangerous form of "fundamentalism" a system in which "law need not be explained as long as it is spelled out (inerrantly) and obeyed (unquestioningly), for we *know* it to be right" (p. 99). Thus, when a law denies conscience the freedom to act and the community refuses to give reasons for maintaining the law, religious minorities have a legitimate objection to the community's insensitive behavior. Given the Supreme Court's unwillingness to balance the claims of religious minorities against the

ability of the general community to write and enforce general rules, it is all the more essential that the body politic take seriously religious dissent.

## V. CONCLUSION: HEARING (DIS)HARMONIES IN THE CHORUS OF DISSENT

There is a kind of negative synergy between Professor Shiffrin's and Professor Carter's dissent-based theories of free speech. Professor Shiffrin conceives of a dissent-based theory of free speech as enhancing the relative voice of cultural minorities to achieve a more just state. This project probably does not include laws criminalizing abortion and homosexual sodomy, much less laws imposing other religiously inspired limitations on personal autonomy (particularly when these rules further marginalize already marginalized cultural minorities). Nevertheless, a dissent-based theory of the First Amendment should create as much possibility for reactionary change as it does for progressive change. Thus, free speech critics are probably correct to suppose that the free speech principle is not necessarily conducive to achieving their social agenda.

Professor Shiffrin's effort to translate the free speech principle into a device that empowers minorities fighting for progressive causes seems unlikely to work. To the extent that dissent protects the reactionary or racist speaker as much as the progressive speaker, it conceivably does more harm than good to the project of securing progressive change. Indeed, Professor Carter's vision of dissent would empower those working in direct opposition to many of the causes that Professor Shiffrin appears to hold dear. Thus, if winning is the most important objective, mainland China's approach to dissent seems more likely to prove successful than a serious commitment to free and open debate about matters of public concern.[194]

Similarly, Professor Shiffrin's theory of dissent in the service of progressive change serves as a powerful proof of Professor Carter's basic complaint: religious minorities are being denied their full measure of participation in the project of democratic deliberation. To the extent that religious minorities position themselves in opposition to progressive understandings on issues of race, gender, and sexual orientation, they increasingly face the prospect of being silenced by government officials who have come to embrace the progressives' value structure.

194. *See supra* note 32; *see also* Charles Fried, *Diversity: From Left to Far Left*, WASH. POST, Jan. 3, 2000, at A19 (describing the Association of American Law School's refusal to facilitate joint programs with the Federalist Society, the National Association of Scholars, and the Christian Law Society, all conservative organizations, while cosponsoring events at its annual meeting with the Society of American Law Teachers ("SALT"), a left-leaning organization).

Professor Shiffrin plainly believes that dissent not only creates the possibility of dialogue, but also facilitates change, citing the civil rights movement as an example of how dissent can forge new understandings of justice. If one were to implement fully Professor Carter's vision of dissent, undoubtedly religious dissenters would prevail more often in securing legislative changes that implement their religiously inspired ideals of good governance. That said, Professor Carter's vision is palatable only to the extent that the "dialogue" does not simply exchange one group of oppressed and alienated persons for another (i.e., religious conservatives for women or sexual minorities).

Shiffrin's confidence in the ability of dissent to promote change raises serious questions about the potential effects of fully embracing Carter's proposal for requiring the secular state to justify on the merits every law or policy religious dissenters oppose. Given that dissent provokes change, this sort of "dialogue" undoubtedly would portend mixed results for women, racial minorities, and gays and lesbians, all groups that historically have supported the kinds of "progressive" social policies often opposed by religious fundamentalists.

This, of course, is not an argument for silencing religious fundamentalists. It is, perhaps, an argument that legitimates a response that simply rejects the religious premise of the fundamentalist dissenters; whereas Carter would have the defenders of the secular state justify existing policies on secular grounds in the face of religious opposition, there is no reason that other members of the community (but not the state itself) should not simply reject the religious premises underlying the objections. The state, of course, can itself neither maintain nor suppress particular theological commitments, but all citizens are free to follow the dictates of their conscience, at least with respect to matters of belief. Given the potential effectiveness of dissent in moving public policy, those opposed to one religious tradition should be free to argue against proposed changes in terms that are either secular or religious. Moreover, if religious dissenters lose this debate, it hardly justifies making war against the state.

In sum, a meaningful commitment to dissent is a kind of social wager, an experiment that guarantees a process, but does not prefigure any outcomes.[195] Considering the potential effect of a particular the-

195. In the immortal words of Justice Holmes:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

ory of freedom of expression on dissent provides an excellent means of analyzing the plausibility of the theory; a free speech theory that fails adequately to protect dissent should be highly suspect. Of course, it is one thing to evaluate free speech theories according to how dissent would fare; it is entirely another to posit dissent as the sum and substance of the Free Speech Clause. For the reasons set forth in this Review, a dissent-based theory of free speech presents very serious problems, at least insofar as one wishes to maintain viewpoint neutrality as a central component of the free speech project.

On the other hand, notwithstanding the definitional and operational difficulties, securing the protection of political speech of a "dissenting" cast has to be an important, indeed essential, objective of any plausible theory of free speech. As Professor Vincent Blasi has explained, "the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[196] How best to achieve this objective, both jurisprudentially and doctrinally, remains elusive. Although Blasi may be correct to suppose that "[i]t is doubtful that legal standards could ever be designed with sufficient prescience and precision"[197] to constrain effectively the lower federal courts' discretion when faced with difficult free speech cases, a system that openly invites entirely intuitive or ad hoc decisions about the relative value of speech activity surely presents a greater threat to project of democratic deliberation.[198] Because the threat to free speech principles is likely to be most acute in times when the value of dissent is potentially at its highest,[199] an ideal test

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

196. Blasi, *supra* note 23, at 449-50.

197. *Id.* at 467.

198. Indeed, Professor Blasi seems to recognize this:

> Courts working within a first amendment tradition that authorized judicial inquiry into motivation, impact, and form would be tempted in pathological periods to find *something* distinctive in the speech of the most unpopular dissenters (concerted or surreptitious conduct, indoctrination, nihilistic motivation, coercive or selective impact) that would place it outside the ambit of first amendment protection. An expansive tradition regarding the reach of the first amendment would make it more difficult for judges to invoke such characteristics as a basis for suppressing speech.

*Id.* at 477-78. Justice Hugo Black, of course, strongly endorsed the utility of strict tests and bright lines, believing such tests essential to prevent judicial backsliding. *See* Barenblatt v. United States, 360 U.S. 109, 140-44 (1959) (Black, J., dissenting); Dennis v. United States, 341 U.S. 494, 579-81 (1951) (Black, J., dissenting); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 866-67, 874-76, 880-81 (1960); *see also* Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 552-55, 557-59 (1962); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 441-53 (1967).

199. *See id.* at 485 ("Any ad hoc assessment of the benefits and costs of speech that is made during pathological times is bound to be tilted in the direction of regulation; that is an

would therefore safeguard dissent even when the social or political consequences of doing so might well be uncertain.[200]

At least arguably, Professor Shiffrin's dissent theory does not take seriously enough the problem of enforcement through personnel selected by majoritarian representatives — personnel who presumably would share the attitudes, values, and prejudices of the dominant groups within the community. Conversely, Professor Carter's basic objection is that cultural elites already ignore or silence the speech of religiously motivated dissenters. Neither Professor Shiffrin nor Professor Carter offers up a comprehensive and potentially effective program of reform — a prescription that would ensure that dissent remains an important component of the process of democratic deliberation. That said, both authors significantly advance the debate and bring a much needed renewed focus on centrality of dissent to the free speech project.

Almost any free speech theory is likely to engender immediate objections — objections that, as often as not, will lead to various "clarifications" or "amendments." The author, thus, gradually refines the theory to include speech that she believes should enjoy constitutional protection (but arguably does not under the initial articulation of the theory).[201] Over three decades ago, Professor Harry Kalven suggested that a commitment to permitting free (even if factually inaccurate) commentary on the government constituted the "central meaning" of the Free Speech Clause.[202] To be sure, this is a plausible theory. On the other hand, myriad alternate theories exist, and it would be difficult — if not impossible — to devise a single animating purpose that adequately would encompass all the reasons why citizens should view free speech as an essential right in a pluralistic, participatory democracy. Accordingly, discovering the "central meaning" of the First Amendment's Free Speech Clause almost certainly will remain a work in progress, and attempts to limit attention to a single aspect of the free speech project are likely to do more harm than good.

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inevitable consequence of the shift in attitudes regarding the desirability of free speech that characterizes such periods.").

200. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *but cf.* Blasi, *supra* note 23, at 507-09 (describing the failure of the federal courts to afford strong protection to dissenters in periods of perceived national crisis).

201. *See, e.g.*, Meiklejohn, *The First Amendment*, *supra* note 9, at 256-57 (modifying the "democratic deliberation" theory of free speech to reach the arts and literature because an educated population is necessary to sustain self-government). Of course, many would argue that the arts and literature have value independent of the role they play (if any) in facilitating self-government. Moreover, as Professor Robert Post has noted, Meiklejohn's original thesis also fails to incorporate the importance of autonomy values to free speech theory. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 268-76, 282-89 (1995).

202. *See* Kalven, *supra* note 7, at 204-21.

Professors Shiffrin and Carter have provided rich commentaries on the centrality of dissent to free speech theory and jurisprudence — albeit from different ideological perspectives. Their books are important contributions to the ongoing dialogue about the First Amendment. That said, I do not think that either has succeeded in ending the quest for the central meaning of the First Amendment. Nor is this, in any meaningful way, a bad thing. The journey — the search for the ultimate answer — can sometimes be more important than attaining the object of the quest. It seems fitting to conclude with another cautionary note from Justice Jackson's opinion in *Barnette*:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.... Ultimate futility of such attempts to compel coherence is the lesson of every such effort, from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.... It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.[203]

203. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 640-41 (1943).

# THE IMPORTANCE OF BEING BIASED

*Anthony M. Dillof**

PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW. By *Frederick M. Lawrence.* Cambridge: Harvard University Press. 1999. Pp. xi, 269. $39.95.

The war against bias crimes is far from finished. In contrast, the battle over bias-crime *laws* is largely over. Bias-crime laws, as commonly formulated, increase the penalties for crimes motivated by bias. The Supreme Court has held that such laws do not violate the First Amendment.[1] Virtually every state has enacted some sort of bias-crime law.[2] Even the federal government, which may consider itself without power to enact a general bias-crime law,[3] has made bias a

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1. *See* Wisconsin v. Mitchell, 508 U.S. 476, 476 (1993). Some bias-crime laws may be open to challenge on other constitutional grounds. In *State v. Apprendi*, 731 A.2d 485 (N.J.), *cert. granted*, 120 S. Ct. 525 (1999), the New Jersey Supreme Court reviewed a law that made bias a sentencing factor that would increase the maximum sentence to which a defendant is subject. According to the defendant, this law violated the Due Process Clause's guarantee that every sentence increasing fact be found by a jury under the reasonable doubt standard. The New Jersey Supreme Court rejected this contention based on its interpretation of Supreme Court precedent. *See id.* at 493-95. The United States Supreme Court will rule on the constitutionality of the New Jersey law this year. The constitutionality of the New Jersey law is far from certain. *See* Jones v. United States, 526 U.S. 227, 251-52 (1999) (finding it unsettled whether all sentence-range maximizing facts must be proven beyond a reasonable doubt). Even if the New Jersey law is struck down, however, states will be free to enforce bias-crime laws in which the existence of bias is not treated as a sentencing factor, but as an offense element to be proven at trial. *Apprendi* thus concerns the manner in which states will be required to establish the existence of bias, not the constitutionality of bias-based penalty enhancements generally.

2. *See* The Staff of the Syracuse Journal of Legislation & Policy, *Crimes Motivated by Hatred: the Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y, 29, 37 (1995) (reporting that, as of 1995, bias-crime legislation of some sort had been enacted by 47 states) [hereinafter Staff].

3. Congress is undoubtedly aware of recent Supreme Court jurisprudence restricting its power to criminalize conduct, *see* United States v. Lopez, 514 U.S. 549 (1995) (striking down an act making carrying a gun in a school zone a federal offense), and has been informed that its power to enact general bias-crime legislation is doubtful. *See The Hate Crimes Prevention Act of 1998: Hearing on S.J. Res. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. 39-44 (1998) (testimony of Lawrence Alexander, Professor of Law, University of San Diego) (urging that Congress lacks authority under the Commerce Clause and the Thirteenth Amendment's Enforcement Clause to enact a general bias-crime law).

sentence-aggravating factor for the range of federal criminal offenses.[4] Bias-crime laws thus are an established feature of the legal landscape.

Against this background, Frederick Lawrence[5] has written *Punishing Hate: Bias Crimes Under American Law*. *Punishing Hate* is not a work of radical vision. It blazes no new trails in its method or its conclusions. Rather, it is a careful reconstruction of reasons and arguments underlying the current consensus approval of bias-crime laws. Accepting that bias should matter for the criminal law, it implies a better theory is needed of why bias should matter, and seeks to provide that theory.

To explain the importance of being biased, Lawrence analyzes bias-crime laws within the context of traditional moral theories and orthodox First Amendment concerns. He cogently explains the basic form and function of bias-crime laws, offers some useful refinements for their formulation, vigorously defends their moral soundness and constitutionality, and forcefully advocates their adoption by the federal government. Throughout, Lawrence displays an unwavering commitment to the ideal of equality, never leaving his readers in doubt as to where his sympathies lie. Occasionally voyaging into sophisticated areas of moral philosophy, criminal theory and federal jurisprudence, Lawrence presents his subjects with accessible, deliberate, and sometimes stirring prose. *Punishing Hate* also includes a number of extensive and well-researched appendices making the book a useful scholarly tool. Thus, Lawrence has written what may come to be regarded a classic liberal treatment of bias crimes and the laws governing them.

To say that Lawrence has presented a classic liberal treatment of his topic, however, is not to say that his valorizing of bias-crime laws will persuade the as-yet unconverted. Encompassing a variety of independent ideals, liberalism[6] occasionally yields merely plausible answers to difficult social issues. As will be discussed, Lawrence in *Punishing Hate* often seems to give unjustified priority to the ideal of equality. When the moral issues concerning desert become controversial, when the empirical evidence concerning social impact becomes thin, when the proper formulation of a law becomes debatable, when

4. *See* U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1998-99). Section 3A1.1(a) provides:

> If the finder of fact at trial ... determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

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6. By "liberalism," I refer to a range of positions distinguished by their commitment to the rule of law, political and intellectual freedom, toleration, opposition to racial and sexual discrimination, and respect for the rights of individuals. *See* Jeremy Waldron, *Liberalism*, *in* 5 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 598 (Edward Craig ed., 1998).

the commands of the Constitution become unclear, when the meaning expressed by an official act becomes ambiguous, Lawrence is willing to let the rhetorical appeal of equality carry the day. Thus, while Lawrence does not settle for simplistic answers to the questions he asks, he often does not ask the hardest questions.

Intellectually, bias crimes are located at the intersection of sociology, moral philosophy, criminal justice, American history, clinical psychology, and cultural studies. *Punishing Hate* thus attempts to cover an enormously complex topic in relatively few pages. Lawrence's strategy is to concentrate on the issues of greatest concern to his intended audience: the interested layperson, the lawyer, and the legislator. In this Review, I shall strategically limit myself to discussing the three major issues of concern to Lawrence: the justification of bias-crime laws, the constitutionality of bias-crime laws, and the role of the federal government in prosecuting bias-crimes.

## I. THE JUSTIFICATION OF BIAS-CRIME LAWS

In Chapter Three, Lawrence examines the central normative question: Are the increased penalties provided by bias-crime laws morally justified? Lawrence answers this question by applying both traditional consequentialist/utilitarian and deontological/retributive theories of punishment to bias-crime laws. Although such theories reflect deep philosophical differences, in practice they often converge. Both theories recognize that, generally speaking, the greater the harm associated with a criminal act, the greater the appropriate penalty. Likewise, both theories recognize that the mental state of the perpetrator is relevant in determining the magnitude of the penalty. There may, of course, be instances where consequentialist concerns for deterrence or incapacitation would authorize greater penalties than those recommended by desert-based forms of retributivism. Because such results are arguably unjust, Lawrence rejects a pure utilitarian theory of punishment in favor of a mixed theory, i.e., a utilitarian theory of punishment with desert-based side-constraints (p. 50). He then examines bias crimes in light of the mental states and harms associated with them. As discussed below, he concludes that both pure retributive and mixed theories of punishment support bias-crime laws.[7]

7. Lawrence's conclusion in Chapter Three that bias-crime laws are warranted is ambiguous at best. Lawrence writes, "[Chapter 3] argues that bias crimes ought to receive punishment that is more severe than that imposed for parallel crimes." P. 45. To support this claim, Lawrence invokes both positive retributivist as well as mixed theories of punishment. Pp. 46, 50. These theories purport to recommend when a particular punishment ought to be imposed. Nevertheless, Lawrence later characterizes his discussion as merely establishing that enhanced penalties *may* be imposed, not that they ought to be imposed. P. 161.

Lawrence begins with a deontological justification based on the bias criminal's mental state.[8] According to Lawrence, this deontological justification is the one espoused by "most supporters" of bias-crime laws (p. 61). This justification asserts that bias criminals are more deserving of punishment than other criminals without appealing to the independent contingent premise that bias crimes cause greater harm than similar crimes not motivated by bias ("parallel crimes"). The justification begins with the unassailable premise that those who kill intentionally are more blameworthy, and hence more deserving of punishment, than those who kill negligently (p. 60). Likewise, so goes the argument, bias criminals are more blameworthy than other criminals. Why should bias criminals be especially blameworthy by virtue of their motivation? Lawrence explains that "[t]he motivation of the bias-crime offender violates the equality principle, one of the most deeply held tenets in our legal system and our culture" (p. 61).

It is unclear to what extent Lawrence endorses this most widely espoused justification of bias crimes. Lawrence states the justification with implicit approval. Elsewhere in the book, he expresses similar sentiments (pp. 38-39, 75). In explaining the grounds for bias-crime laws, however, Lawrence often refers to only justifications based on increased harms associated with bias crime (pp. 4, 5, 40, 45, 80, 95, 175).

Lawrence is sensible to de-emphasize this deontological justification of enhanced penalties. It is flawed. From a deontological perspective, mental states generally are considered relevant to blameworthiness because they speak to the *responsibility* of the offender for her wrongful act.[9] Purpose, knowledge, recklessness, and negligence are the four organizing mental states of the Model Penal Code.[10] They

8. I pass over Lawrence's discussion of the consequentialist significance of the bias criminal's mental state. Rather than looking at traditional consequentialist issues such as the bias criminal's susceptibility to general deterrence or need for incapacitation, Lawrence argues that bias motivation is associated with more brutal crimes. P. 60. The argument, thus, relies on the harmfulness of bias crimes relative to other crimes, a topic Lawrence treats (and I discuss) in greater detail later.

Lawrence advances an additional consequentialist argument based on mental states. According to Lawrence, just as intentional vehicular homicide should be punished more than negligent vehicular homicide because negligent driving has some positive social value (where no accident occurs), so bias crimes should be punished more than other intentional crimes. P. 60. This is unconvincing. Unlike negligent conduct, the conduct involved in intentional crimes, whether motivated by bias or not, generally has no positive social value. Thus, no distinction should be made between bias and other intentional crimes. Lawrence's argument needs much greater elaboration.

9. *See generally* Michael S. Moore, Prima Facie *Moral Culpability*, 76 B.U. L. REV. 319, 319-25 (1996) (explicating relevance of mental states to culpability).

10. *See* MODEL PENAL CODE § 2.02(2) (1962). The Model Penal Code does not explicitly define "negligently" as a mental state. *See* MODEL PENAL CODE § 2.02(2)(d). Nevertheless, a mental state is supposed. In order to be negligent with respect to a material element, a person must be aware of facts that would lead a reasonable person to be aware of a substantial risk that a material element exists.

serve to establish the precise degree of responsibility the wrongdoer bears for the harm she has caused. An actor who rationally, intentionally, and deliberately commits an assault based on racial bias is no more responsible for the assault than one who similarly commits an assault based on greed. They both are, we might say, maximally responsible for the wrong of assault and so are equally blameworthy. Of course, the greed-driven offender merely knows the race of his victim and so is not as responsible for his victim's being of a particular race. A bias criminal is exactly a criminal who may be held fully accountable not only for causing harm, but also for the harm's being caused to a victim of a certain identifiable group. The group identity of the victim, however, is irrelevant to the wrongfulness of the assault. African Americans, for example, have no greater right not to be assaulted than whites and, as a general matter, deserve no greater protection.[11] A person who intentionally assaults an African American is not thereby responsible for a greater right violation than a person who commits an intentional assault indifferent to the race of his victim. Bias motivation does not increase the perpetrator's responsibility for any morally relevant aspect of the assault.[12]

On some accounts, however, mental states are relevant to blameworthiness not because they imply greater responsibility for a harm, but because they reflect the flawed character that is the underlying cause of the crime.[13] By rejecting the equality principle — "one of the most deeply held tenets in our legal system and our culture" (p. 61) — the bias criminal, it may be argued, reveals his character to be more deeply flawed than that of the ordinary criminal.[14]

Without taking a position on the general validity of character theories of punishment, I do not believe that such theories provide support for bias-crime laws. The equality principle does not appear to possess the privileged position that Lawrence ascribes to it. Although

11. Bias-crime laws protect all groups equally. A law that provided enhanced penalties for crimes against only those of a particular racial or religious group likely would offend principles of substantive equality. I do not know any advocates of such group-specific laws, and I do not understand Lawrence as supporting bias-crime laws on the ground that they are covert minority-protection laws.

12. This point, like many others raised in this Review, is more fully developed in my article on bias-crime laws. *See* Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. L. REV. 1015 (1997).

13. *See, e.g.*, R.A. Duff, *Choice, Character, and Criminal Liability*, 12 L. & PHIL. 345, 362 (1993) ("The proper focus of the criminal process is not, the 'character' theorist argues, on the particular actions for which a defendant is formally convicted and sentenced, but on some character-trait that his criminal act revealed."); Michael S. Moore, *Choice, Character, and Excuse*, SOC. PHIL. & POL'Y, Spring 1990, at 29, 31-40.

14. *See* Jeffrie G. Murphy, *The State's Interest in Retribution*, 283 J. CONTEMP. LEGAL ISSUES 283, 285 (1994) (characterizing bias-crime laws as punishing in response to a person's particularly great inner wickedness); *see also* Paul H. Robinson, *Hate Crimes: Crimes of Motive, Character, or Group Terror?*, 1992/1993 ANN. SURV. AM. L. 605, 609 (considering, but rejecting, such a theory as inconsistent with traditional criminal law theory).

Lawrence does not explicitly define it, the equality principle roughly appears to be the principle that individuals should be treated without regard to race, color, religion, or other characteristics that historically have been the basis for widespread discrimination (pp. 11-20). So defined, this principle has ascended undoubtedly in importance in our culture and legal system in recent decades. Yet it is only one among many important ideals. Our culture and legal system equally cherish the principles of fairness, human dignity, autonomy, altruism, reciprocity, forgiveness, loyalty, and self-expression to name a few. Sadists, wife-beaters, loan sharks, child molesters, drug pushers, and their ilk generally act on motives as abhorrent as bias and generally have characters that are equally flawed. The standard penalty levels are believed sufficient to deliver the punishments they deserve. They should be sufficient for bias criminals as well.

Lawrence's harm-based analysis is more convincing. In arguing that bias crimes cause greater harms than parallel crimes, Lawrence takes both an ex ante and an ex post perspective on bias crimes.[15] Ex ante, Lawrence contends, a rational person would prefer to be the victim of a parallel crime because of the deep psychological harm that bias crimes may inflict (pp. 61-62). Is this correct? Deep psychological harm can be caused by perceived attacks on one's identity or sense of self. Some people's identities are based primarily on their race and religious affiliations. Other people's however are based on their family, hobbies, profession, ties to their community, commitments to sport teams, their college, state, and so on. Most people in our pluralistic and polymorphous culture define themselves by reference to many independent categories. I, for example, am a law professor, a Mets fan, a person of Ukrainian extraction, a cat owner, and an advocate of abortion rights. If, one day, I found the tires of my car slashed, I am not at all sure that, ex ante, I would prefer to learn that the perpetrator was a student appalled at my teaching ability, a law professor offended by my review of his book, a radical anti-abortion activist, or a crazed Yankees fan who wanted to strike out at *my* team. Each scenario carries its particular pain.

Indeed, it is deeply disconcerting to be the target of "random" violence. I remember being mugged as a teenager one night by a group of older teens who, in retrospect, probably had nothing better to do that night. As their blows rained down, I recall being overcome by the sheer senselessness of why I, a completely anonymous person to them, would be the target of their aggression. An explanation of any type, even one that included the despicable proposition "they think Jews deserve it" might have been more satisfying than contending with the unanswerable existential question "Why me?" As Lawrence

15. Lawrence does not discuss the relation of these perspectives. It is not clear whether he believes they are equivalent or, if they diverge, which should control.

recognizes, bias crimes are crimes based neither on relatively unique attributes of the individual (such as past personal relations with the perpetrator) nor extremely common characteristics (such as carrying a wallet) (pp. 9, 62). The characteristics on which bias crimes are based, for example race and religion, fall somewhere in between. Lawrence, however, does not explain why crimes based on such middle-level characteristics result in "unique humiliation" (p. 62). Although in one passage, Lawrence theorizes that minority victims of bias crimes experience attacks as forms of racial stigmatization (p. 41), elsewhere he undercuts that theory by citing evidence that minority victims of bias crime do not experience greater psychological trauma than white bias-crime victims (p. 40).

More persuasive is Lawrence's harm-analysis from an ex post perspective. Here, Lawrence relies on newspaper accounts and sociological studies documenting the feeling of depression and anxiety among bias-crime victims (pp. 63, 224 n.66). These works, however, suffer from baseline questions. Bias-crime victims may suffer greater psychological harms, but compared to whom? As offenses vary greatly in circumstance and participants, there are likely many categories of victims of a given offense who also suffer greater depression and anxiety than the average offense victim. Those assaulted on holidays, by alcoholics, by spouses, in prisons, in public, or the complementary sets of victims, may experience greater than average psychological harm. As Lawrence recognizes, the criminal law can operate only with a small number of levels of felonies and misdemeanors (p. 56). Thus, to justify an enhanced range of punishments, bias crimes must form a relatively tight class of crimes resulting in special psychological damage. None of the research cited by Lawrence compares bias crimes with other potentially psychologically harmful subclasses of parallel crimes — such as assaults based on sadism, gang-violence, random victim selection, political affiliation, or intense personal animosity — all of which can be accommodated, it is thought, under the standard set of penalty levels.[16]

There is a further, generally unnoticed, issue associated with Lawrence's claim that the greater psychological harm suffered by bias-

16. Studies cited by Lawrence, such as Joan C. Weiss, *Ethnoviolence: Impact upon and Response of Victims and the Community*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES 174, 182 (1993), only compare bias crime to the general category of "personal" crimes.

There is a second baseline question. It is not clear that the degree of physical violence is held constant when the psychological impacts of bias and parallel crimes are compared. Bias crimes tend to be more violent than parallel crimes (p. 39). Their greater violence, rather than their victims' perceptions of bias motivation, could explain their greater psychological impact. Moreover, the statistically greater physical violence involved in bias crimes does not justify treating these crimes separately as a uniquely penalized class of offenses; the standard set of criminal laws and penalty ranges is thought already sufficient to accommodate the subclass of particularly violent instances of crime.

crime victims justifies the harsher punishment of bias criminals. Harm, as used in either consequentialist or retributive theories, is a concept with a normative component. Not every unwanted occurrence constitutes a harm that justifies deterring the conduct that produced the unwanted occurrence. Likewise, not every setback of interests constitutes a harm that is relevant to determining the punishment an actor deserves.[17] For example, if a man is greatly disturbed by the knowledge that his neighbor reads heretical literature on Sunday, this disturbance should not be recognized as a harm for purposes of punishment. One way to reach this conclusion is to reason in a Rawlsian manner that self-interested individuals who value liberty would not agree in advance to restrictions on intellectual liberty based on the potentially unlimited sensitivity of second parties.[18] Another way to reach the conclusion is to rely on the basic moral premise that it is simply no business of one person what another reads — a person has a sphere of privacy and others have no claim to control what goes on within that sphere.[19] One's thoughts, to the extent they do not evidence future wrongdoing, are arguably within such a sphere.[20] Our thoughts are paradigmatically private matters. They help define who we are and reflect only our subjective beliefs and values. It would be generally conceded that adhering to racism as an abstract principle or even engaging in generally lawful and innocuous activities because of one's racism, such as closing one's store to honor Hitler's birthday, should not be grounds for punishment even if the fact of one's racism or the racist reason for one's action may greatly disturb another.[21] Indeed, the appreciation that such actions are another's, and hence not

17. *See* JOEL FEINBERG, HARM TO OTHERS 31-36 (1984) (distinguishing setbacks from harms and noting that a sense of harm carries normative implications).

18. *See* JOHN RAWLS, A THEORY OF JUSTICE ch. III (1971).

19. *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969) (invalidating a state statute prohibiting possession of obscene materials in the privacy of the home).

20. The claim to dominion over one's own thoughts has Lockean roots. *See* JOHN LOCKE, Second Treatise of Government § 27, *in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2d ed. 1967); *see also* Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 78 (1997) ("If we have the rights to control anything, it is the contents of our minds."); III Lysander Spooner, *The Law of Intellectual Property: or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas*, *in* THE COLLECTED WORKS OF LYSANDER SPOONER 58 (Charles Shively ed., 1971) ("Nothing is, by its own essence and nature, more perfectly susceptible of exclusive appropriation, than a thought.").

21. Concerning the feelings of outrage that one person's religious views might cause another, John Stuart Mill argued:

> [T]here is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it. And a person's taste is as much his own peculiar concern as his opinion or his purse.

JOHN STUART MILL, ON LIBERTY WITH THE SUBJECTION OF WOMEN AND CHAPTERS ON SOCIALISM 84 (Stefan Collini ed., 1989) (1859).

part of our individual identity, enables us to live with another's objectionable attitudes. Admittedly more controversial are cases where the attitudes give rise to actions, such as bias crimes, that wrongfully impinge on others. Perhaps here, the victim has some claim to being psychologically harmed by thoughts that generally are not cognizable grounds for complaint. But there is a respectable normative argument that only the conduct, or, at most, the intent to engage in the conduct, is the legitimate concern of the victim.[22] This argument undoubtedly is bolstered by the proposition, advanced earlier,[23] that motives relating to race or other morally neutral characteristics do not increase the actor's responsibility for a given wrong or manifest a worse character. If a particular motive should not matter to a person determining the actor's punishment, why should it matter to the person harmed? Following this line of reasoning, the actor's motives, even if they generally are of concern to the victim, should not be. One's legitimate area of grievance ends where another's underlying thought processes begin. Any complete inquiry into the moral justification of bias-crime laws should address this issue.[24]

A further short-coming of Lawrence's attempt to justify bias-crime laws is his failure to apply his theoretical justifications to either existing bias-crime laws or his own model bias-crime law. It is fair to concede that bias crimes, generally speaking, create greater apprehension in the target community and produce greater trauma in society at large than crimes from other motivations. These effects, however, are diffuse. Compared to the other sorts of harms the criminal law seeks to prevent, these effects are difficult to identify and quantify. In contrast, the enhanced penalties authorized by bias-crime laws are concrete and specific. Such laws cannot be considered justified unless the amount of the additional penalty is justified. If the devil is in the details, Lawrence's failure to deal with these details bedevils his argument. A hypothetical bias-crime law that imposed a $20 fine in addition to the penalty for the underlying crime likely would meet little objection from those who believe that desert should place a ceiling on unjustified punishment. A bias-crime law that imposed a mandatory additional twenty-year penalty likely would be considered objectionable

22. It may be that "even a dog distinguishes between being stumbled over and being kicked." OLIVER WENDELL HOLMES, THE COMMON LAW 7 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881). It is another question whether the dog cares what inadequate reason motivated the kick.

23. *See supra* text accompanying notes 9-15.

24. In a later part of the book, Lawrence in fact distinguishes between an offense caused by racial motivation and apprehension of future physical harm that may be caused by a bias crime. He argues that, for the purpose of justifying bias-crime laws under the First Amendment, only the apprehension of future physical harm is relevant. P. 102. He does not, however, elaborate on the grounds of the distinction, and it is not clear whether he thinks it reflects a general moral principle as suggested above.

by even hard-core supporters of bias-crime laws. In fact, the penalty enhancements established by most bias-crime laws fall somewhere in between.[25]

Lawrence concludes his book by offering a model bias-crime law that is supposed to embody his considered opinions concerning the nature, scope, and necessity of bias-crime laws (pp. 170-71). Lawrence's model law takes the not uncommon approach of providing for a penalty enhancement of one or two sentencing levels. Assuming a background penal code like the Model Penal Code, Lawrence's model law would authorize the punishment of a bias-motivated act of criminal trespass resulting in a loss of under $25 at the level of an assault with a deadly weapon; a simple assault based on bias at the level of an aggravated assault manifesting extreme indifference to human life; and a bias assault with a deadly weapon as a murder.[26] Even in qualitative terms, these are significant penalty enhancements. To my mind, the equivalences in desert they suggest are problematic.[27] Lawrence admits that his purpose is not to determine the precise amount of penalty enhancement appropriate for every possible bias offense (pp. 222-30). But unless he demonstrates that the appropriate penalty enhancement is great enough to, at least, move a bias crime into the next highest penalty level, he cannot claim to have presented a full defense of bias-crime laws.

## II. THE CONSTITUTIONALITY OF BIAS-CRIME LAWS

In Chapter Five, Lawrence asks "[a]re bias-crime laws constitutional" (p. 80)? The quick and easy answer, based on *Wisconsin v. Mitchell*,[28] is "yes." In *Mitchell*, the Supreme Court squarely held that a Wisconsin statute establishing increased sentences for bias crimes did not violate the First Amendment.[29] Lawrence, however, does not rest with the positive law orthodoxy of the current Court. Nor does he attempt to work through the thicket of First Amendment cases and

25. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 480 (1993) (upholding a state bias-crime law that permitted a five-year sentencing enhancement).

26. *See* MODEL PENAL CODE §§ 210.2, 211.1, 220.3 (1962).

27. *Cf.* Lawrence Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1992/1993 ANN. SURV. AM. L. 485, 495 ("[M]y own intuition . . .[is] that it is excessive for an assault that would otherwise receive a two-year sentence to receive instead a seven-year sentence . . . .").

28. 508 U.S. 476 (1993).

29. Bias-crime laws are open to challenge on grounds other than the First Amendment. Such challenges, however, are directed at only the procedures that implement bias-triggered penalty enhancements, and so only contingently involve bias-crime laws. *See supra* note 1. Lawrence reasonably limits his discussion of the constitutionality of bias-crime laws to their consistency with the First Amendment and their arguably novel focus on motive.

doctrine that the extensive literature on the topic engages.[30] Rather, Lawrence seeks to explore whether bias-crime laws are consistent with the deep and well-established values and principles lying at the heart of the First Amendment.[31] Lawrence does not give these values and principles short shrift. He portrays himself as a First Amendment stalwart in his view that racist speech should be protected (p. 82). Nevertheless, Lawrence ultimately concludes that bias-crime laws and the First Amendment are consistent and that it is possible "both to punish the bias criminal [pursuant to bias-crime laws] and to protect the right of the bigot to express his beliefs" (p. 80). Lawrence thus sets himself the project of distinguishing between bias crimes, which may be subject to enhanced penalties, and bias speech, which may not. This is a challenging project given that some speech may be criminal, some criminal conduct may be expressive, and both may be motivated by bias.

### A. *Bias-Crime Laws and Free Speech*

Where does bias speech end and bias crime begin? To answer this question, Lawrence proposes a "reformation" (p. 99) of the "fighting words" doctrine. The fighting words doctrine, as it now exists, permits the banning of words that tend to incite an immediate breach of the peace.[32] Lawrence points out, however, that the doctrine, as it was originally formulated in *Chaplinsky v. New Hampshire*,[33] permitted the banning of, not only words that tended to incite an immediate breach of the peace, but also those that by their very utterance inflicted injury. According to Lawrence, the Supreme Court, in choosing to em-

30. *See, e.g.*, Madsen v. Women's Heath Ctr., 512 U.S. 753, 762-64 (1994) (holding that an injunction against anti-abortion protests was not improperly content based); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (stating that listeners' reaction to a speech is not a content-neutral basis for regulation); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (considering the First Amendment protections of nude dancing); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105-23 (1991) (invalidating content-based regulation on speech intended to benefit crime victims); Texas v. Johnson, 491 U.S. 397 (1989) (invalidating a state restriction on burning the American flag); City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47-48 (1986) (discussing the significance of a legislative motive to suppress speech); California v. Cohen, 403 U.S. 15 (1971) (recognizing the constitutional right to wear a jacket bearing an offensive slogan about the draft).

31. Lawrence identifies "the right to free expression" as lying at the heart of our legal culture. P. 80.

32. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 522 (1972) (defining fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))). The scope of the fighting words doctrine as it currently exists, is discussed in Melody L. Hurdle, *Recent Development*, R.A.V. v. City of St. Paul: *The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143, 1174 (1994) (suggesting that fighting words should be defined in terms of their minimal contribution to the marketplace of ideas).

33. 315 U.S. 568, 572 (1942).

phasize the first type of fighting words and ignore the second, took the wrong path. Lawrence writes, "If *Chaplinsky* is to have any contemporary vitality, it must be understood to place outside the First Amendment's reach those words that are intended to and have the likely effect of creating fear of injury in the addressee" (p. 102). Lawrence, however, is careful to distinguish the fear of injury and the mere wounding of feelings. "Words that have the intent to hurt the addressee's feelings, even those that also have that effect, however unfortunate, do not come under this understanding of fighting words" (p. 102). This distinction between words that portend harm and words that merely wound feelings, not that between "conduct" and "speech," is the key to drawing the line between constitutionally proscribable bias crimes and constitutionally protected hate speech. Thus, Lawrence concludes, "Racially targeted actions that are intended to create fear in the addressee and that are likely to do so may be treated as bias crimes .... [R]acially targeted behavior that vents the actor's racism is racial speech that is protected, even if it disturbs the observer greatly" (p. 102).

It is not clear that Lawrence needs to reformulate the Supreme Court's fighting words jurisprudence to get where he wants to go. Words used to communicate realistic threats of violence — "Your money or your life" — are uncontroversially subject to state control. There are no serious First Amendment challenges to the tort of assault or the crime of menacing even though words often are used in conjunction with other factors to perpetrate these unlawful acts. There are, however, three difficulties with drawing the distinction between proscribable conduct and protected speech along the lines Lawrence suggests.

First, the distinction between racially targeted action that creates fear of injury and racially targeted conduct that vents the actor's racism is unsound. Racially motivated conduct may simultaneously create fear and vent racism. The distinction thus is as problematic as the distinction between verbal acts ("speech") and nonverbal acts ("conduct") that Lawrence rejects as inadequate to demarcate the protected/proscribable boundary (pp. 89-92). Furthermore, racially based conduct that may be proscribed (bias crimes) should not be identified with acts that create fear of injury in the addressee. Under most bias-crime laws,[34] a white teenager who anonymously slashes the tires of an African-American person's car because of bias commits a bias crime even if he reasonably believes his act will be perceived as one of random vandalism, not bias. If the enhanced punishment of this act as a bias crime is constitutional, it cannot be because it involves the intent or effect of creating fear of injury in the addressee.

34. *See* Apps. B-E (presenting representative bias-crime laws).

Second, Lawrence's identification of bias crimes with acts that are intended to and will have the likely effect of creating fear of injury does not extend sufficient protection to racially motivated expressive conduct. The march of Nazi sympathizers in Skokie, Illinois might be described as a "[r]acially targeted action[] that [is] intended to create fear in the addressee and [is] likely to do so" (p. 102). Likewise, in the 1950s, the public advocacy of communism may have created in some the fear of being injured in the course of a violent uprising. Such acts, however, clearly are protected under the First Amendment.[35] They critically differ from assault and menacing because these latter acts, by definition, require the creation of at least the fear of immediate injury.[36] The First Amendment traditionally has required courts to consider the concreteness and temporal proximity of the threatened harms.[37] Are the fears of future injury caused by bias crimes closer to the fears of immediate injury associated with assault and menacing or the speculative fears associated with neo-Nazism or a possible communist-inspired uprising? In the latter cases, the time frame, perpetrator, circumstances, and type of violence feared are indefinite and unspecified. Likewise, the fear of injury, or "heightened sense of vulnerability" (p. 40), that bias crimes create are indeterminate in these respects. Just as the general apprehension generated by racist demagoguery and demonstration should not support a prison term under free speech principles, so the general apprehension produced by bias crimes should not support an additional prison term.[38]

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35. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (striking down a law that criminalized advocating violence to effect political reform); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (invalidating an ordinance that would have denied a parade permit to a neo-Nazi group).

36. *See, e.g.*, MODEL PENAL CODE § 211.1(1)(c) (1962); ALA. CODE § 13A-6-23 (1994); KY. REV. STAT. § 508.050 (1999); N.D. CENT. CODE § 12.1-17-05 (1999); OR. REV. STAT. § 163.190 (1997).

37. The "clear and present danger" test can be seen in a chronology of Supreme Court cases forming and incorporating the test. *See* Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) (reversing a conviction for a statement generally advocating lawlessness at an indefinite future time); Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam) (stating that advocacy, to be criminalized, must be "directed to inciting or producing imminent lawless action. . ."); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (requiring "clear and imminent danger of some substantive evil" for criminalization); Schenck v. United States, 249 U.S. 47 (1919) (introducing the "clear and present danger" test). While the clear and present danger test has not always been applied vigorously by the Supreme Court, *see Schenck*, 249 U.S. at 52, strong arguments can be made for the test's theoretical soundness. *See* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159 (1982).

38. Lawrence's fear-based criterion for bias crimes is also too narrow. Lawrence writes, "racially targeted behavior that vents the actor's racism is racial speech that is protected by the First Amendment, even if it disturbs the observer greatly." P. 102. A racially targeted assault may be behavior that vents the actor's racism, but it is not protected speech even in the absence of the intent or effect to create fear in the addressee. The First Amendment protects neither conduct nor speech, e.g., a bomb threat, that causes substantial direct harm.

Finally, Lawrence's theory leaves bias-crime laws open to the criticism of being improperly content based. Even if bias crimes could be subjected to significant penalties based on the fact that they, in causing fear of injury, are analogous to fighting words, the question remains whether bias crimes can be so singled out for enhanced penalization. In *R.A.V. v. City of St. Paul*, the Supreme Court struck down a local ordinance that prohibited cross burning and like acts that were likely to cause alarm in others "on the basis of race, color creed, religion or gender."[39] The Court reasoned that although the ordinance banned only fighting words, it violated the First Amendment because the ban was limited to an improper content-defined subcategory of fighting words (essentially bias-motivated fighting words).[40] As Lawrence recognizes, bias-crime laws might be open to similar challenges that they are not appropriately content neutral (p. 105). In *Mitchell*, the Court rejected such a challenge, in part, on the ground that bias-crime laws regulated conduct and not speech and so were not content based.[41]

Lawrence, however, rejects as superficial the speech/conduct distinction. He believes that bias crimes have an expressive aspect and, as such, should be afforded the protection available to speech (pp. 89-92). Lawrence thus accepts that the First Amendment's presumption against content-based restrictions applies to bias-crime laws. According to Lawrence, the proper inquiry is whether the state can "advance a nonpretextual justification for the distinction drawn in its criminal law, a justification that stands independent of any effort to suppress the expression of ideas" (p. 104). Similarly, Lawrence writes, "[w]e must ask whether bias crime statutes further an important interest unrelated to the suppression of racist speech" (p. 106). Lawrence identifies three such interests: the need to deter a rapidly increasing form of crime, the need to specifically deter a perpetrator with a high degree of potential dangerousness, and the desire to address a crime that has a particularly injurious effect on the victim, the targeted group, and society at large (p. 106). Thus, based on considerations not very different from those identified in *Mitchell*,[42] Lawrence concludes that bias-crime laws do not employ a constitutionally defective content-based distinction.

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39. 505 U.S. 377, 380 (1992).

40. *R.A.V.*, 505 U.S. at 391-94.

41. *See* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993).

42. 508 U.S. at 487-88. The Court stated that:

> [T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.

*Id.*

Lawrence's defense of bias-crime laws is not satisfactory. As a general matter, in order to defend bias-crime laws against the claim that they are improperly content based, it is insufficient to show they further an important state interest unrelated to the suppression of speech. Such a showing entirely misses the point of the requirement of content neutrality. Preserving the peace and tranquility of a residential neighborhood is an important state interest unrelated to the suppression of speech.[43] An ordinance banning sound trucks that announce the communist manifesto from residential neighborhoods advances that interest. Nevertheless, the ordinance clearly would be an unconstitutional content-based restriction. Because the interest advanced does not explain why the ordinance is limited to a certain class of peace-disrupting conduct, the interest appears pretextual.

More specifically, the three harm-based justifications advanced by Lawrence have a disturbing air of pretext about them. Consider the alleged need to deter a rapidly increasing form of crime. As Lawrence recognizes, there is little solid evidence that the rate of bias crimes is increasing rapidly. Lawrence writes, "it remains difficult . . . to gauge whether the bias crime problem has actually worsened or merely appears to have done so [due to heightened awareness of the problem]" (p. 20). The issue is fogged by "incomplete data" (p. 24). The best argument for an increase in bias crimes, Lawrence believes, is the historical parallel between bias-crime rates and conditions of economic unrest (pp. 25-26). Characterizing the state of the current economy as "adverse" (p. 26), Lawrence infers a relatively high rate of bias crimes today. The general fall of the crime rate over the last few years,[44] however, belies the supposition that current economic conditions are fertile ground for antisocial sentiment and behavior. Furthermore, even assuming that the rising rate of bias crimes could be satisfactorily established, there remains a serious problem with relying on this fact as a nonpretextual justification. According to the Federal Bureau of Investigation's data for the period of 1985 to 1994, the rates of murder, rape, robbery, aggravated assault, larceny, and car theft increased.[45] Nevertheless, during that period, there was no across-the-board in-

43. *See* Carey v. Brown, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); Saia v. New York, 334 U.S. 558, 562 (1948) (implying that reasonable time, manner, and place restrictions are permissible to regulate loudspeakers).

44. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1998, at 173 tbl.3.2 (1999) (describing the approximately 22% and 25% drop in rates of personal and property crimes (respectively) from 1995 to 1998).

45. *See* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1997, at 201 tbl.313 (117th ed. 1997).

crease in penalties. To single out bias crimes as being particularly in need of increased penalties based on rising rates seems pretextual.[46]

Equally questionable is Lawrence's reliance on the need to specifically deter perpetrators with a high degree of potential dangerousness. Lawrence cites a study that found that assaults based on bias are more than twice as likely to result in physical injury as other assaults (p. 39). To the extent that bias crimes are, on average, more dangerous than their counterpart crimes without bias, it would seem that specific deterrence could be achieved more directly through increased punishment of crimes actually involving physical injuries. Furthermore, an individual's potential dangerousness is a function of both the dangerousness of the crime and of the likelihood of an individual's committing a crime. Lawrence presents neither direct nor circumstantial evidence that bias criminals have an especially high rate of recidivism. While a term in prison is unlikely to negate the many factors that lead a person to commit a bias crime, the rehabilitative effects of prison are undoubtedly weak for many classes of offenders. Those who commit crimes motivated by the need to support a drug habit, the dislike of authority, religious conviction, uncontrollable anger, or deep-seated alienation are likely in need of specific deterrence.

There remains the claim that "the desire to address a crime that has a particularly injurious effect on the victim, the targeted group, and the society at large" (p. 106) constitutes a nonpretextual reason for bias-crime laws. These particularly injurious effects are undoubtedly central to the case for bias-crime laws. Let me, however, suggest three reasons to doubt that their invocation is anything more than a convenient pretext.

First, racism and other varieties of bigotry are disfavored ideologies in our society. In some individuals, these forms of bias exist as no more than unarticulated or barely conscious prompting. A man who chooses his seat on the bus to avoid sitting next to a person of a different color need not subscribe to a racist "ideology." Those who are subject to prosecution under bias-crime laws, however, are often extremists who ascribe to coherent, if baseless, theories of racism, intolerance, and bigotry. Lawrence himself characterizes these forms of bias as an ideology, and indeed, makes their status as an ideology an essential element in the justification of their prohibition (pp. 11-12). Bias-crime laws today are thus analogous to a hypothetical Cold War

46. Furthermore, while the end of stemming the rising rate of bias crimes may be a constitutionally legitimate one, it cannot justify, from a deontological perspective, more severe punishment. From a deontological perspective, the perpetrator's personal desert, not her membership in a contingently expanding class of like perpetrators, must dictate the punishment. Lawrence does not set for himself the goal of developing a unified justification of bias-crime laws consistent with both deontological constraints and the Constitution. Such a justification, however, would be more intellectually satisfying than the diverse moral and constitutional justifications Lawrence presents.

era law providing enhanced penalties for crimes "motivated by Marxism." Such a hypothetical law might be defended based on the particularly great injuries that Marxist-motivated crimes arguably tend to produce (economic instability, pervasive suspicion and fear, reactionary responses, etc.). In light of its facial targeting of an unpopular ideology, any such defense should be greeted with some degree of skepticism, if not heightened scrutiny. The same skepticism is appropriate for the rationales Lawrence advances in support of bias crimes.

Second, these harm-based rationales are not the ones that actually explain the enactment of bias-crime laws. The "desire to address a crime that has a particularly injurious effect" (p. 106) suggests a consequential desire to do something about a particularly virulent social problem. According to Lawrence, however, "[t]he rhetoric surrounding the enactment of bias-crime laws suggests that most supporters of such legislation espouse a thoroughly deontological justification" based on the bias criminal's greater culpability for violating "the equality principle" (p. 61). This deontological justification undercuts the harm-based justifications Lawrence advances.

Finally, Lawrence himself seems to be motivated by concerns other than the harms to the victim, her group, and society that bias crimes allegedly cause. The most telling evidence that these concerns are pretextual is perhaps the very language of Lawrence's model bias-crime law. Lawrence's model statute establishes three means of committing a bias crime. Under the model statute, a person is guilty of a first-degree bias crime if he commits any crime "with the *knowledge* that... his conduct will be perceived... [as] motivated... by ill will... due to the... race, color [or] religion... of the victim" (p. 170; emphasis added). A person is guilty of a second-degree bias crime if he commits any crime "with *conscious disregard for the substantial and unjustifiable risk* that his conduct will be perceived... [as] motivated... by ill will... due to the... race, color [or] religion... of the victim" (p. 171; emphasis added). Given the Model Penal Code's well-known purpose-knowledge-recklessness-negligence culpability scheme, one naturally would expect that the third way of committing a bias crime would be acting with the *purpose* that such action would be perceived as based on bias.[47] Such a provision would be consistent with the harm-based justification of bias-crime laws, which looks to the impact of the perception of bias. In fact, the third way to commit a bias crime under Lawrence's statute is to commit any crime "motivated... by ill will... due to the... race, color, [or] religion... of the victim" (p. 170).

By including a provision that focuses on the motivation itself, as opposed to consistently addressing the perception of the actor's con-

47. Lawrence believes that permitting liability based on mere negligence improperly would minimize the gravity of bias crimes. P. 73.

duct, Lawrence's model law is underinclusive with respect to the harms that allegedly ground it. Lawrence's model law fails to cover those who act with the purpose of causing the mistaken perception of a biased crime. For example, outside the scope of Lawrence's model statute would be the Protective Property Owner and the Misleading Arsonist. The Protective Property Owner is a racially tolerant person who is afraid that if minorities come to live in his neighborhood, the property value of his house will diminish significantly, and thus, for purely economic reasons, he, out of desperation, dents the fender of his minority neighbor's car hoping that his neighbor will interpret this as racially biased and leave the neighborhood, but lacking the belief that there is a substantial likelihood that his act will be so interpreted. The Misleading Arsonist is an arsonist who, before destroying a competitor's store, paints a swastika on the property on the off-chance the arson will be attributed to a hate group and the ensuing investigation will be directed away from him. Though the Protective Property Owner and the Misleading Arsonist intend to cause the relevant harms, they slip through the model statute.

Likewise, by shifting from a focus on perception to motivation, Lawrence's model law is overinclusive with respect to the harms that allegedly ground it. Lawrence specifically considers the case of a person who conceals his bias motivation from the victim and her community so that "no one might even suspect that it was a bias crime" (p. 67). Thus, he assumes that "the actor . . . has not caused the objective harms associated with bias crimes" (p. 67). Lawrence labels such a person "The Clever Bias Criminal" (p. 65). If the harm-based justifications advanced by Lawrence were actually at work, one would expect the Clever Bias Criminal not to be subject to any additional punishment based on his underlying motives. Not only has he caused no additional harm, but because he has no reason to believe that his secretly bias-motivated crime will result in additional harm, the Clever Bias Criminal is no more blameworthy than a person who merely commits a parallel crime. Yet Lawrence's model bias-crime law, by permitting liability to be triggered by bias motivation alone, explicitly is formulated to reach the Clever Bias Criminal.[48]

In general, Lawrence displays admirable sensitivity to the subtleties and reach of the language of bias-crime laws. Lawrence clearly recognizes that there is a logical gap between his harm-based justifications of bias-crime laws and his motivation-based formulations of bias-crime laws (p. 64). Lawrence, however, does not even consider trying to minimize that gap through statutes that directly address the harms

48. P. 170. Inexplicably, Lawrence states that the Clever Bias Criminal is guilty of an attempted bias crime. P. 67. Under all actual bias-crime laws, as well as Lawrence's model law, he would be liable for committing a bias crime, assuming that he completed an underlying crime.

associated with bias crimes. For example, statutes might create enhanced penalties where:

> 1. The offender acted with the specific intent to create (or with knowledge that he was likely to create) terror within a definable community.
>
> 2. The offender acted with specific intent to create (or with knowledge that he was likely to create) a threat of further crime.
>
> 3. The offender knew or should have known that a victim was particularly susceptible to the criminal conduct.
>
> 4. The offender, in the commission of the offense, intended to inflict serious emotional distress.
>
> 5. The commission of the offense created serious psychological harm (comparable to 'serious physical harm' specifications that enhance penalties).
>
> 6. The offender acted with specific intent to interfere with another's exercise of constitutional or statutory rights, or another's enjoyment of or access to public facilities, or another's enjoyment of equal opportunity.[49]

Nor does Lawrence even consider a statute that consistently focuses on only conduct creating the perception of bias motivation. Such a statute would seem to be more consistent with the harm-based justifications Lawrence advances. These facts appear to undercut the sincerity of Lawrence's proffered rationales.

What does Lawrence really have in mind when he speaks of "the desire to address a crime that has a particularly injurious effect" (p. 106)? Surprisingly nowhere in his book does he directly advance the claim that bias-crime laws will reduce the number of bias crimes or the harms associated with them. Such a claim would require complicated empirical argument concerning the causes and effects of bias crime that outstrips the current data.[50] By "address" Lawrence means something other than "prevent." Only in the final chapter of the book, entitled "Why Punish Hate," far away from his First Amendment discussion, does Lawrence reveal his true grounds for believing bias-crime laws are desirable (as opposed to merely permissible (p. 161)). Invoking an expressive theory of punishment, Lawrence writes that "[t]he punishment of bias crimes is necessary for the full expression of commitment to the American values of equality of treatment and opportunity" (p. 169). Lawrence appears to believe that such expression has both a noninstrumental symbolic value and also some consequentialist aspect for law-abiding citizens (pp. 166-67), but his discussion in this regard is lofty and abstract. Unfortunately, Lawrence does not

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49. Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992/1993 ANN. SURV. AM. L. 509, 511 (proposing penalty enhancement for those situations) (footnotes omitted).

50. The success of bias-crime laws in deterring bias crimes is unknown. *See* Staff, *supra* note 2, at 64 (finding that the impact of bias-crime laws on bias crime is "relatively inconclusive" and conclusions are "difficult to draw").

address whether expressing opposition to an ideology is a legitimate motive for enhancing criminal sanctions for conduct based on the ideology. Could Marxist-motivated crime (or speech) be punished more severely simply because our society wants to express its objection to Marxism? Surely not. Relying on an expressive theory of punishment to justify content-based punishment seems far too easy a path to content-based criminal laws. Lawrence writes that "[e]xpressive theory may be concerned less with providing a full justification of punishment than with understanding the full impact of the punishment" (p. 167). But if the expressive theory is the key to understanding why a state "should" (p. 161) have bias-crime laws, and non-pretextual reasons determine constitutionality, its validity deserves closer scrutiny.

### B. *Bias-Crime Laws and Motives*

At the end of Chapter Five, Lawrence considers an additional First Amendment argument raised against bias-crime statutes: the argument that bias-crime laws violate the First Amendment because they criminalize motives (pp. 106-09). Lawrence rejects the argument in part because he considers the distinction between motives (which allegedly should not bear on liability) and intent (which obviously may) to be only a "formal" distinction bearing no substantive weight. Specifically, Lawrence believes that motives are definitionally just intentions that have not been established by the positive law as bearing on liability. Insofar as bias-crime laws establish that bias is relevant to liability, bias *becomes* an intention and is indistinguishable from other intentions the law may properly criminalize. Lawrence writes, "[w]hether bias-crime laws punish motivation or intent is not inherent in those prohibitions. Rather, the distinction simply mirrors the way in which we choose to describe them" (p. 109). Thus, Lawrence concludes, the motive-based argument against bias crimes cannot get off the ground.

While I do not subscribe to the proposition that the First Amendment contains an absolute prohibition against the criminalization of motives, I believe there is more to the intent/motive distinction than Lawrence recognizes. Lawrence is correct that many uncontroversial criminal law doctrines could be characterized as criminalizing motives. Burglary could be reformulated as trespassing with the motive to commit a felony on the unlawfully entered premises; the defense of necessity (or putative necessity) could be reformulated as committing a crime with the motive to avoid a greater evil; attempted homicide could be reformulated as acting with the motive of causing death. The much-repeated maxim against punishing motives, how-

ever, is not dismissed so easily. There is a core of truth to it.[51] As illustrated above, the motivations relevant to criminal law share a common quality: they directly reflect the perpetrator's intent to achieve a significant social harm or good beyond that associated with the prohibited conduct. In H.L.A. Hart's terminology, they are "further intention[s]."[52] In contrast, the criminal law has virtually never found relevant to liability motives that directly reflect only a further intent to achieve a socially insignificant end, such as the demonstration of manhood, the satisfaction of a material desire, the elimination of a romantic rival, the obtaining of funds to pay a personal debt, and so on.[53] The irrelevance of such intentions to liability is the maxim's core of truth. Thus, contra Lawrence, the maxim embodies more than a "formal" requirement — it reflects a substantive distinction between mental states that would make the actor accountable for significant social harms or benefits and those that would not.[54] Bias falls in the latter category. To act from bias is not logically equivalent to acting with the further intent to humiliate the victim, to spread fear through the victim's community, to provoke a race war,[55] or to achieve any other result, much less achieve a significant further social harm. Because bias-crime laws cannot be reformulated as prohibiting criminal conduct with the intent of achieving any further socially significant harm, they are contrary to the core truth of the general rule that criminal law does not punish motives.[56] Thus, even if the criminalization of motive is not per se offensive to the First Amendment, the argument may not be dismissed as easily as Lawrence suggests.[57]

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51. As George Fletcher has written:

> At one level, the claim that motives do not typically bear on criminal liability is a technical point about the way offenses are usually defined. But there is also a deeper point suggested by the claim that the actor's ultimate purposes do not bear on his or her culpability for criminal conduct.

GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 452 (1979).

52. H.L.A. Hart, *Intention and Punishment*, 4 OXFORD REV. (1967), *reprinted in* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, 117-18 (1968).

53. A narrow exception is MODEL PENAL CODE § 213.5 (1962), which provides that "[a] person commits a misdemeanor if, *for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse*, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm.") (emphasis added). The provision would seem more just and effective if the italicized language concerning motivation were removed.

54. *See supra* text accompanying notes 9-15.

55. *Cf.* Barclay v. Florida, 463 U.S. 939, 949-51 (1983) (holding that a desire to start a race war may be relevant to several statutory aggravating factors).

56. *Cf.* Douglas N. Husak, *Motive and Criminal Liability*, CRIM. JUST. ETHICS, WINTER/SPRING 1989, at 3; Paul H. Robins, *Hate Crimes: Crimes of Motive, Character, or Group Terror?* 1992/1993 ANN. SURV. AM. L. 605, 606-09.

57. In a recent article, Carol S. Steiker argues that criminalizing bias is consistent with the criminal law's general treatment of motive. *See* Carol S. Steiker, *Punishing Hateful Mo-*

In sum, Lawrence's First Amendment defense succeeds in going a long way on very little. Abjuring the problematic distinctions between conduct and speech and between motive and ideology, Lawrence rests his case on a variety of relatively value-neutral, harm-based policy ends, such as protecting victims, their community, and society at large from injuries analogous to those caused by verbal assaults and menacing. Such an approach, if legally sound, still invites suspicion. Its empirical foundation in rising bias-crime rates, future dangerousness of bias criminals, and deterability of bias crimes is weak; its air of being motivated by hostility to a disfavored ideology is strong. Nevertheless, to anyone dissatisfied with the Supreme Court's treatment of the issue in *Mitchell*, Lawrence's account offers an alternative approach with appeal and potential.

## III. THE FEDERAL GOVERNMENT'S ROLE IN PROSECUTING BIAS CRIMES

The final major topic that Lawrence considers is the federal government's role in prosecuting bias crimes. Because there are currently no federal laws prohibiting bias crimes per se, a compelling argument for the expansion of the federal government into this area would be a significant contribution to an open policy issue. In this regard, *Punishing Hate* presents a generally persuasive, if not fully developed, case that the federal government should enact bias-crime laws and play some role in their enforcement.[58]

Lawrence organizes his discussion of the federal prosecution of bias crimes around three questions: the constitutional, the prudential

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*tives: Old Wine in a New Bottle Revives Calls for Prohibition*, 97 MICH. L. REV. 1857 (1999) (book review). She argues that all or many determinations of the criminal law to make motive relevant are "political to the core" in just the way the bias-crime laws allegedly are. *Id.* at 1866 (citations omitted). She offers the example of the manslaughter provocation doctrine according to which consuming passion caused by the discovery of infidelity is partially exculpatory. *See id.* at 1863. In contrast, Streiker notes, consuming passion caused by the discovery of one's daughter in bed with a man of another race will not be exculpatory. *See id.* at 1865. If this distinction between motives is not thought objectionable, why should the enhancement of a penalty due to bias be objectionable? The answer is that the manslaughter example involves the intention to kill and the further intention to revenge an act of adultery. This further intention is one that is considered socially valid, or at least "understandable." This assessment of the further intention undeniably involves a value judgment: the judgment that one's status as an adulterer is, at least arguably, morally relevant. In contrast, the status of being Asian-American, for example, is not morally relevant. Thus, to act based on bias is worse than to act based on the discovery of infidelity, which may mitigate culpability. But it is not worse than other "generic" motivations, like envy, which involve no socially acceptable further intentions.

58. The issue of whether the federal government should enact and enforce bias-crime laws is, of course, logically independent from the question, addressed in Part I, whether such laws are justified. The latter question concerned the appropriate penalty level for bias crimes. Assuming it were appropriate for the federal government to enact bias-crime laws, those laws could impose penalties that were either equal to or greater than the penalties for parallel crimes in the same jurisdiction.

and the pragmatic. With respect to the first question — Congress's constitutional authority to enact bias-crime laws — Lawrence's discussion would benefit from greater depth. Lawrence concedes that the Commerce Clause is "a poor[] fit" (p. 152) and the Fourteenth and Fifteenth Amendments are inadequate bases for a federal bias-crime law because of the state-action requirement (p. 153). This leaves the Thirteenth Amendment as the remaining potential source for the authority to regulate bias crimes. The Thirteenth Amendment, by its terms, expressly prohibits only slavery and involuntary servitude; bias crimes are neither. The Amendment's Enabling Clause, however, has been interpreted broadly to permit legislation to eradicate so-called "badges and incidents" of slavery.[59] Following such broad interpretation, racially motivated violence against African Americans could be deemed a badge or incidence of slavery because the hostility producing such violence can be traced to the fact that African Americans were once the subjects of slavery in this country. Bias crimes against African Americans, however, have composed only about forty percent of reported bias crimes.[60]

Lawrence's Thirteenth Amendment arguments for the constitutionality of bias-crime laws that reach beyond the protection of African Americans are comparatively weak. Lawrence notes that in the *Slaughter-House Cases*, the Supreme Court suggested that the Thirteenth Amendment would prohibit "Mexican peonage" and "Chinese coolie labor systems."[61] The Thirteenth Amendment undoubtedly covers the actual slavery of all people both de jure and de facto, and, perhaps, analogous institutions such as the forced prostitution of illegal immigrants, as well as the badges and incidents thereof. It seems a stretch, however, to claim it covers discrete bias-motivated acts of violence against groups that have no history of subjugation in the United States. Lawrence asserts that modern cases have extended the Thirteen Amendment's protections to religious groups (p. 154). The cases he cites in support of this proposition,[62] however, only addressed the scope of 42 U.S.C. §§ 1981 and 1982. The Court made no reference to their roots in the Thirteenth Amendment. Furthermore, in those cases, the Court stated that discrimination based solely on re-

59. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968); The Civil Rights Cases, 109 U.S. 3, 20 (1883).

60. *See* BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 215 tbl.344 (118th ed. 1998).

61. Slaughter-House Cases, 83 U.S. 36, 72 (1873) (noting that such systems would have to develop into slavery of those races).

62. *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (holding that a person of Arabian ancestry may be protected from racial discrimination under § 1981); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (holding that because Jews were considered a distinct race they may assert claims under § 1982).

ligion or place of origin was not within the scope of section 1981.[63] These cases are slender reeds to support his position.

In the end, Lawrence's call for this expansion of the Thirteenth Amendment seems to rest on the following passage:

> The broad reach of the Thirteenth Amendment as understood today goes beyond a prohibition of re-enslavement of those who have previously been enslaved. By protecting ethnic, religious, and national-origin minority groups, the Thirteenth Amendment is now more consonant with a positive guarantee of freedom and equal participation in civil society. Violence, directed against an individual out of motive of group bias, violates this concept . . . ." [p. 154; footnote omitted]

This argument, in my view, is too facile and abstract, resting more on wishful thinking and an assumed shared understanding of "a positive guarantee of freedom and equal participation," than on solid legal authority and analysis. Lawrence devotes thirty-six pages to reviewing this country's convoluted history of federal civil rights enforcement (pp. 113-49). Given this introduction, one would expect greater attention to the substantive constitutional question at issue. While there is room to argue that the Thirteenth Amendment might support broad bias-crime legislation,[64] Lawrence does not make that argument convincingly.

Lawrence's discussion of the prudential and pragmatic questions relating to the federal bias crime prosecution is more persuasive, even if its practical significance is less than clear. Lawrence argues that there is a strong federal interest in supplementing states' historically lax prosecution of bias crimes, because racial equality is an important component of the "national social contract" (pp. 155-57). Lawrence advocates neither a massive federal "war" against bias crimes nor a barrage of dual state-federal prosecutions. Rather, he envisions a process in which "federal and state law enforcement work together, particularly at the investigatory stage, and then, when it comes time to determine which criminal charges are to be brought, the merits of each are weighed" (p. 160). Such a relationship, Lawrence believes, might resemble that between federal and state authorities in the area of police brutality prosecutions (p. 158). Would such a relationship work in practice? Lawrence thinks that local-federal turf battles are avoidable (p. 160). He, however, does not address the issues of whether dual jurisdiction over bias crimes might result in buck passing between local

63. *See, e.g.*, *Saint Francis College*, 481 U.S. at 613 ("If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under § 1981.").

64. *See, e.g.*, Peter Brandon Bayer, *Rationality — and The Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 67 n.214 (1988); G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1, 7-15 (1974).

and federal authorities or unduly complicate investigations. Nor does he consider whether it is a sound expenditure of limited federal resources to prosecute the typical bias crime involving minor property damage or personal injury. Likely, Lawrence would rely on the Justice Department to intelligently assess these matters before involving itself. It is difficult to object to the grant of power where the use of that power will be guided by intelligent discretion. Still, one wonders whether Lawrence's call for the federal prosecution of bias crimes is a proposal for a significant policy change with large-scale repercussions or merely for a symbolic expansion of federal authority with a negligible impact. Just as it is difficult to assess the validity of bias-crime laws without knowing the amount of the proposed penalty enhancements, it is difficult to assess the practicality of federal bias-crime enforcement without knowing the amount of the proposed activity.

## CONCLUSION

*Punishing Hate* presents a well-organized and coherent defense of bias-crime laws. Nevertheless, it at points appears to reflect an unresolved tension in the thinking of the defenders of bias-crime laws. This tension is best exemplified by Lawrence's model bias-crime law. This law authorizes additional punishment based on the existence of bias, as well as the appearance, or perception, thereof. The latter condition ties into the harm-based rationales for bias-crime laws that inform most of Lawrence's defense of bias-crime laws. The appearance of bias is the more proximate cause of the harms associated with bias crimes since these harms follow from actual bias only insofar as the bias is perceived. It is, however, the former condition — the triggering of punishment by bias itself — that most raises the hackles of those who oppose bias-crime laws. The most likely explanation for going further and criminalizing motive is that only such a provision would make a statement directly against bias. It is doubtful that a hypothetical bill targeting "the appearance of a bias-motivated crime" would garner significant legislative support. Rather, one suspects, only insofar as bias-crime bills can be understood as striking at racism, intolerance, and bigotry, will they be elevated to law. Indeed, Lawrence's desire to be seen as striking at racism, intolerance, and bigotry itself may explain Lawrence's repeated statements that bias crimes are necessarily matters of motive[65] — a claim plainly inconsistent with Lawrence's model statute, which permits liability based on merely the perception of motive irrespective of actual motive.

65. Lawrence begins his book by defining a bias crime as "a crime committed as an act of prejudice," p. 9, and later reasserts, after lengthy analysis, that "precisely what we are punishing" with bias-crime laws is "conduct grounded in racial animus." P. 79.

One senses in *Punishing Hate* a mild form of schizophrenia. On the one hand, Lawrence frequently adheres to a safe liberal/libertarian defense of bias-crime laws that turns on the harms that are produced contingently when bias-motivated acts are perceived as such. In this light, bias-crime laws are little more controversial than laws prohibiting menacing, verbal assault, or other plainly unprotected expression. On the other hand, Lawrence sometimes presents a more politically correct, but philosophically problematic position that bias motivation, and the objectionable values that inform it, are the evils that must be driven from our society. This sentiment arises both in the context of Lawrence's deontological justification of bias-crime laws as well as in the final chapter of *Punishing Hate* where Lawrence advances his expressive account of bias-crime laws untethered to the claim that they will reduce the number of bias crimes.

Perhaps my diagnosis is too strong. Perhaps it is legitimate to point to the harms contingently associated with bias crimes when responding to fastidious punishment theorists or zealous First Amendment advocates and to point to symbolic importance of equality when addressing an audience prone to reading appealing values into bias-crime laws. But an expressive account of bias-crime laws adds little to the debate. If bias-crime laws are not supported adequately by harm-based arguments, but trammel on First Amendment values, enacting them expresses a lack of respect for those First Amendment values. Conversely, if bias-crime laws are justified on harm-based grounds, then enacting them in an open society expresses the exact values underlying those grounds, such as the evil of humiliating another, not the ideal of equality. Ultimately, the place of bias-crime laws in our society must turn on the validity of those harm-based defenses that Lawrence so well identifies, not the importance of equality as an abstract ideal that Lawrence so elegantly articulates.

# BUILDING COMMUNITY IN THE TWENTY-FIRST CENTURY: A POST-INTEGRATIONIST VISION FOR THE AMERICAN METROPOLIS

*Sheryll D. Cashin**

CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS. By *Gerald E. Frug*. Princeton: Princeton University Press. 1999. Pp. ix, 223. $35.

"[T]he problem of the Twentieth Century is the problem of the color-line."[1]

When W.E.B. DuBois wrote this prophetic statement at the dawn of the twentieth century, the American metropolis did not yet exist. Perhaps DuBois could not have predicted the sprawled, socio-economically fragmented landscape that is so familiar to the majority of Americans who now live and work in metropolitan regions. But his prediction of a "color line" that would sear our consciousness and present the chief social struggle for the new century proved all too correct. As we contemplate the twenty-first century, Gerald Frug's[2] book, *City Making*, makes clear that the problem of the color line continues in the form of local political borders. Local government borders define who gets what public benefits. They demarcate communities by race and income. They separate good school districts from bad. And, most importantly, they form the geographic boundary for local powers that can be wielded by those living within in ways that can harm those living without.

*City Making* attacks this problem of borders at its roots. It is an important book that deserves serious consideration by all who care about democracy and race relations in America. Frug analyzes our system of local government law, identifying clearly how the current structure of city power has "segregated metropolitan areas into 'two nations,' rich and poor, white and black, expanding and contracting" (p. 4). Undoubtedly, Frug's analysis will be familiar to those well-

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1. W.E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK vii (3d ed. 1903).

2. Gerald Frug is the Samuel R. Rosenthal Professor of Law at Harvard University.

acquainted with the legal literature on local governance.[3] But in the book, he offers fresh insights in a highly readable format that should be accessible to those unfamiliar with such scholarship.

The problem, as Frug sees it, is that our current legal conception of the city creates a duality of city power and city powerlessness, both of which "undermine the fundamental democratic experience of working with different kinds of people to find solutions to common problems" (p. 8). Affluent suburban localities benefit from a privatized conception of local autonomy because the legal system equates suburban local powers with "the protection of home and family and of private property" (p. 7). By contrast, central cities and older suburbs, saddled with increasing populations of poor people and attendant demands on their tax base, are incapable of using local powers in ways that wall out "undesirables." Thus, as Richard Briffault has argued, only affluent suburbs are truly free to use local powers in ways that shape their economic destinies.[4]

On the other hand, Frug chafes at the limits states place on city power. Cities, unlike corporations, are powerless to pursue fully the collective vision of their citizen-members. They must rely on enumerated powers conferred by the state, rather than on any inherent authority to define their goals and powers from within (pp. 8-9). It is ironic that Frug is troubled by this subservience of cities to state laws and policies, given the invitation to self-interest wrought by suburban local autonomy. But he believes that only by reconceiving cities in a manner that frees them to negotiate the scope of their powers can the fundamental democratic enterprise for which cities were created be recaptured.

Frug aims to solve the twinfold problems of local selfishness (city power) and local subservience (city powerlessness). Proposing "a local government law for the twenty-first century" (p. 5), he seeks "to defend a version of city power that does not rely on the notion of local autonomy" (p. 9). He would reject the vision of cities as something akin to autonomous individuals or sovereign nation-states — "cen-

3. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) [hereinafter Frug, *Legal Concept*]; Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047 (1996); Jerry Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998). *See also* Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Our Localism: Part I*]; Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) [hereinafter Briffault, *Our Localism: Part II*]; Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996) [hereinafter Briffault, *Local Government Boundary Problem*]; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. (forthcoming July 2000, on file with author); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994); Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607 (1997).

4. *See* Briffault, *Our Localism: Part II*, *supra* note 3, at 355, 408.

tered subjects" in the vocabulary of the theoretical literature.[5] Instead, Frug would revolutionize local government law by premising cities on the image of the "situated" or "postmodern" self (pp. 73-89, 92-109). In other words, he would transform the legal definition of a city from one that equates city power with the ability to act like a self-interested individual, in order to account for the fact that no individual locality within a metropolitan region is an island. It is necessarily interconnected, in ways profound and minor, to the myriad of other localities, races, and socio-economic classes that make up the metropolis. By embracing these interlocal connections as part of the definition of what a city is, Frug reasons that local government law would be transformed so as to promote rather than frustrate regional collaboration on metropolitan problems (p. 10).

In transforming the legal definition of the city, Frug argues for "a new role for cities in American life," namely "community building" (p. 10). By "community building" he means "increasing the capacity of all metropolitan residents — African American as well as white, gay as well as fundamentalist, rich as well as poor — to live in a world filled with those they find unfamiliar, strange, even offensive" (p. 11). He offers a number of practical suggestions to facilitate this "being together of strangers" (p. 11). First and foremost, he would create "a wider public . . . that would produce a more meaningful experience of public freedom than is now available in many contemporary suburbs and city neighborhoods" (p. 22). The chief vehicle for realizing this aspiration would be a regional legislature through which representatives from disparate communities would negotiate how power would be exercised by the localities in a given metropolitan region (pp. 86-87, 162-63). Thus, Frug imagines that intercity negotiation and compromise, rather than state control, would best curb local selfishness (p. 63). This reliance on democratic participation and negotiation, rather than on state-level mandates, is crucial, Frug believes, to achieving long-term sustainable change. For only if citizens experience the exercise of city power and the resolution of intercity conflict will they begin to eschew selfishness (pp. 80-81). Thus, for Frug, the route to a more capacious metropolitanism[6] is more public freedom at the local level, not less.

In addition to these central ideas, Frug offers an extended legal history of cities, underscoring that "a complex transformation occurred over a period of hundreds of years . . . that increasingly narrowed the definition of the city's nature to that of a state subdivision authorized to solve purely local political problems" (p. 52). Frug also

5. *See, e.g., id.* at 444-45 (describing the localist definition of cities as "individuals" with strictly defined boundaries and a limited range of issues that concern them).

6. Throughout this review I use "metropolitanism" to mean an ability of citizens of the metropolis to be with, collaborate with, and support one another.

offers a number of practical suggestions for how city powers and functions might be reconstructed in light of his reformulated definition of the city.[7] In this review, however, I will focus only on Frug's struggle with the conundrum of city power and powerlessness. In my view, this struggle is critical because it mirrors the real-world tensions that metropolitan America must come to terms with if we are to achieve an equilibrium that bodes well for democracy and race relations in the twenty-first century.

There is much that Frug gets right in this book, particularly his insightful analysis of the impact of our local governance regime in encouraging and rewarding selfish or self-maximizing behavior on the part of localities and neighborhoods. I believe he also is correct to adopt a realistic approach to community building which accepts that the romantic ideal of community or full integration is not likely to be achievable. Finally, Frug is also quite right to acknowledge the sheer difficulty of bringing his vision of a " 'being together of strangers' " to fruition.[8]

That said, I believe Frug's proposed solutions are misguided because they do not account sufficiently for the real-world realities of metropolitan politics. In short, enacting the structural changes he suggests, *ab initio*, would require the type of coalition politics that his proposals are designed to foster. Thus, it is unclear how his proposed reforms would ever come into being. More fundamentally, I believe effective metropolitanism will require strong regional institutions that wield some of the power now vested in cities. We may need to reduce the power of individual cities in order expand the capacity of metropolitan regions to solve serious problems that transcend local borders.[9] Finally, although Frug is unclear about the degree of consensus he

7. In the final part of the book, for example, Frug offers an alternative way of understanding and organizing the delivery of city services, including education and police policies, that rejects a "consumer-oriented" model premised on residency and individual tastes. Instead, he offers a number of suggestions "to transform city services into vehicles for community building." P. 175.

8. P. 116 (quoting IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 237-38 (1990)).

9. Such regionalist proposals have been suggested by a number of policy writers and advocates. *See, e.g.*, ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA (1994) (advocating metropolitan-wide cooperation); MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 11-12 (1997) (advocating, *inter alia*, regional fair housing, property tax-base sharing, land use planning and growth management, public works and transportation reform, and an elected metropolitan coordinating structure); NEAL R. PEIRCE, CITISTATES (1993) (arguing for regional approaches to economic development, environmental concerns, transportation, and other issues); DAVID RUSK, INSIDE GAME / OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA 147, 327-33 (1999) (advocating regional land use planning, tax-base sharing, and "social housing"); DAVID RUSK, CITIES WITHOUT SUBURBS (2d ed. 1995) (advocating annexation and regional governance); Anthony Downs, *Ecosystem: Suburban, Inner City*, J. PROP. MGMT., Nov./Dec. 1997, at 60 (advocating regional governance and tax-base sharing).

would require in order for a regional legislature to effect a change in local governance, I believe affluent suburbs will never be willing to negotiate away the degree of power and influence that they currently wield in metropolitan and state politics.

But the chief value of Frug's book is not in his ultimate proposals. Rather, by struggling mightily to imagine a different legal order from the one so well-entrenched in the American psyche, he illuminates the possibilities. He persuades the reader that the existing fragmented metropolitan landscape is not a pure market phenomenon dictated merely by popular preferences for suburban living. More importantly, he should convince most readers that a change in legal paradigms is necessary if we truly value social cohesion and the long-term stability of metropolitan regions. In my view, there is no more pressing issue for the new millennium. Under the current system, as the United States becomes more diverse, we are likely to see an acceleration of existing trends. Gated communities and homogeneous suburban enclaves that give residents a sense of comfort and control over their social and economic destinies will continue to proliferate. In turn, such balkanization of the metropolitan polity is likely to harden attitudes, entrenching an unfamiliarity and discomfort on the part of all citizens with anyone who can be described as "other." As our collective capacity for empathy with persons who are different subsides, it will become much more difficult to forge coalitions across boundaries of geography, class and race. It will become much more difficult for society to solve problems that may require shared sacrifice. Frug points us in a different direction, offering some hope that we could conceive and pursue a more positive course.

## I. THE THEORETICAL ANALYSIS: TRANSFORMING THE LEGAL CONCEPTION OF THE CITY

The starting point for Frug's critique is the legal definition of the city. As he established in his seminal article, *The City as a Legal Concept*,[10] courts struggled for several centuries with the question "whether cities are an exercise of individual freedom or a threat to that freedom" (p. 24). "[T]he general answer developed by the legal system has been to identify the city with the state and to conceive of it as a threat to freedom" (p. 24). Early American cities, like medieval European towns, had been bulwarks against state authority. Like private corporations, they exercised a degree of self-defined authority based upon values of property, freedom of association, and self-government (p. 43). By the late nineteenth century, however, city

10. Frug, *Legal Concept*, *supra* note 3.

powerlessness was crystallized in legal doctrines, like Dillon's Rule,[11] that formally rendered cities subject to state authority. As a result, Frug laments, "[c]ities . . . lost their economic strength and their connection with the freedom of association, elements of city life that had formerly enabled cities to play an important part in the development of Western society" (p. 53).

Frug seeks to resurrect an important mission for cities in American society. His aim is to reconceive cities in a manner that reestablishes their importance in the lives of their inhabitants and confers upon them an indispensable place in American society (p. 55). In Frug's view, this venture is worthwhile because cities "offer the possibility of dealing with the problematic nature of group power [in the American metropolis] by reinvigorating the idea of 'the public' " (p. 60). Much of the book — indeed its most interesting aspect — is dedicated to exploring what private individuals will gain from the creation of a broadened public sphere. But a prerequisite to creating this broader public is a transformation of the concept of the city. We must, Frug argues, do away with the privatized conception of local autonomy so dear to many suburbanites. By equating cities with individual, albeit collective, autonomy, the current legal definition of the city encourages inward-looking maximization of self-interest and "fuels a desire to avoid, rather than to engage with, those who live on the other side of the city line" (p. 62). Local government law thus creates a privatized relationship *between* cities: because cities are creatures of the state, their only meaningful intergovernmental relationship is the one they have with the state. And if a city can "seek rents" with the state, what incentive does it have to collaborate with other localities in the metropolitan region (p. 62)?

Indeed, this is the precise dynamic that is fueling the disaggregation of wealth and political power from social service needs in the American metropolis. Frequently, an affluent "favored quarter" garners the vast majority of its region's economic growth. In addition, these high-growth quadrants typically receive the majority of the regional public infrastructure investments — roads, sewers, utility lines, etc. — that fuel economic growth. At the same time, through the retention of local powers, such affluent suburbs can avoid taking on any of the region's social service burdens and can export a substantial portion of the costs of their considerable growth to other, less affluent localities.[12]

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11. Seeking to protect private property against abuse by local majorities and against abuse by private economic power, John Dillon, in his 1872 treatise on municipal corporations, advocated strict state control of cities. Pp. 45-46 (citing JOHN DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1st ed. 1872)).

12. For an extensive exploration of the power dynamics and public investment patterns in U.S. metropolitan regions and the manner in which our system of local governance contributes to the phenomenon, see Cashin, *supra* note 3.

Frug offers a counterintuitive solution to this problem of local selfishness. Rather than reduce local powers in a way that curbs the ability of cities to act in selfish ways, his laudatory aspiration is to enhance the ability of all localities, particularly affluent suburbs, to forge intercity alliances. In a context of intercity collaboration, Frug apparently hopes that cities will reach a consensus to define and deploy local powers in a way that does not harm their neighbors. At minimum, he believes that society will be better off if we can increase the capacity of localities "to solve the problems generated by intercity conflict themselves" (p. 63) rather than rely on state mandates.

Frug fully acknowledges the seeming naiveté of his vision (p. 19). In essence, he is asking us to suspend our current conceptions of the limited civic-mindedness of our neighbors and ourselves. He wants to take us on a journey toward the possible, if not the ideal. And I believe it is a trip worth making because so few thinkers are struggling with this question of how to give effect to the ideal of local (read suburban) self-determination while cultivating a sense of collective responsibility for the consequences of our individual choices.

To transform the legal concept of the city in a way that achieves the Herculean feat of promoting intercity collaboration, Frug deploys the theoretical literature on identity and the self. His aim is to create a definition of the city imbued with the idea of connection or reconnection to "other." In practical terms, he ultimately conceives of the city not as an autonomous construct, analogous to a sovereign, but as a public entity embedded in a web of regional interconnections. If such connections are part and parcel of what it means to be a city, then a city's powers should be defined not by the state but by the regional community as a whole. I address Frug's proposal of a regional legislature — the practical consequence of his theoretical critique — in Part II, below. First, however, I will consider Frug's use of the theoretical literature in addressing the difficult conundrum of power dynamics in the metropolis.

Frug's goal is to formulate a definition of the city that will transform the subjectivity of the city and its residents. The current legal definition is premised on collective individualism. Moreover, he asserts, "local government law has endowed these collective individuals with a particular conception of subjectivity, one that is commonly called a centered sense of self" (p. 64). Frug challenges this "centered" subjectivity, with its emphasis on separateness — the distinction of "self" from "other." Local government law has clearly adapted this centered concept of self to cities, encouraging a "localism" in which regulation of land use, schools, and tax policy are determined locally, solely to meet the desires of the residents within a defined

border.[13] Frug's intellectual project is to endow local government law with a new subjectivity — "one that is decentered [and] . . . that questions the sharp self/other distinction that now dominates legal decision making" (p. 65). Drawing on a well-developed theoretical critique of the idea of the centered self, he underscores that notions of the self are contestable and subject to multiple interpretations. The idea of distinguishing "self" from "other" presupposes that there is an identifiable "self" that is clearly distinguishable from other persons and influences. Yet the literature on the centered subject rejects the notion of a stable identity for the self. In doing so, it offers up other possibilities for the subjectivity of the self. Frug takes this cue, formulating two possible alternatives for "a new subjectivity for localities in local government law": the "situated self" and the "postmodern self" (p. 69).

Canvassing the work of thinkers as disparate as Carol Gilligan,[14] Michael Sandel,[15] and Frank Michelman,[16] Frug finds several sources for the idea of the "situated self." The situated subject, like the person who is born into but does not choose her family, is inextricably bound by a number of involuntary associations. Similarly, like it or not, cities and suburbs are inextricably entangled. A depressed urban core constitutes a drag on the economic vitality of outer-ring suburbs, just as a vital urban core enhances their fiscal health.[17] As Frug suggests, the "self/other" dichotomy simply does not fit the empirical reality of metropolitan economies, which operate as a region-wide system. Thus, local government law errs in retaining an "insider/outsider framework of the centered subject" (p. 79).

Nowhere is this embrace of the centered subject more pronounced than in the law of zoning. A handful of forward-thinking state supreme courts and legislatures have mandated some form of affordable

13. For an eloquent, persuasive treatment on the manner in which local government law doctrine, as developed by courts and legislatures, promotes an "ideology" of localism, see Briffault, *Our Localism: Part I*, *supra* note 3, at 113 ("Local autonomy is to a considerable extent the result of and reinforced by a systemic belief in the social and political value of local decision making."). *See generally* Briffault, *Our Localism: Part II*, *supra* note 3.

14. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

15. *See* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

16. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Frank Michelman, *The Supreme Court, 1985 Term Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

17. *Cf.* LARRY C. LEDEBUR & WILLIAM R. BARNES, NATIONAL LEAGUE OF CITIES, CITY DISTRESS, METROPOLITAN DISPARITIES AND ECONOMIC GROWTH 14 (1992) (maintaining that metropolitan areas with greater than average income disparities between central cities and outer suburbs sustained net declines in employment growth, while those with less than average income disparities had modest employment growth); H.V. Savitch et al., *Ties That Bind: Central Cities, Suburbs, and the New Metropolitan Region*, 7 ECON. DEV. Q. 341, 343-44 (1993) (analyzing income data for 59 metropolitan areas and concluding that areas with higher central city income levels have higher suburban income levels).

housing requirement that might be understood to be premised on a regional construction of local identity.[18] But the vast majority of state courts and legislatures have taken their cue from the U.S. Supreme Court, envisioning zoning as a matter of purely local self-determination.[19] Thus, local communities are free to pursue their collective vision of the highest and best use of land, which typically results in the elevation of the single-family home over all other uses.[20] By contrast, a transformation of the law of zoning that would give effect to the image of the situated self would require zoning policies to be "worked out not centrally or by each municipality alone but through regional negotiations" (p. 80). Consistent with civic republican thought, this new, situated self would be formed through dialogue. Dialogue is crucial in the republican tradition because it views identity as politically constructed. In the words of de Tocqueville, " '[f]eelings and ideas are renewed, the heart enlarged, and understanding developed . . . only by reciprocal action of men one upon another.' "[21]

While Frug is fierce in his devotion to this functional role of dialogue in altering citizen consciousness, he also recognizes just how difficult it will be to bring about doctrinal changes that reflect a new subjectivity of the situated subject. This is so because:

> [c]urrent law not only has fragmented the metropolitan area but [it] is perpetuated by the kind of person this fragmentation has nurtured. The problem with implementing [regional] reforms is the power of this status quo. A central government's attempt to change it would be experienced by the people who benefit from it as an astonishing invasion of their personal freedom. Yet it is unlikely that those who profit from current law will undo it themselves. How, then, can centered subjects ever come to embrace a vision of themselves as decentered, as interdependent? [p. 80]

Frug's hope is that the suburban inclination to self-protection will be broken down by organizing regional negotiations in such a way that there are negative consequences of failing to reach agreement and by exploiting the fact that some suburban sub-groups — for example,

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18. *See* Cashin, *supra* note 3 (manuscript at 45-46 & n.256, on file with author) (citing legislative and judicial examples from New Jersey, New Hampshire, Pennsylvania, and Connecticut).

19. *See, e.g.*, Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the* Mount Laurel *Doctrine*, 7 SETON HALL CONST. L.J. 577 (1997) (pointing out the historical and current power localities have had over zoning decisions); Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659 (1997) (enumerating the problems caused by the great deal of power over zoning that localities in most states possess).

20. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (offering a nuisance rationale for allowing the Village to use local zoning powers to segregate "parasit[ic]" apartment houses from single-family homes).

21. P. 80 (citing ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 515 (George Lawrence trans., Doubleday 1969)).

women, the elderly — may have special positive incentives for forging a regional alliance (pp. 81, 154-61).[22]

An alternative subjectivity Frug explores is that of the "postmodern self." Drawing on literature that extends the critique of the centered self, including postmodernism, feminism, and critical race theory, he defines the "postmodern condition" of the American metropolis. Postmodern subjects experience living in the world without any core sense of self. Unlike situated subjects, who see interconnections as a positive way of defining their identity, postmodern subjects "deny themselves [the solace of interconnectedness], this hope of bringing the mysterious hidden core of the self to the surface and sharing it with others" (p. 94). Thus, for the postmodern subject, "relationship with others — and with the world at large — is an experience not of consensus . . . but of conflicting multiplicities" (p. 94).

A postmodern conception of localities, then, would envision people as being located not on one side or the other of a city/suburban border, but at "nodal points of specific communication circuits spread throughout the [metropolitan] area" (p. 97; citations omitted). Under this vision, the metropolis is "a hodgepodge of elements — shopping/office/hotel complexes, strip shopping malls, industrial parks, office buildings, department stores, neighborhoods, subdivisions, condominium communities — that is 'impossible to comprehend,' 'vertigo-inducing' " (p. 99). As they live, work, shop and play, citizens of the metropolis cross local jurisdictional boundaries on a daily basis, often without awareness of such boundaries. To borrow a phrase coined by Michael Sorkin,[23] the postmodern American metropolis is an " 'ageographical city' " (p. 100). Best typified by Los Angeles, the ageographical city is a "pastiche of highways, skyscrapers, malls, housing developments, and chain stores . . . [an] "endless urban landscape of copies without an original — that constitute the place bites . . . of modern America" (p. 100). In short, it is the urban physical equivalent of the 800-number, an area code that is not tied to any particular place (p. 100).

To adapt local government law to this postmodern subjectivity, Frug argues that we must stop building doctrine on residency and should de-emphasize local jurisdictional boundaries. We must recognize that people are not located solely in one place, but that they move daily through a variety of networks of influence that affect their lives (p. 102). Rather than relying solely upon residency within a city limit

22. Frug argues, for example, that women and the elderly are especially impacted by suburban fragmentation, *inter alia*, because of the isolation, traffic congestion, and limited transportation options wrought by fragmented sprawl. Pp. 154-59.

23. *See* Michael Sorkin, *Introduction: Variations on a Theme Park in* VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE xi (Michael Sorkin ed., 1992).

to determine a person's legal rights, a postmodern subjectivity would transform local government law. Eligibility for voting and our system of local government financing, for example, would no longer depend on physical residency within a city's limits (p. 102). In particular, Frug argues that the difficult problem of interlocal tax-base inequity — the concentration of tax-base wealth in outer suburbs and of revenue needs in the urban core — would be remedied by a local government law that embraced the postmodern subject (pp. 104-05). This new subjectivity could form the theoretical basis for a regional system of revenue sharing and service entitlement. And, in Frug's view, it offers a "most promising source of ideas for changing the present-day allocation of power in metropolitan areas" (p. 106). One possible avenue to achieving this new subjectivity would be through a revised model of voter representation. Frug suggests, for example, that each citizen of the metropolis be accorded five votes that they can cast in whatever local elections they feel affect their interest.[24] In this manner, he reasons, elected representatives would view themselves as having constituents throughout the region (p. 106).

In Part II below, I address some of the practical difficulties of effecting doctrinal changes premised on these alternative subjectivities of the locality. Despite these practical difficulties, Frug's enterprise has value in boldly challenging the dominant thinking on local government organization. Most importantly, he has eloquently sketched possibilities for basing local government law on something other than the freely autonomous individual. He admits that there may be other subjectivities, but he finds the images of the situated and postmodern subjects most attractive and he feels no compulsion to choose between the two. Both visions, he argues, stimulate alternative thinking. They both reject the centered subject's focus on boundaries and seek "to build a form of metropolitan life in which people across the region learn to recognize, and make policy on the basis of, their interactions with each other" (p. 111). The beauty of these constructs is that they negotiate the conundrum of city power and powerlessness without doing violence to the near-sacred value of self-determination. Frug offers a revolutionary vision premised on interconnectedness that leaves individuals with the necessary comfort of a local community, which they can select and shape based upon individual preferences. Those who want to live in communities of like preferences, race, income, etc., may do so (within the limits of anti-discrimination law). But they cannot do so without dealing with people from other com-

24. A similar proposal has been suggested by Richard Ford. *See* Ford, *supra* note 3, at 1909-10 & n.221. *See also* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPUBLICAN DEMOCRACY 149 (1994) (suggesting a system of "cumulative voting" whereby each person would have a number of votes to distribute among elective candidates and arguing that such a system would give minorities more sway over who is elected, while preserving the overall system of majority rule).

munities. In this sense, both the situated and postmodern subjectivities of local government "are postintegration visions of America: integration remains possible, but is no longer a master goal" (p. 111).

Whether or not you accept the viability of these alternative visions, considering them seriously frees you to imagine possibilities other than the current legal order. They illuminate the ways in which the core incentive structure of the current legal regime — untethered pursuit of social and economic self-interest — might be different. And in doing so, they undermine the logic of the existing system. Frug is right to suggest that we need much more in the way of a public space to discuss these issues if centuries of entrenched popular, legal, and academic thinking are to be reversed. While I am not in agreement with all of his ultimate proposals, I believe he has offered a powerful case for reconceiving the legal system of local governance so as to appeal to the better angels of our nature. In Part III below, I accept Frug's challenge to imagine a different order, by suggesting an alternative "post-integrationist" vision for metropolitan governance that I believe fits better with the realities of metropolitan power dynamics.

## II. FRUG'S PROPOSED SOLUTION — COMMUNITY BUILDING AND THE UNREALITY OF NEGOTIATED COMPROMISE

As noted, Frug's chief vehicle for realizing his vision of a new, decentered subjectivity for American localities is a regional legislature. He would shift the power to define the legal authority of cities from the state government to this new regional entity. But he rejects decidedly the idea of a regional government that would exercise supra-local powers. Instead, he proposes a regional, democratically elected body that would take on one specific function now performed by state legislatures and courts: "defining the power — specifying what lawyers call the legal entitlements — of local governments" (p. 86). Examples of the types of entitlements this new legislature might allocate include the extent to which individual localities must accommodate regional affordable housing needs, the portion of local tax revenues that can be used exclusively for local schools, and the incentives a locality will be allowed to offer a business from a neighboring jurisdiction to entice it to move across the border (p. 86). The regional legislature would have the power to determine what entitlement questions it can decide. But this would differ from a regional government because, once an entitlement was defined, the local governments would exercise the resulting authority, not the regional legislature. To enhance the possibility of meaningful interlocal compromise, Frug proposes that representatives be elected at the neighborhood level.[25] Thus, the various sub-

25. This neighborhood-based version of representation is offered to give effect to the subjectivity of the "situated self." Frug would modify the regional legislature proposal to

groups that make up an individual locality would participate in negotiations. Because no city could achieve its specific entitlement goals without convincing fellow legislators of the wisdom of its vision of decentralization, Frug argues, the brute objective of parochial self-interest would necessarily give way to a broader understanding of the purpose of local powers (p. 87).

Frug's central objective of community building would be achieved, he imagines, by giving the metropolis this much-needed regional forum for negotiating how land use and other powers will be exercised. He would enhance the chance for success of such interlocal negotiations by causing failure to agree to result in no local powers on the given issue. In the realm of zoning, for example, "unless an entitlement to do so results from intercity negotiation, no city should have the right to zone in a way that excludes 'undesirables,' or to foster development favoring its residents over outsiders" (p. 163). He acknowledges that interlocal negotiation is not likely to result in a uniform distribution of races and classes of people or of commercial development throughout the metropolitan region. Instead, as in those few places in the United States that have strong regional governance structures,[26] a central focus for a regional legislature is likely to be the proper allocation of tax revenues generated by new development, wherever its location. Even if such negotiations fail, as well they might, Frug argues that the process of negotiation would be valuable because "[t]here is little doubt that the retention of existing state-granted entitlements without the establishment of a regional negotiation process will produce more and more fragmentation and dispersal" (p. 164). At minimum, he argues, such negotiations might begin to mount political pressure to reverse federal and state policies that support and encourage metropolitan fragmentation.

While Frug's aspiration to promote community building through the creation of a wider public seems correct, I believe his insistence on intercity negotiation, as opposed to state-created mandates, is misguided. At the outset, one problem with his regional legislature proposal is that the political will to create it does not exist. Such a regional reform, in itself, presupposes the type of coalition politics, or

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accommodate the image of the postmodern self by giving individual citizens the opportunity to vote for up to five candidates from any jurisdiction (or nodal point) that reflects their interests. P. 106.

26. The Twin Cities, Minnesota; Portland, Oregon; and Seattle, Washington regions are among the few that have a metropolitan entity that sets the direction for land use, transportation, and other policies for their regions. Regional cooperation in these metropolitan areas has reduced or mitigated interlocal disparities of tax-base and rendered the urban core more viable. *See, e.g.*, Arthur C. Nelson & Jeffrey H. Milgroom, *Regional Growth Management and Central-City Vitality: Comparing Development Patterns in Atlanta, Georgia, and Portland, Oregon*, *in* URBAN REVITALIZATION (Fritz W. Wagner et al. eds., 1995). For an extended survey of existing regional governance arrangements in the United States, see Cashin, *supra* note 3 (manuscript at 42-44 & n.244, 48-49, on file with author).

situated subjectivity, that the regional legislature is designed to engender. In short, in order for Frug's proposal to gain passage in a state legislature, as would be required, a majority of the localities (or their representatives in the state legislature) would have to agree to submit their existing state-created entitlements to the uncertainties of a regional negotiation. This is unlikely to happen because, as Frug admits, the fragmented system wrought by the existing local government regime has nurtured the "centered" citizen. Indeed, socio-economic and racial differentiation, and the desire to escape the tax burdens of the central city were the prime reasons behind the formation of most new suburban localities in the past five decades.[27] And the majority of voters now live in and have been shaped by these suburban communities.[28]

But even assuming that Frug is offering his legislative model merely as an intellectual idea designed to stimulate thinking about how to promote community building, I believe his conceptual theory is also misguided. Frug's fundamental premise appears to be that the "centered" citizen or the "centered" locality cannot be transformed to embrace a broader subjectivity while also experiencing a loss of power. He views city powerlessness — the city's subordination to the state in terms of its legal powers — as antithetical to the creation of a broader public realm that might enhance possibilities for intercity collaboration. In his view, state institutions are too removed from the citizen to enable a meaningful experience of public life, or, to use his words, "public freedom" (p. 22). He has a similar view of regional governments; only when government powers are wielded at the local level does the citizen truly feel empowered to influence government policy (pp. 80-81). And only in this manner can the citizen experience the give-and-take that de Tocqueville and civic republicans view as necessary for expanding the citizen's heart and perspective.[29]

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27. *See* NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS 75-95 (1994); GREGORY R. WEIHER, THE FRACTURED METROPOLIS 13-15 (1991).

28. *See* RUSK, *supra* note 9, at 5. Older, inner-ring suburbs, however, have more in common both economically and demographically with central cities than with outer-ring developing suburbs. *See* ORFIELD, *supra* note 9, at 4. This fact has been the key to broad intercity coalition-building in the Twin Cities area. *See infra* Part III.

29. *See, e.g.*, TOCQUEVILLE, *supra* note 21, at 515. Several other local government scholars, including Georgette Poindexter and Richard Thompson Ford, also adhere to this logic and hence feel compelled to eschew solutions to metropolitan fragmentation that involve state-imposed mandates. *See* Ford, *supra* note 3, at 1908-09 (arguing that regional administration makes it difficult for politically engaged communities to form because it alienates citizens from the decisionmaking process); Poindexter, *supra* note 3, at 625; *see also* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1556 (1988) (stating the civic republican view that deliberation and collective self-determination most naturally occur through small, localized units of government).

But virtually all serious regional reforms that have been undertaken in the United States have been enacted by a state legislature, either as the result of a state court mandate, or a rare political mandate created by a coalition of metropolitan interest groups.[30] As Richard Briffault has argued, one will search in vain for examples of significant regional cooperation or burden-sharing that is not state-mandated.[31] And this is not surprising, as Frug so powerfully underscores, given the centered subjectivity engendered by the current system. However, as I describe below in Part III, I think the possibilities for future, voluntary metropolitan cooperation in those few metropolitan areas that have relied on state processes to create strong regional institutions (at the expense of local powers), has been dramatically enhanced. Indeed, these areas are much farther along than the rest of the country in promoting a regional or "decentered" identity among their citizens.

In sum, relying on interlocal, negotiated compromise to break out of the status quo of entrenched self-interest is likely to be unsuccessful. Yet, the emerging regionalist models in the United States suggest that the ideals Frug strives for can be achieved to some degree. The means to these ends, however, will have to be different. Most importantly, in order to achieve the ideal of community-building — enhancing the ability of the citizens of the metropolis to work with each other across jurisdictional boundaries of race and class — proposals for reform must be informed by the empirical realities of metropolitan politics.

## III. AN ALTERNATIVE VISION: REVITALIZED DEMOCRACY AND WARRING FACTIONS IN THE POST-INTEGRATIONIST METROPOLIS

Frug acknowledges that in addition to the "situated" or "postmodern" self, there might be other alternatives to the subjectivity of the "centered" self. Likewise, his reconstructed understanding of the city and its role in promoting community building also has alternatives. Rather than permitting the continuation of fairly homogenous localities while calling upon them to negotiate and compromise via a regional legislature, one could imagine a state-level mandate to *reduce* homogeneity. Of course, this is anathema to the ideal of self-determinative local autonomy or city power. But imagine, for a moment, what the American metropolis would be like if poor people, particularly the minority poor, were more evenly dispersed throughout

30. *See generally* Cashin, *supra* note 3 (manuscript at 45-46, 48-49, on file with author). The New Jersey Supreme Court's seminal *Mt. Laurel* decision and the Minnesota State legislature's series of regional reforms on behalf of the Twin Cities are the prime examples of state court and legislative mandates respectively. *See id.*

31. *See* Briffault, *Local Government Boundary Problem*, *supra* note 3, at 1156.

the region.[32] By distributing the fiscal obligations attendant to housing the poor more evenly, the urban core would enjoy more of the fruits of their local powers. In other words, they would have a more meaningful opportunity to use their local powers in ways that meet their citizens' preferences because they would be freed, to some degree, from the often extreme economic constraints that come with having a disproportionate share of the region's service burdens. In turn, affluent suburbs would no longer enjoy the extreme comparative advantage of being able to garner much of the region's economic activity and wealth while walling out virtually all of the social costs and burdens that exist in the region. The region as a whole would be put on a more stable economic course.[33] Further, a concrete "being together of strangers" would be achieved because every community would have its share of low-income (and minority) persons.

This vision constitutes an integrationist ideal, which has not been achieved anywhere in the United States, and which is not likely to happen. Even in New Jersey, the state that has most systematically attacked the problem of fair-share affordable housing, the results in terms of integration of low-income and minority persons into suburbs have been disappointing.[34] The reason this vision will likely remain a chimera in the United States is complex. At least two oppositional forces are at work. First, there is fierce political opposition from citizens who want to protect property values and fear the economic consequences of living near low-income people. Obviously, racism and classism are also a part of this political opposition.[35] But the economic incentives alone would lead many, if not most, persons to oppose economic integration of their neighborhoods. Put in a more positive light, as Frug suggests, there is also a widespread desire among all groups, including minority groups, to live in neighborhoods that create a "we" feeling (pp. 163-64). Second, our nation's sustained ideological com-

32. African-American poverty is more highly concentrated than white and Hispanic poverty. In 1997, 58% of African Americans living in poverty resided within central cities, while 24% lived in suburban areas. *See* BUREAU OF LABOR STATISTICS AND BUREAU OF THE CENSUS, ANNUAL DEMOGRAPHIC SURVEY, MARCH SUPPLEMENT, TABLE FOUR (1998) (visited March 12, 2000) <http://ferret.bls.census.gov/macro/031998/pov/4_001.htm> (placing the remaining 18% in predominantly rural areas). 56% of Hispanics living in poverty resided in central cities and 33% lived in the suburbs. *See id.* (placing the remaining 11% in rural areas). 35% of non-Hispanic whites living in poverty lived in central cities and 39% lived in the suburbs. *See id.* (placing 26% in rural areas).

33. For an extended explanation of the way in which the current system of local governance weakens the economies of central cities and older suburbs while strengthening the economies of affluent outer-ring suburbs, see Cashin, *supra* note 3.

34. *See id.* (manuscript at 45-46, on file with author) (noting that the largest and most comprehensive study of the impact of the *Mt. Laurel* decision found that the "Mt. Laurel" housing units produced were primarily for moderate, not low-income households, that over 80% of suburban units went to white households, and that over 80% of urban units went to black and Latino households).

35. *See supra* text accompanying note 27.

mitment to local powers has cloaked the idea of local self-determination in the trappings of individual rights. In the mind of a new suburban property owner, there is likely not much difference between the right to exclude undesired persons from her own property and the right of her and her neighbors to collectively determine what kind of community they are going to live in, i.e., who should and should not live there.[36]

Thus, an integrationist ideal for the American metropolis is a political non-starter.[37] That said, I believe there are other alternative models that have a better chance of achieving Frug's vision of a "being together of strangers" than the interlocal negotiation model he offers. In the Twin Cities, for example, a political majority in the state legislature was forged among representatives of the urban core — the central cities and older, inner-ring suburbs. This coalition has succeeded over a period of years in enacting a number of regional reforms that reduce interlocal economic disparities. Their legislative victories include laws mandating regional fair-share affordable housing, regional tax-base sharing, and an enhanced regional governance structure — the Metropolitan Council — which administers a $600 million budget and sets the direction for land use, transportation and other policies in the Twin Cities area.[38] As a result of such reforms, interlocal tax-base disparities in the region have been reduced substantially, and the region has in place an established forum for deliberating on regional issues — i.e., for addressing the negative externalities that result from unchecked, self-interested local decisionmaking.

The primary impetus for the extensive grassroots coalition that has been created in the Twin Cities area is regional inequity. In particular, coalition organizers harnessed the self-interest — the centered subjectivity if you will — of citizens and leaders of the older suburbs, making them realize that they, like the central cities, were also losing in the regional competition for public investments that fuel growth. Once leaders like Jesse Ventura — then the mayor of an older, declining

36. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 241 (1985) (describing "economic and racial homogeneity" as "perhaps [the] most important characteristic of the postwar suburb. . . .").

37. I raise the integrationist vision for consideration, however, because I believe it underscores just how much we as a society have lost after over a century of "localism." Notably, American cities were fairly integrated racially and economically at the dawn of the twentieth century. In 1900, African Americans in urban areas generally lived in areas that were 90% white. *See* Frug, *The Geography of Community*, *supra* note 3, at 1064. I mourn the loss of the integrationist ideal because I believe it represented the best route to equal opportunity and intergroup understanding for our country. I accept, however, the politics that make it fairly unrealistic as an option. But we should continue to be vigorous in fighting discrimination in housing markets and in eliminating barriers to residential mobility for all citizens.

38. *See generally* Cashin, *supra* note 3 (manuscript at 48-49, on file with author) (describing the Twin Cities' experience in detail).

suburb — realized that an affluent, favored quarter was garnering more than 60% of the region's public infrastructure investments and the urban core was subsidizing the outmigration of people and jobs to this quadrant, they were more than willing to join a coalition for legislative change.

But this is brute politics, not a civic republican ideal. Affluent suburban communities, that were going to be net contributors under tax-base sharing and were going to have to open their communities to affordable housing, were vocal, strenuous, and sometimes ugly in their opposition to such measures.[39] In short, democracy was reinvigorated, but, as with all democratic processes, there were dissenting voices that ultimately had some proposals imposed upon them. In this case, however, the political losers were the most privileged and advantaged of communities — communities that had the fewest barriers to effective participation in state and federal political processes and that were benefitting disproportionately from the existing regime of local governance.[40]

There are other avenues to meaningful interlocal coordination and collaboration, if not a fairer distribution of benefits and burdens, in the American metropolis. Recently, the issue of uncontrolled suburban growth and its impact on quality of life has fueled a groundswell of state and local initiatives designed to better manage and coordinate local land use. In the Atlanta metropolitan region, for example, the Georgia state legislature recently created the Georgia Regional Transportation Authority — a new regional entity that will have broad powers "to impose transit systems and highways on local governments, [to] restrict development, and even [to] put pressure on cities and counties to raise taxes."[41] The new Authority will have effective veto power over any new development proposed by a locality that is in an overly congested area or that does not have adequate transportation routes. The Authority will also have power to withhold certain state funds to any locality that refuses to participate in planned regional transportation projects, like new rail, bus, or carpool lane routes.[42] This state usurpation of local powers was precipitated by an air pollution and traffic congestion crisis that, in turn, was wrought by fragmented local authority in the 13-county Atlanta area. Because of

39. *See generally* ORFIELD, *supra* note 9, at 13. In one instance, an angry mob of suburban residents occupied the city council chambers in protest of a planned low-income housing development in their neighborhood. *See id.* at 127-28.

40. *See generally* Cashin, *supra* note 3 (manuscript at 19-24, on file with author) (citing empirical evidence of the degree of public investment in affluent suburbs and the extent of cross-subsidization from which they benefit).

41. David Firestone, *Georgia Setting Up Tough Anti-Sprawl Agency*, N.Y. TIMES, Mar. 25, 1999, at A20.

42. *See id.*

years of squabbling and competition among scores of local governments for development, the region had never been able to agree on a regional plan for growth and mass transit. Consequently, the region had been rendered ineligible for federal funds because of record violations of federal air pollution standards.[43] In addition, the predominately white outer counties long opposed expansion of MARTA, Atlanta's rail transport system, because of their fear of a connection to the predominantly black central city.[44]

In both the Twin Cities and the Atlanta scenarios, citizens were able to overcome the problem of "centered" subjectivity or parochial self-interest through an education process that formed cross-border political coalitions based upon a more enlightened understanding of their self-interest. A civic dialogue did occur that focused upon objective evidence of fiscal inequities or the negative externalities — air pollution and traffic congestion — wrought by uncoordinated growth. This process harnessed and re-energized region-wide majoritarian politics. But these efforts would not have been successful had the regional majority — the two-thirds of the population that live in the central city and older suburbs[45] — not had a supra-local forum to go to that could *impose* mandates on dissenting localities.

Hence, under both of these regionalist scenarios, local powers were reduced but the ability of the region to solve difficult problems that transcend local borders was dramatically enhanced. These scenarios demonstrate that we need pressure points beyond mere negotiation to overcome affluent suburban hegemony. The rewards of selfishness are simply too great, at least for some powerful communities.

But this loss of local power, particularly by dissenting localities, does not sacrifice the community-building ideal so dear to Frug and others. My "post-integrationist" vision for the twenty-first century metropolis is premised on a revitalization of grassroots democratic processes. The citizens of the metropolis must collectively decide whether and how they will pursue a regional agenda. In my view, the emerging issues of fiscal inequity and sustainable development will provide an impetus for many to act. Enactment of strong regional reforms, however, will take place only after the creation of a broad coalition of disparate interests that is now all too rare in metropolitan America. Thus, this process of building coalitions for regional reform will necessarily build community.

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43. *See id.*

44. *See Urban Sprawl: To Traffic Hell and Back*, THE ECONOMIST, May 8, 1999, at 23.

45. Approximately one-third of the metropolitan population lives in the central city, inner-suburbs and outer suburbs, respectively. *See* ORFIELD, *supra* note 9, at 12-13. The key to metropolitan coalition building in the next century will be building closer political alliances between the central city and older suburbs. *See id.* at 168-69.

More importantly, if the majority of citizens has coalesced to create new regional institutions with supra-local powers, this does not mean that a "decentered" identity can never be cultivated among dissenting communities. The experience in New Jersey with state mandates of fair-share affordable housing, although not ideal, suggests that recalcitrant communities have adjusted to the mandate.[46] Just as many segregationists had to be dragged kicking and screaming to the second Reconstruction wrought by *Brown v. Board of Education*,[47] regionalism may be a movement in the next century that upsets long-settled expectations created by legal doctrine. In the end, my vision is not dissimilar to Frug's. It is, however, less idealistic. It is premised on gritty democratic realities and an understanding of the entrenched attitudes that disenfranchise the urban core under the existing regime of local governance.

## CONCLUSION

*City Making* offers a revolutionary vision for the twenty-first century. If our nation were able to realize it, our society would be much better off because the prospects for social cohesion would be greatly enhanced. The problems with the book stem both from its inattention to real-world realities and its fierce adherence to the values fueling localist ideology. The civic republican ideal — the belief that local institutions best cultivate citizens and community — borders on romanticism when compared to the manner in which fragmented local authority is disenfranchising many citizens of the metropolis. In the absence of strong regional institutions that enable the metropolis to give effect to majoritarian regional consensus, fragmented localities may remain gridlocked and interlocal inequities may persist or accelerate. In such circumstances, it will matter little to a citizen that she might be able to influence her own local government, given that this government will be powerless to address certain issues — like traffic congestion, air pollution, and suburban job access — that greatly impact her life.

In light of this reality, I do not believe Frug makes a persuasive case for why reliance on state institutions to define and perhaps circumscribe local authority is necessarily an inappropriate route to metropolitanism. If revitalized grassroots democracy is the vehicle for achieving changes in state-defined allocations of power, the enhanced

46. *See* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 188-89 (1996) (noting that "almost all localities in New Jersey have institutionalized planning for moderate- and low-income dwelling units" and that the Mount Laurel mandates "make the local process of considering [regional] housing needs a common routine that stands as a new norm in the political . . . process").

47. 347 U.S. 483 (1954).

public realm that is Frug's ultimate goal will have been achieved. Given the often extreme injustices currently being visited upon many citizens of the American metropolis, I believe the end is more important than the means. Yet, Frug has made a powerful case for how we might give effect to the values undergirding local autonomy while pursuing a brave new course for the collective greater good. He has laid down the markers for a debate that will become increasingly central in the next century. So let the new century and the debate begin.