THE "OFFENSIVE" OVERSIMPLIFICATION: AN ARGUMENT FOR HATE SPEECH LAWS IN THE MODERN ERA

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In recent years, there has been an influx in the number of mass shootings committed by white supremacists. In 2019 alone, white supremacists shot and killed 22 people in El Paso, Texas; 3 people in Gilroy, California; 1 person in Poway, California; and 51 people in Christchurch, New Zealand.[1] As of August 2019, suspects with ties to white supremacy had carried out at least 17 active-shooter attacks[2] around the world in eight years, killing more than 175 people.[3] In 2019, the Department of Homeland Security said that domestic terrorism, particularly white supremacist violence, is just as big of a threat as ISIS and al-Qaeda.[4]

In response to this violence, some have argued that the United States, an outlier among other nations with its hate speech-friendly legal landscape, must begin restricting hate speech.[5] Indeed, several notorious white supremacist shooters in recent years had found audiences and supporters online before they committed their crimes, and some even corresponded with

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[1] Lois Beckett, *More than 175 killed worldwide in last eight years in white nationalist-linked attacks*, THE GUARDIAN (Aug. 4, 2019 3:58 PM), https://www.theguardian.com/us-news/2019/aug/04/mass-shootings-white-nationalism-linked-attacks-worldwide; Weiyi Cai et al., *White Extremist Ideology Drives Many Deadly Shootings*, N.Y. TIMES (Aug. 5, 2019), https://www.nytimes.com/interactive/2019/08/04/us/white-extremist-active-shooter.html.

[2] Cai, *supra* note 1.

[3] Beckett, *supra* note 1.

[4] Ellen Nakashima, *DHS: Domestic terrorism, particularly white-supremacist violence, as big a threat as ISIS, al-Qaeda*, WASH. POST (Sept. 20, 2019 3:06 PM), https://www.washingtonpost.com/national-security/domestic-terror--particularly-white-supremacist-violence--as-big-a-threat-as-isis-al-qaeda-dhs-says/2019/09/20/dff8aa4e-dbad-11e9-bfb1-849887369476_story.html.

[5] *See, e.g.,* Richard Stengel, *Why America needs a hate speech* law, WASH. POST (Oct. 29, 2019 8:20 AM), https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/.

each other directly.[6] On websites like 8chan,[7] violent white supremacists freely circulate racist conspiracy theories like the Great Replacement Theory, which warns of the erasure of white people by people of color.[8] The shooters that used these websites went on to cite these falsities in their manifestos.[9] Acts of mass violence have led to policy changes in the United States in the past.[10] The National Firearms Act of 1934, The Gun Control Act of 1968, and the NICS Improvement Amendments Act were laws passed in response to acts of violence: the St. Valentine's Day Massacre, the assassinations of President Kennedy and Martin Luther King Jr., and the Virginia Tech shooting, respectively.[11]

Others argue that restrictions on hate speech would violate the First Amendment.[12] Although the First Amendment generally bars speech restrictions, there are exceptions to the rule.[13] Obscenity, defamation, fraud, and child pornography are all considered unprotected speech by the Supreme Court, and the government does not have to show as much as it would

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[6] Weiyi Cai & Simone Landon, *Attacks by White Extremists Are Growing. So Are Their Connections.*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/interactive/2019/04/03/world/white-extremist-terrorism-christchurch.html.

[7] *See, e.g.*, Gianluca Mezzofiore & Paul P. Murphy, *The New Zealand mosques attack appeared to inspire California synagogue suspect*, CNN (Apr. 30, 2019, 8:44 AM), https://edition.cnn.com/2019/04/29/us/california-synagogue-8chan-new-zealand-mosque/index.html.

[8] Rick Noack, *Christchurch endures as extremist touchstone, as investigators probe suspected El Paso manifesto*, WASH. POST (Aug. 6, 2019), https://www.washingtonpost.com/world/2019/08/06/christchurch-endures-extremist-touchstone-investigators-probe-suspected-el-paso-manifesto/.

[9] Arsalan Iftikhar, *Christchurch Anniversary: the Islamophobic 'Great Replacement Theory,'* BRIDGE A GEO. U. INITIATIVE (Mar. 14, 2020), https://bridge.georgetown.edu/research/christchurch-anniversary-the-islamophobic-great-replacement-theory/.

[10] *See* Linda Qiu & Justin Bank, *Major Shootings Led to Tougher Gun Laws, but to What End?*, N.Y. TIMES (Feb. 23, 2020), https://www.nytimes.com/2018/02/23/us/politics/fact-check-mass-shootings-gun-laws.html.

[11] *Id.*

[12] *See, e.g.*, Conor Friedersdorf, *Bad Arguments for Limiting Speech*, THE ATLANTIC (Oct. 31, 2019), https://www.theatlantic.com/ideas/archive/2019/10/arguments-limiting-speech/601066.

[13] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

otherwise need to justify restrictions of unprotected speech.[14] Hate speech, however, is considered protected speech.[15]

When assessing the constitutionality of speech restrictions, the Court often balances the interests in protecting First Amendment rights and the interests in regulating the speech at issue.[16] For example, the Court has found that defamation, obscenity, and other categories of speech "can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas."[17] How the Court characterizes the competing interests, then, is critical to their ultimate holdings in these cases.

There is a common theme among the cases in which the Court has refused to allow restrictions on hate speech. Whenever the Court voids a hate speech restriction law, it minimizes the interests at stake that justify the restriction. Instead of acknowledging the history behind certain expressions of hate, their harmful effects on their targeted audiences, and their ability to spur violence, the Court often characterizes the harm as simply and vaguely causing offense, which, it says, is not sufficient to justify restriction.[18] It is unclear why the Court discusses the complexities and degrees of harm caused by defamation, fraud, obscenity, and child pornography, only to stop short of any nuanced conversation of the harms of hate speech. In light of increasing hate speech on the Internet and its links to acts of white supremacist violence, the Supreme Court must begin considering the actual harms of hate speech.

I will begin this analysis by exploring available definitions of hate speech and defining hate speech for the purposes of this Note. I will then illustrate the critical role that hate speech plays in acts of white supremacist violence in the twenty-first century. Next, I will explore how the Court has characterized the interests

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[14] *Id.* Government restrictions of protected speech must be the least restrictive means to further a compelling interest. *See* Sable Commc'ns Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). But a government regulation of unprotected speech must only be rationally related to legitimate government interest. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 406 (1992) (White, J., concurring).

[15] *See, e.g.,* Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 24 (Ill. 1978) (holding that a swastika is not prohibited speech). *Skokie* and other hate speech cases are discussed further in Part III.

[16] *See* Chaplinsky, 315 U.S. at 571–72.

[17] Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007).

[18] *See* discussion *infra* Part III.

in favor of regulating hate speech in the past. I will argue this characterization does not consider the violent ends that are furthered by hate speech, although this violence is what makes the need for hate speech regulations so pressing.

I. WHAT IS HATE SPEECH?

Because there are no federal hate speech laws in the United States, there is no legally recognized definition of hate speech. However, some scholars have attempted to formulate definitions.[19] In his popular article "Words That Wound," Richard Delgado argues that racist speech should be proscribed and crafts a tort action for racist speech.[20] To succeed on this tort action, Delgado proposes plaintiffs would have to show (1) the defendant addressed them with language that was intended to demean through reference to race, (2) the plaintiff understood the language as intending to demean through reference to race, and (3) a reasonable person would recognize the language as a racial insult.[21] In "The Content and Context of Hate Speech," Bhikhu Parekh also proposed a three-part definition of hate speech: (1) "it is directed against a specified or easily identifiable individual or, more commonly, a group of individuals based on an arbitrary or normatively irrelevant feature;" (2) the speech "stigmatizes the target group by implicitly or explicitly ascribing to it qualities widely regarded as undesirable;" and (3) "because of its negative qualities, the target group is viewed as an undesirable presence and a legitimate object of hostility."[22]

The international community also provides examples of hate speech definitions.[23] Article 20 of the International Covenant on Civil and Political Rights (ICCPR), a multilateral U.N. treaty, holds state parties to the provision that "[a]ny

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[19] *See* Richard Delgado, *Words That Wound*: *A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 179 (1992); *see also* Andrew F. Sellars*, Defining Hate Speech*, BERKMAN KLEIN CTR. Publication No. 2016-20, 15–18, (2016), https://cyber.harvard.edu/publications/2016/DefiningHateSpeech (citing Bhikhu Parekh, *Is There a Case for Banning Hate Speech?, in* THE CONTENT AND CONTEXT OF HATE SPEECH 37, 40–41 (Michael Herz & Peter Molnar eds., 2012)) [hereinafter *Is There a Case for Banning Hate Speech?*].

[20] Delgado, *supra* note 19, at 167.

[21] *Id.* at 179.

[22] Sellars, *supra* note 19, at 18 (citing *Is There a Case for Banning Hate Speech?*, *supra* note 19, at 40–41).

[23] *See infra* notes 24–30 and accompanying text.

advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[24] The Office of the United Nations High Commissioner for Human Rights interprets this clause as "an obligation on State Parties to prohibit hate speech."[25]

In Canada, it is unlawful to communicate statements in a public place which incite hatred against an identifiable group and where it is likely to lead to a breach of the peace.[26] It is also an offense to willfully promote hatred against any identifiable group when making statements (other than in private conversation).[27] In Denmark, "[a]ny person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion, or sexual inclination" is in violation of the law.[28] In Germany, it is unlawful to, in a manner that is likely to disturb public peace, incite hatred, violence, or arbitrary measures against a national, racial, religious, or ethnic group, against parts of the population, or against an individual because of their belonging to a specified group or part of the population.[29] It is also unlawful to violate the human dignity of others by insulting, maliciously maligning, or defaming a specified group, parts of the population, or an individual because of his belonging to a specified group or part of the population.[30]

This Note broadly discusses how hate speech leads to acts of violence and argues that this link is a sufficient justification for *some* regulation of hate speech. The appropriate language of that regulation, including its definition of hate speech, would require further analysis that is beyond the scope of the discussion presented here. Additionally, this Note requires a broad definition of hate speech because the various Supreme Court cases discussed here address laws drafted by different U.S. states,

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[24] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 14668.
[25] Barbora Bukovska, Agnes Callamard & Sejal Parrmer, *Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred* 3 (2010), https://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/CRP7Callamard.pdf.
[26] Canada Criminal Code, R.S.C. 1985, c C-46, 319(1).
[27] Canada Criminal Code, R.S.C. 1985, c C-46, 319(2).
[28] Straffeloven § 266b.
[29] Strafgesetzbuch [StGB] [Penal Code], § 130(1), *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).
[30] *Id.*

each with their own definition of the proscribed speech. For these reasons, hate speech, for the purposes of this Note, should be understood as speech made publicly that willfully promotes hatred against a marginalized group.

II. WHY REGULATE HATE SPEECH?

Given the history and nature of racist violence in the United States, our society has always had a significant interest in regulating hate speech, regardless of whether or not we have acted on this interest. However, an increase in white supremacist violence that is traceable, directly and indirectly, to online hate speech, makes this interest even more weighty, and more difficult for the Court to ignore.

The causal relationship between hate speech and white supremacist violence is evidenced through two trends: direct correlations between hate speech and hate crimes, and the actions of perpetrators leading up to their acts.

A. The Correlation Between Hate Speech and Hate Crimes

Correlations alone do not imply causal relationships. However, strong evidence of a correlation is worthy of attention, and it exists between hate speech and hate crimes. When hate speech increases, hate crimes do too.[31]

One of the most recent examples of this correlation is the 2016 United States presidential campaign, which brought with it some of the most frequent use of Islamophobic rhetoric by public figures in recent years.[32] Throughout Donald Trump's campaign in 2015, he regularly dehumanized and incited violence against Muslims.[33] In September of 2015, Trump said of Syrian refugees, "They could be ISIS, I don't know. This could be one of the great tactical ploys of all time. A 200,000-man army, maybe."[34] In

[31] *See infra* notes 32–43 and accompanying text.
[32] *See infra* notes 33–38 and accompanying text.
[33] *See infra* notes 34–38 and accompanying text.
[34] Jenna Johnson & Abigail Hauslohner, *'I think Islam hates us': A timeline of Trump's comments about Islam and Muslims*, WASH. POST (May 20, 2017),

November, he said that he would "strongly consider" closing mosques in the United States and twice falsely claimed that he watched thousands of people in New Jersey, who he implied were Arab, cheer as the World Trade Center collapsed.[35] In December, he said, "If you have people coming out of mosques with hatred and death in their eyes and on their minds, we're going to have to do something."[36] Later that month, Trump announced his proposed Muslim Ban policy and said that Muslims are "sick people."[37] He also said that large segments of Muslims in the United States hate America, citing a widely disproven poll by an Islamophobic organization.[38] His extreme rhetoric coincided with a tremendous surge in anti-Muslim violent crimes: In November 2016, there were thirty-five documented anti-Muslim incidents, and in December there were fifty-three attacks.[39] Anecdotally, as a Sikh American myself, I distinctly remember my own heightened fear for my safety and that of my loved ones that November and December. While the uptick in hate crimes during that period may also have been attributable to the San Bernardino and Paris terror attacks that occurred at that time, anti-Muslim hate crimes increased by sixty-seven percent in 2015 compared to 2014, the highest surge seen since 9/11.[40] That Trump's rhetoric caused more hate crimes by emboldening perpetrators is further supported by research that shows that Trump's election was associated with a statistically significant surge in reported hate crimes nationally, even when controlling for other potential explanations.[41]

While Trump's candidacy is one of the most convincing examples of a strong correlation relationship between hate speech and hate crimes in recent years, it is not the only example

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https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Engy Abdelkader, *When Islamophobia Turns Violent: The 2016 U.S. Presidential Elections*, THE BRIDGE INITIATIVE GEO. U. 36 (2016).

[40] Mazin Sidahmed, *FBI reports hate crimes against Muslims surged by 67% in 2015*, THE GUARDIAN (Nov. 14, 2016), https://www.theguardian.com/us-news/2016/nov/14/fbi-anti-muslim-hate-crimes-rise-2015.

[41] Griffin Sims Edwards & Stephen Rushin, *The Effect of President Trump's Election on Hate Crimes* (Jan. 14, 2018), available at SSRN: https://ssrn.com/abstract=3102652; Ayal Feinberg et al., *Counties that hosted a 2016 Trump rally saw a 226 percent increase in hate crimes*, WASH. POST (Mar. 22, 2019, 7:45 AM), https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/.

of this relationship. One study found a correlation between the number of racist tweets and the amount of racist hate crimes in 100 U.S. cities.[42] This correlation is not unique to the United States. For example, according to the Council on Foreign Relations, there is research that shows a correlation between anti-refugee Facebook posts by a far-right political party and attacks on refugees in Germany.[43] These studies further demonstrate that hate speech often prefigures violence.

B. The Actions of Perpetrators Leading Up to Their Acts

There is perhaps no stronger evidence of the direct relationship between hate speech, specifically hate speech on the Internet, and white supremacist violence, than the actions of several recent white supremacist shooters leading up to their acts of violence.

One of the most infamous examples of this trend was the Charleston church shooting in 2015. On a June evening, Dylann Roof walked into Emanuel African Methodist Episcopal Church in Charleston, South Carolina.[44] After participating in a bible study with churchgoers, he pulled out a gun and opened fire on them, killing nine people.[45] He explained his motivation to one of the churchgoers who tried to stop him: "I have to do it. You rape our women and you're taking over our country. And you have to go."[46]

In his manifesto, Roof explained how influential the Internet was to his radicalization: "I was not raised in a racist

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[42] Kunal Relia et al., *Race, Ethnicity and National Origin-based Discrimination in Social Media and Hate Crimes Across 100 U.S. Cities*, N.Y. UNIV. 8–9 (2019), https://arxiv.org/pdf/1902.00119.pdf.

[43] Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 7, 2019), https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons.

[44] Marco della Cava, *5 Years after Charleston was Rocked by the Mother Emanuel Church Shooting, the Pain Lingers*, USA TODAY (June 17, 2020), https://www.usatoday.com/story/news/nation/2020/06/16/charleston-church-shooting-mother-emanuel-five-years/3193054001/.

[45] *Id.*

[46] *Church Gunman Reportedly Said: 'I have to do it,'* NBC NEWS (June 18, 2015), https://www.nbcnews.com/video/church-gunman-reportedly-said-i-have-to-do-it-467402819802.

home or environment,"[47] he wrote. According to Roof, the murder of Trayvon Martin, a Black child, by George Zimmerman, a white man, sent him on an Internet expedition that radicalized him:

> It was obvious that Zimmerman was in the right . . . this prompted me to type in the words 'black on White crime' into Google, and I have never been the same since that day. The first website I came to was the Council of Conservative Citizens. There were pages upon pages of these brutal black on White murders."[48]

The Council of Conservative Citizens is a white supremacist group,[49] and its website is still online. The home page features headlines that cast current events in a white supremacist light, such as "The FBI and Jewish Organizations Invent Anti-White Coronavirus Conspiracy Theory,"[50] and "Italian Virologist Says Concerns Over 'Racism' Crippled Italy's Coronavirus Response."[51] There is also a section on the website called the Memorial Wall, which purports to list examples of murders by people of color, noting when the people killed were

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[47] Rebecca Hersher, *What Happened When Dylann Roof Asked Google For Information About Race?*, NPR (Jan. 10, 2017, 2:23 PM), https://www.npr.org/sections/thetwo-way/2017/01/10/508363607/what-happened-when-dylann-roof-asked-google-for-information-about-race. Contrary to Roof's statement on his upbringing, he was likely raised around some manifestation of racism, whether he knew it or not. All of us are. This statement is not included here to suggest that it is in fact true that Roof was not raised around racism, but to help demonstrate Roof's own insistence that his Internet search was one of the defining moments that lead to his horrific acts.

[48] *Id.*

[49] David A. Graham, *The White-Supremacist Group That Inspired a Racist Manifesto*, THE ATLANTIC (June 22, 2015), https://www.theatlantic.com/politics/archive/2015/06/council-of-conservative-citizens-dylann-roof/396467/.

[50] Eric Striker, *The FBI and Jewish Organizations Invent Anti-White Coronavirus Conspiracy Theory*, CONSERVATIVE HEADLINES (Apr. 5, 2020), https://conservative-headlines.org/the-fbi-and-jewish-organizations-invent-anti-white-coronavirus-conspiracy-theory/.

[51] Paul Joseph Watson, *Italian Virologist Says Concerns Over "Racism" Crippled Italy's Coronavirus Response*, CONSERVATIVE HEADLINES (Mar. 23, 2020), https://conservative-headlines.org/italian-virologist-says-concerns-over-racism-crippled-italys-coronavirus-response/ (originally published on SUMMIT NEWS, https://summit.news/2020/03/20/italian-virologist-says-concerns-over-racism-crippled-italys-coronavirus-response/).

white.[52] Dylann Roof seemed to refer specifically to this section of the website in his manifesto.[53]

Federal prosecutors said that Roof self-radicalized online.[54] According to anti-hate organizations, Roof is not alone.[55] In a report on hate and extremism published in 2016, the Southern Poverty Law Center said that:

> White supremacists are increasingly opting to operate mainly online, where the danger of public exposure and embarrassment is far lower, where younger people tend to gather, and where it requires virtually no effort or cost to join in the conversation . . . . The milieu of the web is an ideal one for "lone wolves"—terrorists who operate on their own and are radicalized online.[56]

Adam Neufeld of the Anti-Defamation League told the Washington Post "I think that the white-supremacist movement has used technology in a way that has been unbelievably effective at radicalizing people."[57] Shannon Martinez of the Free Radicals Project, a former white supremacist, said "[t]here's a lot of romanticization of violence among the far-right online, and there aren't consequences to that."[58]

As another example, in August 5, 2012, Michael Page entered a gurdwara, or Sikh place of worship, in Wisconsin and opened fire, killing seven worshipers.[59] Before the shooting, Page

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[52] *Memorial Wall 2017*, CONSERVATIVE HEADLINES, https://conservative-headlines.org/memorial-wall-2017/ (last visited Apr. 20, 2020).
[53] Hersher, *supra* note 47.
[54] Mark Berman, *Prosecutors say Dylann Roof 'self-radicalized' online, wrote another manifesto in jail*, WASH. POST (Aug. 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/22/prosecutors-say-accused-charleston-church-gunman-self-radicalized-online/.
[55] *See infra* notes 56–58 and accompanying text.
[56] MARK POTOK, THE YEAR IN HATE AND EXTREMISM (2016), https://www.splcenter.org/fighting-hate/intelligence-report/2016/year-hate-and-extremism.
[57] Rachel Hatzipanagos, *How Online Hate Turns into Real-Life Violence*, WASH. POST (Nov. 30, 2018, 2:31 AM), https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/.
[58] *Id.*
[59] Jordan Mickle, *Sikh Priest Who was Left Partially Paralyzed after 2012 Sikh Temple Shooting in Oak Creek has Died*, WTMJ-TV MILWAUKEE (Mar. 2, 2020, 8:51 PM),

had found community among fellow white supremacists online.[60] He used the Internet to promote his white supremacist musical groups and interact with other white supremacists.[61]

A 2019 analysis by the *New York Times* further illustrates the role of the Internet in modern hate crime trends by consolidating the connections among recent white supremacist perpetrators.[62] For example, the shooter who killed fifty-one Muslims in a mosque in Christchurch, New Zealand in 2019 claimed to have been inspired by an attacker in Norway who killed seventy-seven people in 2011.[63] The Christchurch shooter had also corresponded directly with Dylann Roof and with another perpetrator who killed nine people.[64] The *Times* writes that these international connections "highlight how the [I]nternet and social media have facilitated the spread of white extremist ideology and violence."[65]

Finally, according to the Council on Foreign Relations, hate speech on social media has inspired violence in other parts of the world.[66] In India, acts of communal violence have been traced to rumors originating on the Internet messaging app Whatsapp.[67] In Myanmar, military leaders and Buddhist nationalists demonized Rohingya Muslims on social media before and during a campaign of ethnic cleansing.[68] In Sri Lanka, the government blocked access to Facebook, Whatsapp, and the messaging app Viber, after rumors online inspired violence against the Tamil Muslim minority community.[69]

The Internet has become a refuge for white supremacists, including the perpetrators of some of the most deadly acts of

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https://www.tmj4.com/news/local-news/sikh-priest-who-was-left-partially-paralyzed-after-2012-sikh-temple-shooting-in-oak-creek-has-died.

[60] *See* Michael Laris et al., *Excessive Drinking Cost Wade Michael Page Military Career, Civilian Job*, WASH. POST (Aug. 7, 2012) https://www.washingtonpost.com/world/national-security/excessive-drinking-cost-wade-michael-page-military-career-civilian-job/2012/08/07/274ccc7a-e095-11e1-a421-8bf0f0e5aa11_story.html?itid=lk_inline_manual_6.

[61] *Id.*

[62] Cai & Landon, *supra* note 6.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Laub, *supra* note 43.

[67] *Id.*

[68] *Id.*

[69] *Id.*

racist violence in recent years.[70] Their racist views might isolate them from other parts of society, but they are able to find, support, and radicalize each other online. By providing white supremacists with communities of like-minded individuals and a platform to espouse hate speech, the Internet has become instrumental to white supremacist violence in the twenty-first century. The kind of speech that our allies have regulated[71] circulates freely on websites in the United States, and people of color continue to pay the price for it with their lives.

III. HATE SPEECH JURISPRUDENCE IN THE UNITED STATES

In *Chaplinsky v. State of New Hampshire*,[72] the Supreme Court articulated several categories of speech that are not protected under the First Amendment: "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[73] These words are unprotected, the Court held, because they play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [74]

The Supreme Court's general rule is that governmental bodies may not proscribe the form or content of individual expression.[75] According to the Court, "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . ."[76]

Under the *Chaplinsky* framework, there was a brief moment in history during which the Supreme Court was protective of hate speech regulations.[77] In 1952, the Court upheld an Illinois statute that regulated hate speech in *Beauharnais v. Illinois*,[78] finding that hate speech is group libel, and thus can be proscribed under the constitution.[79] The Illinois statute in question declared the following:

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[70] *See supra* Part II.B.
[71] *See supra* notes 24–30 and accompanying text.
[72] 315 U.S. 568 (1942).
[73] *Id.* at 571–72.
[74] *Id.* at 572.
[75] Cohen v. California, 403 U.S. 15, 24 (1971).
[76] *Id.*
[77] *See infra* notes 78–92 and accompanying text.
[78] 343 U.S. 250 (1952).
[79] *Id.* at 258.

> It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.[80]

The case arose after Beauharnais exhibited leaflets in public places in Chicago that included a membership application for the White Circle League of America, Inc. and a petition.[81] It called on local government "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons," and called for "[o]ne million self-respecting white people in Chicago to unite."[82] It also said that "[i]f persuasion and the need to prevent the white race from becoming mongrelized by the [omitted] will not unite us, then the aggressions, rapes, robberies, knives, guns and marijuana of the [omitted], surely will."[83] In holding that the Illinois law and the conviction under it did not violate the First Amendment, the Court categorized the type of speech punished by the law as group libel.[84] Libel is unprotected speech under *Chaplinsky*.[85]

In coming to its conclusion, the Court engaged in a lengthy discussion of the harms of hate speech.[86] Two pages of the Court's opinion are dedicated to a discussion of Illinois' history of racist violence, the impact hate speech has on its audience, and the tangible ways it affects its victims.[87] The Court cited the murder of abolitionist Lovejoy, a riot that resulted from the arrival of immigrants and Black migrants, and other acts of

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[80] *Id.* at 251.
[81] *Id.* at 252.
[82] *Id.*
[83] *Id.* (racist slurs omitted).
[84] *Id.* at 266.
[85] *Id.* at 259–60.
[86] *Id.* at 259–61.
[87] *Id.*

racist violence in Illinois.[88] Further, the Court highlighted acts of racist violence that occurred just prior to the passage of the hate speech restriction in question.[89] According to the Court, it was reasonable to believe that hate speech might have contributed to these acts of violence: "In many of these outbreaks, utterances of the character here in question, so the Illinois legislature could conclude, played a significant part."[90]

In addition to acknowledging the potential ways hate speech had contributed to violence in Illinois, the Court also noted that the speech prohibited by the Illinois statute was "made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented."[91] Finally, the Court recognized that hate speech can inhibit the rights and liberties of its victims:

> "Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs. . . . [t]he Illinois Legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[92]

In the decades following *Beauharnais* and into the present-day, *Beauharnais* "has been de facto overruled."[93] This dramatic shift is evident in cases like *Village of Skokie v. National Socialist Party of America*,[94] in which the Supreme Court of Illinois held that the village of Skokie, Illinois, could not stop the American Nazi Party from displaying swastikas while marching in Skokie.[95] A majority Skokie of residents were Jewish, 5,000 to

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[88] *Id.*
[89] *Id.* at 260.
[90] *Id.* at 259.
[91] *Id.* at 261.
[92] *Id.* at 262–63.
[93] Geoffrey R. Stone, *Hate Speech and the U.S. Constitution*, 3 EAST. EUR. CONST. REV. 78, 79 (1994).
[94] 373 N.E.2d 21 (1978).
[95] *Id.* at 25.

7,000 of whom survived German concentration camps.[96] In addition to wearing swastika armbands and carrying a swastika banner, the demonstrators planned on carrying signs with messages including "Free Speech for White America."[97] According to the Court, swastikas did not fall into the unprotected speech category of fighting words.[98] They also were not sufficiently "offensive and peace threatening to the public" to be their own category of unprotected speech.[99] Thus, they were afforded protection under the First Amendment.[100] The Court made no reference to *Beauharnais* in its opinion.[101]

Among the differences between the *Beauharnais* and *Skokie* opinions is the way the opinions characterized the regulatory interests involved in restricting hate speech. In upholding Illinois' hate speech law, the *Beauharnais* majority discussed the history of racist violence in Illinois at length, as well as how that violence was connected to hate speech.[102] The majority also discussed how hate speech is detrimental to "free, ordered life in a metropolitan, polyglot community," and to the exercise of equal rights and liberties of those whom it targets.[103] In *Skokie*, however, the Court's discussion of the regulatory interests at stake was comparatively lacking. There was no discussion of the history of racism in Illinois or elsewhere. Additionally, although the case dealt with a free speech issue, there was no discussion of what the speech at issue—the swastika—actually meant or symbolized, beyond the fact that it was part of the German Nazi uniform. Unlike in *Beauharnais*, there was no discussion of the ability of the targets of the speech to exercise their rights and liberties, nor of the effect that the speech had on the community. In lieu of any such nuanced discussion, the Court repeatedly characterized the speech at issue as simply "offensive,"[104] with no discussion of what it means to be offensive, or why the speech at issue might offend.

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[96] *Id.* at 22.
[97] *Id.*
[98] *Id.* at 24.
[99] *Id.*
[100] *Id.*
[101] *See id.* at 21.
[102] *See supra* notes 86–102.
[103] Beauharnais v. People of State of Ill., 343 U.S. 250, 258–61 (1952).
[104] *Village of Skokie*, 373 N.E.2d at 24.

The Court dismissed regulatory interests again in *R.A.V. v. City of St. Paul*.[105] There, the Court invalidated a bias-motivated crime ordinance, describing it as impermissible viewpoint discrimination,[106] with no discussion of the meaning or history of the speech in question: cross burning. The opinion made no mention of the Ku Klux Klan (K.K.K.) or of the history of racist violence associated with cross burning. While we will never know exactly how many Americans the K.K.K. has killed, we do know that thousands of people have been killed in lynchings, either by the K.K.K. or by those who subscribe to the same racist philosophy of white supremacy that the K.K.K. does.[107] The Court also did not acknowledge Minnesota's own specific history of racism, documented in part by 30,000 racially restrictive property deeds in just one Minnesota County.[108] By barring Black Minnesotans from homeownership, these racist covenants also deprived them of the stability and wealth-building opportunities that come with homeownership. This prolific practice was a contributing cause of Minnesota's current status as one of the most racially inequitable states in the country.[109] Further, the *R.A.V.* Court did not discuss the effects that cross burning has on people of color and their liberties, or the effects on our society as a whole. Instead, the Court simply found that, although the speech restricted by the ordinance falls into the unprotected category of fighting words, the ordinance nonetheless violated the First Amendment, because it restricted only *certain* fighting words, while allowing others.[110]

Finally, the Supreme Court once again minimized the regulatory interests at stake in hate speech cases in *Virginia v. Black*.[111] There, the Court struck down a Virginia law that prohibited cross burning.[112] Unlike in *R.A.V.*, the *Black* Court actually did discuss the history of cross burning, the K.K.K., and the violence associated with that group.[113] However, the Court

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[105] 505 U.S. 377 (1992).
[106] *Id.* at 391.
[107] EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2017), https://lynchinginamerica.eji.org/report/.
[108] Randy Furst & MaryJo Webster, *How Did Minnesota Become One of the Most Racially Inequitable States?*, STAR TRIBUNE (Sept. 6, 2019, 10:52 AM), https://www.startribune.com/how-did-minnesota-become-one-of-the-most-racially-inequitable-states/547537761/.
[109] *Id.*
[110] *R.A.V.,* 505 U.S. 377 at 391.
[111] 538 U.S. 343 (2003).
[112] *Id.* at 347–48.
[113] *Id.* at 352–57.

went on to assert that there are two categories of cross burning: cross burning with the intent to intimidate, and cross burning without the intent to intimidate.[114] The latter category encompasses cross burning done as political speech.[115] According to the Court, "sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself."[116] For this reason, the Court said, it is fundamentally different from cross burning meant to intimidate.[117] Once the Court established that cross burning might be political speech in instances like this, there was no further discussion of the regulatory interest. There was no return to the discussion of the Klan's history of racist violence and how that history weighs against cross burning as political speech. The only interest weighing against *political* cross burning, according to the Court, was that it might arouse "a sense of anger or hatred among the vast majority of citizens who see a burning cross."[118] But the Court quickly dismissed this interest by citing a quote by Gerald Gunther, who, despite his childhood experience in Nazi Germany, believed he must "walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law."[119] And, thus, by simply citing the personal opinion of one legal scholar, the Court dismissed the interests against political cross burning, after already minimizing those interests as simply the risk that political cross burning would arouse a sense of anger or hatred.[120]

Underlying the stark contrast between *Beauharnais* and the cases that came after it is a fundamental shift in the way our judiciary understands and characterizes the interests against hate speech. In *Beauharnais*, the Supreme Court displayed an understanding of the real, tangible harms associated with hate speech: it is intertwined with violence, it undermines the values of our communities, and it violates the rights of its targets.[121] But in post-*Beauharnais* hate speech cases, the Supreme Court has

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[114] *Id.* at 365.
[115] *Id.*
[116] *Id.* at 365–66.
[117] *Id.*
[118] *Id.* at 366.
[119] *Id.* at 366–67.
[120] *Id.*
[121] Beauharnais v. Illinois, 343 U.S. 250, 259–62 (1952).

consistently dismissed the interests associated with hate speech regulations by generalizing the harms of hate speech as merely that they cause offense and by ignoring the history of violence associated with hate speech.[122] This minimization is perhaps most clear when the Court begins and ends its characterization of the interests at stake as simply "offensive." The lack of nuance is glaring here. Black's Law Dictionary provides two definitions for "offensive" as used in this context: "[u]npleasant or disagreeable to the senses; obnoxious[,]" and "[c]ausing displeasure, anger, or resentment; esp., repugnant to the prevailing sense of what is decent or moral . . . ."[123] Under these definitions, something can be offensive for many different reasons. A movie review is offensive to a reader who disagrees with it. We all encounter expressions that offend us in this way frequently. However, an order to kill someone——which is more severe and likely to cause harm than a movie review——can also be characterized as offensive. Similarly, an expression that denies someone a constitutional right is also both offensive and significantly harmful. Hate speech is offensive to many, but it also potentially denies the rights of people of color when it fosters violence against them. To call something "offensive" then cannot be the end of a complete discussion of a statement's harms. Yet the Court has repeatedly ended the discussion there.

The Court illustrated this point further in *Matal v. Tam*.[124] While the facts of *Matal* presented a scenario unique compared to other hate speech cases,[125] the Court's opinion, written by Justice Alito, once again oversimplified the interests at stake in hate speech cases generally: "But no matter how the [Government's] point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing

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[122] *See, e.g.*, *Black*, 538 U.S. 343; R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
[123] *Offensive*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[124] 137 S. Ct. 1744 (2017).
[125] The *Matal* Court invalidated the disparagement clause of the Lanham Act, which prohibited federal trademark legislation from trademarks that might disparage any persons. *Id*. at 1751–53. The plaintiffs were Asian-American members of a dance-rock band called *The Slants*. *Id.* at 1751. This case raises the important issue of the ability of marginalized people to reclaim slurs against them and the Court's colorblind jurisprudence. *See id.* The speech in this case—a slur reclaimed by its historically targeted community—is not hate speech for the purposes of this article. However, the Court did not distinguish slurs used derogatorily from slurs used by their targets for reclaiming purposes. The derogatory use of slurs is hate speech for the purposes of this article, and so this opinion is relevant to understanding the Court's hate speech jurisprudence.

ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment."[126]

Justice Kennedy also minimized the interests at issue in his concurring opinion in *Matal: "*A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all."[127] Here, Justice Kennedy minimized the interests at stake by characterizing the speech as merely offensive, and then justified protecting so-called offensive speech by asserting that minority and dissenting views would be silenced if such speech was unprotected.

Supreme Court Justices are not the only ones who minimize the interests in regulating hate speech. Nani Jansen Reventlow, director of the Digital Freedom Fund, argues for lenient, if any, regulation of harmful speech online.[128] Although she concedes that the Internet should be safe and open for everyone regardless of race, she writes, "[i]n order to move forward as a society, we need dissenting voices; even ones that express their views in a way that may be offensive or shocking to others, however unpleasant that might be."[129] In addition to "unpleasant," Jansen refers to harmful speech on the Internet as "unpopular" and, of course, "offensive."[130] While it may be true that harmful speech is all of those things, its harms do not stop there, and discussions of hate speech regulations should not either.

In addition to minimizing the interests at stake in hate speech cases, commentators also overstate the value of hate speech. In "Bad Arguments for Limiting Speech," Conor Friedersdorf argues that, if hate speech can be regulated because it leads to violence, then feminist speech or "Hollywood movies that portray two men kissing" that, according to Friedersdorf, might provoke violence from "Islamist radicals" would also be subject to potential regulation.[131] But just as the *harms* of hate

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[126] *Matal*, 137 S. Ct. at 1764 (citing United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).
[127] *Id.* at 1769 (Kennedy, J., concurring).
[128] Nani Jansen Reventlow, *The Right to 'Offend, Shock, or Disturb,' or the Importance of Protecting Unpleasant Speech*, BERKMAN KLEIN CTR. COLLECTION (Aug. 14, 2017), https://medium.com/berkman-klein-center/the-right-to-offend-shock-or-disturb-or-the-importance-of-protecting-unpleasant-speech-c57bc0672a30.
[129] *Id.*
[130] *Id.*
[131] Friedersdorf, *supra* note 12.

speech should not be minimized to the fact that it offends or is unpopular, the *value* of hate speech should not be equated to the value of feminist speech and speech that portrays the LGBTQ community. When speech is understood to have high value, it is harder for the interests against it to outweigh the interests for it. And after one hundred years of slavery, one hundred years of Jim Crow laws, thousands of lynchings, and pervading social inequities and mass acts of racist violence that continue today, we should be able to recognize that the value of hate speech cannot be equated to the value of feminist and pro-LGBTQ speech, which have both been integral to movements that secured rights for women and the LGBTQ community.

IV. THE DISSONANCE

The Court's First Amendment hate speech jurisprudence can be summed up as follows: certain types of speech—the lewd and obscene, the profane, the libelous, and insulting or fighting words—are unprotected under the First Amendment.[132] These categories of speech, and only these, are unprotected because the interest in social order and morality outweighs their contribution to society, if they have any.[133] Hate speech is not one of the enumerated categories of unprotected speech, so it would have to fall under one of the enumerated categories to be unprotected. It does not fall under the category of libel anymore, like it once did in *Beauharnais*.[134] It is also not considered fighting words, as established in *Skokie*.[135] Hate speech cannot fall under the obscene category, because speech must appeal "to the prurient interest" to be obscene.[136] According to the Court's position that the enumerated exceptions cover most types of speech that the government is justified in proscribing, because their threat to social order and morality outweighs any contribution they might

[132] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942).
[133] *Id.*
[134] *See* Stone, *supra* note 93.
[135] Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 24 (Ill. 1978).
[136] In *Miller v. California*, the Supreme Court established that the guidelines for determining if speech is obscene are: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. 15, 24 (1973) (citing Kois v. Wisconsin, 408 U.S. 229, 230, (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))).

have, the Court apparently believes that the threat posed to society by hate speech is not so severe or harmful that it outweighs its contributions.

If the interest at stake in hate speech cases is merely that audiences will be offended, as the Court has often said or implied,[137] then perhaps the Court is right: people are offended every day, and this is hardly a reason to regulate all of the speech that causes this offense. But to say that the interest against hate speech is that it is offensive is the logical equivalent of saying that the interest against arson is that it is distressing. Certainly, arson can cause distress. It can cause distress because it is unsightly, but it can also cause distress because it can hurt and kill people. Similarly, hate speech can offend because a listener disagrees with it, but it can also offend by providing community and encouragement to white supremacists, who often go on to hurt and kill people. If the Supreme Court heard a case about the regulation of arson, it would almost certainly consider the potential that arson could hurt people. The Court might cite statistics of the number of people killed or hurt by arson every year, the monetary cost of repairs undergone after acts of arson, and the effects of arson on a peaceful society. The discussion of arson would not simply be that it is offensive or unpleasant, or even just that it arouses anger.

Why, then, does the Supreme Court dismiss the interests against hate speech so hurriedly, with no discussion of the history of racism in the United States and the ways it has cost us, in capital and human life? And as white supremacists continue to flock to the Internet to spread racist lies that inspire acts of violence, why is there no discussion of the connections between hate speech and acts of mass violence?

When assessing the Supreme Court's ability and willingness to assess the tangible effects of racism on the lives of people of color, it is difficult to ignore the racial makeup of the Supreme Court bench. While there is no way to know for sure if more diversity on the bench would have led to different outcomes in the Court's hate speech cases, it is not implausible that Justices of color might have more easily appreciated the weighty consequences of hate speech while hearing these cases. This seemed to be the case in *Virginia v. Black*, where Justice

[137] *See supra* notes 93–120 and accompanying text.

Thomas, the only Black person and person of color on the Court, was the sole dissenter.[138] Research shows that Black people sometimes recognize racism when white people do not.[139] White Americans are also more likely than Black, Hispanic, and Asian Americans to say that too much attention is paid to race issues in our country, and non-White people are more likely to say that discrimination is overlooked.[140] Again, there is no way to know if a more diverse Court would have decided hate speech cases differently. The racial composition of the Court is simply one potential explanation for the Court's discourse on the harms of hate speech. But entertaining the hypothetical scenario in which the Court ruled differently in these cases begs one more "what if?"

What if that Court *had* followed its precedent set in *Beauharnais*? And what if, as a result, other states, and perhaps the federal government, enacted laws like Illinois' hate speech law in *Beauharnais*?[141] If speech that publicly demeans on the basis of race or religion was in fact regulated in the United States, as it is in other countries, would Donald Trump still have called Muslims "sick people" during his campaign?[142] If he had refrained, would the Christchurch shooter, who praised Trump as a "symbol of renewed white identity and common purpose" still have killed fifty-one Muslims in their place of worship?[143] If hate propaganda distributed electronically could be confiscated in the United States, as is the case in Canada,[144] would Dylann Roof have found the propaganda that he said changed him forever after a Google search?[145] If he had not, would he ever have committed mass murder in the name of white supremacy?

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[138] Virginia v. Black, 538 U.S. 343, 388–401 (2003) (Thomas, J., dissenting). "Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself." *Id.* at 397–98.

[139] Evelyn R. Carter & Mary C. Murphy, *Group-based Differences in Perceptions of Racism: What Counts, to Whom, and Why?*, 9 SOC. & PERSONALITY PSYCHOL. COMPASS 269, 271 (2015).

[140] Juliana Menasce Horowitz et al., *How Americans See the State of Race Relations*, PEW RSCH. CTR (April 9, 2019), https://www.pewsocialtrends.org/2019/04/09/how-americans-see-the-state-of-race-relations/.

[141] Beauharnais v. Illinois, 343 U.S. 250, 251 (1952).

[142] Johnson & Hauslohner, *supra* note 34.

[143] *New Zealand Mosque Attacks Suspect Praised Trump in Manifesto*, AL JAZEERA (Mar. 16, 2019), https://www.aljazeera.com/news/2019/03/zealand-mosques-attack-suspect-praised-trump-manifesto-190315100143150.html.

[144] Canada Criminal Code, R.S.C. 1985, c. C-46, 320(1).

[145] Hersher, *supra* note 47.

Of course, this conjecture is futile. Just like it is impossible to know if the Court would have ruled differently under different circumstances, it is impossible to know for sure how many lives might have been saved if they had. But it is not impossible to change course now and potentially prevent more tragedy. The Supreme Court has established precedent in *Beauharnais* that is as applicable to the present as it ever was:

> The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.[146]

While racist violence has always been present in the United States, the direct connections between hate speech online and acts of mass violence provide an inescapable justification for allowing the regulating of hate speech. At the very least, it is time for the Court to acknowledge racist violence in the context of hate speech as an interest weighing in favor of regulation.

[146] *Beauharnais*, 343 U.S. at 261 (quoting Cantwell v. State of Connecticut, 310 U.S. 296, 310 (1940)).