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In contrast to this line of commercial speech cases, neither Rust nor Casey analyzes the restrictions from the standpoint of their infringement on the audience-based, informational interests of listeners. Instead, these opinions, insofar as they are concerned with speech rights at all, focus on the impact of the regulations on physicians' speech rights. n79

-Footnotes-

n79 For a more extensive analysis of Rust and Casey from the standpoint of patients' audience-based rights under the First Amendment, see Berg, supra note 2, at 219-31.

-End Footnotes-

Moreover, both opinions take a highly paternalistic attitude toward the audience-based interests of patients by assuming that they lack the capacity to assess their own informational needs. In the view of the Casey plurality, a woman's "mature [\*172] and informed" decision about whether to continue a pregnancy to term can be ensured only if the State structures the doctor-patient dialogue, mandates the communication of certain information, and compels the expression of the State's preference for childbirth over abortion immediately before the procedure is performed. n80 Unlike its approach in commercial speech cases, the Court in Casey did not demand proof that pregnant women seeking an abortion lack this information or themselves consider it relevant to their decision. n81

-Footnotes-

n80 Casey, 505 U.S. at 883 ("We permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in doing so the State expresses a preference for childbirth over abortion").

n81 One commentator has concluded that the available evidence does not support the conclusion of the State and the Court that women need the information mandated by the "informed consent" statute in Casey. See Robert D. Goldstein, Reading Casey: Structuring the Woman's Decisionmaking Process, 4 WM. & Mary Bill of Rts. J. 787, 817-18 (1996) (stating that evidence from the tort system and Reagan Administration study do not support the conclusion that women do not understand the "moral" or psychological risks of abortion prior to undergoing the procedure).

-End Footnotes-

The dissonance between the Rehnquist Court's rejection of unproved assumptions to justify restrictions on commercial speech and its acceptance of unproved assumptions to justify restrictions on doctor-patient speech in Rust and Casey may be yet another example of a long-standing tradition of distrusting women's capacity for rational decision making, particularly in the area of reproduction. n82 For example, rather than mandating disclosure of information about the risks and benefits of participating in medical research and then permitting pregnant women to make their own decisions, the law has summarily excluded them from such participation. n83 Similarly, New York [\*173] recently enacted, and many states are considering, legislation that supplants new mothers' authority to decide whether to test their newborns for HIV. n84

These measures, which mandate the testing of all newborns and the disclosure of the results, n85 rest upon the unproven assumption that new mothers cannot be trusted to make a rational decision about testing their babies for HIV even if fully informed about the benefits of learning their infant's HIV status.

- - - - -Footnotes- - - - -

n82 Several commentators have observed that a distrust for women's capacity for rational decision making is apparent in reproduction jurisprudence. See, e.g., Paula Abrams, The Tradition of Reproduction, 37 Ariz. L. Rev. 453, 463 (1995) (stating that "woman has been judged historically as incapable of rational thought" and "the pervasiveness of this tradition throughout religion, philosophy, science, and ultimately law, distorts modern day cultural and legal evaluation of women's reproductive autonomy"); Nancy Ehrenreich, The Colonization of the Womb, 43 Duke L.J. 492 (1993) (exploring the different ways in which the medical and legal professions approach women's reproductive choices and the willingness of courts to intervene in women's choices).

n83 A number of legal scholars have analyzed the problem of gender bias in clinical research and the law. See, e.g., Karen H. Rothenberg, Gender Matters: Implications for Clinical Research and Women's Health Care, 32 Hous. L. Rev. 1201, 1203 (1996) (explaining that in clinical practice "the majority of drugs have never been tested on pregnant women, primarily because of fetal protection policies that prohibit the inclusion of women of childbearing potential in most drug trials"); Vanessa Merton, The Exclusion of Pregnant, Pregnable, and OncePregnable People (a.k.a. Women) from Biomedical Research, 19 Am. J.L. & Med. 369 (1993) (arguing that stereotypes about women underlie, and are reinforced by, gender-based exclusionary criteria for biomedical research); L. Elizabeth Bowles, The Disenfranchisement of Fertile Women in Clinical Trials: The Legal Ramifications of and Solutions for Rectifying the Knowledge Gap, 45 Vand. L. Rev. 877 (1992) (analyzing the "history and ramifications of exclusion of women from clinical trials").

n84 N.Y. Pub. Health Law <sect> 2500-f (McKinney Supp. 1997-98) (ordering creation of a program to deal with problems associated with HIV-positive newborns). In 1996, Congress amended the Ryan White CARE Act of 1990, which provides funds for AIDS-related services and treatment, to include financial incentives for states to adopt mandatory HIV testing of all newborns and the disclosure of the results. 42 U.S.C.A. <sect> 300ff-37 (West Supp. 1997) (allowing disqualified states to receive grant money if they establish mandatory HIV testing).

n85 N.Y. Pub. Health Law <sect> 2500-f (McKinney Supp. 1997-98) (creating a program to test newborns for HIV).

- - - - -End Footnotes- - - - -

V. THE FUTURE CONSTITUTIONAL STATUS OF DOCTOR-PATIENT SPEECH

Since the time of Hippocrates, the highest ethical duty of physicians has been to regard the interests of patients as paramount to those of all others, including the State. n86 A patientcentered medical ethic does more than facilitate the identification and satisfaction of the health care needs of individual patients; it also creates a crucial boundary between the State and the practice of medicine. In doing so, it serves several important functions:

it protects the medical decision making of patients from governmental coercion; it protects the intellectual freedom of physicians to practice their profession according to their best judgment; and, equally important, it safeguards the integrity of medicine from the potentially corrupting effects of a State agenda. n87

-Footnotes-

n86 Stedman's Medical Dictionary 716-717 (25th ed. 1990).

n87 We need not speculate about what can come to pass when the allegiance of doctors shifts from their patients to the State. In the 1930s and '40s, German physicians were taught that they owed a higher duty to the health of the State than to the health of their patients. The substitution of State policy for a patient-based medical ethic led substantial numbers of German doctors to lend their support to the Nazi agenda and its theories of racial superiority, and to participate in the sterilization and extermination of "undesirable" patients. See Jeremiah A. Barondess, Medicine Against Society: Lessons From the Third Reich, 276 JAMA 1657, 1658-61 (1996) (describing the restructuring of the German medical profession and the consequences of its transformation into an arm of State policy).

-End Footnotes-

[\*174]

While the Constitution includes several provisions that, like the patient-centered teaching of Hippocrates, shield a sphere of individual liberty against government infiltration, none of these is more towering than the First Amendment. By prohibiting the State from distorting speech, the First Amendment aspires to insure that the formation of belief about all matters related to the "intellect and spirit" n88 occurs within a free and unfettered context. To achieve this aim, the First Amendment protects both positive and negative speech rights -- the right to speak, the right not to speak, the right to receive ideas by listening to others, and the right not to be compelled to listen to unwanted speech. n89 As one First Amendment scholar has stated: "Freedom of expression . . . supports a mature individual's sovereign autonomy in deciding how to communicate with others; it disfavors restrictions on communication imposed for the sake of the distorting rigidities of the orthodox and the established." n90

-Footnotes-

n88 See Wooley v. Maynard, 430 U.S. 705, 715 (1977) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) to determine that requiring a motorist to display the motto "Live Free or Die" invaded the sphere of the intellect and spirit [protected by] the First Amendment").

n89 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."); Wooley, 430 U.S. 705, 714 ("The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); Rowan v. United States Post Office Dep't, 397 U.S. 728, 737-38 (1970) (noting that the Constitution does not compel citizens to listen to or view

unwanted communications, including those sent by mail); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating that "it is now well established that the Constitution protects the right to receive information and ideas").

n90 David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45, 62 (1974).

- - - - -End Footnotes- - - - -

A dispassionate application of established First Amendment doctrine in Rust and Casey would have led the Rehnquist Court to conclude that doctor-patient speech is protected expression that cannot be regulated on the basis of viewpoint. n91 [\*175] Affording First Amendment protection to doctor-patient speech would not altogether displace the right of government to impose some content-based regulations. Informed consent requirements, for example, would survive even the most exacting standard of review because they are viewpoint-neutral and serve the compelling state interest of facilitating informed medical decision making. n92 Additionally, unlike the paternalistic rationale advanced to support the viewpoint-based disclosure requirements in Casey, there is extensive historical and empirical evidence supporting patients' need for governmental intervention to prevent coerced medical decisions by insuring that doctors communicate complete information about diagnosis and alternative treatments. n93 Indeed, the evidence supporting the need for informed consent requirements is as compelling as that deemed sufficient by the Rehnquist Court to justify a content-based regulation of political speech in Burson v. Freeman. n94

- - - - -Footnotes- - - - -

n91 I have argued elsewhere that doctor-patient speech is protected under the First Amendment because it is intimately connected to patients' autonomy and audience-based interests in receiving information. See Berg supra note 2, at 221-31. For alternative theories for protecting doctor-patient speech, see Robert C. Post, Subsidized Speech, 106 Yale L. J. 151, 174 (1996) (arguing that the First Amendment prohibits viewpoint-based regulation of medical counseling because "patients expect the independent judgment of physicians to trump inconsistent managerial demands"); Goldstein, supra note 81, at 853 (arguing that the First Amendment protects doctorpatient speech because of "substantial individual and societal interests in physicians' free speech"). For an argument reaching the opposite conclusion, see Bezanson, supra note 69, at 766 (describing physician speech as "representational speech" not protected by the First Amendment).

n92 For another formulation of a standard of review for restrictions on doctor-patient speech specifically designed to protect patients' First Amendment right to receive unbiased medical advice, see Berg, supra note 3, at 260-65.

n93 For a history of the doctrine of informed consent, see generally Paul S. Appelbaum et. al., Informed Consent: Legal Theory and Clinical Practice (1987); Ruth R. Faden & Tom L. Beauchamp, A History and Theory of Informed Consent (in collaboration with Nancy M.P. King 1986) (exploring the origin and nature of informed consent, concentrating on conceptual issues, particularly the conditions under which informed consent is obtained). See also Jay Katz, The Silent World of Doctor and Patient (1984).

n94 504 U.S. 191 (1992) (plurality opinion) (holding that a Tennessee statute restricting political campaigning near the entrance to polling places did not violate the First Amendment). Of particular relevance to the plurality in Burson was the extensive history of voter intimidation and the widespread existence of state statutes limiting polling place speech. Id. at 200-04. It is similarly well-established that physicians have historically deprived patients of accurate and complete information about diagnosis and alternative treatments, and thereby undermined the voluntariness of medical decisions. To address this problem, every state imposes informed consent requirements on physicians either as a matter of common law or by statute. For an analysis of the various types of informed consent requirements, see Peter H. Schuck, Rethinking Informed Consent, 103 Yale L.J. 899, 916-17 (1994).

- - - - -End Footnotes- - - - -

The Rehnquist Court's highly protective free speech jurisprudence since Rust and Casey supports the thesis, advanced by some at the time, n95 that the constitutional protection of [\*176] doctor-patient speech was forfeited to accommodate profound disagreements about the practice of abortion among the Court's members. n96 Unfortunately, it is doubtful that this distortion of free speech jurisprudence will be remedied in the near future. If history is any indication, prospective Supreme Court challenges to government regulation of doctor-patient speech are likely to involve measures requiring physicians to utter increasingly pointed statements opposing abortion, n97 or to express the State's viewpoint concerning some other highly controversial medical practice about which members of the Court are likely to disagree. n98 Indeed, the most recent First Amendment chal [\*177] lenge to a government restriction on doctor-patient speech concerned the contentious issue of the medicinal use of marijuana. n99 One can only hope, therefore, that the next time the Rehnquist Court confronts a viewpoint-based regulation of physician-patient speech, it will hold its nose and adhere to the dictates of the First Amendment, which, above all else, protects expression regarding practices or subjects that some condemn.

- - - - -Footnotes- - - - -

n95 See, e.g., Berg, supra note 2, at 219 (stating that "while one suspects that the Court's conclusions in these cases reflect the majority's views on the highly volatile subject of abortion, the Court did not limit its holdings to this narrow context"); Wells, supra note 26, at 1724 (arguing that "in its hurry to dismantle abortion rights . . . the Court also pulled apart the fundamental tenets of the First Amendment").

n96 It has also recently become apparent that Justice Souter's sanctioning of the imposition of viewpoint-based regulations on physician speech may be an aspect of a larger theory that doctors' professional roles appropriately include overseeing patients' moral health. See Washington v. Glucksberg, 117 S.Ct. 2258, 2288 (1997) (Souter, J., concurring) (stating that "the good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient").

n97 For example, in 1975, Illinois enacted a statute that required physicians to inform patients that "the State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be

preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth." Ill. St. Ch. 38 <sect><sect> 81-23.5(1975), repealed by P.A. 83-1128, <sect> 2 (1984) (text of repealed statute is reprinted in part in Charles v. Carey, 627 F.2d 772, 781 n.13 (7th Cir. 1980) While this statute was held to violate the First Amendment at the time, it could survive constitutional review today under the standard set forth in Casey.

n98 State statutes patterned on the Pennsylvania statute in Casey requiring physicians to communicate to patients the government's ideological opposition to abortion have been generally upheld. See, e.g., Fargo Women's Health Organization v. Schafer, 18 F.3d 526 (8th Cir. 1994) (upholding a statute that requires the physician or physician's agent to inform a woman seeking an abortion that medical assistance benefits may be available, that the father is liable for child support, and that she has a right to review printed materials describing the fetus and listing abortion alternatives); Planned Parenthood v. Miller, 63 F.3d 1452 (8th Cir. 1995) (upholding a district court ruling striking a parental notification provision because it failed to provide a "parental bypass mechanism," and also holding that South Dakota may constitutionally require physicians to provide patients with certain information 24 hours before performing an abortion), cert. denied sub nom., Jamklow v. Planned Parenthood, 116 S.Ct. 1582 (1996); Utah Women's Clinic, Inc. v. Leavitt, 844 F.Supp. 1482 (D.Utah 1994) (deciding that a Utah abortion statute requiring informed consent and a 24-hour waiting period was unconstitutional). However, on July 2, 1997, a Florida state court judge enjoined the implementation of the "Women's Right to Know Act," which mandated that physicians convey viewpoint-based information to patients seeking an abortion. The plaintiffs asserted that the bill violated a woman's constitutional right to privacy, due process, and equal protection in requiring "the physician to be . . . an arm of the state in advising his patient . . . and forces the physician to steer his patient in favor of parenthood regardless of his true beliefs about the best interest of his patient and the expressed desire of his patient, who has come to him for an abortion." Judge Enjoins Implementation of Abortion Right to Know Law, 6 BNA Health L. Rep., 1091, 1091 (1997) (quoting from complaint in the case).

n99 See Conant v. McCaffrey, 172 F.R.D. 681 (N.D. Cal. 1997) (holding that threats by federal drug enforcement officials to prosecute physicians for advising patients about medical uses of marijuana after enactment of the California Compassionate Use Act of 1996 violated physicians' and patients' rights under the First Amendment).

- - - - -End Footnotes- - - - -

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ARTICLE: HATE SPEECH: AFFIRMATION OR CONTRADICTION OF FREEDOM OF EXPRESSION\*

\* This essay originally was presented on November 4, 1995, as the first 1995-96 lecture of the David C. Baum Memorial Lectures on Civil Liberties and Civil Rights at the University of Illinois College of Law.

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SUMMARY:

... She then looks at the traditional rationales underlying broad protection of the freedom of speech and undertakes a critical analysis of these rationales. ... In the last decade, small but increasing numbers of commentators, constitutional experts, legal theorists, human rights activists, and others are asking the hard questions, like whose liberty does the free speech guarantee protect? When freedom of speech for all is one of the guarantees of democracy, what do you do with speech that silences people? If civic participation and deliberation are the most valued aspects of democracy, then why is the loss of voices not seen to be harm of the highest order? What value is liberty for some, if it undermines democracy for all? Professor Derrick Bell's description of law as both a product and promotion of racism makes others wonder: is the absolutist approach to freedom of speech just another racist structure which entrenches existing power? ... The history of mass killings, rapes, torture, and other forms of racial, religious, and ethnic violence provoked and sustained by hate propaganda should be the backdrop against which the truth value of hate speech is measured. ... In addition to the Criminal Code hate propaganda provisions, Canada has a number of other laws which prohibit or otherwise regulate hate speech. ...

TEXT:

[\*789]

In this essay, originally delivered as a David C. Baum Memorial Lecture on Civil Liberties and Civil Rights at the University of Illinois College of Law, Professor Mahoney begins by examining the harms caused by hate speech to individuals, the group that they belong to, society generally, and democracy. She then looks at the traditional rationales underlying broad protection of

the freedom of speech and undertakes a critical analysis of these rationales. Professor Mahoney argues that concern for other rights and freedoms provides a basis for government restrictions on "hate speech" in at least some circumstances. She concludes that the harms hate speech inflicts justify some governmental restrictions. In particular, when the value and importance of the speech does not outweigh the harms that it causes, limits on the freedom of speech are necessary and appropriate.

## I. Introduction

Let me first say how deeply honored I am to be invited to give the 1995 David C. Baum Memorial Lecture on Civil Liberties and Civil Rights. Although I did not have the privilege of knowing Professor Baum during his lifetime, his request that this series of lectures in his memory be on Civil Liberties and Civil Rights speaks to me of his understanding of the delicate balance between rights and liberties: neither liberties nor rights can ever be taken for granted; they are evolutionary in process and in substance; they change with time, with information, with experience, and with insight. In dedicating this memorial series to Civil Liberties and Civil Rights twenty-two years ago, Professor Baum ensured that a process of constant examination, vigilant introspection, and aggressive open-mindedness will continue, as it must, indefinitely, if rights and liberties are to endure. [\*790]

In my remarks today, I will talk about free speech, liberty, and equality in the context of hate speech. My analysis starts in the lives of people directly affected by hate speech. From there, the discussion moves to the constitutional implications of the effects and harms of hate speech. Then, I look at the arguments used to protect hate speech as "free speech" and argue that they provide something less than the fully inclusive concept of rights that truly democratic societies must have. In the concluding part of my lecture, I will look at the treatment of hate speech in other jurisdictions, including Canada. This leads me to look at some emerging trends, particularly the reconceptualization of the meaning of rights, especially the equality right.

## II. The Freedom and the Traditional Response

Consider the following: (1) A black worker is subjected repeatedly to racist speech on the job. A noose is hung in his work area. His coworkers direct racial slurs and death threats at him. n1 (2) A Canadian high school teacher teaches his students that the Holocaust was a hoax and that Jews are responsible for all the problems in the world. If their essays and exams reflect his view, they get high marks. If not, they get poor grades. n2 (3) An Amtrack train south of Phoenix is sabotaged, killing one and injuring seventy-eight others, by saboteurs leaving behind notes signed "Sons of Gestapo." n3 (4) Soldiers in the Airborne regiment of the Canadian army organize a dinner to celebrate "Mark Lepine Day," on the anniversary of the Montreal Massacre of fourteen women Lepine called "a bunch of feminists" before machine-gunning them down. n4 (5) A bomb explosion in Oklahoma City claims 168 lives. The accused have links to

extremist, antigovernment militia groups. n5 (6) The word "Queen" and other antigay epithets and swastikas are spray painted on a gay man's car and property. n6 (7) A thirty-meter-high cross is burned in a farmer's field in Alberta, while men with rifles, wearing Ku-Klux-Klan robes and Nazi uniforms, circle around it chanting racist slogans such as "Death to Jews." n7 (8) A young college student finds the words "Nigger, go [\*791] home!" scrawled on his dormitory room the first day of school. "No Blacks Allowed" is spray-painted in a law student's dorm at the University of Wisconsin. n8 (9) Yitzak Rabin is assassinated at a peace rally. n9

-Footnotes-

n1. Introduction to *The Price We Pay: The Case Against Racist Speech, Hate Propaganda and Pornography* 3 (Laura Lederer & Richard Delgado eds., 1995) [hereinafter *The Price We Pay*].

n2. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 714 (Can.).

n3. *Terrorism on the Tracks*, *Calgary Sun*, Oct. 10, 1995, at 4.

n4. *Soldiers Celebrated Massacre of 14 Women*, *Calgary Herald*, Nov. 6, 1995, at A-3.

n5. Howard Witt & Hugh Dellios, *Oklahoma Blast: City Devastated by "Evil Cowards"*, *Calgary Herald*, Apr. 20, 1995, at A-1.

n6. Martin Kazu Hiraga, *Anti-Gay and -Lesbian Violence, Victimization, and Defamation: Trends, Victimization Studies, and Incident Descriptions*, in *The Price We Pay*, supra note 1, at 109.

n7. *Harvey Kane et al. v. Church of Jesus Christ Christian-Aryan Nations, Board of Inquiry*, Alberta, Canada 17-18 (Feb. 28, 1992) (presenting the decision of a three-member panel appointed by the Canadian Human Rights Commission to adjudicate claims arising under the Canadian Human Rights Act, R.S.C., ch. H-6 (1985) (Can.)).

n8. Introduction to *The Price We Pay*, supra note 1, at 3.

n9. *Martin Cohn & Dan Perry, Shocked Israelis Mourn*, *Calgary Herald*, Nov. 6, 1995, at A-1.

-End Footnotes-

Different, yet the same. Small incidents to catastrophic ones. Their commonality lies in the force motivating them. Hatred is that force. All the victims were victims of hatred - not of them as individuals, but of their membership in a despised group.

Thousands of similar incidents occur daily in my country and yours, sustained by a steady diet of racist, misogynistic, homophobic, and other forms of hate propaganda, distributed through a variety of low and high technologies. Hate messages are spread through anonymous phone calls and letters, posters, books, graffiti, magazines and pamphlets, cable television, videos, recorded telephone messages, computer networks, music recordings, bulk mail, and leafletting. The spoken or taunted message of hatred, probably still the most

common form, is conveyed on streets, in schoolyards, at places of work, on college campuses, in community centers, at political rallies, and at most other places where people gather. Some political parties in Europe and North America overtly promote racist platforms, n10 while others promote racism under a different name, as a necessary part of generally repressive policies. n11

-Footnotes-

n10. See Stephen J. Roth, *The Legal Fight Against Anti-Semitism: Survey of Developments in 1993*, at 84-96 (1995). Some of the overtly racist parties include the British National Party in Great Britain; the Heimattreue Vereinigung Elsass in France; the Movimento Politico, the Azione Skinhead, and the Veneto Fronte Skin in Italy; the Party of the National Right, the For the Fatherland Party, and the Movement for Romania Party in Romania; the Nationalistische Front, the Deutsche Alternative, the Nationale Offensive, the Freiheitliche Deutsche Arbeiterpartei, and the Nationale Liste in Germany.

n11. The Reform Party of Canada has been criticized for promoting racist policies under the guise of reforming immigration and refugee laws and procedures. The same party has attacked support for foreigners, immigrants, and ethnic minorities through the rationale of fiscal responsibility.

-End Footnotes-

In recent years, racial hatred has intensified in ways which the Western World has not seen since World War II. Various groups of skinheads, unofficial paramilitary formations, and other groups engage in violent racist attacks, harassment, and propaganda in ever increasing numbers. n12 In their 1992-93 audit, the Anti-Defamation League noted a twenty-three percent increase in acts of assault, threat, or harassment of Jews in the United States over the previous year; arson, bombings, and cemetery desecrations increased by eight percent. n13

-Footnotes-

n12. See Roth, *supra* note 10, at 1.

n13. Alan Schwartz, *Hate Activity and the Jewish Community*, in *The Price We Pay*, *supra* note 1, at 97.

-End Footnotes-

[\*792]

The National Lesbian and Gay Task Force reports that the number of antigay incidents, including multiple offenses, rose twenty-two percent from 1992 to 1993. n14 Acts included arson, vandalism, bomb threats, harassment, kidnapping, and murder. n15

-Footnotes-

n14. Hiraga, *supra* note 6, at 109.

n15. *Id.*

-End Footnotes-

In the former Yugoslavia, hate propaganda nourishes state-supported genocide, involving mass murders, torture, rapes, forced pregnancies, and sexual slavery of thousands upon thousands of innocent civilians, their only "crime" being that they are Muslims. n16 Racist pornography, the misogynist version of hate speech, uses media technology to merge racism and sex, with the result that hatred is sexualized and made into a kind of sexually arousing racism.

-Footnotes-

n16. See, e.g., Roy Gutman, *A Witness to Genocide* (1993) (detailing tales of "ethnic cleansing" in Bosnia); Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in *On Human Rights: The Oxford Amnesty Lectures 83* (Stephen Shute & Susan Hurley eds., 1993) (discussing how rape and other types of sexual abuse are used as weapons to victimize women both during times of war and times of peace).

-End Footnotes-

Whatever form hate propaganda takes, its purpose and effect is to distort the message of a group or class of people, to deny their humanity, and to make them objects of ridicule and humiliation such that acts of aggression against them are perceived less seriously. n17 It is meant to lay the foundation for mistreatment up to, and including, death. n18 To fail to understand this is to fail to understand racism. As all fascists know, it is just a matter of time, after hate propaganda and disparagement have done their work, that violence will follow.

-Footnotes-

n17. See *R. v. Zundel*, [1992] 2 S.C.R. 731, 808 (Can.) (Cory & Iacobucci, JJ., dissenting). In *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.), the Supreme Court of Canada said that society as a whole suffers because hate speech undermines freedom and core democratic values by creating discord between groups and an atmosphere conducive to discrimination and violence. *Id.* at 744-49; see also Center for Democratic Renewal, *They Don't All Wear Sheets: A Chronology of Racist and Far Right Violence, 1980-1986* (Chris Lutz ed., 1987); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2332 (1989). Several reports done by both government and nongovernmental organizations have come to similar conclusions. See Patrick D. Lawlor, *Canadian Bar Ass'n, Group Defamation Submissions to the Attorney-General of Ontario 95-97* (1984) (The Lawlor Report); John D. McAlpine, *The Report Arising Out of the Activities of the Ku Klux Klan in British Columbia 61-66* (1981) (The McAlpine Report); Law Reform Comm'n of Canada, *Working Paper 50: Hate Propaganda 32, 39* (1986); Ontario Human Rights Comm'n, *Life Together: A Report on Human Rights in Ontario 8-11* (1971) (The Symons Report); Special Comm. on Racial & Religious Hatred, *Canadian Bar Ass'n, Hatred and the Law 8-12* (1984); Special Parliamentary Comm. on Participation of Visible Minorities in Canadian Society, *Equality Now 35-40* (1984).

-End Footnotes-

n18. Gordon W. Allport, *The Nature of Prejudice 14-15* (1954), cited in Dino Bottos, Keegstra and Andrews: *A Commentary on Hate Propaganda and the Freedom of Expression*, 27 Alberta L. Rev. 461, 471 (1989).

People who are targeted by hate propaganda respond to it by being fearful and withdrawing from full participation in society. They are humiliated and degraded, and their self-worth is undermined. They are silenced as their credibility is eroded. The more they are silenced, the deeper their inequality grows. Some quit their jobs; [\*793] others leave their studies at university or leave their homes. Some suffer post-traumatic stress disorder; others commit suicide. Richard Delgado's ground breaking article, Words That Wound, which asks for a tort remedy for victims of hate propaganda, is based on these realities. n19 As the Supreme Court of Canada has described it, hate speech is not merely offensive: it constitutes a serious attack on psychological and emotional health. n20

-Footnotes-

n19. 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).

n20. See Keegstra, [1990] 3 S.C.R. at 744-49.

-End Footnotes-

Social psychologist Gordon Allport analyzes hate speech as part of a continuum of increasing violence and intimidation. He says there are five stages of racial prejudice: expression of prejudicial attitudes, avoidance, discrimination, principal attack, and extermination. Each stage is dependent upon and is connected to the preceding one. Allport used the history of the Third Reich as an example. He explains that it was Hitler's antilocution that led Germans to avoid their Jewish neighbors and erstwhile friends. This preparation made it easier to enact the Nuremburg laws of discrimination, which in turn, made the subsequent burning of synagogues and street attacks on Jews seem natural. The final step in the macabre progression was the ovens at Auschwitz. n21

-Footnotes-

n21. Allport, supra note 18, at 14.

-End Footnotes-

My lecture today can be summed up in one sentence: The harm of hate speech matters. It matters to individuals, it matters to the groups they belong to, it matters to society generally, and it matters to democracy. Hate propoganda is not legitimate speech. It is a form of harassment and discrimination that should be deterred and punished just like any other behavior that harms people. Free speech cannot be degraded to the extent that it becomes a license to harm.

But, mine is a difficult argument to make. Serious consideration of such arguments is rare, especially in the United States. Reflexive invocation of principles of liberty and free speech, considered to be the cornerstones of democracy, tend to foreclose discussion and close people's minds to new ways of thinking. Professor Cass Sunstein is one who argues against such an approach, saying, in some circumstances, what seems to be government regulation of speech actually might promote free speech and should not be treated as an abridgment at all. He argues that it is better to examine and evaluate regulation to see whether it serves liberty or not. n22

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n22. Cass Sunstein, Free Speech Now, in The Bill of Rights in the Modern State 262-65 (Geoffrey Stone et al. eds., 1992).

-End Footnotes-

In the last decade, small but increasing numbers of commentators, constitutional experts, legal theorists, human rights activists, and others are asking the hard questions, like whose liberty does the free [\*794] speech guarantee protect? n23 When freedom of speech for all is one of the guarantees of democracy, what do you do with speech that silences people? If civic participation and deliberation are the most valued aspects of democracy, then why is the loss of voices not seen to be harm of the highest order? What value is liberty for some, if it undermines democracy for all? Professor Derrick Bell's description of law as both a product and promotion of racism makes others wonder: is the absolutist approach to freedom of speech just another racist structure which entrenches existing power? n24

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n23. See Introduction to The Price We Pay, supra note 1, at 3.

n24. Derrick Bell, Race, Racism and American Law 27-29 (2d ed. 1980).

-End Footnotes-

These questions go to the very core elements of the philosophy underlying free speech values to which I now turn. Values underlying the free speech doctrine are incontestable. Philosophers, judges, lawmakers, and even poets articulate them as the quest for truth; the promotion of individual self-development and human flourishing; and the protection and fostering of vibrant democracy where the participation of all individuals is accepted and encouraged. n25

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n25. Irwin Toy, Ltd. v. Quebec, [1989] 1 S.C.R. 927, 967-71; see also R. v. Keegstra, [1990] 3 S.C.R. 697, 763-65.

-End Footnotes-

The metaphor widely adopted as a model for truth seeking is the marketplace of ideas. In this marketplace, citizens meet as equals, and no idea is suppressed. The purpose of the marketplace is to enable wise decisions to be made for the general good, based on a hearing of all viewpoints. If relevant information in the form of opinion, doubt, disbelief, or criticism is not heard, the results of the deliberations will be ill considered or unbalanced. The truth will not emerge. n26

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n26. See Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting); Thomas I. Emerson, Toward a General Theory of the First

Amendment, 72 Yale L.J. 877, 882-83 (1963).

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The strongest proponent of the marketplace analogy is the traditional civil libertarian movement. n27 Traditional civil libertarians generally believe that freedom of expression is the most crucial freedom in a democratic society. Negative liberty, or nonintervention in the personal lives of individuals, is the cornerstone of this philosophy. While civil libertarians express concern about hate propaganda, they believe the only laws that can be justified are those prohibiting incitement to racial violence in situations of imminent peril. In other words, where there is no "clear and present danger," of violence, civil libertarians say limits on speech are not permissible. To determine "clear and present danger," they ask whether the situation at hand is [\*795] analogous to falsely shouting "Fire!" in a crowded theater. n28 If it is not, the speech limitations cannot be justified.

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n27. For an overview of civil libertarian orthodoxy, see A. Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (1988), and Aryeh Neier, *Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom* (1979).

n28. The operational guideline of "clear and present danger" was first used in *Schenck v. United States*, 249 U.S. 47, 52 (1919), by Justice Oliver Wendell Holmes. It has been repeated subsequently in different contexts, including hate propaganda cases, notwithstanding the clear rejection of the doctrine for libelous utterances. See *Beauharnais v. Illinois*, 343 U.S. 250, 267 (1952). The *Beauharnais* case was undermined significantly by the Supreme Court's decision in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (summarily reversing a decision of the Illinois Supreme Court that imposed limitations on the ability of the National Socialist party to march in Skokie, a predominately Jewish community). The most recent development at the Supreme Court, which seems to have brought the law around full circle, was the decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where the Supreme Court struck down an ordinance that selectively prohibited certain forms of racist expression. It held that fighting words are not entirely devoid of First Amendment protection, and in particular, may not be prohibited based on the content of the message. For a discussion, see Mary Becker, *The Legitimacy of Judicial Review in Speech Cases*, in *The Price We Pay*, supra note 1, at 208, and Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, in *The Price We Pay*, supra note 1, at 202.

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So heavy is the reliance on the truth-seeking rationale, it is extended to the point of saying there is no such thing as a false idea. What this means is that expressions that some races are inferior to others or that the Holocaust never happened become protected speech. All ideas deserve a public forum, and the way to combat ideas with which one does not agree is through counterexpression, or "talking back."

The objectives of free speech are thus result oriented. Practical, concrete benefits are said to flow to the community from the protection of speech. When

it comes to extremist speech on the periphery of the freedom, most traditionalists believe it, too, must be protected. If it is not, the important, highly valued speech at the core of the freedom is threatened. This is the "slippery slope" argument often used against government regulation of hate speech.

A further argument that civil libertarians make is that there is little, if any, tangible harm that can result from the mere expression of words. They say words are not acts. Consequently, hate propaganda and pornography are understood by them to be merely "offensive material," nothing more. n29

-Footnotes-

n29. See Borovoy, supra note 27, at 40-66; Neier, supra note 27, at 134-48.

-End Footnotes-

Furthermore, they worry that antihate legislation may be abused. Civil libertarians fear that vagueness in the language of the law could result in a "slippery slope" of inappropriate prosecutions of innocent groups or be used to silence intemperate remarks made in moments of passion. Moreover, because hate mongers are such a small minority of obscure, marginal individuals who command no substantial audience or following, there is not need for legislative measures to deal with them. n30

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n30. See Borovoy, supra note 27, at 40-41.

-End Footnotes-

On the strategic side, the argument goes that prosecuting hate mongers is counterproductive and dangerous. Courts provide a forum [\*796] for hate propagandists to reach a far larger audience than otherwise would be possible. By wrapping themselves in a martyr's cloak, they are able to elevate their cause to a level that it does not deserve.

Although many of these arguments are persuasive on their face, it is my view that applied to present day realities, most of them are either inapplicable or fall short of dealing with the relevant issues democracies of today must confront. The sacred cow of free speech diverts attention from gaps in civil libertarian arguments. Serious flaws emerge when context-based analyses replace formalistic ones. Civil libertarian orthodoxy looks increasingly outdated, as it ignores harm to target groups. It is gender, race, and class biased, and through its legal formulations, it is impossible to reconcile freedom of speech with the constitutional right of equality. As Alexander Meiklejohn stated, "How hollow may be the victories of the freedom of speech when our acceptance of the principle is merely formalistic." n31

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n31. Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 104-05 (1948).

-End Footnotes-

For example, the argument that a commitment to the democratic system of government requires an unqualified and preeminent commitment to free speech is simply false. It sets up an "either-or" dichotomy which is not relevant in modern, western democracies. It relies on the proposition that governments are a constant threat to the freedom of the citizens; that they are perpetually hostile and aggressive towards individuals and society; and that once in possession of power, they will revert back to the autocratic powers of their eighteenth-century predecessors. In the context of western democracies in the twentieth century, this argument is overplayed. It is defensive and rigid to the extent that any attempt to limit or make exceptions to the free speech principles is almost subversive. By its dichotomous nature, it is a conversation stopper.

The reality is that speech issues raised by hate propaganda today are entirely different than speech issues that faced fledgling democracies in the seventeenth and eighteenth centuries. To equate discussion of public issues and free elections of that era to the hate speech of today conceals the social functions of speech, minimizes the harms and abuses hate speech causes, and ignores the responsibility of government to maintain a civilized society. It refuses to contemplate that what seems to be free speech may in fact abridge speech and other fundamental freedoms required in a free country. Robert Bork, for example, has opposed toleration of even ineffectual talk about violent overthrow of democratic institutions because he says, "It is not political speech because it violates constitutional truths." n32

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n32. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 31 (1971); see also Irving L. Horowitz & Victoria C. Bramson, *Skokie, the ACLU and the Endurance of Democratic Theory*, 43 *Law & Contemp. Probs.* 328, 328 (1979). But see Lee Bollinger, *The Tolerant Society: Freedom of Speech & Extremist Speech in America* 213-36 (1986) (arguing that the best approach to hate mongering is condemnation by nonlegal sanctions, like criticism and ostracism).

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[\*797]

It is hard to imagine how hate speech could be characterized as either elemental to the structure of democracy or an advancement in the protection of freedom. In setting up a "freedom of expression equals democracy" equation as an "either-or" proposition, any inquiry or analysis of the experience of disadvantaged or vulnerable members of society is impossible. This lack of middle ground explains why few civil libertarians debate or even recognize the harms hate propaganda causes to women or racial and ethnic groups.

On the other hand, genuine democracies that respect the inherent dignity of the human person, social justice, and equality accept the fundamental principle that legislative protection and government regulation are required to protect the vulnerable. It follows that when the free speech doctrine is used by more powerful groups to seriously harm less powerful, vulnerable ones, some government action is required. Otherwise, the proper role of government and free speech is misunderstood. n33 While great care must be taken to contain the

exercise of state power, to view the government as villain for interfering is incorrect. To paraphrase Justice Jackson in the case of Terminiello v. Chicago, n34 freedom of speech is not a suicide pact.

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n33. The Supreme Court of Canada enunciated this principle in R. v. Wholesale Travel Group, Inc., [1991] 3 S.C.R. 154. It later was applied in the hate propaganda context in R. v. Zundel, [1992] 2 S.C.R. 731. The Canadian Charter of Rights and Freedoms expressly sets out the balancing concept, as it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), 1. For a discussion in the American context, see David Partlett, From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech, 22 Vand. J. Transnat'l L. 431, 459, 468-69 (1989).

n34. Terminiello v. Chicago, 337 U.S. 1, 37 (1949). The exact words of Justice Jackson were: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional bill of rights into a suicide pact." Id.; see also Irwin Cotler, Giving Free Speech a Bad Name, in Freedom of Expression and the Charter 255 (David Schneiderman ed., 1991).

-End Footnotes-

A second related assumption underpinning the civil libertarian argument, which I think is wrong, is that hate speech is individualized behavior. To see hate propaganda laws as putting the government in the position of infringing individuals' rights misunderstands the purpose of hate speech. It is more accurate to analyze hate promotion as a group-based activity. Those who promote hatred, violence, or degradation of a group are aggressors in a social conflict between groups. It is a well-established principle that where groups conflict, governments must draw a line between their claims, marking where one set of claims legitimately begins and the other fades away. n35 If governments fail to make these assessments and draw lines, they fail in their responsibility to maintain social harmony in the society. When viewed this way, it makes more sense to argue that unless hate propagandists [\*798] can justify the harm they cause to minority groups and women, governments can justify limiting their expression.

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n35. See Irwin Toy, Ltd. v. Quebec, [1989] 1 S.C.R. 927, 990, 993-94.

-End Footnotes-

A third criticism of the civil libertarian approach is the degree of reliance placed on the truth-seeking rationale. Although the general proposition that open discussion advances the pursuit of truth cannot be questioned, the way civil libertarians use it in the context of hate speech pushes the claim too far. Its dogmatic application has become a cliché, rather than a principled analysis. For example, the proposition that it could be true that the Holocaust is a hoax is hardly a principled basis upon which to defend such speech. When speakers deliberately misrepresent the work of historians, misquote witnesses,

fabricate evidence, and cite nonexistent authorities, as Holocaust deniers do, n36 their speech is the antithesis of seeking truth through the free exchange of ideas.

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n36. See R. v. Zundel, [1992] 2 S.C.R. at 786-87 (Cory & Iacobucci, JJ., dissenting). The defendant, Ernst Zundel, was charged under 181 of the Canadian Criminal Code for publishing Historical Facts No. 1, Did Six Million Really Die? Truth at Last Exposed, which denied the fact that the Holocaust occurred during World War II. Justices Cory and Iacobucci, in their dissenting decision, provide a description of Zundel's "evidence." Id. (Cory & Iacobucci, JJ., dissenting).

-End Footnotes-

Similarly, opinions of sexists who advocate the sexual torture of or violence against women cannot be said to contribute to truth seeking. n37 In both examples, the reality of the social ills of racism and sexism renders the marketplace of ideas much less effective. The content of the speech fundamentally contradicts basic egalitarian principles and values of a free and democratic society. The more such a society upholds these democratic values, the weaker the "truth" justification becomes.

-Footnotes-

n37. See R. v. Butler, [1992] 1 S.C.R. 452, 496-98. In this unanimous (9-0) Supreme Court of Canada decision, the Court adopted a harms-based equality approach to uphold the constitutionality of obscenity legislation. For a fuller discussion of the harms-based approach in the context of pornography, see Kathleen Mahoney, The Limits of Liberalism, in Perspectives on Legal Theory 64 (Richard Devlin ed., 1991), and Kathleen Mahoney, Canaries in a Coal Mine: Canadian Judges and the Reconstruction of Obscenity Law, in Freedom of Expression and the Charter, supra note 34, at 156-64.

-End Footnotes-

Although it can be argued that these forms of extremist speech may educate the population about racial hatred and misogyny, it is far from clear that an open confrontation with racist and misogynistic propaganda in the marketplace of ideas leads to a richer belief in the truth. It is more likely that the opposite result occurs. Debasement of women in pornographic magazines, books, movies, films or television, on street corner newsstands, on covers of record albums, and in shop windows is an ever increasing phenomenon. In Canada, sales of pornographic magazines increased by 327% in the last twenty-five years. n38 This represents an increase of at least fourteen times the [\*799] growth of the Canadian population during the same period. Furthermore, the messages in pornography - that women and children are sex objects available to be violated and coerced at the will of men - is replicated in real life statistics which also are increasing at a very rapid rate. n39 Widespread sexual assault, wife battery, sexual harassment, and sexual abuse of children indicate that the competing idea, that women as human beings are equal to men and that children must be protected and treated with dignity and respect, is not emerging from the marketplace of ideas in any significant way. The "value" of pornography as a truth-seeking device in these terms ranges from remote to none. It makes no sense to suggest that the uninhibited activity of pornographers or hate

mongers is important for maintaining a belief that what they have to say is wrong.

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n38. See Robin F. Badgley, Canadian Dep't of Justice, Sexual Offences Against Children 11 (1984) (The Badgley Report); see also Neil M. Malamuth & Robert D. McIlwraith, Fantasies and Exposure to Sexually Explicit Magazines, 15 Comm. Res. 753, 762-65 (1988) (suggesting that "some connections" exist between one's "consumption of certain sexually explicit media" and one's "sexual fantasies and hostility"). Similar results were reported in Park E. Dietz & Barbara Evans, Pornographic Imagery and Prevalence of Paraphilia, 139 Am. J. Psychiatry 1493, 1494 (1982), and Park E. Dietz & Alan E. Sears, Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines, and Films in Four American Cities, 21 U. Mich. J.L. Ref. 7, 16-38 (1987). See also Special Comm. on Pornography & Prostitution, Pornography and Prostitution in Canada C-6 (1985).

n39. See Special Comm. on Pornography & Prostitution, supra note 38, at C-6. Incidents of rape in Canada increased by 174% between 1961 and 1971. Lorene M.G. Clark & Debra J. Lewis, The Price of Coercive Sexuality 61 (1977). During the period from 1969 to 1973, rape in Canada increased by 76%. Kathleen Mahoney, The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography, 55 Law & Contemp. Probs. 77, 100 n.113 (1992). The Canadian Panel on Violence Against Women reported in 1993 that one in four women in Canada have experienced domestic violence; one in two have experienced rape or attempted rape. Canadian Panel on Violence Against Women, Minister of Supply & Servs., Changing the Landscape: Ending Violence - Achieving Equality 9 (1993) (final report).

-End Footnotes-

If one looks at other areas of social life where the primary objective is the pursuit of truth, the marketplace of ideas is not the model used. In the criminal justice system, for example, speech is recognized as being important to the goal of learning the truth; but at the same time, its potential to undermine the truth is clearly recognized. Parties may present their arguments as they wish, but speech that is inflammatory or highly emotive may be excluded because of its potential prejudicial effects on the judgment of the judge or jury. In other words, it is recognized that certain forms of speech can undermine the truth.

In the case of highly emotive hate speech directed against minorities and women, where the speech seeks to subvert the truth-seeking process itself, a forceful argument can be made that the interests of seeking truth work against, rather than in favor of, speech. n40 Once again, the values relied upon to support freedom of speech lose their force. The view that the truth will always win out in a free marketplace of ideas is, at best, naive, and at worst, dangerous. The history of mass killings, rapes, torture, and other forms of racial, religious, and ethnic violence provoked and sustained by hate propaganda [\*800] should be the backdrop against which the truth value of hate speech is measured. n41

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n40. See Bollinger, supra note 32, at 57-58.

n41. For a case study of the maintenance of violence through hate propaganda, see Cyril Levitt, Racial Incitement and the Law: The Case of the Weimar Republic, in Freedom of Expression and the Charter, supra note 34, at 211.

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Another problem with the market analogy is that "more speech" is quite unrealistic or even impossible in the face of much hate propaganda. This is because "more speech" requires rationally constructed arguments. A dozen heterosexual males pursuing one gay male screaming epithets at him, an anonymous death threat slipped under a door, burning a cross on another's lawn, or a dead dog left in a lesbian's mailbox do not constitute situations where "talking back" is a viable option. Either the hate monger has slipped away in the night or has created such an intimidating situation through ganging up or bullying that vigorous debate or "more speech" is not a reasonable response. Speech in these examples is nothing more than a weapon, used to silence and terrorize victims and deepen their inequality. n42

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n42. See Wanda Henson, Bible Belt Lesbians Fight Hate, in The Price We Pay, supra note 1, at 35-36; Hiraga, supra note 6, at 109; Laura J. Lederer, The Case of the Cross-Burning: An Interview with Russ and Laura Jones, in The Price We Pay, supra note 1, at 28-31.

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Even if "more speech" is possible, the "free market" analogy remains flawed because it assumes equal, unhindered access where all citizens have the opportunity to communicate and be heard. The reality today is that modern methods of mass media have altered drastically the concept of equal communication envisioned by nineteenth-century liberals who developed the metaphor. n43 The mass media "owns" the skills and language techniques necessary to address the people. The marketplace of ideas, if it ever did exist, has long ago succumbed to technological and social change. In today's world, untruths can certainly prevail if powerful agencies with strong motives gain a hold in the market. Because equality of access to the media does not exist between advantaged and disadvantaged groups, reliance on the "marketplace" to protect the disadvantaged from the promotion of hatred against them is guaranteed to fail. Advantaged groups possess a disproportionate share of freedom of expression by virtue of their greater share of power and wealth. In a marketplace where some have a greater ability to speak and be heard than others, it is more likely that the ideas of the advantaged will emerge out of the competition of ideas, rather than the truth. For example, to assume, as the traditional civil libertarian orthodoxy does, that native people have the same access to speech as oil companies or that women and children have the same access as pornographers or that blacks have the same access as whites is to create false equivalencies [\*801] which perpetuate and ensure inequality and an unfair distribution of speech rights on the basis of race, sex, class, and age.

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n43. For example, John Stuart Mill's work anticipated speech occurring in a setting where everyone has the same opportunity to speak and to be heard. John Stuart Mill, *On Liberty* (Penguin Books 1968). For a discussion about the weaknesses in the marketplace model, see Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 *Duke L.J.* 1, 17-49.

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A further proposition which requires some response is the argument that there is little, if any, tangible harm that can result from the mere expression of words or symbolic acts. The problem arises in the way harm is defined. Civil libertarians say that unless hate speech causes "clear and present danger," it cannot be said to be harmful. n44 Anything less than that is merely "offensive" and cannot be limited. I disagree with this proposition for a number of reasons.

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n44. See Harlan F. Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* 4, 10 (1936); see also *Collin v. Smith*, 578 F.2d 1197, 1204-05 (7th Cir. 1978); *Anti-defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 174 (D.C. Cir. 1968). The Supreme Court of Canada explicitly has disagreed with the American approach. See *R. v. Keegstra*, [1990] 3 S.C.R. 697, 740-44, 746 (citing three reasons why the test should not be used).

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First, the "offensive" categorization wrongly places the harm within the victim's control. It suggests that if the victim is harmed, it is her or his own fault because they could, or should, have avoided it - by averting their eyes or not listening. This form of victim blaming ignores the essence of discrimination, which is not just how members of disadvantaged minorities feel about themselves; it is also how they are viewed by members of the dominant majority.

Second, the use of the "clear and present danger" test can comprehend only linear, individualized harm of the "fist in the face" variety. It cannot take into account the subtle way hate propaganda actually works, which is to indoctrinate over time by establishing that racism is expected and permissible. n45 Any requirement to prove "clear and present danger" ignores this reality.

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n45. See Allport, *supra* note 18, at 49-51.

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Third, "clear and present danger" assumes a male norm. Like the self-defense doctrine, it is based on a "bar-room brawl" model, envisioning emotional reactions of male combatants. n46 It is highly unlikely that women victims of hate propaganda would ever be provoked to physical violence in response to it. Rather than create a situation analogous to shouting "Fire!" in a crowded theater, their reaction to hate speech would more likely be to flee or otherwise disappear. Such an exclusionary, gender-biased test effectively eliminates women from any protection hate speech laws can provide.

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n46. The Supreme Court of Canada has recognized the gender bias in the self-defense doctrine as it applies to women who fight back to save their own lives. R. v. La Vallee, [1990] 1 S.C.R. 852, 873-75. The case concerned a battered woman, found to be a victim of the battered woman syndrome, who killed her partner to save her own life. Id. at 856-57. So far, neither the Supreme Court of Canada nor the U.S. Supreme Court has examined the normative standards for gender bias in their application of free speech jurisprudence.

-End Footnotes-

Fourth, the "clear and present danger" test is inconsistent. In the hate propaganda context, it assumes that words are only a prelude to action and cannot be prohibited because they are not "acts." But the test does not explain why other laws which limit speech, such as laws [\*802] prohibiting bribery, treason, blackmail, conspiracy, forms of verbal harassment, threatening, and price-fixing, are not questioned. All are prohibitions of forms of speech, yet none satisfy the "clear and present danger" test. From a legal standpoint, they are considered to be "acts" consisting solely of words. It seems that as a line-drawing device the action-word distinction is applied selectively. n47

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n47. Justice Cory, as he then was, of the Ontario Court of Appeal in a hate speech case, R. v. Andrews, 65 O.R.2d 161, 187 (Ont. Ct. App. 1988), aff'd, [1990] 3 S.C.R. 870, cited numerous examples of laws that prohibit activities that carry a risk of harm, regardless of whether harm actually occurs, such as impaired driving, attempted murder, and conspiracy. He could see no qualitative difference in having laws to protect society from the risk of harm inherent in the public, wilful promotion of group hatred. Id. at 188.

-End Footnotes-

Finally, the civil libertarians' arguments regarding definition and "casting the net too wide" must be addressed. They say it is legislatively impossible to draw the distinctions required to avoid suppressing the wrong material. Therefore, no lines should be drawn. n48 Professor Lee Bollinger adds that the legal protection of hate speech reinforces tolerance as a value. If speech of the worst kind is protected, then people will internalize the need for tolerance and will draw upon it in times of stress. n49 In response, I would say that it is correct to say that words capable of more than one precise meaning may create opportunities for unintended distinctions to be drawn and that if imprecise words are used to describe a criminal offense, the law can be misused or misinterpreted to cause an unjust result. However, it is not correct to suggest that unless we have absolute certainty in words, we cannot have laws. This is a false suggestion because in any legal system uncertainty is inevitable. n50 The choice does not exist between a legal system without uncertainty and one with it. Open-ended words such as "reasonable" or "dangerous" create opportunities for abuse, but they are starting points of principled approaches in many areas of law. Although exact precision in language is the optimum, imperfection cannot be used to foreclose action. Merely to ask how much uncertainty any given law carries with it is an incomplete inquiry. The companion question, how much uncertainty we are prepared to live with given the interests the law is trying to protect, also must be asked. It is a question of balance in every case.

Insofar as tolerance is concerned, I would say that intellectual pluralism does not, and cannot mean, that racism or sexism will be given the same deference as tolerance. n51 If so, the slippery slope created by the free [\*803] flow of racist hatred will lead inevitably to a place where freedom is compromised for all.

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n48. See Alan Borovoy, *How Not to Fight Racial Hatred*, in *Freedom of Expression and the Charter*, supra note 34, at 244-45.

n49. See *Bollinger*, supra note 32, at 104-44.

n50. For a discussion about the uncertainties in the law and the extent of judicial discretion afforded to judges, see Aharon Barak, *Judicial Discretion* 3-45 (1987); Benjamin Cardozo, *The Nature of the Judicial Process* 9-52 (1960); and Peter McCormick & Ian Greene, *Judges and Judging* 83-189 (1990).

n51. See Rosalie S. Abella, *From Civil Liberties to Human Rights: Acknowledging the Differences*, in *Human Rights in the Twenty-First Century* 61 (Kathleen E. Mahoney & Paul Mahoney eds., 1993).

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III. International Responses

If one looks to the international community, there is a recognition that racist hate propoganda is integral to the perpetuation of racism, that it is illegitimate speech and is properly subject to control under law. The debate is not whether to control hate speech but how to control it. The Convention on the Elimination of All Forms of Racial Discrimination n52 requires states to criminalize racial hate messages as well as participation in organizations which promote and incite racial discrimination. n53 Article 4 declares that states "condemn all propoganda ... based on ideas or theories of superiority ... or which attempt to justify or promote racial hatred and discrimination in any form." n54 Within Western Europe, thirty-four countries are party to the Convention for the Protection of Human Rights and Fundamental Freedoms. n55 When laws sanctioning racist speech have been challenged before the European Commission of Human Rights, it has found that the purpose of protecting aggrieved minorities from the wilful promotion of hatred against them is a constitutionally justifiable limit on freedom of expression. n56

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n52. Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 194, 3 I.L.M. 164 [hereinafter *Racial Discrimination Convention*].

n53. See Irwin Cotler, *Racist Incitement: Giving Free Speech a Bad Name*, in *Freedom of Expression and the Charter*, supra note 34, at 255-56.

n54. Racial Discrimination Convention, supra note 52, art. 4, 660 U.N.T.S. at 218, 220, 3 I.L.M. at 166-67.

n55. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; see also Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

n56. See, e.g., Roth, supra note 10, at 23-26 (citing cases from the European Commission of Human Rights approving limits on the freedom of expression when the expression to be limited is hate speech).

- - - - -End Footnotes- - - - -

Many individual countries have acted upon their international obligations and criminalized or otherwise regulated various forms of hate propaganda in their domestic laws. Since 1992, Sweden, Belgium, Azerbaijan, Brazil, Cyprus, the Czech Republic, Austria, Italy, Estonia, Lithuania, New Zealand, Romania, Russia, Switzerland, Hungary, and the Netherlands all embarked on new legal strategies to deal with hate propaganda in an attempt to meet the flood of racist and xenophobic manifestations unprecedented in their countries since the end of World War II. n57 For similar reasons, as of 1994, Austria, Belgium, France, the Czech Republic, Germany, Israel, and Switzerland have either created or strengthened laws specifically designed to combat Holocaust denial. n58 These measures have received interna- [\*804] tional support, especially from the European Parliament whose resolutions on racism refer specifically to the Holocaust.

- - - - -Footnotes- - - - -

n57. Id. at 39-49.

n58. Id. at 100-02.

- - - - -End Footnotes- - - - -

Canada has a criminal provision which prohibits three types of hate propaganda: advocacy of genocide; communications inciting hatred against an identifiable group where a breach of the peace is likely to follow; and the public wilful expression of ideas intended to promote hatred against an identifiable group. n59

- - - - -Footnotes- - - - -

n59. Criminal Code, R.S.C., ch. C-46, 319 (1985) (Can.). For an explanation of the hate laws and their relationship to the constitutional rights of freedom of expression, see generally Mahoney, supra note 39, at 77.

- - - - -End Footnotes- - - - -

In 1990, the legislation was challenged for the first time as a violation of free speech as protected by Canada's Charter of Rights and Freedoms. n60 The case involved a high school teacher who taught anti-Semitic hate propaganda to his students during school hours, examined them on this material, and gave high marks to those who agreed with his views. Those who disagreed received poor grades. After being charged under the hate propaganda provisions, the accused

challenged the law on the basis that it violated his constitutionally guaranteed right of freedom of expression. n61

-Footnotes-

n60. R. v. Keegstra, [1988] 5 W.W.R. 211 (Alta. Ct. App.) (decision of the Alberta Court of Appeals declaring unconstitutional the antihate provisions of the Canadian Criminal Code, R.S.C., ch. C-46, 319 (1985) (Can.), rev'd, [1990] 3 S.C.R. 697.

n61. R. v. Keegstra, [1990] 3 S.C.R. 697.

-End Footnotes-

The case was appealed at different levels by both sides to the Supreme Court of Canada where, in a ground-breaking decision, the legislation was upheld. n62 It was ground-breaking because the court focused on the harm that is caused by hate propaganda to other constitutional rights - namely, equality - as well as the psychological and emotional harm caused to the target group. When the harm of the speech was balanced against the rights of hate mongers to speak it, the court found that hate speech is low-value speech which cannot outweigh the interests the legislation protects. n63 The court rejected the clear and present danger test on the basis that it was incapable of addressing the harms hate propaganda causes. n64

-Footnotes-

n62. Id. at 744.

n63. Id. at 744-49.

n64. Id. at 743.

-End Footnotes-

Another reason the court upheld the legislation was the importance of the Canadian commitment to multiculturalism. The court said that attacks on groups need to be prevented if multiculturalism is to be preserved and enhanced. n65 Looking to the underlying purposes of freedom of expression, the truth value of hate propaganda was found to be marginal, as was its contribution to other democratic values. n66 The court said hate speech undermines the value of protecting and fostering a vibrant democracy because it denies citizens equality [\*805] and meaningful participation in the political process, and its contribution to self-fulfillment and human flourishing is negligible. n67 It found that hate speech not only chills or denies freedom of expression to those it targets, but also undermines self-development and human flourishing among all members of society by engendering intolerance and prejudice. The Chief Justice's remarks in the case with respect to the role of legislation in promoting free speech were very similar to those of Professor Cass Sunstein mentioned earlier. n68

-Footnotes-

n65. Id. at 746.

n66. Id. at 761.

n67. Id.

n68. Sunstein, supra note 22, at 264-65.

- - - - -End Footnotes- - - - -

In addition to the Criminal Code hate propaganda provisions, Canada has a number of other laws which prohibit or otherwise regulate hate speech. The Canadian Human Rights Act prohibits the use of the telephone for recording hate messages; n69 the Broadcasting Act authorizes the creation of standards for radio, television, and pay television, prohibiting abusive comment likely to expose individuals or classes of individuals to hatred or contempt on the basis of race, ethnicity, religion, sex, color, age, or mental or physical disability; n70 and the Customs Act prohibits the importation of hate propaganda. n71 Provincial human rights legislation in most provinces address discriminatory signs and symbols, and some specifically address hate propaganda as a human rights violation.

- - - - -Footnotes- - - - -

n69. Canadian Human Rights Act, R.S.C., ch. H-6, 13 (1985) (Can.).

n70. Broadcasting Act, R.S.C., ch. B-9, 3 (1985) (Can.).

n71. Customs Act, R.S.C., ch. 1 (2d Supp.), 181 (1985) (Can.); see also Customs Tariff Act, R.S.C., ch. C-54, 37 (1985) (Can.) (prohibiting the importation of materials of an "immoral or indecent character" and certain materials "depicting scenes of crime or violence").

- - - - -End Footnotes- - - - -

Although the Canadian model is nowhere near perfect, I would argue not only that governments should act to protect their minorities in similar ways, but also that they must do so. This is because government inaction in the face of injurious vilification implicates the state in the discrimination, adding to the harm the targeted group suffers and harm to democracy.

Professor Mari Matsuda eloquently describes the impact of hate speech on individual members of target groups when governments fail to act. She says:

To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When ... the courts refuse redress for racist insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person.

....

...The government's denial of personhood by denying legal recourse may be even more painful than the initial act of hatred. [\*806] One can dismiss the hate groups as organizations of marginal people, but the state is the official embodiment of the society we live in. n72

-Footnotes-

n72. Matsuda, supra note 17, at 2338, 2379.

-End Footnotes-

Author Andrea Dworkin makes a similar point in her equally eloquent and powerful discussion of the protection of pornography in the name of free speech:

In the country where I live as a citizen, there is a pornography of the humiliation of women where every single way of humiliating a human being is taken to be a form of sexual pleasure for the viewer and for the victim, where women are covered in filth, including feces, including mud, including paint, including blood, including semen; where women are tortured for the sexual pleasure of those who watch and those who do the torture, where women are murdered for the sexual pleasure of murdering women, and this material exists because it is fun, because it is entertainment, because it is a form of pleasure, and there are those who say it is a form of freedom.

Certainly it is freedom for those who do it. Certainly it is freedom for those who use it as entertainment, but we are also asked to believe that it is freedom for those [to] whom it is done.

....

...Now that tells me something about what it means to be a woman citizen ... and the meaning of being second-class. n73

-Footnotes-

n73. Andrea Dworkin, Pornography Is a Civil Rights Issue for Women, 21 U. Mich. J.L. Ref. 55, 56-57 (1987).

-End Footnotes-

IV. Conclusion

Throughout this paper, I have discussed principles taken from the thoughts of Locke, Hobbes, Rousseau, and Mill, n74 and I have disagreed with the way

many of them are applied by civil libertarians in the present day context. Eighteenth- and nineteenth-century theories that served a need that modern democracies have outgrown do not seem to be the best way to address the problems created by hate speech. While attaining the truth, achieving and maintaining the democratic values of self-government, and achieving personal growth through self-expression are critically important reasons to protect speech from government interference, the real value of hate speech must be assessed against the real harms it inflicts. Any marginal truth value is insignificant compared to the injury and harm hate speech engenders. Constitutionally speaking, when these forms of "speech" strike at the heart of other values deeply cherished in a free and democratic society - particularly, the right of equality - doctrinal space for regulation opens up.

-Footnotes-

n74. See John Locke, *Essay Concerning Understanding* (Clarendon Press 1984); John Locke, *Two Treatises of Government* (New Am. Library 1965); John Stuart Mill, *supra* note 43; John Rawls, *A Theory of Justice* (Harvard Univ. Press 1971).

-End Footnotes-

Equality is an emerging right. Establishing it requires reciprocity of respect and parity of regard for physical dignity and personal integrity. I would argue, as Professors Fred Schauer, Cass Sunstein, Catherine MacKinnon, Mari Matsuda, Richard Delgado, and John Powell do, n75 to name very distinguished constitutional scholars, that legal interpretation must be guided by these values and goals if the mandate of equality is to be met. No democracy should be embarrassed or uncomfortable prioritizing the needs of the impoverished, disempowered, and disadvantaged over those who are more privileged.

-Footnotes-

n75. See Frederick Schauer, *Uncoupling Free Speech*, in *The Price We Pay*, *supra* note 1, at 259; Cass Sunstein, *Words, Conduct, Caste*, in *The Price We Pay*, *supra* note 1, at 266; Catharine A. MacKinnon, *Pornography and Global Sexual Exploitation: A New Agenda for Feminist Human Rights*, in *The Price We Pay*, *supra* note 1, at 301; Matsuda, *supra* note 17, at 2356; Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, in *The Price We Pay*, *supra* note 1, at 327; John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, in *The Price We Pay*, *supra* note 1, at 332.

-End Footnotes-

The key insight is that the limits of rights only can be properly understood through a contextual, purposive, harms-based approach which respects equality. This approach not only exposes previously hidden issues but also affects how the issues are framed and how legal principles are applied. It challenges the assumption that human behavior can be generalized into natural, universal laws. It challenges civil libertarian orthodoxy, centered on the individual's relationship to the state, by emphasizing the importance of the relationship of individuals to one another. In my view, the goal of a more humane, egalitarian, and democratic society requires a new conversation, with new ways of talking and thinking about free speech.

That conversation has been revitalized in a jurisprudential way in the Supreme Court of Canada. n76 I am sure it will continue here as it is continuing at meetings, conferences, and government caucuses all over the world. If this momentum continues, I believe it will be for the benefit of all because rights and duties eventually will be allocated more equitably, not simply on the basis of abstract, doctrinally stagnant, grand principles that thwart, rather than achieve, liberty and substantive equality.

-Footnotes-

n76. R. v. Keegstra, [1990] 3 S.C.R. 697, and R. v. Butler, [1992] 1 S.C.R. 452, are the two ground-breaking and leading cases in Canada which govern how speech that is harmful to others will be analyzed in any future constitutional challenge.

-End Footnotes-

In closing, I will leave you with the words of one of David Baum's heroes, the late Judge Learned Hand. They were repeated at the memorial service here at the College of Law in March of 1973, by the then-Dean of this College of Law, John Cribbet, in a tribute to Professor Baum. Wrote Hand,

I submit that it is only by trial and error, by insistent scrutiny and by readiness to reexamine presently accredited conclusions that [\*808] we have risen, so far as in fact we have risen from our brutish ancestors; and I believe that in our loyalty to those habits lies our only chance, not merely of progress, but even of survival. n77

-Footnotes-

n77. John E. Cribbet, Foreword to the David C. Baum Memorial Lecture on Civil Rights and Civil Liberties at the University of Illinois College of Law, 1973 U. Ill. L.F. 1 (quoting Judge Learned Hand).

-End Footnotes-

Thank you, most sincerely, for the honor to speak with you today as the David C. Baum Memorial Lecturer.

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ARTICLE: THE JURISPRUDENCE OF THURGOOD MARSHALL\*

\* This article was originally presented on February 29, 1996, as the second 1995-96 lecture of the David C. Baum Memorial Lectures on Civil Liberties and Civil Rights at the University of Illinois College of Law.

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## SUMMARY:

... In this essay, originally presented as a David C. Baum Memorial Lecture on Civil Liberties and Civil Rights at the University of Illinois College of Law, Professor Mark Tushnet explores the character and contributions of the late Thurgood Marshall, Associate Justice of the United States Supreme Court. ... I. Thurgood Marshall as a Lawyer ... Thurgood Marshall as a Lawyer-Statesman ... If told by someone else, a law clerk observed, Marshall's stories might have been depressing. ... Though he felt traditionalism's pull, Marshall's traditionalism is better understood as the legacy he carried with him of his training as a litigator and lawyer in a classical profession. ... Marshall did indeed change his vote. ... Thurgood Marshall as a Lawyer-Social Engineer ... Powell shows Marshall as social engineer and demonstrates that social engineering did not necessarily lead to conventionally liberal positions. ... Similarly, in Maxwell v. Bishop, an early death penalty case, Marshall agreed with an opinion drafted by Fortas arguing that the Constitution did not require that judges instruct juries on the standards they should use to decide whether to impose a death sentence. ... Marshall's pragmatic jurisprudence was problematic for a judge making constitutional law. ... The Supreme Court's course over the decades of Marshall's service suggests some difficulties with Marshall's jurisprudence of social engineering. ...

## TEXT:

[\*1129]

In this essay, originally presented as a David C. Baum Memorial Lecture on Civil Liberties and Civil Rights at the University of Illinois College of Law, Professor Mark Tushnet explores the character and contributions of the late Thurgood Marshall, Associate Justice of the United States Supreme Court.

Professor Tushnet presents a view of Justice Marshall as a true lawyer-statesman, whose professionalism and respect for legal rules were shaped by his middle-class roots and by his years as a litigator for the civil rights movement. The essay demonstrates that these qualities, together with a sense of pragmatism and social activism, are visible in the positions taken by Justice Marshall during his years on the Supreme Court.

I. Thurgood Marshall as a Lawyer

When Thurgood Marshall first saw his official portrait, he was upset. The portrait, he believed, failed to show him as the "curmudgeon" he was, and it did not show his ring. n1 Simmie Knox, the African American artist who painted the portrait, could not do anything to make Marshall into a curmudgeon, because, Knox said, Marshall had never been curmudgeonly during his sittings. n2 But Knox could add a ring to the portrait, and he painted in Marshall's wedding ring. Marshall, however, thought the portrait deficient because it did not show his Masons ring as well. In 1965, Marshall held one of the main offices with the Prince Hall Masons, the "Grand Minister of State." n3 He rev- [\*1130] eled in the Masonic rituals and the meetings he attended. His Masonic affiliation is an important clue to Marshall's social location and ultimately to his jurisprudence.

- - - - -Footnotes- - - - -

n1. Tony Mauro, Honoring Thurgood Marshall, the Advocate, Legal Times, Nov. 22, 1993, at 11.

n2. Id.

n3. List of Elective Officers, United Supreme Council, Prince Hall Masons (on file in Thurgood Marshall Papers, Library of Congress, Manuscript Division, box 24, file 7). The Prince Hall Masons, in turn, helped fund two positions at the Inc. Fund. Mark Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961, at 311 (1994).

- - - - -End Footnotes- - - - -

Marshall was also active in the Episcopal Church. After his appointment to the Second Circuit, Marshall declined most speaking invitations, but he made time to read the Second Lesson at a Tuesday afternoon church service n4 and to give a talk at the Brooklyn Heights Parish dinner. n5 Marshall's church work was of a piece with his legal work. His parish dinner talk offered "a no-holds-barred message based upon Christian responsibility" for civil rights. n6 In 1964, Marshall was a lay delegate from the New York diocese to the Episcopal Church's triennial convention in St. Louis. n7 Marshall walked out when the convention defeated a resolution recognizing the right to disobey segregation laws in "basic conflict with the concept of human dignity under God." n8 Reportedly, he was disappointed not only with the resolution's defeat, but with the fact that the primary opponents were the lay delegates, not the clergy. Four delegates sent a telegram to Marshall urging him to return. They pointed out that the convention had condemned racial discrimination in other resolutions, including one that was understood to mean that "persons of

different racial backgrounds may marry and receive the church's blessing." n9 Marshall criticized the "reasonably small group of well-heeled lawyers and businessmen" who, he believed, controlled the convention. n10 "This same group," he wrote a correspondent, "reject our women, reject anything pointing toward real desegregation and so far as I am concerned cannot wait for the return of the horse and buggy." n11

- - - - -Footnotes- - - - -

n4. Letter from Judge Thurgood Marshall to Rev. Bernard C. Newman, Trinity Church in the City of N.Y. (June 17, 1963) (on file in Thurgood Marshall Papers, supra note 3, at box 6, file 12).

n5. Letter from Covington Hardee to Judge Thurgood Marshall (May 7, 1965) (on file in Thurgood Marshall Papers, supra note 3, at box 3, file 8).

n6. Id.

n7. George Dugan, Marshall Quits Church Session, N.Y. Times, Oct. 22, 1964, at 23.

n8. Id. Marshall's walkout was highly publicized. The St. Louis Globe-Democrat editorialized, "Here is a Federal judge, the very embodiment of our law, acting as though he had turned in his judicial robes for a pair of sneakers and a CORE sweatshirt.... The terrible danger of such an official endorsement of civil disobedience is that it leaves to the individual to judge what laws to violate." George Dugan, New Vista Given to Episcopalians, N.Y. Times, Oct. 24, 1964, at 34 (quoting editorial). The Bishop of Missouri apologized to Marshall for what he called "an unfair editorial attack," and noted that the convention had endorsed the "classical doctrine of obedience to God's law, and its corollary, the right of conscience under extreme circumstances to reject unjust laws which deny human dignity," and he called Marshall's walkout "a judgment on us all." Id.

n9. George Dugan, 4 Churchmen Ask Marshall to Return, N.Y. Times, Oct. 23, 1964, at 16.

n10. Letter from Judge Thurgood Marshall to Mrs. Edward L. Cushman (Nov. 12, 1964) (on file in Thurgood Marshall Papers, supra note 3, at box 2, file 7).

n11. Id.

- - - - -End Footnotes- - - - -

It might seem peculiar to begin a discussion of Marshall's jurisprudence with references to his Masonic and religious affiliations rather than by describing a key case or two. But these affiliations provide an important clue to understanding Marshall's jurisprudence, because they help identify the kind of lawyer he was. A member of the solid middle class, active in the Masons and his church, but an African American lawyer as well, insisting that his church take a stand on civil rights, Marshall saw his job as ensuring that society's commitment to social improvement through law would be honored. He did so through a jurisprudence influenced by his mentor, Dean Charles Hamilton Houston of Howard Law School, but grounded at least as much in the good common sense of the best among our practicing lawyers. In some ways, I believe, we

understand Thurgood Marshall best if we see him as exemplifying the very best in what I think of as small-town lawyering, a man so deeply embedded in his community that he saw no difference between what he found to be common sense and what the Constitution required.

In saying this, I need to emphasize that Marshall's community, as he understood it, was the entire United States. When newspapers reported in the early 1970s that Richard Nixon was seeking a Southerner to appoint to the Supreme Court, Marshall's reaction was somewhere between bemusement and outrage. n12 For, as far as he was concerned, there already was a Southerner on the Supreme Court. To put the point more strongly than Marshall would have, he was the only person on the Court who represented the entire nation, African Americans as well as whites, at least in the sense that people like Nixon defined the South as its white population while Marshall defined it as its real population.

-Footnotes-

n12. This is the author's recollection.

-End Footnotes-

II. Thurgood Marshall as a Lawyer-Statesman

Marshall's principal contribution to constitutional law may have been the substantive vision of justice his work embodied. He was a New Deal liberal particularly devoted to advancing the interests of African Americans. But Marshall's approach to law went deeper than the specific substantive values he sought to advance. His career, both with the NAACP Legal Defense Fund and as a judge, embodied the tradition of the lawyer-statesman, "devoted," in law school dean Anthony Kronman's words, "to the public good but keenly aware of the limitations of human beings and their political arrangements." n13 For Kronman, the lawyer-statesman must simultaneously be sympathetic to all concerned and detached enough to avoid being "swept along by the tide of feeling that any sympathetic identification with a particular way of life ... can arouse," allowing the lawyer-statesman to "withdraw to the standpoint of decision." n14

-Footnotes-

n13. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 12 (1993).

n14. *Id.* at 72.

-End Footnotes-

[\*1132]

As a litigator Marshall walked into courtrooms throughout the South, facing and then defusing hostility by his easy manner. Marshall's professional success rested in large part on the fact that in so many ways he was so much like other lawyers. When Marshall tried a case or argued an appeal, he engaged his listeners in a conversation with them as equals, and they responded to him as an equal. A lawyer who argued against him recalled that "it is a credit to him that he could be cordial when ... there was no hotel, restaurant, or restroom open to him" near the courthouse. n15 Describing his first day at an Oklahoma murder

trial, Marshall wrote that he was introduced to the court and "the building did not fall and the world did not come to an end." n16 The court personnel, he said, were "very nice and explained that this was their first experience in seeing a Negro lawyer try a case - first time they had seen such an animal." n17 He courageously faced down a threatened lynching and then transformed it into a humorous story that he recounted at least once a year to his law clerks. n18 His good-humored use of this otherwise quite grim tale was typical. If told by someone else, a law clerk observed, Marshall's stories might have been depressing. n19 But Marshall's remarkable good humor made it possible for him to transform the circumstances that shaped him.

-Footnotes-

n15. Tushnet, supra note 3, at 132.

n16. Id. at 62.

n17. Id.

n18. Id. at 54-55.

n19. Elena Kagan, For Justice Marshall, 71 Tex. L. Rev. 1125, 1127 (1993).

-End Footnotes-

An aspect of Marshall's Supreme Court work that is only occasionally noted confirms how strongly he thought of himself as a lawyer in the classical tradition. Although he was clearly a liberal in politics, Marshall nonetheless had a conservative streak. Sometimes he would take positions in discussions with his law clerks that they regarded as inconsistent with Marshall's liberal views. Regularly, a law clerk would say, "Judge, you can't do that." And regularly, Marshall would reply, "There are only two things I have to do - stay black and die." n20 Marshall took these positions in part because he knew they elicited outrage from his law clerks, and he delighted in tweaking them. He knew as well that he could prod them to develop the strongest arguments for the liberal position by pretending to be on the other side. n21 That was one of the ways in which he demonstrated the detachment and sympathy characteristic of the lawyer-statesman.

-Footnotes-

n20. Id. at 1128.

n21. Tushnet, supra note 3, at 39-40.

-End Footnotes-

This side of Marshall was not entirely feigned, however, because it sometimes shaped his votes at conference and even his ultimate position. His conservative streak came out in one of only two Marshall opinions Chief Justice Rehnquist referred to in his eulogy for Mar- [\*1133] shall. n22 The New York statute at issue in Loretto v. Teleprompter Manhattan CATV Corp., n23 required apartment building owners to allow operators of cable television systems to install receivers on their buildings, so that tenants could get cable service. Some years before, Marshall had reacted to the initial civil rights sit-ins by

"storming around the room proclaiming ... [that] he was not going to represent a bunch of crazy colored students who violated the sacred property rights of white folks." n24 For Marshall, "sacred property rights" were involved here, too. The New York statute authorized "a permanent physical occupation," for which the government had to pay. n25 The physical occupation of property was "perhaps the most serious form of invasion of an owner's property interests"; the owner could not use the occupied space, nor could it exclude the cable operator from it. n26 As Marshall saw it, the statute said that someone else could put something on the apartment owners' property, which was incompatible with the idea that it was their property in the first place. n27

-Footnotes-

n22. See Chief Justice William Rehnquist, Remarks at the Funeral of Justice Thurgood Marshall, reprinted in Fed. News Serv., Jan. 28, 1993.

n23. 458 U.S. 419 (1982).

n24. Tushnet, supra note 3, at 310.

n25. Loretto, 458 U.S. at 421, 441.

n26. Id. at 435-36.

n27. Id.

-End Footnotes-

Blackmun's dissent accurately called Marshall's majority opinion "curiously anachronistic" and "formalistic." n28 I do not mean to suggest that Marshall was a strong traditionalist. n29 Though he felt traditionalism's pull, Marshall's traditionalism is better understood as the legacy he carried with him of his training as a litigator and lawyer in a classical profession.

-Footnotes-

n28. Id. at 442.

n29. In Loretto, a New York agency had already found that a one-time fee of one dollar per receiver was reasonable. Id. at 423-24. Marshall may have thought that such a small fee would indeed be sufficient compensation.

-End Footnotes-

Another dimension of Marshall's traditionalism was his respect for legal rules. He was unwilling to let attorneys get away with sloppy practices. At one conference, he grumbled, "Don't bail this stupid guy out." n30 Marshall's law clerks were familiar with what they called his "rules is rules' theory": lawyers were supposed to follow the rules. Torres v. Oakland Scavenger Co. n31 invoked those rules in an extremely rigid way. n32 A litigant must file a notice of appeal after losing in trial court. The rules of appellate procedure state that the notice "shall specify the party or parties taking the appeal." n33 Jose Torres was one of a group of sixteen plaintiffs who claimed that Oak- [\*1134] land Scavenger had discriminated against them. n34 The trial court dismissed their complaint. n35 The plaintiffs filed a notice of appeal in the

name of the fifteen other plaintiffs "et al." n36 Torres's name did not appear on the notice of appeal because of a clerical error by his lawyer's secretary. n37 Marshall's law clerks "pleaded with [him] to vote" with Justice William Brennan to allow the appeal. n38 Marshall refused. As he told his colleagues in another procedural case, "Rules mean what they say." n39

-Footnotes-

n30. Conference Notes for Walker v. Armco Steel (on file in William J. Brennan Papers, Library of Congress, Manuscript Division, box 514, file 2).

n31. 487 U.S. 312 (1988).

n32. See Kagan, supra note 19, at 1128.

n33. Torres, 487 U.S. at 314.

n34. Id. at 313.

n35. Id.

n36. See id. at 317.

n37. Id. at 313.

n38. Kagan, supra note 19, at 1128.

n39. Conference Notes for Schiavone v. Fortune (on file in William J. Brennan Papers, supra note 30, at box 695, file 12).

-End Footnotes-

Marshall's background as a litigator for African Americans was part of the reason for his insistence on procedures. When his law clerks argued for "liberal" interpretations of procedural rules, Marshall replied that as a litigator, he had to follow the rules carefully and was never allowed to get away with sloppiness simply because he was on the right side of the case, as he saw it. n40 According to one of his former clerks, in Marshall's view, "all you could hope for was that a court didn't rule against you for illegitimate reasons; you couldn't hope, and you had no right to expect, that a court would bend the rules in your favor." n41 He told an audience of African American law students and lawyers that Dean Houston "taught us that you will get no favors, and I emphasize that." n42 Today's litigants, in his view, should be held to the same standards of meticulous preparation that he imposed on himself and his staff. n43

-Footnotes-

n40. Kagan, supra note 19, at 1128.

n41. Id.

n42. Justice Thurgood Marshall, Address at the Dedication of the Thurgood Marshall School of Law at Texas Southern University (Feb. 14, 1976), in 4 Tex. S.L. Rev. 191, 193 (1977).

n43. See Randall Kennedy & Martha Minow, Thurgood Marshall and Procedural Law: Lawyer's Lawyer, Judge's Judge, 6 Harv. Blackletter J. 95, 98 (1989).

- - - - -End Footnotes- - - - -

This interpretation is not entirely satisfactory, however, because it overlooks the difference between a litigator and a judge. As a litigator Marshall had to accept the rules as they were interpreted and applied by judges often hostile to his substantive views; as a judge he was in a position to interpret the rules and thereby make the life of litigators easier than it had been for him.

Two of Marshall's former law clerks, Martha Minow and Randall Kennedy, have suggested a deeper explanation for Marshall's proceduralism. They argue that "respect for procedural rules ... can guard against abuses committed by officials in the name of the law" by allowing advocates to invoke basic norms of fair play. n44 Procedural rules can also promote substantive goals when the advocate is better [\*1135] at maneuvering within the rules than his or her opponent. n45 Here procedural rigor is a positive virtue, for the looser the interpretation of the rules, the more difficult it is for an advocate to trap an opponent in a procedural error. Finally, Minow and Kennedy said, "Respect for procedural rules is perhaps the purest form of respect for the Rule of Law." n46

- - - - -Footnotes- - - - -

n44. Id. at 99.

n45. Id.

n46. Id.

- - - - -End Footnotes- - - - -

There is undoubtedly something to this explanation of Marshall's views. In particular, Marshall's basic position throughout his career with the NAACP was that once the same rules were applied to African Americans and whites, African Americans would show they could accomplish anything whites could. In that sense, his advocacy was procedural too: make sure the rules were followed and fairly applied, and African Americans would achieve all they sought.

Yet this explanation, too, misses the difference between a litigator's position and a judge's. The litigator attempts to invoke existing procedural rules against his or her opponents and can properly say, "Here are the rules; just apply them fairly - that is, as I suggest they should be interpreted." The judge, however, actually must choose which of competing interpretations of the rules is the one that is then to be applied even-handedly. Minow and Kennedy invoked an image of the procedural rules as already in place and ready to be applied for their arguments to be persuasive; yet, for Marshall as a judge, the point of the enterprise was to determine what the procedural rules were.

In the end, therefore, Marshall's proceduralism can be understood only by referring to his traditionalist streak. Lawyers, he thought, should continue to do things as he had learned to do them. Here, too, he was the lawyer-statesman, insisting that lawyers always behave as true professionals.

Marshall's concern for professionalism pervaded his thinking about capital punishment. In speeches to the judges of the Second Circuit, Marshall said that "capital defendants do not have a fair opportunity to defend their lives in the courtroom." n47 Their lawyers were "ill-equipped to handle capital cases," because "death penalty litigation has become a specialized field of practice" where even well-trained lawyers unfamiliar with the field "inevitably make very serious mistakes." n48 As a result, Marshall argued, the federal courts should be more receptive to claims that capital defendants had not received effective assistance from their lawyers:

- - - - -Footnotes- - - - -

n47. Justice Thurgood Marshall, Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit, in 86 Colum. L. Rev. 1, 1 (1986).

n48. Id. at 1-2.

- - - - -End Footnotes- - - - -  
[\*1136]

I can remember way back in the good old days when people used to say that every man is entitled to his day in court, and they left off the rest of that sentence - if he had the money. We have come a long way from that. But I still don't feel we have come far enough. n49

- - - - -Footnotes- - - - -

n49. Justice Thurgood Marshall, Remarks at the Annual Judicial Conference of the Second Circuit (Sept. 9, 1988), in 125 F.R.D. 197, 201.

- - - - -End Footnotes- - - - -

Not just counsel, but effective counsel, was needed, particularly in capital cases. As Marshall saw it, it was simply unfair to take a man's life when his appointed counsel was not at least as capable as the prosecution. n50 When the Court allowed a defendant to represent himself without a lawyer, Marshall wanted to "make sure he underst[ood the] consequences of not having a lawyer" and would have required "a lawyer there to be consulted." n51

- - - - -Footnotes- - - - -

n50. See generally Interview with Sam Donaldson, ABC News, Primetime Live (July 26, 1990); Searching for Justice: Three American Stories (WUSA television broadcast, Sept. 13, 1988).

n51. Conference Notes for Faretta v. California (on file in William J. Brennan Papers, supra note 30, at box 426, file 4).

- - - - -End Footnotes- - - - -

Marshall's impatience with sloppy lawyering led him to develop a careful theory of ineffective assistance of counsel. He articulated that theory in Strickland v. Washington, n52 the only death penalty case after 1972 in which he and Brennan disagreed. n53 Brennan wanted an opinion that "set the right tone - one that will sensitize the lower courts to the question of fairness to the defendant but not one that will allow defendants to retry every aspect of their cases." n54 Marshall was less compromising.

- - - - -Footnotes- - - - -

n52. 466 U.S. 668 (1984).

n53. Alan I. Bigel, Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court, 8 Notre Dame J.L. Ethics & Pub. Pol'y 11, 158 (1994).

n54. Conference Memo for Strickland v. Washington (on file in William J. Brennan Papers, supra note 30, at box 654, file 6).

- - - - -End Footnotes- - - - -

The Sixth Amendment requires that defendants have the assistance of counsel, and the Court has held that this means that they must have "effective assistance." n55 Determining what constitutes effective assistance has been difficult, however. Lawyers have to make many decisions in the heat of a trial, some of which will, in hindsight, appear to have been quite bad. A defendant is entitled to a lawyer with some grasp of the law applicable to the case and some insight into possible defense strategies. n56 The Supreme Court did not want to develop a doctrine of ineffective assistance of counsel that routinely allowed courts to second-guess the strategic decisions defense lawyers made, n57 but it could not develop a doctrine leaving defendants with no more [\*1137] than a warm body next to them - no more than a "potted plant," as Oliver North's lawyer put it. n58

- - - - -Footnotes- - - - -

n55. Strickland, 466 U.S. at 685-86.

n56. See id. at 688.

n57. Id. at 688-89.

n58. Fred R. Shapiro, The Oxford Dictionary of American Legal Quotations 271 (1993).

- - - - -End Footnotes- - - - -

The facts of Strickland suggest some of the difficulties faced by defendants and their attorneys in capital cases. David LeRoy Washington committed an extended series of crimes in September 1976, including three murders, kidnaping, attempted murder, and assaults. n59 Eventually he surrendered and gave the police a lengthy confession. n60 An experienced criminal lawyer was appointed to defend him. n61 The lawyer was active in the early stages of the defense, but lost hope when he discovered that Washington had confessed to all three

murders. n62 Against the lawyer's advice, Washington pleaded guilty and waived his right to a jury determination of sentence. n63 To prepare for the sentencing hearing, the lawyer spoke with Washington and telephoned his wife and mother, but did not meet them or seek any other character witnesses. n64 At the hearing the lawyer urged that Washington did not deserve a death sentence because the very fact that he confessed showed his remorse. n65 After being sentenced to death, Washington argued that his lawyer had not given him effective assistance of counsel. The lawyer, Washington said, did not try to get a psychiatric evaluation or to present character witnesses, and did not offer the judge a meaningful argument against a death sentence. n66

-Footnotes-

n59. Strickland, 466 U.S. at 671-72.

n60. Id. at 672.

n61. Id.

n62. Id.

n63. Id.

n64. Id. at 672-73.

n65. Id. at 673.

n66. Id. at 675-76.

-End Footnotes-

The Supreme Court rejected Washington's claim, in its first extended consideration of the requirement of effective assistance. The Court adopted a general standard instead of providing detailed guidelines for acceptable attorney behavior. n67 The Constitution was violated, according to the Court, when defense attorneys "made errors so serious that counsel was not functioning as the "counsel'" required by the Constitution, if those errors deprived the defendant of "a fair trial, a trial whose result is reliable." n68 The Court said that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." n69 It emphasized that courts should be "highly deferential" to the attorneys themselves and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." n70

-Footnotes-

n67. Id. at 687-89.

n68. Id. at 687.

n69. Id. at 688.

n70. Id. at 689.

-End Footnotes-

- [\*1138]

Only Marshall dissented from this approach. His copy of the draft of the majority opinion is covered with his underlinings indicating the places he disagreed. n71 Marshall's opinion opened by pointing to the "unfortunate but undeniable fact that a person of means ... usually can obtain better representation" than poor people, who have to rely on appointed counsel with "limited time and resources to devote to a given case." n72 Marshall's opinion then asked, "Is a "reasonably competent attorney' a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?" n73 Marshall found the Court's approach "unhelpful" because it rested on numerous "unacceptable" generalizations about what defense attorneys could reasonably be expected to do. n74 For Marshall, some aspects of criminal defense were clear enough that the courts could develop appropriate guidelines. At the very least, the lawyer should confer with the client and object to "significant, arguably erroneous rulings." n75

- - - - -Footnotes- - - - -

n71. Draft Opinion for Strickland v. Washington (on file in Thurgood Marshall Papers, supra note 3, at box 345, file 2).

n72. Strickland, 466 U.S. at 708 (Marshall, J., dissenting).

n73. Id.

n74. Id. at 707.

n75. Id. at 709.

- - - - -End Footnotes- - - - -

Marshall also objected to the Court's requirement that a defendant, even one whose attorney acted unreasonably and incompetently, show "prejudice." n76 Commenting on this in a speech later, Marshall asked, "Well, how under the sun can a deficient performance not register in the defense?" n77 He knew that "it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent"; n78 enough of his NAACP cases ended with retrials in which defendants had both better lawyers and better results. A "cold record" could not show, for example, how "a shrewd, well-prepared lawyer" might have devastated a "seemingly impregnable case[ ]." n79 He also thought that the Court's focus on the reliability of the outcome treated results as the only concern in a criminal proceeding whereas, for Marshall, under the Constitution "every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer," even if the defendant is "manifestly guilty." n80 Washington's lawyer had been deficient, in Marshall's eyes, because, immobilized by his reaction to Washington's behavior, he failed to locate character witnesses who could humanize Washington "to counteract the impression conveyed by the trial that he was little [\*1139] more than a cold-blooded killer," by testifying that Washington was "a responsible, nonviolent man, devoted to his family, and active in the affairs of his church." n81

- - - - -Footnotes- - - - -

n76. Id. at 710.

n77. Marshall, supra note 49, at 202.

n78. Strickland, 466 U.S. at 710 (Marshall, J., dissenting).

n79. Id.

n80. Id. at 711.

n81. Id. at 717.

- - - - -End Footnotes- - - - -

Lankford v. Idaho, n82 decided during Marshall's last Term on the Court, was probably the most dramatic example of Marshall's impatience with sloppy lawyering. Bryan Lankford distracted two campers, allowing his older brother Mark to beat them to death. n83 Both brothers were sentenced to death. n84 Bryan Lankford's case came to the Supreme Court twice. In the first appeal, one justice of the Idaho Supreme Court voted to overturn Bryan's death sentence because he had not been involved deeply enough in the murders. n85 The Justices were troubled by the case and sent it back to the Idaho Supreme Court to consider whether the trial judge had improperly considered testimony Bryan had given against Mark. n86 One additional justice of the Idaho court was persuaded, but Bryan's death sentence was again affirmed by a vote of three to two. n87

- - - - -Footnotes- - - - -

n82. 500 U.S. 110 (1991).

n83. Id. at 112.

n84. Id. at 117.

n85. Id. at 118.

n86. Id. at 119.

n87. Id.

- - - - -End Footnotes- - - - -

Justice John Paul Stevens was determined to overturn Bryan's death sentence. Under the Court's rules, it takes six Justices to decide a case without hearing oral argument. Stevens got five Justices to join a draft opinion reversing the sentence, and Sandra Day O'Connor orally agreed as well. n88 When Antonin Scalia circulated a dissent, however, O'Connor changed her mind and voted to hear the case. n89 The Court limited its review to a question about the process by which the death sentence was imposed. n90 After the jury found Bryan guilty, the judge asked the prosecutor whether he would seek a death sentence. n91 The prosecutor said no, believing that Mark was responsible for the murders and that Bryan was under Mark's influence. n92 The prosecution and defense at the sentencing hearing concentrated on whether Bryan should receive consecutive sentences and what term of years he should serve. n93 The judge then sentenced Bryan to death despite the prosecutor's position. n94

-Footnotes-

n88. Bench Memo for Lankford v. Idaho (Feb. 19, 1991) (on file in Thurgood Marshall Papers, supra note 3, at box 513, file 7).

n89. Id. at 1-2.

n90. Lankford, 500 U.S. at 119.

n91. Id. at 114.

n92. Id. at 114-15.

n93. Id. at 116.

n94. Id. at 116-17.

-End Footnotes-

As Stevens posed the question, the issue for the Court was whether it was fair to impose a death sentence when the prosecutor [\*1140] had not sought it, and no one had specifically alerted the defense that the judge might sentence Bryan to death. n95 He thought the judge's behavior outrageous; as Stevens saw it, the defense had been lured into thinking there was no risk of a death sentence and then had been blind-sided with one. n96 There was, he said, "a grossly deficient lack of fair notice." n97 The trial judge's behavior, the Court eventually held, "had the practical effect of concealing from the parties the principal issue." n98 Justices Byron White and Scalia responded that the defense lawyer should have known better: the case was a capital one from the outset; under Idaho law, judges impose sentences and can ignore a prosecutor's recommendation. n99 Indeed, early in the proceedings the trial judge expressly refused to rule out a death sentence. n100

-Footnotes-

n95. Id. at 111.

n96. Id. at 122.

n97. Memorandum from Justice John Paul Stevens to Conference (June 11, 1990) (on file in Thurgood Marshall Papers, supra note 3, at box 493, file 8).

n98. Lankford, 500 U.S. at 126.

n99. Memorandum from Justice Byron R. White to Conference (June 8, 1990) (on file in Thurgood Marshall Papers, supra note 3, at box 493, file 8); Lankford, 500 U.S. at 128 (Scalia, J., dissenting).

n100. Lankford, 500 U.S. at 128 (Scalia, J., dissenting).

-End Footnotes-

When the Justices discussed the case, Marshall voted to affirm the Idaho Supreme Court. He did not want to bail the defense lawyer out of a bad

situation. n101 As he initially saw it, the legal issue was whether the defense had enough notice that a death sentence was possible. n102 The question of notice arose from the Sixth Amendment's requirement that defendants have lawyers and the Fourteenth Amendment's requirement of fair notice. The Idaho statutes should have alerted any decent lawyer that a death sentence was possible. n103 If Lankford's lawyer was worried about avoiding a death sentence for Bryan, Marshall thought, she should have tried to pin the trial judge down. n104 Neither the Sixth nor the Fourteenth Amendment was violated.

-Footnotes-

n101. Interview with confidential source (Sept. 1994).

n102. Id.

n103. Id.

n104. Id.

-End Footnotes-

Marshall's vote placed Chief Justice Rehnquist in an awkward position. With Marshall's vote there were five to affirm the Idaho court. But the case involved a death sentence, and Marshall never voted to uphold death sentences. Who could Rehnquist ask to write the majority opinion? If he asked White or Scalia, Marshall might well change his position, converting the majority into a minority and wasting the work the drafter would have done. Rehnquist did the best he could by assigning the opinion to Marshall. n105 Marshall did indeed change [\*1141] his vote. n106 His law clerks persuaded him that the case also involved the Eighth Amendment's ban on cruel and unusual punishments, and Marshall said to Rehnquist, "I cannot bring myself to endorse the death penalty under the Eighth Amendment." n107 In Marshall's view, the inexcusable sloppiness of Bryan Lankford's lawyer did not mean that Bryan should die.

-Footnotes-

n105. Jeffrey Rosen, Court Marshall, New Republic, June 21, 1993, at 14, provides a more critical assessment, describing Rehnquist as "delighted" and saying that Marshall "does not appear to have grappled with the constitutional issues the case presented."

n106. Letter from Justice Thurgood Marshall to Chief Justice William H. Rehnquist (Mar. 5, 1991) (on file in Thurgood Marshall Papers, supra note 3, at box 537, file 7).

n107. Id.

-End Footnotes-

III. Thurgood Marshall as a Lawyer-Social Engineer

Marshall was a legendary storyteller and, as Justice Anthony Kennedy put it, Marshall's "gift of story-telling" was "an essential part of his professional greatness." n108 For Kennedy, Marshall's "stories proved that his compassion and his philosophy flow from a life and legend of struggle." n109 As Justice White

said in tribute, "Thurgood could tell us the way it was, and he did so convincingly, often embellishing with humorous, sometimes hair-raising, stories straight from his own past." n110

-Footnotes-

n108. Justice Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 *Stan. L. Rev.* 1221, 1222 (1992).

n109. *Id.* at 1222.

n110. Justice Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 *Stan. L. Rev.* 1215, 1216 (1992); see also Justice Sandra Day O'Connor, *The Influence of a Raconteur*, 44 *Stan. L. Rev.* 1217, 1217-19 (1992).

-End Footnotes-

The stories Marshall told his colleagues on the Supreme Court were designed to remind them, in Justice Harry Blackmun's words, that "there is another world 'out there.'" n111 In a note to Marshall in an abortion case, with a copy only to Justice William Brennan, Blackmun lamented, "That 'real world' continues to exist 'out there' and I earnestly hope that the 'war,' despite these adverse 'battles,' will not be lost." n112 One observer believed that in his references to the "world 'out there,'" Blackmun was "shaped in part by his association with Justice Marshall." n113

-Footnotes-

n111. *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

n112. Letter from Justice Harry A. Blackmun to Justice Thurgood Marshall (Nov. 12, 1980) (on file in Thurgood Marshall Papers, supra note 3, at box 279, file 6).

n113. Gay Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 *Ariz. St. L.J.* 429, 456 (1994).

-End Footnotes-

Dean Houston taught Marshall that lawyers should be "social engineers." n114 As engineers, they were engaged in an intensely practical activity. They had to use the legal materials available to them to shape a working solution to the pressing problems of social life that lawyers confronted. n115 When Marshall was a law student, it was almost unimaginable that an African American lawyer would become a federal judge, much less a Supreme Court Justice. Houston's teachings, directed at students who would become practicing lawyers, were adaptable for judges as well.

-Footnotes-

n114. *Tushnet*, supra note 3, at 6.

n115. *Id.*

-End Footnotes-

Marshall's vision of law as social engineering came out early in his Supreme Court work. In 1962, in the case of Robinson v. California, n116 the Court held that California violated the Constitution's ban on cruel and unusual punishments by making it a crime for a person to be a drug addict. The Court's theory was that a person who was a drug addict had no control over the addiction and that the nation's theory of criminal liability rested on the premise that people could be made criminals only for doing things over which they had some control. n117 That analysis threatened to rework the country's system of criminal law: all aspects of criminal liability - the insanity defense, for example - would have to be examined to see if they comported with the theory of criminal responsibility the Court found in the Constitution. Drunkenness came closest to drug addiction, both in terms of the Court's theory and in terms of public importance. If alcoholism were a disease, as many doctors were coming to believe in the 1960s, it was just as unfair to punish someone for being an alcoholic as for being a drug addict: neither addicts nor alcoholics could control the behavior that made them criminals.

-Footnotes-

n116. 370 U.S. 660 (1962).

n117. Id. at 666-67.

-End Footnotes-

In a case the Supreme Court decided in 1968 during Marshall's first Term, Leroy Powell had been convicted of public drunkenness. n118 His attorney saw the case as an opportunity to extend the drug addiction case. He had a doctor testify as an expert that alcoholics like Powell could not control their dependency on alcohol and therefore could not refrain from being drunk in public. n119 Powell was convicted and fined \$ 50. n120 His attorney brought the case directly to the Supreme Court. n121 After the Court heard Powell's argument, it voted five to four to overturn his conviction. The dissenters were Chief Justice Earl Warren and Justices Hugo Black, John Marshall Harlan, and Marshall. This unusual coalition of two Warren Court liberals, the conservative Harlan, and Black, who had come to apply his idiosyncratic combination of judicial activism and restraint in an increasingly conservative way in the 1960s, eventually took control of the case.

-Footnotes-

n118. Powell v. Texas, 392 U.S. 514 (1968) (plurality opinion).

n119. Id. at 517-20.

n120. Id. at 517.

n121. Id.

-End Footnotes-

Justice Abe Fortas circulated a proposed majority opinion n122 saying that being drunk in public was, according to the expert testimony at trial and

other reputable medical sources, "a characteristic part of the pattern of [Powell's] disease." n123 Given this medical evidence, [\*1143] Fortas argued, the drug addiction case required the Court to accept Powell's claim. n124 That case stood "upon a principle which ... is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." n125 Powell's condition fit that principle perfectly.

-----Footnotes-----

n122. Draft Opinion by Justice Abe Fortas for Powell v. Texas (May 3, 1968) (on file in Thurgood Marshall Papers, supra note 3, at box 46, file 2).

n123. Id. at 4-5.

n124. Id. at 13.

n125. Id. at 12.

-----End Footnotes-----

Warren and Black circulated proposed dissents, and it soon appeared that the majority in favor of Fortas's opinion was extremely shaky. Two weeks after Fortas's opinion went to his colleagues, White sent around a separate opinion, telling Fortas that he had gone "back and forth" on the question before arriving at the position he proposed. n126 That position, as one of Warren's law clerks noted, was "puzzling." n127 As White saw it, Powell was not being punished simply for being drunk; n128 he was being punished for being drunk in public. n129 And that, for White, was something Powell could control; he disagreed with the trial judge's finding that Powell was compelled to go out in public when drunk. n130

-----Footnotes-----

n126. Letter from Justice Byron R. White to Justice Abe Fortas (May 8, 1968) (on file in Hugo Black Papers, Library of Congress, Manuscript Division, box 401, file: Case File No. 405 O.T. 1967, Powell v. Texas).

n127. Memorandum from Law Clerk to Chief Justice Earl Warren (May 9, 1968) (on file in Earl Warren Papers, Library of Congress, Manuscript Division, box 555, file: Powell v. Texas).

n128. Draft Opinion by Justice Byron R. White for Powell v. Texas (May 8, 1968) (on file in Thurgood Marshall Papers, supra note 3, at box 46, file 2).

n129. Id. at 1.

n130. Id. at 2.

-----End Footnotes-----

With White's change in vote, Fortas lost his majority. It was not clear, however, that Warren had a new majority, for, according to a law clerk, Marshall appeared to be waffling. n131 Warren talked with Marshall and reassigned the

majority opinion to him, in an effort to solidify Marshall's vote against Powell. n132 Marshall circulated an opinion adopting essentially all of Warren's earlier draft dissent. The Marshall-Warren opinion was highly critical of the "expert" testimony on which Fortas relied: "it goes much too far on the basis of too little knowledge." n133 The record, the opinion said, was "utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle." n134 The opinion emphasized divisions within the medical community over the status of alcoholism. n135 It devoted substantial attention to the linked propositions that public drunkenness was a serious problem in the country and that as yet the [\*1144] nation had been unable to devise acceptable methods to handle the problem, other than the criminal process: "It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides." n136 The picture of society's treatment of alcoholics was "not a pretty one," but, the opinion said, "before we condemn the present practice ... , perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people." n137 The opinion turned, finally, to the drug addiction case, which it said should be narrowly confined to avoid creating a comprehensive "constitutional doctrine of criminal responsibility." n138

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- n131. Id.
- n132. Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court* 694 (1983).
- n133. *Powell v. Texas*, 392 U.S. 514, 521 (1968).
- n134. Id.
- n135. Id. at 522.
- n136. Id. at 528.
- n137. Id. at 530.
- n138. Id. at 534.

- - - - -End Footnotes- - - - -

Powell shows Marshall as social engineer and demonstrates that social engineering did not necessarily lead to conventionally liberal positions. Perhaps Marshall was troubled by the fact that Powell's supporters had failed to make the sort of comprehensive presentation of sociological and psychological evidence that Marshall assembled in the segregation litigation. Marshall and Warren saw public drunkenness as a practical problem of government, and it certainly mattered that no one had any better ideas to deal with the problem. Similarly, in *Maxwell v. Bishop*, n139 an early death penalty case, Marshall agreed with an opinion drafted by Fortas arguing that the Constitution did not require that judges instruct juries on the standards they should use to decide whether to impose a death sentence. "In this area," Marshall said, "we do not yet have the skills to produce words which would fit the punishment to the

crime." n140

-Footnotes-

n139. 398 U.S. 262 (1970).

n140. Letter from Justice Thurgood Marshall to Justice Abe Fortas (Apr. 21, 1969) (on file in Thurgood Marshall Papers, supra note 3, at box 58, file 3).

-End Footnotes-

As critics from both the left and right have pointed out, treating law as an instrument for social engineering has a deep elitist and technocratic strain. It treats lawyers as people with specialized knowledge unavailable to the general public and allows the technocratic lawyers to impose their solutions to practical problems. As one critic from the left put it recently, social engineering

ignores the essential nature of politics as the necessary art (not science) of contestation and compromise. Where does the power originate to implement one plan and not another? ... The success of the radio designers, dam builders, and locomotive makers depended on authority, consistency, and imposition of will. How [could] that success ... be duplicated in human societies without an abandonment of democracy, pluralism, and freedom .... n141

-Footnotes-

n141. John M. Jordan, Machine-Age Ideology: Social Engineering and American Liberalism, 1911-1939, at 177 (1994).

-End Footnotes-

[\*1145]

Treating constitutional law as a vehicle for social engineering only exacerbates the difficulty. Lawyers may have some specialized knowledge about how the technologies of law actually work, and so may advise clients and assist policymakers who seek to use those technologies in the service of goals the clients and policymakers select. But, in making constitutional law, lawyers themselves design and implement public policy. Powell shows that lawyers who see themselves as social engineers need not always put their judgments above legislators', but the tendency is built into the concept. Another aspect of Marshall's jurisprudence, his widely commented-on pragmatism, set the bounds on the technocratic strain in his conception of law.

IV. Thurgood Marshall as a Pragmatic Lawyer

Marshall's approach to law was often described as pragmatic, reflecting the understanding his wide experience gave him "of the way in which law worked in practice as well as on the books, of the way in which law acted on people's

lives." n142 A student of Marshall's antitrust decisions summarized them as having "a practical, commonsense approach, relatively uncomplicated by academic distinctions and elaborate doctrinal analysis." n143 When the Court voted to uphold a procedure allowing someone storing a person's goods to sell them without notifying the owner, Marshall told his colleagues, "This result is the opposite of what common sense would dictate." n144 The opinion he published criticized the majority for its "callous indifference to the realities of life for the poor" and said, "We cannot close our eyes to the realities that led to this litigation." n145 His law clerks reported the ease with which Marshall assimilated complex records in criminal cases. n146 Having represented defendants in criminal cases, Marshall had a feel for the record: he understood what was going on in the courtroom even when it was not reflected in the cold words of a transcript. n147

-Footnotes-

n142. Kagan, supra note 19, at 1127-28.

n143. Victor H. Kramer, The Road to City of Berkeley: The Antitrust Positions of Justice Thurgood Marshall, 32 Antitrust Bull. 335, 364 (1987).

n144. Memorandum from Justice Thurgood Marshall to Conference (Jan. 23, 1978) (on file in Thurgood Marshall Papers, supra note 3, at box 212, file 5).

n145. Flagg Bros. v. Brooks, 436 U.S. 149, 166, 167 (1978).

n146. Janet Cooper Alexander, TM, 44 Stan. L. Rev. 1231, 1233 (1992).

n147. Id.

-End Footnotes-

Marshall's feel for the courtroom made him less concerned than some of his Supreme Court colleagues with the precise way in which an opinion stated the law. n148 As Dean Ronald Cass has recently writ- [\*1146] ten, a judge's inattention to details "does not necessarily reflect [lack of interest] in the ground staked out in his opinions." n149 Instead, Cass argues, "the delegation of the details of opinion-crafting ... reflects the comparative advantages of judges and clerks. The typical judge's comparative advantage is in focusing more attention on the decisions themselves ... than on the detail of the opinions announcing those decisions." n150 A fair amount of the Justices' correspondence involves one Justice's suggestion that another modify slightly some words or phrases in a draft opinion. In one case, for example, Rehnquist asked Marshall to change the word duty in a footnote because Rehnquist believed it to be a term of art from tort law with more expansive implications than Rehnquist was comfortable with; Marshall changed the word to responsibility. n151

-Footnotes-

n148. Marshall did pay attention, though. Marshall's law clerk Stephen Carter reviewed a draft opinion in a death penalty case by Justice Harry Blackmun, who was less adamant than Marshall in his opposition to capital punishment. Memorandum from Stephen L. Carter to Justice Thurgood Marshall (Mar. 24, 1981) (on file in Thurgood Marshall Papers, supra note 3, at box 280, file 2). Carter informed Marshall that "it does not expressly approve any of this Court's

precedents holding that the death penalty may constitutionally be imposed." Id. Marshall read the opinion and noticed a footnote that seemed to accept the death penalty's constitutionality, and joined Blackmun's opinion only after Blackmun eliminated the footnote. Id.; Letter from Justice Thurgood Marshall to Justice Harry A. Blackmun (Apr. 1, 1981) (on file in Thurgood Marshall papers, supra note 3, at box 280, file 2). Marshall's copy of Carter's memo has "See fn 17 of HAB's opinion" in Marshall's hand on it. Memorandum from Carter to Marshall, supra.

n149. Ronald A. Cass, Judging: Norms and Incentives of Retrospective Decision-Making, 75 B.U. L. Rev. 941, 989 (1995).

n150. Id. at 989-90.

n151. Letter from Justice William H. Rehnquist to Justice Thurgood Marshall (Feb. 22, 1983) (on file in Thurgood Marshall Papers, supra note 3, at box 320, file 8).

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Those who make such suggestions, and those who take them seriously, have a jurisprudence in which the precise formulations in Supreme Court opinions have significant impact on the arguments lawyers can make and the ones lower court judges can accept. As Justice Lewis F. Powell put it in making some suggestions that he called "flyspecks," "we know that lawyers, as well as the courts below, scrutinize every word we write." n152 Justices with this philosophy were concerned about sentences that, as Rehnquist put it, "seem[ ] fine at the time, but could come back to haunt us" or, in Brennan's terms, "might lay a hidden trap for later cases." n153

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n152. Letter from Justice Lewis Powell to Justice William J. Brennan (May 24, 1983) (on file in William J. Brennan Papers, supra note 30, at box 629, file 4).

n153. Letter from Justice William Rehnquist to Justice John Paul Stevens (Dec. 17, 1982) (on file in Thurgood Marshall Papers, supra note 3, at box 312, file 3) (discussing Community Television v. Gottfried). For further examples of this sort of give and take, see Letter from Justice William J. Brennan to Justice John Paul Stevens (Mar. 21, 1983) (on file in Thurgood Marshall papers, supra note 3, at box 317, file 9) (discussing Illinois v. Abbott & Assocs.); Letter from Justice Antonin Scalia to Justice Harry A. Blackmun (Feb. 19, 1987) (on file in Thurgood Marshall Papers, supra note 3, at box 412, file 8) (discussing Illinois v. Krull).

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Marshall was almost completely indifferent to these suggestions, because he thought they overestimated the impact of precise wording on lawyers and lower courts. In one opinion, Marshall's draft referred to the "reliability" of certain procedures. Scalia "worried about somebody taking literally (and therefore litigating)" the question of [\*1147] reliability. n154 Marshall responded that Scalia's concern was misplaced, because neither "future litigants nor the lower courts will read our decision to require perfection." n155