Free Speech v. Hate Speech: The Politics and Practicalities of Regulating Employee Speech

Speakers:

Jody D. Armour, University of Southern California, Gould School of Law
Eugene Volokh, UCLA School of Law
Jody David Armour is the Roy P. Crocker Professor of Law at the University of Southern California. A widely published scholar and popular lecturer, he is a Soros Justice Senior Fellow of The Open Society Institute's Center on Crime, Communities and Culture. He has published an award-winning book, Negrophobia and Reasonable Racism and various law review articles. He teaches a diverse array of subjects, including Criminal Law, Torts, and Stereotypes.
Eugene Volokh teaches free speech law, tort law, religious freedom law, church-state relations law, an intensive editing workshop, and a First Amendment amicus brief clinic at UCLA School of Law, where he has also often taught copyright law, criminal law, and a seminar on firearms regulation policy. Before coming to UCLA, he clerked for Justice Sandra Day O'Connor on the U.S. Supreme Court and for Judge Alex Kozinski on the U.S. Court of Appeals for the Ninth Circuit. He is a part-time Academic Affiliate at Mayer Brown LLP.
The Politics of Becoming

By Jody D. Armour

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This is the 15th in a series of “Provocations,” a LARB series produced in conjunction with “What Cannot Be Said: Freedom of Expression in a Changing World” a conference cosponsored by UCI, USC, and UCLA (January 22 -24, 2016). All contributors are also participants in the conference.

THE N-WORD, one of the most transgressive utterances in the English language, figures centrally in gansta rap, the art form at the heart of the “Rap and Repression” discussion that caps off the What Cannot Be Said: Freedom of Expression in a Changing World conference. For many, the N-word is the linguistic equivalent of the Confederate battle flag; many see both as blood-soaked forms of symbolic communication with deep roots in black oppression.

Yet the relationship of blacks to the N-word is not the same as our relationship to the battle flag—the N-word has been adopted, inverted, and transvalued by significant numbers of black artists (like those featured in “Rap and Repression”), writers, entertainers, and ordinary folk in a way that the Confederate flag has not.
Further, the American flag has been adopted by many blacks despite its own deep roots in slavery, Jim Crow, and racial injustice.

All of which leads to the subject of this provocation: The ability of some words and symbols with ugly historical roots to evolve new meanings while others remain mired in their past uses and applications.

The Confederate battle flag controversy that was ignited by the Emanuel Nine murders reminded me of my debates with my dad about the meaning of flags (and other forms of symbolic communication) and their political role in creating and transforming communities.

My dad was a big black patriot—a six foot eight-inch barrel-chested black veteran of the Second World War and proud Marine who, in the words of America the Beautiful, “more than self his country loved.”

This fact baffled me for years. I couldn’t fathom a black man like my dad pledging allegiance to a flag, and the nation for which it stands, after that very same nation showed its gratitude for his military service by falsely incarcerating him for 22 to 55 years in a state penitentiary for alleged possession and sale of marijuana.

He taught himself the law in prison and found the key to his cell in the warden’s own law books, vindicating himself in a case I now teach in my criminal law class called Armour v. Salisbury; yet his wrongful conviction robbed our family of its sole breadwinner, abruptly reducing a middle class family of eight to crumbs and roaches and rats. I could only attribute his unflagging love for “his” flag, his undying zeal for his own captors and their emblems, to some kind of psychological disability—say, Stockholm syndrome—in which victims sympathetically identify with and even defend and celebrate their abusers.

In time I came to see his patriotic devotion to the American flag not as a mental illness but as a profoundly political act.

Politics in a democracy is about more than merely getting — more than a contest over the distribution of goods and services, over who gets what, when, and how. Democratic politics equally focuses on becoming, and consists critically in the formation of the “us” and the “them” that make unified social action possible.

American and Confederate flags figure centrally in a politics of becoming, for both symbols bond individuals together into a unified “us.” To be more precise, an American or Confederate flag is what language philosophers call a “performative”
— a form of symbolic communication that performs (hence its name) a social action, such as bonding individuals together. Words like "I promise," "I pledge allegiance," and "With this ring I thee wed" epitomize linguistic bonding performatives; non-linguistic performatives that perform the same social bonding action as promises, pledges of allegiance, and wedding vows include flags, personifications (Uncle Sam), monuments (Mount Rushmore, the Statue of Liberty, Confederate memorials) street names (Martin Luther King and Robert E. Lee), and melodies (purely instrumental versions of the Star Spangled Banner, America the Beautiful, Dixie).

As the Confederate battle flag controversy illustrates, struggles over the meaning of words and symbols play a major role in the process of creating the "us" and "them" of politics. As J. L. Austin pointed out in *How to Do Things with Words*, performatives don't simply say something, they do something, and in political communication the thing that bonding performatives such as flags, monuments, melodies, and street names do is unify and rally individuals; they create collective social actors and forge social identities.

The "us" that the American flag originally stood for did not include blacks, who, according to the Supreme Court's 1857 Dred Scott decision, "had no rights which the white man was bound to respect." Put differently, in terms of race, the "us" and "them" of the American flag before the Civil War was the same "us" and "them" of the original Confederate flag — no Confederate flag was necessary before the war because the Stars and Stripes already stood for an "us" of white American citizens and a "them" of black chattel slaves. It took 600,000 dead men in a cataclysmic race war to transform the American flag into an emblem that includes black folk in its "us" of American citizens.

It took another struggle — the Civil Rights Movement — to make the "us" of the American flag still more racially inclusive. After Plessy v. Ferguson, the 1896 SCOTUS decision that made separate-but-equal — i.e., Jim Crow segregation — the law of the land, the American flag stood for a racially segregated "us" that in effect (as SCOTUS itself later admitted) made blacks second-class citizens.

In other words, after Plessy, for many Americans the Red, White, and Blue stood for an "us" of first-class citizens who are white and a "them" of second-class black citizens. In the 1950s and 60s, many who adopted, displayed, and embraced the Confederate battle flag resisted including blacks in the "us" of first-class citizens.

Legislation that mandated redesigned state flags across the South incorporating the Confederate battle banner were at least partly responses to SCOTUS
desegregation decisions like Brown v. Board of Education and other federal pressures to desegregate. Just as before the Civil War there was no need for a separate Confederate flag to stand for slavery because the American flag itself already stood for that, before the Civil Rights Movement there was no need for a separate Confederate flag to stand for segregation because Old Glory itself stood for that already. At the two crucial turning points in the history of racial justice in America, as the "us" represented by the American flag started to become more inclusive, many lawmakers and ordinary citizens rallied around some version or incorporation of the Confederate flag in support of a more narrow, pinched, exclusive "us."

Many groups and individuals fly the American and Confederate battle flag together, as if they don't stand for competing conceptions of "us." One can contend that the two flags do not stand for contradictory conceptions of "us" if one believes that the battle flag can mean something other than support for segregation or white supremacy—something such as, say, Southern pride. Recent YouGov and CNN polls have found that while more Americans see the battle flag as a symbol of Southern pride than of racism, many more Democrats than Republicans and many more blacks than whites view it as a symbol of racism.

The partisan divide over the meaning of the battle flag illustrates how struggles over the meanings of words and symbols can politically unify and rally individuals. Confederate battle flag critics use the symbol to isolate a "them" of segregationists and white supremacists and to mobilize a racially liberal and inclusive "us." Many battle flag supporters use the same symbol to distinguish an "us" of folk with Southern pride from a "them" of folk without. Still other battle flag supporters (like the KKK) use the emblem to isolate a "them" of inferior blacks and to mobilize a racially illiberal and exclusionary "us."

Because no words or symbols have indelible meanings (again, think of the historically vile N-word and the positive uses many blacks have put it to), many different claims can be made about the battle flag's meaning, none of which are "illogical." These conflicting claims set the stage for today's impassioned political struggle over the Confederate flag, whose meaning is a prize in a pitched conflict among groups attempting to describe their social reality, constitute their social identity, and vindicate their social existence.

The flag of my father, the increasingly inclusive American one for which he fought, flatly contradicts the segregationist and white supremacist senses of its Confederate counterpart, which may explain the widely-circulated picture of
Dylann Roof, the man who murdered the Emanuel Nine in hopes of jumpstarting a race war, burning an American flag.

My dad knew that the flag he bled for once stood for slavery and Jim Crow, but he also knew that meanings are not fixed and frozen but hotly contested in the process of creating the “us” and “them” of politics and nationhood. The hope and promise of an ever more inclusive “us” is what my dad saluted in the American flag and celebrated on the Fourth of July. The same hope and promise moves me to do the same.

Jody David Armour is the Roy P. Crocker Professor of Law at the University of Southern California. Armour studies the intersection of race and legal decision making as well as torts and tort reform movements. A widely published scholar and popular lecturer, Professor Armour is a Soros Justice Senior Fellow of The Open Society Institute’s Center on Crime, Communities and Culture. His book Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America (New York University Press) address three core concerns of the Black Lives Matter movement — namely, racial profiling, police brutality, and mass incarceration. He will participate in the conference Freedom of Expression in a Changing World: What Cannot Be Said.
Straight Outta Compton: The Profound in the Profane

By Jody D. Armour

We die. That may be the meaning of life. But we do language. That may be the measure of our lives.

— Toni Morrison

Land of the free
But the skin I'm in identifies me

— Public Enemy, “Nighttrain,”

Apocalypse 91... The Enemy Strikes Black
THERE ARE FOUR OCCUPATIONS in America whose bread and butter is word work: writers, poets, lawyers, and rappers. *Straight Outta Compton* celebrates one of the most dynamic creative periods of these: a movie about how a group of young black men crafted a bold new language to describe the death, danger, poverty, and brutality into which they were born, and from which few escape.

"I'm a journalist [...] reporting what's going on in the hood," Ice Cube says at one point in the film. The notion of rap as a political lens through which to view the otherwise invisible world of the hood — invisible, at least, to white America — is at the heart of what this film is all about. Fellow artist Chuck D of Public Enemy, who appeared on Cube's first solo album, *AmeriKKKa's Most Wanted*, once described rap as "the black CNN." *Straight Outta Compton* tells the story of how N.W.A's talent penetrated pop culture with bold new rhymes and beats that described the social reality of young black men stuck in an over-policed neighborhood and trapped in over-policed bodies — all in the heyday, and at the geographical epicenter, of the crack plague.

But on a grander scale, *Straight Outta Compton* is about how great art can grow out of great social oppression — or, to put it in the words of another iconic "gangsta" rapper who appears in the movie, Tupac Shakur, this movie is about roses that grew from a crack in the concrete:

Did you hear about the rose that grew from a crack in the concrete?  
Proving nature's laws wrong, it learned to walk without having feet  
Funny it seems, but by keeping its dreams  
It learned to breathe fresh air  
Long live the rose that grew from concrete  
When no one else even cared!
When I first heard N.W.A, it was a nippy, bomber-jacket kind of day in the Bay Area in 1988; I was walking down Bancroft Way in Berkeley after my constitutional law class at Boalt Hall. Blasting from the flung-open window of a dorm room, a fresh, profane, defiant new sound stopped me in my tracks:

Fuck the police
Coming straight from the underground
Young nigga got it bad cuz I'm brown
And not the other color, so police think
They have the authority to kill a minority

The law student in me immediately connected with the raw eloquence of the word work, the fittingly profane outcry against police brutality. These were coarse, crude, brutal words that realistically described Compton, South Central, and many other poor black neighborhoods across the nation during the 1980s. Style and substance meshed perfectly. The political animal in me heard an urgent protest slogan and recognized an anthem for victims of state oppression in the form of police brutality.

Profanely eloquent and politically forceful, the words also proved tragically prophetic: as the film shows, the powder keg of rage N.W.A's language expressed exploded into revolt in the form of the 1992 Los Angeles Uprising. The prominent role of this uprising in Straight Outta Compton makes clear how these young black urban griots — these Compton Cassandras — were endowed with the gift of prophesy, but fated not to be believed. I call the civil unrest of '92 an uprising or a revolt rather than a riot. Had "rioters" been looking for any excuse to wreak havoc, they could have gone off when the images of the Rodney King beating first saturated the airwaves. But they didn't. The black community waited for the justice system to honor its promise of neutrality and equality before the law. People took to the streets only when that promise seemed so brazenly flouted by a verdict that seemed to scream, in the language of today's 21st-century uprising: "Black Lives Don't Matter!"
Ice Cube’s 1990, post-N.W.A track “The Nigga Ya Love to Hate” — featured in Straight Outta Compton — foreshadowed those riots and chronicled the deep reservoir of resentment behind them:

I heard payback’s a motherfucking nigga
That’s why I’m sick of gettin treated like a goddamn stepchild
[...] The damn scum that you all hate
Just think if niggas decide to retaliate

Because of its profane style, especially its unremitting repetition of “the N-word,” many people in the late-'80s and early '90s (like many today) could not appreciate the political significance or artistic excellence of the “gangsta”/“reality” rap genre that N.W.A and Ice Cube pioneered. Many people, quite understandably, have a violent visceral reaction against the N-word and maintain that, due to its historical roots in black oppression and degradation, any use of the word by anyone for any purpose should be rejected like the tainted fruit of a poisonous tree. During its 2007 annual convention, the NAACP sought to purge popular culture and public discourse of the word by giving it a public burial in Detroit on Freedom Plaza. The ceremony included a march by delegates from across the country through downtown Detroit, led by two Percheron horses pulling a pine box adorned with fake black roses and bearing the remains of the racial slur. NAACP National Board chairman Julian Bond, Detroit mayor Kwame Kilpatrick, and the young delegates who organized the funeral were cheered by hundreds of onlookers. “We gather burying all the things that go with the N-word. We have to bury the ‘pimps’ and the ‘hos’ that go with it,” said Mayor Kirkpatrick. The Rev. Otis Moss III, assistant pastor at Trinity United Church of Christ in Chicago, said in his eulogy of the word, “This was the greatest child that racism ever birthed.”

Still, countless times a day the N-word rises like Lazarus to walk among us in popular culture and casual banter. When it comes to N.W.A (Niggaz Wit Attitudes) and the vanguard of “reality” or “gangsta” rap that the group represents, the N-word doesn't just walk, it struts. As it should, for the hallmark of this genre is transgressive, unsayable language. In Straight Outta Compton, the
group gets arrested for performing “Fuck tha Police” at a concert after police warned them not to, which actually happened (though the movie dramatized the details). Just the thought of state agents arresting or punishing citizens because they find their words offensive or defiant or critical should send a chill up the spine of anyone who works with words, especially edgy or controversial ones. For years prosecutors have used the “reality” rap lyrics of young black defendants against them in criminal trials to obtain convictions (New Jersey rapper Vonte Skinner’s case is just one recent example). In a criminal prosecution, for instance, the lyrics in AmeriKKKa’s Most Wanted could have been used against Ice Cube to obtain a criminal conviction. Some see such prosecutions as a form of government censorship designed to throttle rebellious rappers, to stuff their own defiant words down their throats, and SCOTUS will look at the constitutionality of this deeply troubling but long-standing practice in the coming term.

One reason I find the N-word-laden profanities at the core of politically charged “gangsta” rap so apt is precisely because, for many listeners, such words are so uncomfortable. A core tactic of today’s Black Lives Matter movement has been to compel people, from elected officials to ordinary citizens, to have uncomfortable conversations about race in order to cut through our collective complacency about savage and persistent racial inequality. In Black Brunch, for example (a division of Black Lives Matter), demonstrators storm “white spaces” — restaurants serving a symbol of privileged indulgence, brunch, to predominantly white customers — chanting the names of African Americans killed by police. Profanity in general, and the blood-soaked N-word in particular, can be an extremely uncomfortable and therefore effective style of art and form of protest.

This is why, back in 1999, I introduced the N-word-laden lyrics of N.W.A and Ice Cube first to the legal academy and then to the larger university community. Drawing inspiration from these sages of South Central, and in the spirit of provoking uncomfortable conversations about racial oppression, I first “dropped the N-bomb” at a Criminal Justice and Race Workshop for the Association of American Law Schools (AALS) 1999 Annual
Meeting in New Orleans. Before a roomful of sedate and tweedy legal scholars, I performed the same song from AmeriKKKa’s Most Wanted that Ice Cube performs in Straight Outta Compton, spitting New Jim Crow–related lines like:

Kicking shit called street knowledge
Why more niggas in the pen than in college?
Now cause of that line I might be your cellmate
That’s from the nigga ya love to hate

I told my audience that I had been compelled to use this profane alternative to the smug complacency beneath the “proud but calcified language of the academy.” I was confronting the baffling silences around race that our professional vocabulary could not fill.

Professors and practitioners of criminal law primarily speak in the languages of morality and law, so I’ve thought a lot about the world of shared meanings these vocabularies create and the limits they impose on one who speaks them. I would characterize my relationship with the language of crime and punishment inside and outside my law school classrooms over the past 20 years as impossible, for I find the language of both the legal academy and conventional morality — “free will,” “personal responsibility,” “depraved heart,” “subjective wickedness” — not adequate to my needs and purposes. This kind of language is inadequate to my sense of myself and my world, requiring me, as it plainly does, to view as wicked and irresponsible many close friends, family, and the up to 90 percent of young black men in some inner city neighborhoods who will end up in jail, on probation, or on parole at some point in their lives. For me, such language is a disabled
and disabling device for grappling with meaning in moral and
criminal matters, one that ignores or discounts gross inequalities
in race and class — and sweeps empirically clear antiblack bias
under the rug of jury verdicts and “findings of fact” about guilt
and innocence. Prevailing legal and moral language organizes our
experience so that “wicked” black wrongdoers have no access to
empathy, sympathy, care, or concern from “ordinary” law-abiding
people. Yet in my scholarly associations and legal journals I saw
and see an entrenched moral and legal vocabulary content to
admire its own paralysis, to accept with serenity its estrangement
of underprivileged and disadvantaged masses.

As James Boyd White points out, when words lose their meaning,
as these words did for me, a speaker must make a new language,
remake an old one, or radically repurpose old words to serve new
ends. The point of my N-word-laden 1999 AALS performance of
_AmeriKKKa’s Most Wanted_ was to radically reconstitute my cultural
resources, my possibilities for making and maintaining meaning,
to make them adequate to my needs. Specifically, following the
example of N.W.A and Ice Cube, I repurposed the N-word as a
term of art in an oppositional discourse I called “nigga-talk.”
Nigga-talk uses this “troublesome” word — a word professor
Randall Kennedy of Harvard Law School rightly calls the “nuclear
bomb of racial epithets” in his 2002 book _Nigger: The Strange Career
of a Troublesome Word_ — to critique the status quo in criminal
matters and to bond with black criminals.

Profanity in general, and the N-word in particular, is not language
that respectable blacks use, so its use can signal a defiant rejection
of distinctions based on respectability politics. In _Straight Outta
Compton_, the black cop who “showed out” for the white ones in
the shakedown of the group outside the Torrance recording studio
embodies the spirit of respectability politics in the black
community. For proponents of the politics of respectability, the
black community must distinguish sharply between what one
prominent black scholar calls “good Negroes” (law-abiding and
respectable blacks) and “bad Negroes” (black criminals), and it
must maximize the distance between the two in the eyes of whites
for the sake of the racial reputation of our community. Chris Rock
expressed this same perspective in his infamous punch line, “I love black people, but I hate niggas!,” where he makes it clear that lovable “black people” means “law-abiding, respectable blacks” and “niggas” means morally deficient and contemptible black criminals. No utterance in the English language more forcefully drives a social and political wedge between a worthy “us” and an unworthy “them” than this vile epithet.

Straight Outta Compton opens with Eazy-E embroiled in a violent drug transaction, a prototypical “bad Negro.” But “reality” rap provides an alternative perspective on so-called “niggas” and “bad Negroes” — the perspective of black criminals themselves. By adopting the narrative perspective of “bad Negroes,” this rap genre invites listeners to stand in the shoes of black criminals, to better understand their story, and thereby to recognize them as one of “us.” As Morrison points out in her Nobel lecture, “Narrative is radical, creating us at the very moment it is being created.” A key insight of the law and literature movement is that the true center of value of a word, text, or performance of language, its most important meaning, is to be found not in any factual information that it conveys — not in what is says — but in what it does, specifically, in the community that it establishes with its audience. “It is here,” says James Boyd White, “that the author offers his reader a place to stand, a place from which he can observe and judge the characters and events of the world.” N.W.A, through their alternative narrative perspective and their repeated performances of the “N-word,” offers listeners a place to stand that is beyond condemnation. Their words showed how a person’s moral record is largely determined by luck and human frailty rather than simply “free will.” From this perspective, black criminals can be understood as tragic social facts for which we as a class- and race-riven nation are accountable, rather than wicked wrongdoers mired in self-destruction for which they alone are to blame.

N.W.A (and the politically relevant “reality” rappers who followed them) used this alternative narrative perspective and the N-word
as brushstrokes in a new political landscape, one in which the very meaning of the N-word — its substantive content and range of application — is part of a fierce contest over the “us and them” of politics, over the formation and transformation of individual and collective black identities. Politically relevant black urban poets and N-word virtuosos like Tupac Shakur, N.W.A, and Ice Cube vividly illustrate how people use words, sometimes the very same word, to embrace or push away, recognize or deny, others. In the hands of these profane poets, “gangsta rap” is N-word-laden oppositional political discourse; for them, “nigga talk” is language smithereyed to challenge conventional characterizations of black criminals with ironies, inversions, and invitations aimed at bonding and standing in solidarity with them.

At the same time, the movie reminds us of the tragic costs of crime when Dr. Dre loses his little brother to it and when Suge Knight ruthlessly leaves pain and suffering in his wake. By regularly reminding us of the internecine costs of crime, the film avoids romanticizing criminals by ignoring or discounting the harm they cause. While it invites us to empathize and sympathize with Eazy-E, whose passing is mourned and deeply felt, it avoids completely demonizing black criminals. Glenn Loury captures the nature of this complex, nuanced response to black criminals among black folk in his observations that “the young black men wreaking havoc in the ghetto are still ‘our youngsters’ in the eyes of many of the decent poor and working class black people who are often their victims” and that “for many of these people the hard edge of judgment and retribution is tempered by sympathy for and empathy with the perpetrators.”
Coda

In 2007, immediately after Ice Cube had performed "Fuck tha Police" and other classics in my 2007 play, Race, Rap, and Redemption, the dean of our law school read him a resolution on stage in front of a packed auditorium of enthusiastic USC students. Cube — and through him the whole genre of politically relevant "reality" or "gangsta" rap — was recognized in the USC Law School resolution as a wordsmith and scholar. Even though I wrote the resolution, I knew the genre that N.W.A pioneered did not need the imprimatur of a major research university to vindicate its value. Still, it felt good to see it get such recognition just the same.

Be It Resolved:

A Resolution under the seal of the USC Gould School of Law
Whereas Ice Cube a rap pioneer and virtuoso lyricist has led a musical revolution with brutal, profound and politically-charged music.

Whereas Ice Cube's searing music rails against injustice and takes to task an oppressive social order that traps blacks and other minorities in ghettos, robs them of opportunities for escape, and then makes them scapegoats for the System's own failures.

Whereas Ice Cube's latest masterpiece, Laugh Now, Cry Later, simmers with celebration, humor, irony, rage, reflection, and deep insight that are the hallmarks of timeless music and first-rate critical scholarship.

Now therefore be it resolved that the USC Law School hereby joins with Dean Ed McCaffrey, Professor Jody Armour, Professor Ron Garet in honoring Ice Cube on the occasion of his participation in Race, Rap, and Redemption at USC and recognizing his musical genius and his tireless commitment to racial justice.

Jody David Armour is the Roy P. Crocker Professor of Law at the University of Southern California. Armour studies the intersection of race and legal decision making as well as torts and tort reform movements.
Nigga Theory:
Contingency, Irony, and Solidarity
in the Substantive Criminal Law

Jody Armour*

INTRODUCTION

Po’ niggers can’t have no luck—
Nigger Jim, Adventures of Huckleberry Finn

Some will find the N-word in my title jagged-edged and hurtful. Words can wound: more than mere vehicles for the expression of ideas or the transfer of information, words are deeds—acts with consequences—and the words “nigger” and “nigga” are two of the most violent and blood-soaked verbal acts in the English language. Nevertheless, used with the precision and reticence of a surgeon’s hands, these vicious epithets can also suture the places where blood flows.

In that spirit, in profane language picked for its unparaphrasable power to focus attention on the implications of moral condemnation for racial justice and political solidarity, I use these jagged epithets here as part of a metaphoric redescription,2 in racial terms, of the criminal law’s ancient subjective culpability or mens rea requirement. In this essay, in other words, a “nigga” is a metaphor for black wickedness, black mens rea, which I will use to probe the intersection of morality, race, and class in matters of blame and punishment and politics.3 An example of a non-racialized metaphor for mens rea would be the common law’s “depraved heart” test of murderous mens rea in cases of unintentional homicide—the jury is given the depraved heart metaphor and told to use it as the litmus test

* Roy P. Crocker Professor of Law, University of Southern California Law School. I dedicate this Ohio State Journal of Criminal Law article to the Ohio State Law School students who in the late 1960s helped my wrongfully convicted dad find the key to his own jailhouse door in the hornbooks, casebooks, treatises and reporters that they provided. #PoeticJustice.


3 I start out using Nigga as a metaphor for mens rea in criminal matters and wind up using it as a political performative aimed at unifying non-criminals and “niggas”; that is, it goes from being a trope (for conceptual purposes) to a performative (for political purposes). As a political performative, its irony becomes most evident.
for serious subjective culpability. From the standpoint of this ancient heart metaphor for moral blameworthiness, a “nigga” metaphorically is a depraved or indifferent black heart; but on another level, my metaphorical re-description of black subjective culpability and black mens rea in terms of “niggas” will be an urgent political call to bond with and support black-hearted wrongdoers.

To that end, this essay proceeds as follows. I begin in Part I expounding on the inadequacy of our current legal and moral vocabularies and my repurposing of the words “nigger” and “nigga” to engage in an oppositional discourse I call “nigga-talk.” I use “nigga-talk” to help explain and problematize the need to distinguish, even within the black community, law-abiding, respectable blacks from so-called “niggas,” or morally deficient and contemptible blacks. In short, there exists a type of Black Criminal Litmus Test. Part II elaborates on this litmus test by discussing what I coin “Good Negro Theory,” the constellation of assumptions, beliefs, and values that undergird the bad nigga-good negro dichotomy and its contention that law-abiding blacks should distance themselves from bad niggas. Part II also advances “Nigga Theory,” an argument aimed at eradicating the distinction between blacks and promoting solidarity between law-abiders and law-breakers regardless of race. I return to this core aspect of Nigga Theory in Part III, which discusses our retributive urge, causation, and our general denial of accountability.

I. ON LANGUAGE, “NIGGAS,” AND THE BLACK CRIMINAL LITMUS TEST

I first “dropped the N-bomb” at a Criminal Justice and Race Workshop for the Association of American Law Schools [AALS] during the 1999 Annual Meeting in New Orleans. In the company of sedate legal scholars, I performed an N-word-laden gangsta rap song by Ice Cube titled The Nigga Ya Love to Hate, spitting lines like “kicking shit called street knowledge—why more niggas in the pen than in college?” I told my audience that the baffling silences our professional vocabulary could not fill compelled me to use this profane alternative rather than iterate the voice of speechlessness underneath the rigor, precision, and eloquence of our scholarly marks and noises.

As criminal law professors, our primary professional vocabularies are those of morality and law—the two language games prosecutors and defense lawyers must master and deftly deploy—and thus I have thought a lot about the world of shared meanings these vocabularies create and what limits they impose; what can be done by one who speaks them and what cannot. As the son of a black prison inmate

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4 See Commonwealth v. Malone, 47 A.2d 445, 447 (Pa. 1946) (quoting 4 William Blackstone, Commentaries *1999) (“At common law, the ‘grand criterion’ which ‘distinguished murder from other killing’ was malice on the part of the killer and [for unintentional killings] this malice was . . . ‘the dictate of a wicked, depraved and malignant heart.’”).

5 Ice Cube, The Nigga Ya Love to Hate, on Amerikkka’s Most Wanted (Universal Music Group 1990).
given 22 to 55 years for possession and sale of marijuana, and as a close friend of many black inmates, I would characterize my relationship with the language of blame and punishment inside and outside my law school classrooms over the past twenty years as impossible, for I find the proud but calcified language of both the legal academy and conventional morality—"choice," "free will," "personal responsibility," "subjective culpability," "malice," "malignant heart," "moral agency," and "mens rea"—not adequate to my needs and purposes, to my sense of myself and my world, requiring me, as it plainly does, to view as wicked and irresponsible my closest friends, family, and the up to 90% of young black men in some inner city neighborhoods who will end up in jail, on probation, or on parole at some point in their lives. For me, any language whose words and logic lock up staggering numbers of truly disadvantaged black men on the ground of their own moral deficiencies is a disabled and disabling device for grappling with meaning in moral and criminal matters, one that ignores or discounts savage inequalities in race and class and sweeps empirically demonstrable anti-black bias under the rug of jury verdicts and "findings of fact" about guilt and innocence. Prevailing legal and moral language organizes and claims a meaning for experience in a way that blocks the access of "wicked" black wrongdoers to the empathy, sympathy, care and concern of ordinary, law-abiding people; such language actively stalls conscience in relation to such wrongdoers' suffering, masking the pity and waste of mass incarceration and draconian punishment. Yet in my scholarly associations and legal journals, I see an entrenched moral and legal vocabulary content to admire its own paralysis, to accept with serenity its estrangement of underprivileged and disadvantaged masses.

As James Boyd White points out, when words lose their meaning, a speaker must make a new language, remake an old one, or radically repurpose old words to serve new ends. In my N-word-laden 1999 AALS performance of Amerikka's Most Wanted, I radically reconstituted my cultural resources—my possibilities for making and maintaining meaning—to make them adequate to my needs. Specifically, I repurposed "nigger" and "nigga" as terms of art in an oppositional discourse I shall call "nigga-talk." Nigga-talk uses this "troublesome" word—a word Professor Randall Kennedy rightly calls the "nuclear bomb of racial epithets" in his 2002 book Nigger: The Strange Career of a Troublesome Word—in its

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6 Sanford H. Kadish et al., Criminal Law and Its Processes 7 (9th ed. 2012) ("For an inner-city black male, the lifetime risk of arrest and incarceration may approach 90 percent.") (citing Jerome G. Miller, Nat'l Center on Institutions & Alternatives, Hobbling a Generation: Young African American Males in the Criminal Justice System of America's Cities: Baltimore, Maryland (1992)).


9 Id. at 28.
most condemnatory sense for conceptual purposes and in its most compassionate sense for political purposes.

Conceptually, nigga-talk uses the "morally deficient black man" sense of "nigga" to critique the categories, distinctions, and dichotomies of conventional morality and the substantive criminal law.10 "Nigga" in this sense means precisely what black comedian Chris Rock means in his famous laugh line, "I love black people, but I hate niggas!", where lovable "black people" means "law-abiding, respectable blacks" and "niggas" means morally deficient and contemptible black criminals.11 As White points out, jokes, like all texts, are invitations to share the speaker's response to the world which we accept through our laughter,12 and implicit in Rock's joke is a political invitation to distinguish between a law-abiding and respectable "us" and a morally contemptible "them," an invitation to niggerize—or niggarize—black wrongdoers, which black audiences in packed auditoriums heartily accepted through peals of laughter and a chorus of "amens," "uh-huhs," and "preach!" Part moral mantra, part political slogan, part sneering closing argument refrain, the phrase "I love black people but I hate niggas!" struck a resonant chord with black audiences because many do view black wrongdoers as morally condemnable "niggas."13 No utterances in the English language more forcefully drive a political wedge between a worthy "us" and an unworthy "them" than this vile epithet—none more bluntly express and inflame that widely shared and deeply entrenched urge, to put it crudely, to retaliate and avenge, or, to dress it up in loftier language, to "return suffering for moral evil voluntarily done"14 or to act on "the necessity of purging one's own country from depraved criminals"15 or to see blameworthy wrongdoers "pay one's debt to society."16 Legal philosopher Meir Dan-Cohen aptly dubs this urge to blame and punish wicked wrongdoers "the retributive urge."17 Because millions of Americans of all races

10 A "nigga" is a personification of moral blameworthiness in the same sense that the "Reasonable Man" is a personification of moral innocence (i.e., reasonable mistakes and shortcomings are excusable or mitigatory under many doctrines, including negligence, recklessness, self-defense, provocation, extreme emotional disturbance, and duress). Both a "nigga" and a Reasonable Man exemplify human characteristics, including human limitations and frailties—in the case of "niggas," the deficiencies and limitations are generally viewed as not excusable; in the case of the Reasonable Man, they (by definition) are excusable.

11 CHRIS ROCK: BRING THE PAIN (HBO television broadcast June 1, 1996).

12 See WHITE, supra note 7, at 14–20.

13 RANDALL KENNEDY, RACE, CRIME, AND THE LAW 306 (1997) ("According to data collected by a 1993 Gallup Poll, 82 percent of the blacks surveyed believed that the courts in their area do not treat criminals harshly enough; . . . 68 percent favored building more prisons so that longer sentences could be given.").


15 IMMANUEL KANT, THE PHILOSOPHY OF LAW 228 (W. Hastie trans., Edinburgh, 1887).

16 HERBERT MORRIS, ON GUILT AND INNOCENCE 39 (1976).

share that laughing black audience’s contempt for black wrongdoers, so-called “niggas” inflame the retributive urge in millions of all races.

Rock’s blunt moral distinction between respectable “black people” and damnable “niggas” parallels the more genteel one asserted by Professor Randall Kennedy between what he calls law-abiding “good Negroes” and criminal “bad Negroes.” Specifically, Kennedy exhorts good law-abiding blacks to “distinguish sharply between ‘good’ and ‘bad’ Negroes” for the sake of safety and racial respectability. His litmus test for “bad Negroes” is identical to Rock’s for “niggas”—namely, criminal wrongdoing. In support of his distinguish-and-distance-them-from-us approach, Professor Kennedy cites black civil rights icon Thurgood Marshall. As Kennedy points out, Marshall, working on behalf of the NAACP, initially allowed it to represent only good—“innocent”—Negroes. For example, Marshall refused to represent a sixteen year old black boy sentenced to death for rape and attempted prison escape on grounds that “the youngster was ‘not the type of person to justify our intervention.’” Recast in Rock’s street vernacular, Thurgood Marshall sharply distinguished and distanced the interests of “black people” from those of “niggas.” According to Professor Kennedy, even when Marshall later “loosened his policy” and represented some black defendants he believed to be guilty, Marshall’s worries about black people’s respectability in the eyes of whites kept Marshall from ever “tak[ing] the position that racism excuses thuggery when perpetrated by blacks.”

So the distinguished black scholar, the venerable black Supreme Court Justice, and the iconic urban comedian converge on the Black Criminal Litmus Test of condemnable blacks, differing only in whether they call these morally odious creatures “niggas” or “bad Negroes” or “thugs.” Accordingly, I will use the terms “niggas,” “niggers,” and “bad Negroes” interchangeably and in contradistinction to their loveable and respectable polar opposites—“black people” and “good Negroes.” In sum, at the conceptual level I use these terms in their most morally judgmental and retributive-urge-inflaming sense to first pinpoint, then discredit moral condemnations of black criminals. I discredit them both on reliability grounds, given the pervasiveness of “unconscious bias,” and on legitimacy grounds, given the simple reality of “moral luck.”

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18 See KENNEDY, supra note 13, at 17.
19 Id. at 20.
20 Id. at 20–21.
21 Id. at 21.
22 Jody D. Armour, Nigga Theory: Luck, Law and Language in the Social Construction of Niggas (2014) (unpublished manuscript) (on file with author). This article is part of a larger book project currently under review by a publisher. In chapters of my book not included in this article, I extensively investigate the role of racially differential “attribution bias” and “empathy bias” in juror assessments of a defendant’s subjective culpability or mens rea. Id.
23 Id. In chapters of my book, currently under review by a publisher, I extensively investigate the phenomenon of “moral luck” identified by moral philosophers Thomas Nagel and Bernard Williams and apply it to questions of moral condemnation in the substantive criminal law. Id.
The reliance on mens rea in deciding criminal culpability has analogues here. Prosecutors, defense attorneys, judges and jurors routinely debate and weigh the moral blameworthiness of wrongdoers because the substantive criminal law directs them to under the ancient legal maxim, actus non facit reum, nisi mens sit rea—in Blackstone's translation, "an unwarrantable act without a vicious will is no crime at all." Under this mens rea principle, it is unjust to punish someone who commits an "unwarrantable act"—i.e. a wrongdoer—unless he acted with a "vicious" or wicked will. As the Model Penal Code puts it, "[c]rime does and should mean condemnation." Thus, under the mens rea principle, if jurors conclude that a wrongdoer killed someone without the requisite subjective wickedness or "vicious will," they must return a verdict of not guilty. So the criminal law—through its mens rea requirement—routinely directs judges and jurors to morally distinguish between wicked and innocent wrongdoers and to differentiate degrees of wicked criminality for purposes of punishment. Under the law of homicide, for instance, a wrongdoer can suffer different punishments depending on whether he is found wicked in the 1st or 2nd Degree; voluntarily or involuntarily wicked; purposely, knowingly, recklessly or negligently wicked; or wickedly depraved and indifferent. Correspondingly, under the Black Criminal Litmus Test championed by proponents of a politics of respectability in criminal

24 SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 213 (8th ed. 2007). Under our substantive criminal law, an alleged harm-doer can be "innocent" in one of two ways: innocent of causing the harm or (assuming causation) morally innocent, that is, he caused the harm but did so without subjective culpability. See id.

25 I will use the term wrongdoer to refer to someone who commits a prohibited and hence wrongful act (i.e. commits the actus reus). One can commit a wrongful act, in this sense be guilty of wrongdoing, without subjective culpability or mens rea. Wrongdoing plus mens rea are the main ingredients of criminal guilt under this usage.

26 Thus, a driver can hit and kill a pedestrian (thus qualifying as a "wrongdoer" by committing the prohibited act of causing a death) without moral blameworthiness or mens rea if, say, he was overwhelmed by a sudden emergency.

27 MODEL PENAL CODE AND COMMENTARIES § 2.05 cmt. 1 at 283 (1985) ("[T]hat the defendant's act was culpable."). Not everyone who commits a prohibited or criminal act is culpable. For instance, a driver can kill a pedestrian—a prohibited act—without subjective culpability if the victim darted from between parked cars and the driver's reactions, even if not perfect, were those of an ordinary man or woman.

28 Wrongdoing here means commission of the actus reus or prohibited act. Not all wrongdoers, however, act with subjective culpability. Under this usage, only wrongdoing accompanied by subjective culpability or mens rea makes an actor criminally liable under standard analysis.

29 Criminal conviction stigmatizes because it is meant to. As the Supreme Court has recognized, criminal "felony is "as bad a word as you can give to man or thing." Morissette v. United States 342 U.S. 246, 260 (1952) (citation omitted). Thus the moral credibility of the criminal law and its processes depends entirely on whether, first, it criminalizes only act that deserve moral condemnation and, second, it only blames and punishes actors who deserve moral condemnation and even then it only blames and punishes them the amount they deserve.
matters like Kennedy and Rock, a jury could find a morally blameworthy black wrongdoer to be a "nigga" in the First or Second Degree, a Voluntary or Involuntary "nigga," a purposeful, knowing, reckless, or negligent "nigga," or a "nigga" with a depraved and malignant heart. In fact, most "official niggas" (i.e., blacks formally convicted of a crime) have been found subjectively wicked in one of these ways beyond a reasonable doubt by a jury or other fact finder, so criminal conviction provides assurance—backed by the full faith and credit of the U.S. criminal justice system—that only black wrongdoers who deserve our most corrosive contempt achieve the status of felonious "official niggas."

Politically, a key insight of the law and literature movement is that the true center of value of a word, text, or performance of language, its most important meaning, is to be found not in any factual information that it conveys—not in what is says—but in what it does, specifically, in the community that it establishes with its audience. "It is here," says James Boyd White, "that the author offers his reader a place to stand, a place from which he can observe and judge the characters and events of the world . . . ." The place I offer my reader to stand through the many repetitions and juxtopositions and performances of the "N-word"—a place made solid by my substantive, conceptual uses of the term to pinpoint unwarranted moral condemnation—is one beyond such condemnation, one from which it can be seen that a person's self is a tissue of contingencies whose moral record is determined by the union of fortuity and human frailty rather than mere "free will." It is a place that prioritizes compassion, concern, and mercy over retribution, retaliation, and revenge. Hence, it is a place from which disproportionately poor black criminals can be understood as tragic social facts for which we as a class and race-driven nation are accountable, rather than as wicked wrongdoers mired in self-destruction for which they alone are to blame. Accordingly, I use the N-word in this essay as a brush stroke in a new political landscape, one in which the very meaning of the word—its substantive content and range of application—is part of a fierce contest over the "us" and "them" of politics, over the formation and transformation of individual and collective black identities.

Allow me to go a step further. Politically conscious black urban poets and N-word virtuosos—The Last Poets, Tupac Shakur, dead prez, Nas, NWA, Ice Cube,
Jay Z—vividly illustrate how people use words, sometimes the very same word, to embrace or push away, recognize or deny, others. In the hands of these poets gangsta rap is N-word laden oppositional political discourse; for them “nigga talk” is language smithereyed to challenge conventional characterizations of black criminals with ironies, inversions, and invitations to bond with them. These oppositional black poets provide the inspiration for my metaphoric re-description of mens rea and moral blame in terms of the N-word. After all, as Richard Rorty observes in his philosophical essays on language through the lenses of Wittgenstein, Davidson, and Nietzsche, viewing human history as the history of successive metaphors lets us “see the poet, in the generic sense of the maker of new words, the shaper of new languages, as the vanguard of the species” and of revolutionary science, morality, and legal theory. The common insight animating the word work of these philosophers and “gangsta” poets—Nas and Nietzsche, Davidson and dead prez, Wittgenstein and Ice Cube, Lakoff and The Last Poets—is that “truth” in matters of morality and justice is “a mobile army of metaphors,” a ceaseless struggle over metaphorical re-description, a pitched political battle over the range of application of words and symbols.

II. On “Good Negro Theory” and “Nigga Theory”

Drawing on the N-word’s conceptual and political utility, this Part constructs a model, which I will call “Good Negro Theory,” of the values, beliefs, and assumptions that underlie efforts to morally and politically distinguish between law-abiding “good Negroes” and law-breaking “Niggas.” But first, to fiercely contest Good Negro Theory, I will expound “Nigga Theory.”

A. On “Nigga Theory” and the Centrality of Class

I use the term “Nigga Theory” to refer to a group of interlocking proofs and performances aimed at destroying the distinction between disproportionately privileged law-abiding blacks and disproportionately poor black criminals and promoting solidarity between them. To be sure, many of the proofs and performances underling Nigga Theory have the potential to also promote solidarity between all law-abiders and all criminals regardless of race or class. However, because black males bear the brunt of our current blame and punishment practices, because stereotypes and prejudice make black criminals especially likely to stoke the retributive urge in ordinary Americans, and because many misguided black leaders, lawmakers, scholars, and prosecutors have supported and still support the mass incarceration of young black males at the core of the crack plague and its

34 Rorty, supra note 2, at 20, 37.
aftermath, it is apposite to term this group of proofs and performances Nigga Theory.

Now, a model. Nigga Theory:

1) Focuses on the moral and criminal condemnation of largely poor black males whose criminal status makes them "niggas" or "bad Negroes" according to critics;

and

2) Addresses itself especially—though certainly not exclusively—to black leaders, lawyers, jurors, voters and ordinary folk.

Critical to an understanding of Nigga Theory is an understanding of the role class has played and continues to play in the social construction of "niggas." As the careful studies of Ruth Peterson and Lauren Krivo on the links between race, place, class and crime in the urban black community demonstrate, the vast majority of "violent crimes" Americans worry most about—murder, manslaughter, robbery, aggravated assault—are committed by "extremely" disadvantaged blacks, not the black bourgeoisie, whose crime rates are much closer to those of their white middle and upper-middle-class counterparts. In terms of violent crime, bad Negroes are disproportionately truly disadvantaged blacks living in extremely disadvantaged neighborhoods.

Good Negroes, by contrast, disproportionately come from the ranks of middle and upper-middle class blacks living in much better neighborhoods. As one of both the wealthiest and wealthiest majority black areas in the United States, and as part of the single largest geographically contiguous middle and upper-middle class black area in the United States, the hills of View Park that I call home might be the Good Negro capitol of America—it is brimming with well-to-do and hence relatively law-abiding Negroes.

For going on two generations now, the working class and poor black neighborhoods that surround my own predominantly black and prosperous "Golden Ghetto"—including South Central, The Jungle, Inglewood, Watts, and Compton—have hemorrhaged staggering numbers of young black men into prison

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As one of the wealthiest predominantly black areas in the country, View Park has been called the Black Beverly Hills as well as Golden Ghetto.
yards and juvenile detention centers. The flow of poor blacks from bleak streets to cell blocks turned torrential in the mid-1980s with the onset of the crack plague and enactment of laws like the Anti-Drug Abuse Act of 1986, which ushered in a new era of mandatory minimum sentences for possession of specified amounts of cocaine and a 100-to-1 sentencing disparity between distribution of powder and crack cocaine. Ironically or fittingly, depending on the interpretation of the observer, these laws were co-sponsored by Mickey Leland, chair of the Congressional Black Caucus, and Harlem congressman Charles Rangel and supported by most members of the Congressional Black Caucus.37 Truly disadvantaged black males took the brunt of these severe new sanctions. Thanks in part to the actions and attitudes of these and other largely middle-class black leaders toward largely poor black male wrongdoers, nearly two generations of poor black males have been hobbled if not lost. That so many black leaders and lawmakers, i.e., good negroes, played a leading role in the mass incarceration of black wrongdoers—especially young black males—should come as no surprise in view of the aforementioned “niggerization” of black criminals in both popular culture and legal discourse during the crack plague and in its festering aftermath.

Class plays a central role in the social construction of “niggas”—in whether we explain their wrongdoing in terms of their own internal moral deficiencies or instead in terms of external social factors and structural determinants—because being broke, like being a criminal, means being viewed as morally deficient by millions of Americans. Put differently, millions blame poverty solely on blameworthy poor people just as they blame wrongdoing solely on blameworthy criminals.38

Fifty years ago Michael Harrington’s extraordinarily influential book, The Other America, debunked the then-popular belief that America was a classless society by shining a light on the “invisible” poor, especially inner-city blacks, Appalachian whites, farm workers, and the elderly.39 But his explanation of poverty absolved middle-class America of accountability for the plight of the poor by attributing poverty not to macro-level social factors like social inequality or the simple absence of jobs but instead to the absence of proper values and dispositions in poor people themselves, that is, to their twisted proclivities and “culture of


38 Put differently, millions of Americans reject macro-level social explanations of the poor just as they reject social explanations of black criminals. So the urge to blame criminals and the urge to blame the poor are very close cousins. Viewing the poor in light of the retributive urge may explain why we may deny causal responsibility for their plight and why we may feel a diminished sense of urgency or obligation to rescue. Both poor people and criminals inflame the urge to blame them for their respective conditions and hence help us deny collective accountability for their plight.

poverty." In Harrington’s words, "[t]here is . . . a language of the poor, a psychology of the poor, a worldview of the poor. To be impoverished is to be an internal alien, to grow up in a culture that is radically different from the one that dominates the society."[41]

The celebrated Moynihan advanced a similar view, attributing inner-city poverty to deficiencies in the structure of the “Negro family.”[42] Harvard urban government professor Edward C. Banfield—head of the Presidential Task Force on Model Cities under Nixon and advisor to Presidents Ford and Reagan—put it this way, “the lower-class individual lives from moment to moment. . . . Impulse governs his behavior . . . . He is therefore radically improvident: whatever he cannot consume immediately he considers valueless. . . . [He] has a feeble, attenuated sense of self . . . .

In the Reagan years, the “culture of poverty” hypothesis ripened into plump orthodoxy; it became received wisdom that the cause of poverty was not macro-level social factors like meager wages, galloping unemployment, and economic inequality, but rather the internal deficiencies of the poor, who, as Barbara Ehrenreich points out, were viewed as “dissolute, promiscuous, prone to addiction and crime, unable to ‘defer gratification,’ or possibly even set an alarm clock.”[43] Even Bill Clinton formulated and implemented policies guided by “culture of poverty” thinking.[44] Indeed, much legislation enacted by both Democratic and Republican lawmakers today remains imbued with this perspective.[45]

So from the standpoint of Nigga Theory, those who deny our collective accountability for the plight of both criminals and the poor—call them Deniers—

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40 Id. at 15.
41 Id. at 17.
44 Barbara Ehrenreich, Rediscovering Poverty: How We Cured “The Culture of Poverty,” Not Poverty Itself, TomDispatch (Mar. 15, 2012), http://tomdispatch.com/blog/175516/. As Barbara Ehrenreich points out, Charles Murray argued in his popular 1984 book Losing Ground that “any attempt to help the poor with their material circumstances would only have the unexpected consequence of deepening their depravity.” Id.
46 Ehrenreich, supra note 44.
are bi-partisan and committed to the same logic of denial. A logic that discounts macro-level social explanations of crime and poverty, and instead adopts (or gives undue weight to) individual-level explanations centered on the “moral poverty” of the poor, the “moral poverty” of criminals, and hence the hyperconcentrated “moral depravity” of poor black criminals, who get whipsawed by both class and race stereotypes and thus are especially likely to stoke the retributive urge. From the perspective of Nigga Theory, poor black criminals belong to a special category of hyperconcentrated otherness that makes them easy to hate—a profound otherness that the words “nigger” and “nigga” capture with fierce felicity.

The retributive urge, even in the black community, to blame and punish “niggas,” fueled by ingrained stereotypes of black wrongdoers as morally deficient and depraved, and further stoked by their niggerization in popular stage acts, books, and op-eds by black entertainers, scholars, and commentators, makes the claims of Deniers more persuasive to many ordinary law-abiding Americans. This urge makes it harder for them to recognize the structural determinants of—and hence our collective accountability for—what I will call “the cataclysmic crack plague and its festering aftermath,” a monumental and roughly 30-year-long crime and incarceration disaster that first struck black America in the mid 1980s, and which has inflicted as much misery on the black community as a thousand Hurricane Katrinas slamming a thousand Ninth Wards. To be more concise, our urge to blame and punish black wrongdoers helps ordinary Americans deny our collective accountability for the foreseeable criminal acts of poor blacks stranded in forsaken neighborhoods brimming with guns and drugs. I will show, in other words, how an inflamed retributive urge toward so-called niggas causes voters, jurors, judges, lawmakers, and others to ignore, deny, or downplay the role of macro-level social factors (for which we are collectively accountable) in both the production and construction of black criminals. I will trace the following links between the process of niggerization, the retributive urge, and America’s collective denial of accountability:

47 Just as with criminal “others,” the plight of poor “others” can be explained either from an internal, macro-level perspective that reinforces their deficient “otherness,” or from an external, macro-level perspective that disputes their alien otherness by looking at the poor as just ordinary people who lack jobs with living wages, resources, and prospects.


49 It may be useful to distinguish between criminal construction and production as follows: Social factors and other factors beyond the control of the wrongdoers may produce criminals in the sense of provoking or tempting or pressuring them to voluntarily do wrong. In contrast, those who must judge the subjective culpability or mens rea of these voluntary wrongdoers—judges, jurors, judges, lawmakers and laymen alike—may construct criminals in the sense of making biased normative judgments about their subjective culpability and just deserts. Production focuses on the impact of social forces on the behavior of wrongdoers, on increasing their number. Construction focuses on the impact of stereotypes and prejudice on decision makers who must assess a wrongdoer’s moral guilt or innocence and the grade or degree of his crime.
• The better wrongdoers fit the “depraved nigga” stereotype, the more they stir the retributive urge for blame and punishment;
• The more wrongdoers stir the retributive urge, the easier it is for Americans to deny a causal connection between the specific criminal acts of poor black wrongdoers and general social facts like racism and joblessness;
• Finally, the easier it is to deny that social forces cause criminal wrongdoing, the easier it is to deny our collective accountability for the crack plague and its legacy.\(^{50}\)

In short, I will show how the powerful urge to damn and condemn “niggas” induces us to deny our collective accountability for the criminal consequences of being broke, black and hopeless in post-civil rights America.

However, Nigga Theory is not just descriptive. Nigga Theory is also prescriptive, and rests on the hopeful and optimistic premise that once the moral basis for the retributive urge toward black criminals is shown to be illegitimate, irrational and unreliable, it may become easier for fair-minded Americans to curb the urge to condemn such wrongdoers and recognize our collective accountability for their plight and the causal links leading to their plight. For example, consider the last 30 years of crime and incarceration that constitute the crack epidemic and its legacy. There are causal links between those 30 years of crime and the following five macro-level social facts:

• Extreme social and economic inequality in the setting of a cultural belief system sociologists call the American Dream\(^{51}\)
• The massive flow of jobs from dying rustbelt cities and the stampede of the black bourgeoisie from economically integrated black neighborhoods

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\(^{50}\) To be more concise, I will show how niggerizing black criminals inflames the retributive urge and thus keeps us as a nation from recognizing our collective accountability for their wrongdoing. According to Deniers, because the intervening and morally deficient choices of criminals and poor people break the causal link between social forces on the one hand and poverty or crime on the other, we as a nation are absolved of accountability for the crime and poverty foreseeably resulting from criminogenic social forces. See infra Part III.

\(^{51}\) “It is when a system of cultural values extols, virtually above all else, certain common success goals for the population at large, while the social structure rigorously restricts or completely closes access to approved modes of reaching these goals for a considerable part of the same population, that deviant behavior ensues on a large scale.” ROBERT K. MERTON, SOCIA,L THEORY AND SOCIAL STRUCTURE 200 (1968); see also Robert Merton, Social Structure and Anomie, 3 AM. SOCIOL. REV. 672 (1938); STEVEN MESSNER & RICHARD ROSENFELD, CRIME AND THE AMERICAN DREAM 9–10 (5th ed. 2013).
to economically segregated formerly white ones like my own in View Park.\textsuperscript{52}

- Well-documented decisions by high ranking U.S. officials during the Reagan and George H. Bush administrations to fight communism by prioritizing foreign policy over drug enforcement and thus knowingly—though not conspiratorially—helping flood poor black neighborhoods with crack in the name of national security.\textsuperscript{53}

- Political posturing and opportunism by lawmakers from the Democratic Party, Congressional Black Caucus, and Republican Party on the Anti-Drug Abuse Act of 1986 in response to the cocaine-induced death of Boston-bound basketball star Len Bias, resulting in “the criminalization

\textsuperscript{52} [T]he growing problem of joblessness in the inner city… [is] partly created by the changing social composition of inner-city neighborhoods. In the 1940s, 1950s, and even the 1960s, lower-class, working-class, and middle-class black urban families all resided more or less in the same ghetto areas, albeit on different streets… The exodus of black middle-class professionals from the inner city has been increasingly accompanied by a movement of stable working-class blacks to higher-income neighborhoods in other parts of the city and to the suburbs. Confined by restrictive covenants to communities also inhabited by the urban black lower classes, the black working and middle classes in earlier years provided stability to inner-city neighborhoods and perpetuated and reinforced societal norms and values. In short, their very presence enhanced the social organization of ghetto communities.

\textbf{William Julius Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy} 143 (1987).

Yana Kicheva and Richard Sander reach conclusions consistent with this view in their analysis of the relationship between \textit{Shelley} and the hyper-concentration of criminogenic disadvantage in poor black neighborhoods:

- We find strong and fairly consistent support for the “Shelley” hypotheses, while the “white abandonment” hypotheses are generally unsupported or weakly supported. Our data suggests that almost immediately after \textit{Shelley} in 1948, blacks began to enter middle-class covenanted neighborhoods that were adjacent to existing black enclaves. The “blockbusting” phenomenon, we suspect, quickly became the institutional midwife for much of the white-to-black transition. Over the next twenty years, black districts dramatically increased in size, substantial portions of the black middle-class became homeowners, and the old ghettos became poorer and more economically isolated from affluent blacks.

of U.S. foreign policy" through mandatory minimums and gross sentencing disparities for crack-related crimes.\footnote{Len Bias was a University of Maryland student and star basketball player who died from a powder cocaine overdose less than 48 hours after he was drafted in the first round by the Boston Celtics as heir apparent to Larry Bird as the face of the franchise. As Dan Baum observes in his book:}

Immediately upon returning from the July 4 recess, Tip O'Neil called an emergency meeting of the crime-related committee chairmen. Write me some goddamn legislation, he thundered. All anybody up in Boston is talking about is Len Bias. The papers are screaming for blood. We need to get out front on this now. This week. Today. The Republicans beat us to it in 1984 and I don't want that to happen again. I want dramatic new initiatives for dealing with crack and other drugs. If we can do this fast enough, he said to the Democratic leadership arrayed around him, we can take the issue away from the White House.

In life, Len Bias was a terrific basketball player. In death, he became the Archduke Ferdinand of the Total War on Drugs. What came before had been only skirmishing; the real Drug War had yet to begin. Within weeks, the country would be marching, bayonets fixed.

\textbf{DAN BAUM, SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE 225 (1996).}

The result was the Anti-Drug Abuse Act of 1986, complete with mandatory minimums and sentencing disparities. Eric E. Sterling, who was counsel to the U.S. House Committee on the Judiciary and was involved in the passage of mandatory minimum sentencing laws, is now President of the Criminal Justice Policy Foundation. Eric E. Sterling, \textit{Drug Laws And Snitching: A Primer}, \textit{FRONTLINE}, http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/.

His first-hand account of what happened, told to PBS's Frontline, confirms Baum's description in Smoke and Mirrors:

In 1986, the Democrats in Congress saw a political opportunity to outflank Republicans by "getting tough on drugs" after basketball star Len Bias died of a cocaine overdose. In the 1984 election the Republicans had successfully accused Democrats of being soft on crime. The most important Democratic political leader, House Speaker "Tip" O'Neil, was from Boston, MA. The Boston Celtics had signed Bias. During the July 4 congressional recess, O'Neil's constituents were so consumed with anger and dismay about Bias' death, O'Neil realized how powerful an anti-drug campaign would be.

O'Neil knew that for Democrats to take credit for an anti-drug program in November elections, the bill had to get out of both Houses of Congress by early October. That required action on the House floor by early September, which meant that committees had to finish their work before the August recess. Since the idea was born in early July, the law-writing committees had less than a month to develop the ideas, to write the bills to carry out those ideas, and to get comments from the relevant government agencies and the public at large.

One idea was considered for the first time by the House Judiciary Committee four days before the recess began. It had tremendous political appeal as "tough on drugs." This was the creation of mandatory minimum sentences in drug cases. It was a type of penalty that had been removed from federal law in 1970 after extensive and careful consideration. But in 1986, no hearings were held on this idea. No experts on the relevant issues, no judges, no one from the Bureau of Prisons, or from any other office in the government, provided advice on the idea before it was rushed through the committee and into law. Only a few comments were received on an informal basis. After bouncing back and forth between the Democratic controlled House and the Republican controlled
And finally

- Empirically demonstrable unconscious bias in direct moral judgments of black wrongdoers by judges, jurors, lawmakers, police officers, prosecutors, voters and other powerful social decision makers.  

These five factors explain both the dramatically disproportionate rates of criminal wrongdoing among poor black males and the lack of empathy for them in jury boxes, legislative chambers, and voting booths.
To help us curb the urge to condemn blameworthy blacks long enough to recognize these five macro-level social factors as the causes of the crack plague and its consequences, I will discredit the twin convictions that undergird the retributive urge toward so-called niggas, namely:

A) our self-congratulatory substantive conviction that persons deserve credit and blame for what they do irrespective of contingency

and

B) our naïve epistemological conviction that judges, jurors, and others called upon to make moral judgments of black wrongdoers can do so without conscious or unconscious racial bias.

These twin convictions sanctify the retributive urge by reassuring us that any “niggas” blamed and punished to satisfy it deserve their state-inflicted pain and suffering and solitary confinement and sometimes death. Under Nigga Theory, however, the twin phenomena of moral luck and ubiquitous unconscious bias subvert the support for these convictions both in theory and in practice. My hope is that once the absence of any rational or reliable moral ground for distinguishing wicked from worthy blacks has been exposed, once the urge to

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55 This includes empirically demonstrable unconscious empathy-bias and racially differential attribution bias.
56 The first conviction goes to the substantive question of whether there is a legitimate and rational difference between praise and blame. The second goes to the “epistemic” one of (assuming for the sake of argument that there is a substantive difference between them), whether we can accurately come to know which category any particular case should fall into.
57 See JAMES FITZHUGH STEPHEN, 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND, 81–82 (1883).
blame and punish “niggas” loses its footing in logic and fairness,\textsuperscript{58} readers can more clearly see black wrongdoers not as radically “other” moral monsters to be damned, but rather as “social facts”\textsuperscript{59} to be deplored and, if necessary, incapacitated and, if possible, rehabilitated, but never, as now, harshly punished in the name of revenge, retaliation, or retribution.\textsuperscript{60}

Having described Nigga Theory, I now turn to Good Negro Theory.

B. On “Good Negro Theory” and the “Ostracizer”

For greater precision and clarity, I have coined the term “Good Negro Theory” to refer to the constellation of assumptions, beliefs, and values that undergird the bad Negro-good Negro dichotomy and its corollary contention that law-abiding blacks should socially and politically ostracize black criminals. This interconnected assortment of values, beliefs, and assumptions can be viewed as interlocking tools in an apparatus—call it an “Ostracizer”—designed to advance the social interests of disproportionately privileged law-abiding blacks. The Ostracizer includes:

1. Calibrated \textbf{Nigga Detector}, outfitted with
   A) \textit{Warning System}
   and
   B) \textit{Blaming System},
2. Built-in \textbf{Excuse Deflector},
3. Double Barreled \textbf{Distinguish and Distance Device},
4. \textbf{Good Negro Code of Ethics}, and
5. \textbf{Cost-Benefit, Wealth-Maximizing Moral Compass}.

In addition to promoting the social interests of law-abiding blacks, the Ostracizer also helps America, as a collective social actor, deny accountability for the foreseeable consequences of its criminogenic social conditions and state actions. It does this by reducing crime to the bad choices of morally deficient

\textsuperscript{58} It is patently unjust to blame and punish people whose blameworthiness we cannot fairly or justly determine. This is precisely the point of the venerable “presumption of innocence” and ancient “mens rea” or subjective culpability requirement in criminal cases—both rest on the premise that only blameworthy wrongdoers are proper objects of our desire for vengeance or retribution.

\textsuperscript{59} As “human-all-too-human” social facts in the sense of being the result of human frailty subjected to certain social forces and other factors beyond their control.

\textsuperscript{60} In viewing criminal matters through macro-level social lenses, this article adopts an unapologetically determinist perspective in that it views criminal wrongdoing as ultimately determined by social forces (for which America, as a collective social actor, is accountable) and other factors beyond the control of wrongdoers. As moral philosophers Thomas Nagel and Bernhard Williams show, morally we are at the mercy of luck. Thomas Nagel, \textit{Mortal Questions, in Ethics: The Essential Writings} 446 (Gordon Marino ed., Modern Library 2010); Bernard Williams, \textit{Moral Luck, in Moral Luck: Philosophical Papers 1973–1980} 20 (1981).
individuals at whom the retributive urge should be aimed and on whom it should be satisfied.

Below, I describe in more detail each of the Ostracizer's devices.

1. Nigga Detector

The most important device in the Ostracizer is the calibrated Nigga Detector, for bad Negroes must be positively identified before being distinguished, distanced, and disgraced. The calibrated Nigga Detector consists of two separate systems for assessing blacks in criminal matters—a warning system for "suspicious blacks" whom ordinary people would view as posing a heightened risk of wrongdoing, and a blaming system for blacks who actually have done wrong. As part of its warning system, the Detector identifies "patently good" and "suspicious" Negroes. As part of its blaming system, the Nigga Detector identifies "real" Niggas. In keeping with this distinction between warnings and condemnations, the two sources of error that can undermine the Detector's results are: 1) inaccurate predictions about whether a given black person is committing or about to commit a crime and 2) unreliable inferences about the wickedness or mens rea of a black person who has clearly committed a past wrongful act.

i. The Warning System: Assessing Riskiness

First, consider the Detector's warning system, whose sole function is to assess an ambiguous black person's riskiness, specifically the risk that he is committing—or is about to commit—a wrongful act.\(^{61}\) In this respect the Detector's operation raises issues commonly couched in terms of "racial profiling," "reasonable suspicion," "probable cause," "the Fourth Amendment," and "criminal procedure." What is more, the Detector's race-sensitive predictions and warnings reflect ordinary people's risk assessments of ambiguous blacks. In Negrophobia and Reasonable Racism, I dubbed the social price blacks must pay as targets of racial profiling, rooted in racial stereotypes and statistical generalizations, the "Black Tax."\(^{62}\)

The Detector's warning system operationalizes the Black Tax by using different sounds, lights, and scrolling electronic ticker tape displays to differentiate blacks according to the kind and degree of criminal risk they appear to pose to ordinary people. Thus, when pointed at "patently Good Negroes" (that is, blacks who ordinary people would view as posing no meaningful risk of wrongdoing, say,

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\(^{61}\) Risks of criminality can figure in predictions of future criminal acts (e.g. in self-defense cases) and ex post facto determinations of the likelihood that a particular defendant committed the prohibited act of which he is accused. This analysis applies mostly to predictions of imminent wrongdoing or inferences of current, ongoing wrongdoing.

nattily clad black Brahmins at a Jack and Jill cotillion in the “Black Beverly Hills”\textsuperscript{63}, the Detector’s warning system warbles melodiously, glows good-Negro green, and scrolls “Safe Negro” across its electronic ticker tape display.

When aimed at blacks who ordinary people would view as dangerous (say, a “big, black man” under ambiguous circumstances), it activates flashing yellow caution lights and differentiates three different kinds of “Suspicious Negroes”:

1. Somewhat suspicious Negroes, who elicit a scrolling nigga advisory and a deep monotonous drone like a bee on the wing or humming refrigerator;
2. Very suspicious Negroes, who trigger a scrolling nigga alert and a stream of midrange horn honks; and
3. Imminently dangerous Negroes, who activate a scrolling nigga alarm and high-pitched emergency sirens.

Bear in mind that nigga alarms, alerts, and advisories are predictions and risk assessments rooted in the beliefs, assumptions and perceptions of ordinary men and women. Because the law defines the perceptions and responses of ordinary people as “reasonable,”\textsuperscript{64} the Detector’s warnings reflect “reasonable” risk assessments of the dangerousness of ambiguous blacks. Of course, appearances can be deceiving, so law-abiding Negroes can trigger false alarms, alerts, and advisories in ordinary people. Nevertheless, in the eyes of the law such false warnings are “reasonable mistakes” as long as they are the kind that ordinary people would make under similar circumstances.\textsuperscript{65}

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\textsuperscript{63} Another nickname that, in addition to the “Golden Ghetto,” View Park goes by.


\textsuperscript{65} Case in Point and Cautionary Tale:

Call it arresting irony or just improbable farce, but midday Black Friday of 2011, while laying out these lubrications on “Suspicious Negroes” on my laptop, I had an eerie nigga-alarm-laden visitation, complete with a portable steel cage and cocked assault weapons. I was nominating in the rumpus room of our upper-middle class Hillside home in our economically gated all-black neighborhood when my dogs started barking, which at midday means The Mailman Corneth. Our dogs hate to hear the postman clang the door on our mailbox shut after stuffing it mostly with junk mail and come-on schemes—**M E G A B U C K S You Could Be Our Next Millionaire**!—that pander to the poverty all about this privileged enclave. (Buried in the small print are the impossibly long odds against winning: 505,000,000 to one). To spare the dogs that acoustic insult, as usual I walked over to the foyer, swung open the front door, and stepped outside to intercept the mail. But, by striding across our doorsill into a cloudless Southland afternoon, everything thrown into brilliant visibility by the impassive slant of our southwestern sun, I set off wailing sirens and scrolling nigga-alarms in the hearts and minds of a small cluster of Sheriff’s deputies, provoking several to draw and train their handguns on my head and torso. “Freeze” and “Get your hands up” were their simultaneous but mutually contradictory commands—if you “freeze,” of course, you cannot “get your hands up”—but as I was about to share this snarky observation with my gun-wielding interlocutors I noticed that the nearest one held his cocked firearm in a tremulous hand, a sign that he
Self-defense claims illustrate how the substantive criminal law treats false nigga alarms. Self-defense doctrine privileges both private citizens and police personnel to use lethal defensive force against persons who reasonably appear to pose an imminent threat of serious harm. The reach of this privilege to shoot scary black males can be exceedingly long, as illustrated by cases like Bernard Goetz, Amadou Diallo, Sean Bell, and Trayvon Martin. Professors E.

was in the throes of an instinctive and fuel-injected fight-or-flight reaction. It struck me that despite my grey beard and two sons in college, by standing 6'5", weighing two hundred pounds, and brazenly brandishing nappiness from crown to jowl, I was to these armed and alarmed officers a “big, black man” who “looked like a criminal.” It turns out that here in the Good Negro capitol of America, nappy performatives and celebrations of the African-American soul are worn at one’s own peril.

With “nigga alarms” wailing, me and my impertinent performative were patted down and locked in the backseat of a police cruiser with the heavy-handed disrespect that is the common lot of “suspect Niggas.” As I peered through the police car partition cage, more deputies arrived, a sharpshooter posted up across the street, and a phalanx of officers swept through our home with drawn assault weapons. With implacable forces swirling around me, I inwardly moved toward the quiet “eye” of this sudden tempest, that unruled region at a storm’s center about which winds rage and rotate, but which itself remains calm. From this serene eye I gazed at the links between my own rolling “prisoner transport cage” and those wrapped in concrete and barbed wire called correctional institutions. In this stillness I heard echoes of long ago captivities—plantations brimming with blacks in bondage—commingling with current-day captivities of both black inmates and law-abiding Negroes who appear imminently dangerous to ordinary police officers equipped with guns and rolling cages.

I was eventually told that someone had reported hearing a gunshot, although the way echoes reverberate through these densely-populated hills, its location necessarily involved guesswork. As the sweep uncovered no evidence of foul play, only the sole other occupants of the home in addition to me, namely, a playful chocolate Lab and gray-flannel Weimaraner, with a certain detached reflection I watched the deputies “nigga alarm” sirens first deescalate into “nigga alert” honks, then dissolve into “nigga advisory” drones, and finally melt into the melodious “safe-negro” warble that for many years has been music to the ears of innocent but “suspicious” blacks. The door of my custom built cage swung open as “Safe Negro” scrolled across their ticker tape displays and I emerged like an Easter chick from its shell, stretching my legs and counting my blessings. Yet, had the Deputy’s surge of adrenaline made his trigger finger any twitchier, or had his stereotypes about big, black men made it any ichier, our encounter could easily have ended not in a warble but a dirge.

66 The “serious harms” that typically justify lethal defensive force are death, serious bodily injury, and rape. These justificatory grounds for self-defense involving deadly force have been expanded in some jurisdictions to include robbery (as in the Bernhard Goetz case) and “standing your ground” (as in Florida and other “stand your ground” jurisdictions that extend the “castle doctrine’s” privilege not to retreat when attacked in one’s own home to public spaces). See e.g., FLA. STAT. § 776.012; People v. Goetz, 497 N.E.2d 41, 46–48, 54 (N.Y. 1986); Corn Carrer, 23 Other States Have ‘Stand Your Ground’ Laws, Too, THE WIRE (Mar. 22, 2012, 4:20 PM), http://www.thewire.com/national/2012/03/23/other-states-have-stand-your-ground-laws-too/90226/.

67 Goetz, 497 N.E.2d at 41.

68 Precisely the same analysis applies to police officers, as illustrated by the case of Amadou Diallo, the 22-year-old Guinean immigrant in New York City who was shot and killed in 1999 by four New York City Police Department plain-clothed officers, who mistook his wallet for a gun and fired 41 shots, hitting Diallo nineteen times. Michael Cooper, Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed, N.Y. TIMES (Feb. 5, 1999), http://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html. The internal NYPD investigation ruled that the officers’ mistaken beliefs
Ashby Plant and B. Michelle Peruche have conducted experiments with police officers which showed that officers were quicker to decide to shoot an *unarmed* black target than a similarly situated *unarmed* white target. Because such discriminatory reactions often occur in the cognitive unconscious, bypassing the actor's voluntary or conscious control, racially liberal and well-meaning officers (and ordinary citizens) arguably cannot help shooting ambiguous blacks more hastily. Because self-defense doctrine excuses ordinary mistakes rooted in ordinary human frailty, the law of self-defense thus allows ordinary police officers and civilians alike to use lethal defensive force more hastily against ambiguous but innocent blacks than against similarly situated whites. So long as ambiguous black men make the trigger finger of ordinary citizens or law enforcement personnel itchier or twitchier in uncertain situations than that finger would be for similarly situated white men, more hasty applications of deadly force to black men will qualify as reasonable and privileged. In the end, then, under current law, the quicker use of lethal force against blacks by ordinary—hence reasonable—and

were reasonable under the circumstances, and a criminal jury acquitted them on the same grounds. See Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES (Feb. 26, 2000), http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html. See also Alan Feuer, *$3 Million Dollar Deal in Police Killing of Diallo in 99*, N.Y. TIMES (Jan. 7, 2004), http://www.nytimes.com/2004/01/07/nyregion/3-million-deal-in-police-killing-of-diallo-in-99.html ("The department accepted recommendations by two former investigative panels, which found that the officers, although they fired at an unarmed man, had not breached police guidelines because they believed that Mr. Diallo held a weapon and that their lives were in danger.").


71 *SAUL KASSIN, STEVEN FEIN & HAZEL ROSE MARKUS, SOCIAL PSYCHOLOGY 185 (7th ed. 2007)* (citing E. Ashby Plant & Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181–82 (2005)). That the targets were unarmed makes it clear that we are focusing on mistakes and excuses rather than justifications. What's more, subjects were also quicker to decide to shoot an *armed* black target than a similarly situated *armed* white target. *Id.*


73 *Id.*
well-meaning police officers and private citizens is an inexorable expression of the Black Tax that black men must simply grin and bear without civil compensation or criminal vindication. 75

ii. On Race, Place, Class, Crime, and Profiling

Allow me a brief side note. Interestingly, instead of criticizing the use of such profiling, of what I term the general deployment of a Nigga Detector, many in the black community critique only its unfair use on them. It is not the Nigga Detector they object to, but rather the fact that it is still too blunt an instrument, not sufficiently calibrated to exclude all good negroes. These critics add that the disproportionate misdeeds of bad niggas hurt the interests of good law-abiding Negroes by providing the statistical justification for the “Black Tax.” As Ellis Cose chronicles in The Rage of a Privileged Class, the Black Tax is the bane of the existence of the black bourgeoisie and one big reason black Brahmins feel so enraged. 76 Indifferent as lightning, the Black Tax strikes both black haves and black have-nots, both good and bad Negroes. But unlike natural lightning, which in myth never strikes twice in the same place, bolts of Black Tax lightning repeatedly strike the same targets again and again. This phenomenon is shown by a Community Service Society of New York’s analysis of 2009 stop-and-frisk data for the New York police: there were 132,000 stops of black men 16–24 in 2009 (94 percent of which did not lead to an arrest). 77 According to Census Bureau data, only 120,000 black men of that age lived in New York City in 2009! 78 Thus, “on average, every young black man can be expected to be stopped and frisked by the police each year.” 79 Put differently, young black men in New York are law-

74 Self-defense is a privilege to a battery claim in tort. See Restatement (Second) of Torts, § 63 (1965). We could recognize strict liability in tort for reasonable mistakes about the need for deadly defensive force; specifically, we could adopt the logic of Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 459 (1910) and hold that a deliberate appropriation of another’s well-being to promote and protect one’s own interests triggers a duty to compensate the injured party even though the injurer acted reasonably and was in no way at fault. Alternatively, perhaps we could think of law enforcement as an ultra-hazardous activity subject to strict liability vis-à-vis innocent blacks in light of demonstrable unconscious bias.

75 However, unlike strict tort liability, legally vindicating innocent victims of reasonable mistakes through imposing strict criminal liability on their injurers would be impossible without fundamentally violating the culpability principle that is the cornerstone of our criminal jurisprudence. See Morissette v. United States, 342 U.S. 246, 250–51 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. . . . A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory ‘But I didn’t mean to.’”).

76 See Ellis Cose, The Rage of A Privileged Class 95 (1993).


78 Id.

79 Id.
enforcement lightning rods who can expect to be struck over and over by blue surge bolts of Black Tax lightning.

Some privileged blacks would not find the Black Tax so infuriating if it were more targeted, tailored, and regressive, that is, more limited to poor blacks, whose disproportionate misdeeds establish and maintain the statistical link between race and crime in the first place. Black Brahmin icon, Bill Cosby, stressed the class factor in his address at the NAACP on the 50th anniversary of Brown v. Board of Education: “Ladies and Gentlemen, the lower economic and lower middle economic people are not holding their end in this deal.”80 Statistically at least, these better off critics of poor blacks have a point: the vast majority of black street criminals are from “extremely” disadvantaged neighborhoods.81 From this statistical perspective, by committing street crimes at such disproportionately high rates, “poor black criminals” make blackness itself, in the language of evidence law, relevant evidence of criminal wrongdoing or criminal intent. The disproportionate misdeeds of poor blacks—to paraphrase the evidence code—make the proposition that someone did or will do a crime statistically more likely to be true given his blackness than it would be without that factor. This cold but cogent math—chiefly bottomed on the criminal wrongdoing of blacks from truly disadvantaged neighborhoods—has prompted my Black Beverly Hills neighbors to openly declare “We don’t want Compton up here”; in eerily similar language it also prompted an L.A. County Sheriff’s Deputy to warn an event planner that “We

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80 Bill Cosby, Address at the NAACP on the 50th Anniversary of Brown v. Board of Education, at Constitution Hall, Washington D.C. (May 17, 2004), available at http://www.americanrhetoric.com/speeches/billcosbypoundcakespeech.htm. Cosby’s speech is often called the “Pound Cake” speech because of the following lines in which he drives a sharp and deep wedge between morally “innocent” victims of Jim Crow and their champions (“the ones up here in the balcony”), on the one hand, and morally culpable common black criminals, on the other:

But these people, the ones up here in the balcony fought so hard. Looking at the incarcerated, these are not political criminals. These are people going around stealing Coca-Cola. People getting shot in the back of the head over a piece of pound cake! And then we all run out and are outraged, “The cops shouldn’t have shot him.” What the hell was he doing with the pound cake in his hand? I wanted a piece of pound cake just as bad as anybody else, and I looked at it and I had no money. And something called parenting said, “If you get caught with it you’re going to embarrass your mother.” Not “You’re going to get your butt kicked.” No. “You’re going to embarrass your family.”

Id. Note that the socially conservative but popular position Cosby expresses here flatly rejects, on moral grounds, Michelle Alexander’s contention that the mass incarceration of black criminals constitutes a form of unwarranted social and political oppression analogous to Jim Crow. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

81 See generally Krivo & Peterson, Extremely Disadvantaged Neighborhoods and Urban Crime, supra note 35; Krivo & Peterson, The Structural Context of Homicide, supra note 35; Peterson & Krivo, Macrostructural Analyses of Race, Ethnicity, and Violent Crime, supra note 35; Peterson & Krivo, Race, Residence, and Violent Crime: A Structure of Inequality, supra note 35.
don’t want South Central up here. The cogent math linking extremely disadvantaged black neighborhoods and violent crime means that, from the perspective of these good negroes, someone from such a neighborhood should pose a much greater risk of serious street crime than his Golden Ghetto doppelganger. These good negroes thus embrace something akin to a mapping of the link between race, place, class, and crime, something akin to a “nigga geography” or “nigga cartography.” Not surprisingly, there’s an app for that—a service originally launched under the name “Ghetto Tracker” and relying on crowd sourced information (locals rate which parts of town are safe and which ones are ghetto, or unsafe) to help people avoid unsafe areas.

For these good negroes, the Nigga Detector would be less blunt and more finely calibrated if it also included a Ghetto Tracker. For these good negroes, “class” and “place” profiling—“spatial profiling”—is perfectly rational, reasonable, and right. They can echo defenders of racial profiling and say, with the cool precision of Mr. Spock or Data, “it is regrettable but rational to profile on the basis of geography—nothing personal. As long as there remains a statistically rational relationship between extremely disadvantaged neighborhoods and violence, we cannot escape the logical link between geography and dangerousness. Simply put, we must distinguish and distance ourselves from Jungle-South Central-Compton-Ingleshieldt-Watts blacks because doing so enhances our safety; it’s not about race or class but safety—again, nothing personal.” Thus an

82 I, along with Eddie Harris (former Santa Monica police officer) and Chris Cuben (producer and event planner), witnessed the Sheriff’s remarks.

83 What’s more, inasmuch as black criminals are morally condemnable, ten, by hypothesis, not only are denizens of truly disadvantaged neighborhoods more dangerous, they are also much more often morally condemnable; in other words, they are morally suspect. Put differently, under the Black Criminal Litmus Test of a morally condemnable “nigga,” it turns out that the moral boundary that runs between law-abiding “black people” and wicked “niggas” tightly tracks the geographical boundaries between black havens and have-nots.

84 Massey and Denton have argued and shown that residential segregation serves to channel the racial inequality in rewards (e.g., high income) and disadvantages (e.g., poverty) evident in a racially stratified society into distinct neighborhood environments. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN Apartheid: SEGREGATION AND THE MAKING OF THE UNDERCLASS 122–23 (1993).

85 Heather Kelly, Ghetto Tracker Site Offends Dirt and Riches, CNN (Sep. 6, 2013, 5:17 PM), http://www.cnn.com/2013/09/06/tech/web/ghetto-tracker-controversy; Lydia O’Connor, ‘Ghetto Tracker,’ App That Helps Rich Avoid Poor, Is as Bad as It Sounds, THE HUFFINGTON POST (Sept. 5, 2013, 4:50 PM), http://www.huffingtonpost.com/2013/09/04/ghetto-tracker_n_3869051.html. Ghetto Tracker’s ratings of neighborhoods weren’t based on any hard crime data but rather on the impressions (and perhaps biases) of ordinary people. Would Ghetto Trackers remain objectionable if they changed the name—say, to “Good Part of Town,” as was done by the site founder—and rested the ratings on hard data? In the words of the site owner, “This website is not about race or income, as some of the PC myrmidons have asserted . . . . Again, it’s about safety.” Kelly, supra.

86 I call such black apologetics for spatially profiling other blacks “talking white”—deploying the same arguments against poor blacks to justify class profiling that whites use against blacks to justify racial profiling. Hypocrisy seeps through these class-based discriminations, however. In
enraged “privileged class” that rails against too blunt racial profiling itself routinely practices spatial profiling without compunction or even a hint of irony.

iii. The Black Tax as a Tithe That Binds

Allow me another side note. Although I have attacked the Black Tax in books, blogs, and law reviews, a silver lining runs through it. To appreciate the consolation I find in racial profiling, start with the well-supported empirical premise that extreme disadvantage breeds street crime. Then add the observation that so long as truly disadvantaged blacks continue to disproportionately commit street crime, their disproportionate misdeeds will continue to statistically justify the use of a Nigga Detector and the resulting Black Tax, and generate the false nigga warnings that rankle and enrage the privileged class. Now add the recognition that more sophisticated Nigga Detectors will never adequately reduce the false warnings visited upon the enfranchised class of privileged blacks. The silver-lining implication of these three propositions is that the only way for enraged black Brahmins to pay or sing less of the Black Tax is to destroy its statistical foundation by lifting poor blacks out of extremely disadvantaged neighborhoods, fixing their crumbling schools, and addressing other criminogenic social conditions that besiege them. In fact, whenever members of the black bourgeoisie are struck by bolts of Black Tax lightning (whenever, say, they nearly get tennis elbow from trying to flag down cabs that won’t stop), their rage should give way to a “moment of Zen”—they should reflect on reasons for the sometimes cogent

Rage of a Privileged Class, Ellis Cose chronicles the seething festering resentment of many in the black bourgeoisie whose socio-economic privilege provides no immunity to a steady barrage of indignities and micro-aggressions rooted in racial stereotypes and suspicions. See Cose, supra note 76, at 11–14. Yet this righteous rage over racial profiling rings hollow when that same privileged class practices spatial profiling against other blacks. Black-on-black spatial profiling cannot be justified any more than white-on-black racial profiling. Teens from poor black neighborhoods have no more control over the class they were born into than members of the black bourgeoisie have over their skin pigment. Kids and teens are not poor because they are bad anymore than people are black because they are bad, so neither poor black teens nor privileged black adults can control the social characteristic profilers use against them.

87 See Armour, Race Ipsa Loquitur, supra note 64, as reprinted in KADISH ET AL., supra note 6, at R26–27; id., as reprinted in CRITICAL RACE THEORY: THE CUTTING EDGE 180 (Richard Delgado & Jean Stefancic eds., 3d ed. 2013); see Armour, supra note 62.


89 Armour, Race Ipsa Loquitur, supra note 64, at 782–83.

90 The Black Brahmin Blues—the genre of the Black Tax Blues sung by View Park Negroes—could go something like this:

Black Tax rising, despite my degrees I can’t buy no relief
I said, Black Tax rising, despite my degrees I don’t get no relief
Blue surge bolts of Black Tax lightning don’t respect my good Negro pedigree.
statistical disparities in rates of crime by race that can be advanced to justify racial profiling and its attendant indignities, namely, the hopelessness, frustration, alienation, and despair of truly disadvantaged blacks stranded in neighborhoods abandoned long ago by the “privileged class” itself.91 The relatively law-abiding black bourgeoisie should view the Black Tax as a “tithe” that births their fate to that of extremely disadvantaged blacks, a relentless reminder that as long as “they” don’t look good, “we” don’t look good. That is the silver lining, at least in theory.

iv. The Blaming System: Weighing Wickedness

Next, consider the Nigga Detector’s blaming system, the primary focus of this essay and of the substantive criminal law. When aimed at a black person who has already committed a prohibited act or actus reus (for instance, a black defendant in a criminal trial who clearly caused a death or some other serious social harm), the Detector no longer needs drones, honks, or sirens to warn of the risk of someone committing a prohibited act. At this point, the risk of wrongdoing has been realized—the jury believes beyond a reasonable doubt that the defendant committed a wrongful act. So in this phase of its operation, the Detector shifts from assessing someone’s riskiness, suspiciousness, and dangerousness to assessing his moral fault, blameworthiness, and subjective culpability.92 Since the sole function of the Detector’s blaming system is to assess a black wrongdoer’s wickedness, its operation and application raises concerns commonly couched in terms of “mens rea” (i.e. “criminal intents,” “vicious wills” and “depraved hearts”), “individual choice,” “personal responsibility” and “substantive criminal law.” Once again, the Detector’s assessments of a wrongdoer’s wickedness or mens rea reflect the moral judgments, perceptions and beliefs of ordinary men and women.93

91 See Wilson, supra note 52; Kuecheva & Sander, supra note 52.

92 The wrongdoer’s “character” can influence both the warning and blaming judgments of fact finders. “Character” as propensity to commit a crime in the evidentiary sense can be seen as relevant to the warning system. The “character” part of subjective culpability and mens rea analysis is also relevant to the blaming system. Evidence of a defendant’s character to prove propensity and hence to prove he committed the actus reus is generally screened out of criminal adjudications. However, drawing inferences of bad character traits from the commission of an actus reus or prohibited act is, as George Fletcher points out, a standard part of mens rea analysis. George P. Fletcher, Rethinking Criminal Law 799–800 (1978).

93 Many black commentators and decision makers who criticize ordinary, widespread, “common sense” beliefs about blacks when it comes to the Detector’s warning system nevertheless warmly embrace such beliefs when it comes to its blaming system. When it comes to the warning system’s race-based predictions and risk assessments (that is, when it comes to the Black Tax), the interests of disproportionately privileged law-abiding blacks and those of disproportionately poor black criminals converge more, making it easy for privileged black scholars, commentators, and ordinary people to energetically attack a harmful social practice—like that of racial profiling—that falls especially hard on poor black males trapped in aggressively policed low income neighborhoods. However, when it comes to other harmful social practices that especially hurt poor black males—like
So, when aimed at a black who has already committed a wrongful act, the Detector activates a flashing red "Presumptive Nigga" light while broadcasting the click-clack sound of double barrel hammers cocking in rapid succession. This cocking sound acoustically represents the typical or ordinary inference that someone who commits a wrongful act is wicked, so it acoustically represents our readiness to condemn and ostracize the wrongdoer if and when he fails to refute that ordinary inference of subjective culpability. As Professor George Fletcher observes, if someone commits a prohibited act—say, a jewelry store clerk opens a safe and turns over all the jewels to an unauthorized stranger, or a driver runs over someone lying in the street, or a State Department employee turns over vital state secrets to a foreign government—we typically infer from his wrongful act that he is wickedly dishonest, indifferent, or greedy. More succinctly, we typically infer a bad actor from a bad act. In this sense, someone who commits a prohibited act is presumptively blameworthy. And this is particularly true of black wrongdoers, in part because of the implicit biases we all have. Accordingly, when the Detector is aimed at a black wrongdoer, it scrolls "Prima Facie Nigga" across its display along with an acoustic cascade of click-clacks.

Of course, this typical inference of culpability or presumptive wickedness can be defeated. If the clerk, the driver, and the State Department employee commit their prohibited acts at gunpoint, we cannot infer from their wrongful act anything about their dishonesty, indifference, or greed. All three could claim a full excuse of duress. Excuses, in the words of George Fletcher, "preclude an inference from our blame and punishment practices—the interests of disproportionately privileged law-abiding blacks and those of disproportionately poor black wrongdoers in critical ways diverge, making it easier for Good Negroes to energetically endorse "lock 'em up and throw away the key" approaches toward their "bad 'brothers.'"

This presumption of subjective culpability or mens rea may seem at odds with the "presumption of innocence" guaranteed under the Due Process Clause of the Fourteenth Amendment. In re Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Compare Patterson v. New York which seems to permit legislators to make mens rea factors affirmative defenses and hence shift the burden of proof on those matters of guilt and innocence to the accused. 432 U.S. 197, 225-32 (1977) (Powell, J., dissenting). That is, assuming that Due Process requires the state to prove that the defendant committed a prohibited act beyond a reasonable doubt, the state may then shift to the defendant the burden of proving his moral innocence, of proving that his act was not accompanied by intent or any other form of mens rea. Id. So characterizing someone who commits a prohibited act as presumptively blameworthy would not necessarily violate the soft, anemic presumption of innocence recognized in Patterson. Id.

FLETCHER, supra note 9.

Id.

Model Penal Code would allow a duress excuse for someone who ran over another person with a gun at his head, but most courts would not allow the excuse for the intentional taking of human life. See Model Penal Code and Commentaries § 2.09(2) cmt. 3 at 375-78 (1985).
the act to the actor’s character." But can a Prima Facie Nigga destroy the ordinary inference of wickedness that accompanies wrongdoing by raising or interposing a valid excuse?

A wrongdoer may be unable to assert a valid excuse either because the law does not recognize the kind of excuse he wants to assert or because the jury does not think he deserves the benefit of an excuse the law does recognize. In either case, without an effective excuse, he will be found wicked beyond a reasonable doubt. Accordingly, when the Detector points toward a black wrongdoer unable to raise a valid excuse and hence found wicked beyond a reasonable doubt by a jury, the Detector scrolls “real Nigga” across its ticker while acoustically broadcasting the Blam-Blam of the distinguish and distance barrels discharging twin rounds of Bad Negro buckshot.

v. An Illustration-Application-Demonstration: The Reasonable Poor Black Man Test of Mens Rea

To see the Detector tools in action, let’s apply the apparatus thus far to the longstanding debate over broad excuses for black criminals from disadvantaged social backgrounds. Of course, any analysis of criminal excuses must begin with a prohibited act or actus reus—like causing death or giving away vital state secrets. Again, blacks who commit such prohibited acts trigger the Detector’s cascading click-clacks and scrolling “Prima Facie Nigga” ticker.

At this point a prima facie bad Negro can seek to assert either a broad partial excuse like provocation and “extreme emotional disturbance” or a broad full excuse like duress and self-defense. In claims of provocation and extreme emotional disturbance, a wrongdoer is partially excused if a “reasonable person in the situation” would have been sorely tempted to lose self-control; in duress and self-defense, he is fully excused if a “reasonable person” (i.e. a person of average courage, firmness and backbone) in the wrongdoer’s situation would have been overwhelmed by the threats or apparent threats. So both kinds of excuse turn crucially on the “reasonable person in the situation” test of subjective

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98 Fletcher, supra note 92, at 798–99 (claiming that something about the wrongdoer’s circumstances drove a wedge between his true self and the contingent self who committed the prohibited act or more concisely they claim that their wrongdoing was the result of ordinary human frailty).

99 Accordingly, excuse claims involve the Detector’s “blaming system,” not its “warning system.” Of course, failure to act when under a duty to act also constitutes an act.

100 I know that provocation doctrine can be narrowly limited to a few adequate forms, but I’m following the Maher line of cases that allow most claims of provocation to react the jury subject to the judge playing the role of gatekeeper. See Maher v. People, 10 Mich. 212, 222 (1862).

Thus, the reasonable person test provides judges and jurors with a flexible legal vehicle by which they can excuse a wrongdoer on the moral ground that his circumstances, in the words of Mark Kelman, drove a wedge between his "contingent" self—the self that came forward under the unjust pressures of the situation in which he found himself—and some underlying "true" self that could have manifested itself and maintained control if not for those unjust pressures.

The "reasonable or ordinary person in the situation" test of wickedness can be either rigid and "invariant" (i.e. a typical person drawn from the general population, average in mental, emotional, psychological and dispositional make up) or flexible and "individualized" (a typical person drawn from a social subgroup, like a typical battered woman or a typical person suffering from a post-traumatic stress disorder or a typical impoverished, poorly educated and chronically unemployed person). Whether the test is invariant or individualized, the underlying question of legal excuses can be distilled to this: "Should the 'reasonable person in the situation' test of blameworthiness in cases of duress and extreme emotional disturbance be individualized to make allowances for the wrongdoer's disadvantaged social background?" Alternatively, in instructing on the reasonable person standard: "Should courts instruct jurors on an 'ordinary

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102 Jurors excuse or condemn on the basis of this decision rule. Decision rules are addressed to the fact finder and guide their judgments of defendant at trial; conduct rules are addressed to the general public and guide their behavior as citizens outside the courtroom. See Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV. 625 (1984); Paul H. Robinson, Rules of Conduct and Principles of Adjudication, 57 U. CHI. L. REV. 729 (1990).

103 Mark Kelman, Reasonable Evidence of Reasonableness, 17 CRITICAL INQUIRY 798, 802 (1991). As Martin Wasik puts it, in cases of duress "the accused claims that there was no act by him." Martin Wasik, Duress and Criminal Responsibility, CRIM. L. REV. 453, 453 (1977); see also State v. Woods, 357 N.E.2d 1059, 1066 (Ohio 1976) ("The essential characteristic of coercion . . . is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences."); vacated in part, 438 U.S. 910, 910 (1978), and overruled on other grounds by State v. Downs, 364 N.E.2d 1140, 1144 (Ohio 1977), vacated in part, 438 U.S. 909 (1978). By this logic, we must ascertain a wrongdoer's true character before we can justify blame him, and the reasonable person test provides the legal basis for jurors to assess his blameworthiness by either attributing his misdeeds to his "contingent self" and thus excusing him or attributing them to his "true" self—to an inner depravity, malignity and wickedness—and thus condemning him.

104 Some contend that the reasonable person test is a form of strict liability that does not get at subjective culpability like the aware mental state forms of mens rea do. This claim is not supported by the case law and substantive doctrine. GLAVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 122–23 (2d ed. 1961) (cited and quoted in KADISH ET AL., supra note 24 at 423).

105 HART, supra note 14, at 153–54.

106 Which one it is depends on case law, the trial judge, and even the legislature (in self-defense law, for instance, legislatures have required courts to recognize evidence of battered women's syndrome, essentially requiring courts to individualize the reasonable person test in such cases). See, e.g., VA. CODE ANN. § 19.2-270.8.
impoverished black man trapped behind ghetto walls’ test of reasonableness in
claims of putative self-defense, duress, provocation, or extreme emotional
distress?” Bear in mind that, at bottom, the “reasonable person in the situation”
approach to excuses and subjective culpability depends on jury sympathy. In the
words of a Model Penal Code Comment on the reasonable person test in
provocation cases, “[i]n the end, the question is whether the actor’s loss of self
control can be understood in terms that arouse sympathy in the ordinary
citizen.” Sympathy, or its absence, drives our moral judgments of wrongdoers at
least as much as—if not far more than—reason or logic or categorical
imperatives. “Nigga” from this standpoint is a conclusory label that the object
of assessment inspires no sympathy in the observer, commentator or decision
maker: individuals are not unsympathetic because they are bad Negroes, they are
bad Negroes because they are unsympathetic.

2. Excuse Deflector

The above illustration brings me to the remaining components of the
Ostracizer apparatus, beginning with the Excuse Deflector. In seeking to assert
excuses based on duress, heat of passion, or an individualized reasonable person
test, our posited wrongdoer activates the Nigga Detector’s built-in Excuse
Deflector, which deflects excuses for blacks on moral, legal, psychological, and
political grounds.

i. Morally

The Excuse Deflector brushes aside excuses on two often heard grounds.
First, in keeping with the widespread view that sympathy for wrongdoers in
criminal matters is misplaced, the Deflector channels sympathy away from the
human frailty of the wrongdoer and solely toward the terrible suffering of his
victims. From this standpoint, sympathy for victims flatly trumps that for

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107 See Kadish et al., supra note 6, at 459 (citing Model Penal Code and Commentaries,
§ 210.3 cmt. at 62–63 (1980) (emphasis added). The Model Penal Code states this in the setting of
the Extreme Emotional Distress defense, but it applies equally to self-defense, duress, recklessness
and negligence. Id.

108 Inasmuch as condemnation of and sympathy for wrongdoers pull in opposite directions, this
issue of how individualized to make the standard of care really boils down to what exculpatory or
mitigating factors jurors will hear about in reaching their decision on whether to withhold or give
sympathy.

109 More generally, individuals are not unsympathetic because they are wicked. They are
wicked because they are unsympathetic.

110 See, e.g., Victoria Nourse, Passion’s Progress: Modern Law Reform and the Provocation
Code’s formulation has aggravated the unfairness to women of the provocation defense by expanding
greatly the kinds of frictions in intimate settings that may suffice to reduce a killing from murder to
manslaughter). Of course, excuse claims will not persuade judges, jurors and laypeople who
victimizers. Second, in keeping with another widespread viewpoint, the Deflector brushes aside most excuses for black criminals on the ground that excuses insult the dignity of their intended beneficiaries—black criminals—by treating them like animals or things or Pavlovian bundles of conditioned reflexes rather than as persons, that is, as moral agents capable of meaningful choice. Both these classic and oft-repeated reasons for rejecting most excuses (even limited and long-standing excuses like heat of passion on sudden provocation) are captured in the following comment by Professor Stephen Morse:

I would abolish [the provocation defense] and convict all intentional killers of murder. Reasonable people do not kill no matter how much they are provoked, and even enraged people generally retain the capacity to control homicidal or any other kind of aggressive antisocial desires. We cheapen both life and our conception of responsibility by maintaining the provocation/passion mitigation. This may seem harsh and contrary to the supposedly humanitarian reforms of the evolving criminal law. But this ... interpretation of criminal law history is morally mistaken. It is humanitarian only if one focuses sympathetically on perpetrators and not on their victims, and views the former as mostly helpless objects of their overwhelming emotions and irrationality. This sympathy is misplaced, however, and is disrespectful to the perpetrator. As virtually every human being knows because we all have been enraged, it is easy not to kill, even when one is enraged.

ii. Legally

For reasons like those expressed by Professor Morse, the Deflector turns aside all but a few narrowly framed legal excuses, like involuntary act, maybe limited insanity, maybe very limited duress, and no provocation or extreme emotional

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commiserate solely with the suffering of victims. From this standpoint, sympathy for victims trumps sympathy for victimizers, even though from a broader frame of reference, the victimizers can be seen as victims, too. This victim-centered approach is incident-focused and begins the narrative with the crime. Like critiques of torts and contract law, the critique of this approach is that it ignores background inequalities in the formulation and application of its rules of decision and in the normative assessment of those decision rules; changes in the status quo ante are all that are considered.

111 My moral luck analysis in my forthcoming book embraces rather than flees this charge. See ARMOUR, supra note 22.


113 See ARMOUR, supra note 62, at 92–94.
disturbance. Many courts arbitrarily—from the standpoint of the culpability principle—limit the scope of excuse claims as a matter of law so that wrongdoers never get to present them to a jury. The Deflector reflects and gives effect to these artificial legal limitations on what kinds of extenuating factors a wrongdoer can get before a jury to potentially arouse their sympathy.

iii. Psychologically

The Deflector more readily rejects and deflects excuses for black wrongdoers than for white ones in order to reflect the role of unconscious bias in moral

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114 See Morse, supra note 112; see also Nourse, supra note 110, at 1331–34 (contending that provocation and EED doctrines redound to the detriment of female assault victims and so should be severely circumscribed or abolished).

115 For instance, the commentary to Section 2.09 of the Model Penal Code explains the operation of duress doctrine with the following illustration:

(a) X is unwillingly driving a car along a narrow and precipitous mountain road, falling off sharply on both sides, under the command of Y, an armed escaping felon. The headlights pick out two persons, apparently and actually drunk, lying across the road in such a position as to make passage impossible without running them over. X is prevented from stopping by the threat of Y to shoot him dead if he declines to drive straight on. If X does go on and kills the drunks in order to save himself he will be excused [under duress doctrine] if the jury should find that “a person of reasonable firmness in his situation would have been unable to resist,” although he would not be justified under the lesser evil principle of [necessity doctrine].

MODEL PENAL CODE AND COMMENTARIES § 2.09(2) cmt. 3 at 378 (1985).

X’s choice in this hypothetical situation to kill the people lying across the road rather than sacrifice himself is deemed to be determined. However, courts strictly cabin the duress defense by requiring that the defendant face immediate and specific threats, usually of death or severe bodily injury, and that the threats come from specific human agents who seek to compel the defendant to commit the particular crime for which he is charged. The Model Penal Code illustrates the incoherence (from the moral standpoint of his deserts) of these restrictions on the duress defense in the following variation on their earlier hypothetical:

(b) The same situation as above except that X is prevented from stopping by suddenly inoperative brakes. His alternatives are either to run down the drunks or to run off the road and down the mountainside. If X chooses the first alternative to save his own life and kills the drunks he will not be excused under [duress doctrine] even if a jury should find that a person of reasonable fortitude would have been unable to do otherwise.

Id. (emphasis added).

From the standpoint of the defendant’s blameworthiness, it is impossible to distinguish between these two hypothetical situations. By hypothesis, even if a reasonable person could not have avoided doing exactly what the defendant did, he must be legally condemned because of morally irrelevant doctrinal limitations. From the standpoint of the culpability principle, the following distinction between the two cases offered in the commentary to the Model Penal Code is embarrassingly beside the point: “In the former situation, the basic interests of the law may be satisfied by prosecution of the agent of unlawful force; in the latter circumstance, if the actor is excused, no one is subject to the law’s application.” Id. at 379.

Also in keeping with conservative formulations of the black letter law, the Deflector deflects excuses peculiar to someone’s social subgroup by using only an invariant or so-called “objective” reasonable person test and rejecting an individualized one.
judgments of blacks by ordinary people. Studies on unconscious discrimination—both in the form of attribution bias\textsuperscript{116} and in-group empathy bias\textsuperscript{117}—show that ordinary people are more likely to reject excuses for blacks than for similarly situated whites.

iv. Politically

The Deflector rejects excuses because successful ones gum up both barrels of the Ostracizer’s double barreled distinguish and distance “them” from “us” response to black criminals.\textsuperscript{118} Full excuses like duress clog up the “distinguish” barrel by making it impossible to “differentiate” the character of blacks who commit prohibited acts from those who do not; partial excuses like provocation clog up the “distance” barrel by reducing murder to manslaughter and hence reducing the moral distance between an intentional killer and the law-abiding rest of us.\textsuperscript{119} By deflecting most excuses for black wrongdoers, the Deflector keeps both barrels of the double-barreled anti-lumping political reaction to black criminals unclogged and ready.\textsuperscript{120}

\textsuperscript{116} In a classic experiment, Birt Duncan showed white subjects a videotape depicting one person (either black or white) ambiguously shoving another (either black or white). Birt L. Duncan, Differential Social Perception and Attributes of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 595–97 (1976). Subjects who characterized the shove as “violent” more frequently attributed the wrongdoing to personal, dispositional causes when the harm-doer was black, but to situational causes when the harm-doer was white. Id. A recent study of juvenile offenders found a pronounced difference in court officials’ attributions about the causes of crime by black versus white youths: Court officials are significantly more likely to perceive blacks’ crimes as caused by internal factors and crimes committed by whites as caused by external ones. George S. Bridges & Sara Steen, Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms, 63 AM. SOC. REV. 554, 557, 561 (1998). In the words of the researchers, “[b]eing black significantly reduces the likelihood of negative external attributions by probation officers and significantly increases the likelihood of negative internal attributions, even after adjusting for severity of the presenting offense and the youth’s prior involvement in criminal behavior.” Id. at 563–64.

\textsuperscript{117} Jennifer N. Gutelle & Michael Inzlicht, Empathy Constrained: Prejudice Predicts Reduced Mental Simulation of Actions During Observation of Outgroups, J. EXP. SOC. PSYCHOL. 841, 842 (2010); Vani A Mathur et al., Neural Basis of Extraordinary Empathy and Altruistic Motivation, 51 NEUROIMAGE 1468, 1468 (2010).

\textsuperscript{118} Part of the political reason for distinguishing and distancing good and bad Negroes is to look better in the eyes of whites and enhance our racial reputation. KENNEDY, supra note 13, at 17. This kind of political rationale will apply to cases of minorities who must care about their subgroup’s reputation. But a more general political reason for a “distinguish and distance” approach to wrongdoers may be the need for proponents of “law and order,” retribution, stiffer sentencing, and more prisons to maximize the contempt and indignation stirred by the objects of the longer sentences and harsher treatment that they advocate.

\textsuperscript{119} What’s more, successful excuses clog both barrels by focusing attention on the human frailty of wrongdoers and inviting decision makers to show them sympathy as well as their victims.

\textsuperscript{120} Accordingly, Good Negro Theory and its proponents must assume that there is a stark dichotomy, a “sharp” distinction, between criminals and non-criminals.
3. Double Barreled Distinguish and Distance Device

Once the Deflector has rejected the excuse claims of most black wrongdoers, the resulting absence of valid excuses means the jury will confirm the Detector’s prima facie readings by finding the wrongdoer a blameworthy bad Negro beyond a reasonable doubt, thereby triggering the implacable BLAM-BLAM of the distinguish and distance barrels while the words “Real Nigga” scroll across their collective electronic ticker display.

4. Good Negro Code of Ethics

Because the Detector—the conceptual and operational embodiment of the Black Criminal Litmus Test of a Nigga—rejects most excuses for black criminals, any racial justice advocate who “makes excuses” for such odious creatures violates the Ostracizer’s Good Negro Code of Ethics, under which ethical advocates must remain faithful to the kind of “morality of means” that inspired Justice Marshall to refuse to make excuses for “thuggery when perpetrated by blacks.” In other words, for Good Negro Theory, distinguishing and distancing good and bad Negroes is an ethical obligation, one that imposes ethical limits on how racial justice advocates should treat black criminals and approach criminal matters. Under Good Negro Ethics, racial justice advocates who fail to morally and legally distinguish and distance black criminals from law-abiding blacks breach their most basic duty to help rather than hurt Black People.

For convenience, let me emphasize that I am using the term “Good Negro” to refer to law-abiding blacks who “ethically” wield whatever influence they have in criminal matters to sharply distinguish morally and legally between black law abiders (other good negroes) and black criminals (bad niggas). Thus, there can be Good Negro Presidents, Senators, Attorneys General, Judges, and Jurors. Good Negro Sheriffs, District Attorneys, Parole Board Members and Probation Officers. Good Negro Scholars, Bloggers and Pundits. And finally, there can be Good Negro Associations and Advocates, like the NAACP under Thurgood Marshall, dedicated to ethically advancing the social interests of African Americans in criminal matters through strategies that “sharply distinguish” between Good and Bad Negroes. From the standpoint of Good Negro Ethics, black activists must not defend black criminals, for it hurts Black People when racial justice advocates carry briefs for niggas.

121 KENNEDY, supra note 13, at 20.
122 Id. at 21.
123 Even Good Negro Ordinary Citizens—a category encompassing ordinary blacks who, for instance, eschew public displays of solidarity with black criminals. Id.
124 See id. at 20–21.
125 And these strategies also maximize the distance between them in the eyes of whites.
5. Good Negro Cost-Benefit Wealth-Maximizing Moral Compass

Finally, according to the cost-benefit moral compass of the Ostracizer,126 excuses—such as an "ordinary impoverished black man trapped behind ghetto walls" test of the "reasonable man"—are bad policy for blacks as a group because excuses keep criminal wrongdoers, including drug dealers, users, and gangbangers, out of jail and on the street, where they can claim more mostly black victims. In short, "A thug in prison can't shoot your sister."127 Good Negro legal scholar Randall Kennedy puts it this way: "[i]n terms of misery inflicted by direct criminal violence," blacks "suffer more from the criminal acts of their racial 'brothers' and 'sisters' than they do from the racist misconduct of white police officers..."128 This wry remark may very well be true. It is not hard to imagine that a given Black gangbanger could inflict more pain and suffering on other blacks than a given bigot with a badge and a gun.129 It may even be true that, to quote another Good Negro commentator, "Racist white cops, however vicious, are ultimately minor irritants when compared to the viciousness of the black gangs and wanton

126 To settle conflicts of interests between subdivisions, do what maximizes the general welfare of the Black community. Of course, criticisms of black criminals are partly rooted in notions of personal responsibility, choice, free will, just deserts, and retribution, and partly rooted in utilitarian notions of welfare maximization. Because my discussions elsewhere of moral luck and unconscious bias in judging the just deserts of black wrongdoers will destroy the "personal responsibility" and "individual choice" bases for distinguishing between Good and Bad Negroes, not a principle of justice but rather the welfare principle will be the only remaining plausible normative support for Good Negro Theory.

127 John J. Dilulio, Jr., Prisons Are a Bargain, by Any Measure, N.Y. TIMES, Jan. 16, 1996, at A17, reprinted in KADISH, supra note 24, at 102. According to Dilulio, research shows "it costs society at least twice as much to let a prisoner loose than to lock him up." Id. As proof that "prisons pay big dividends," Dilulio cites Patrick Langan's calculation that "tripling the prison population from 1975 to 1989 may have reduced 'violent crime by 10 to 15 percent below what it would have been, thereby preventing [many serious crimes]." Id. So by reducing the prison population, excuses reduce the big dividends prisons pay to Black People. Put differently, if more unexecuted Black criminals mean more Niggas in prison, then rejecting excuses and landing more Niggas in prison may be good policy for Black People in that, according to cost-benefit thinking about criminal matters, "prisons are a real bargain." KADISH, supra note 24, at 102 (citation omitted). This logic applies even to "relatively minor, nonviolent infractions," like broken windows, curfew violations, or nonviolent drug activity. See KENNEDY, supra note 13, at 304.

128 KENNEDY, supra note 13, at 20.

129 Statement of Decision, Request for Clemency by Stanley Williams, (Dec. 12, 2005) (corrected version) available at http://perma.cc/K3PZ-QNKK. After twenty-two years on death row he was executed in 2005 after then Governor Schwarzenegger refused to stay his execution officially on the ground that Mr. Williams had not achieved personal redemption. Hence, Mr. Williams, from the standpoint of Good Negro Theory, was an officially irredeemable Nigga. Sarah Kershaw, Governor Rejects Clemency for Inmate on Death Row, N.Y. TIMES (Dec. 13, 2005), http://www.nytimes.com/2005/12/13/national/13tookie.html.
violence.”

From this perspective, calling destructive criminals like gangbangers racial “brothers” or “sisters”—words of solidarity and in-group love—rings as false as calling viciously racist white cops “brothers” or “sisters.”

From a cost-benefit standpoint, many criminal matters pit the interests “us” Black People against “them” Niggas. Thus, “colorblind criminal laws”—that is, laws silent on race and not enacted for the purpose of treating one racial group different than another—whose effects disproportionately burden Niggas can be a good social policy for law-abiding blacks. For instance, laws that punish crack offenders much harshly than powder cocaine offenders (who more often are white) may help Black People more than they hurt Niggas, say Good Negro Theorists, “by incarcerating for longer periods those who use and sell a drug that has had an especially devastating effect on African-American communities.”

By the same logic, because urban curfews that disproportionately fall upon black youngsters also help some black residents feel more secure, such disparities may help Black People more than they hurt Niggas. Similarly, because crackdowns on gangs that disproportionately affect black gang members also reduce gang-related crime, Black People may be helped more than Niggas hurt by such racial disparities. And because prosecutions of pregnant drug addicts that disproportionately fall on pregnant black women also may deter conduct harmful to black unborn babies, Black People may be helped more than Niggas hurt by such racial disparities.

Under this cost-benefit or welfare principle—and positing that most blacks in the aggregate are law-abiding—there is no reason to give any special weight to the interests and frustrations of black criminals. As David Lyons describes this approach in Ethics and the Rule of Law, when interests conflict “we should serve the greater aggregate interest, taking into account all the benefits and burdens that might result from the decisions that are available to us.” By this logic, because the social, political and safety costs of excising black criminals fall mainly on the larger Black People subdivision while the benefits of excising them are reaped mainly by the smaller Nigga contingent, recognizing general excuses for black wrongdoers fails the cost-benefit test of desirability by burdening Black People

130 KENNEDY, supra note 13, at 20 (quoting Jerry G. Watts, Reflections on the King Verdict, in Reading Rodney King Reading Reading Urban Uprising 244 (Robert Gooding-Williams ed., 1993)).

131 Id. at 10.

132 See id.

133 See id.

134 Id. Viewing laws like these as “social policy” propositions, Kennedy concludes that “it is often unclear whether social policy that is silent as to race and devoid of a covert racial purpose is harmful or helpful to blacks as a whole since, typically, such a policy will burden some blacks and benefit others. Id. at 11.

more than they benefit Niggas. 136 From this perspective, even if judges, jurors, voters, policymakers and the rest of us make racist, biased or otherwise irrational moral judgments of black wrongdoers, laws and other social practices that help the larger Black People subdivision more than they hurt the smaller Nigga subgroup are nevertheless cost-justified and desirable, no matter how unfair from the standpoint of retribution or the culpability principle.

This completes my outline of Good Negro Theory, an interlocking set of values, beliefs and assumptions rooted in moral and legal theories that conveniently advance the interests of disproportionately privileged law-abiding blacks at the expense of those who are disproportionately extremely disadvantaged.

At the conceptual level, the object of Nigga Theory is to attack every one of these values, beliefs and assumptions and thereby expose the blame and punishment problem for what it really is—not a moral or personal responsibility problem but a political and social one, all the way down. To that end, in other work I attack the legitimacy and reliability of moral and legal condemnations of black wrongdoers on philosophical and empirical grounds. I turn now to the broader social and political implications of not critically interrogating our moral condemnation of black wrongdoers and hence of giving in to the “retributive urge.”

136 When the interests of these two subdivisions collide, the moral and legal principle that should settle the conflict, according to Good Negro Theory, is the welfare principle—the principle that laws are good if they increase the satisfaction of the larger Black People subdivision more than they increase the frustration of the smaller Nigga subdivision. One great attraction of the welfare principle is that it does not play favorites—the principle does not require the interests of Bad Negroes to be discounted on account of their moral blameworthiness. Each person’s welfare figures in the rough calculations of costs and benefits that shape social policy—no one’s may be discounted. In the words that John Stuart Mill attributed to Jeremy Bentham, “everybody [is] to count for one, nobody for more than one.” JOHN STUART MILL, UTILITARIANISM 93 (Cambridge University Press 1869).

If an interest can be served, that creates a reason to do whatever would serve it. Interests can be ordered in terms of the degree of satisfaction or frustration serving them would produce. There is good reason, then, to promote satisfaction as much as possible. Thus, the welfare principle seems to provide a reasonable, neutral moral and legal principle for adjudicating conflicts of interests between subdivisions of any social group—it says that when interests conflict, we should serve the greatest aggregate interest. The principle thus expresses benevolence in the sense of concern for all humans—an attractive moral attitude. (But why regard benevolence as the most basic moral attitude—attractive as it is—rather than a concern or passion for justice?!) And it provides clear, general guidance to policymakers seeking to advance the interests of blacks in criminal matters. Applied to racially burdensome criminal laws, the welfare principle provides moral and legal support for viewing such laws as good for “blacks as a group” inasmuch as the costs of such laws (blame and punishment) fall disproportionately on the smaller Nigga subdivision while their benefits (increased safety and respectability) accrue primarily to the larger subdivision of Good Negroes. The interests of Good Negroes, in other words, can be tantamount to those of “the black community” and “blacks as a group” in criminal matters. Racially burdensome laws can represent, in Kennedy’s words, a “net plus . . . for African-Americans as a group.” See KENNEDY, supra note 13, at 11.
III. The Retributive Urge, Causation
And America’s Denial of Accountability

Deniers reject our collective accountability for the crack plague and its festering aftermath on two standard grounds:

A) impersonal social forces cannot cause people to choose to do wrong

or

B) even if empirical evidence proves that such forces do cause voluntary wrongdoing in the sense of increasing the rate at which people make wicked criminal choices, the very fact that some or many similarly situated non-criminals chose not to commit similar crimes—the very fact of a wicked choice—cuts off our collective accountability on “proximate cause” grounds.

I critique each of these grounds below.

A. Impersonal Social Forces Cannot Cause Persons to Make Wicked Choices

The first defense Deniers raise against our collective accountability for the crack plague and its legacy is the common assertion that voluntary criminal acts cannot be caused by impersonal macro-level social factors like poverty and social inequality. Stated more generally, the assertion is that voluntary human action cannot be “determined” by social factors or external influences and thus that there can be no “social determinism.” In keeping with this approach, Deniers attribute wrongful behavior to persons and their individual choices rather than to social situations and factors beyond their control. A bad person, Deniers declare, is different than a bad thing, bad event, or bad social fact. We may deplore tsunamis, avalanches or shark attacks, but we would not morally blame these impersonal destructive forces any more than we would blame a rock for falling on one’s head, for we reserve blame and praise for persons with wills and character traits. Deniers contend that macro-level approaches offend the personal dignity of wrongdoers by treating them as things or events or Pavlovian bundles of conditioned reflexes without hearts or minds or wills. For Deniers and other proponents of personal responsibility, this is the Achilles heel of all macro-level explanations of wrongdoing and the flaw in the logic of all broad excuses for criminal misconduct: Such explanations and excuses, they contend, deny the personhood of criminals by treating them as bad “social facts” rather than bad

\[137\] And persons have the capacity to recognize the difference between right and wrong and to act for moral reasons. See generally Peter Arozenia, Convicting the Morally Blameworthy: Reassessing the Relationship Between Legal and Moral Accountability, 39 UCLA L. REV. 1511 (1992).
persons. Accordingly, personal responsibility champions tell us we must condemn black criminals to show them respect and damn them in the name of their own personal dignity.

Nevertheless, if sound empirical evidence compels the conclusion that criminal wrongdoing is caused by social forces such as extreme social disadvantage, as it overwhelmingly does, then responsibility for the crack plague and its calamitous aftermath cannot so hastily be shifted to individual wrongdoers themselves. A clear causal link between social facts and voluntary wrongful acts paves the way for holding all beneficiaries of the boon we call the American way of life accountable for its criminogenic social conditions. Social science proves the existence of a clear causal link between social facts and personal, private, individual acts. For instance, in his pioneering work, Suicide: A Study in Sociology, Emile Durkheim showed how the seemingly most personal, private, and even “anti-social” decision of someone to end his own existence rather than continue to suffer a weary life—a decision ostensibly rooted only in individual psychology, private thought processes, and personal demons—actually reflects social currents and at bottom is primarily a social (not psychological or biological) fact. The social character of deliberate acts of violent self-destruction can remain hidden if we look only at a separate individual and his melancholy musings; but the social character of suicide leaps into bold relief when we look at rates of suicide. These suicide rates differ among societies, and among different groups in the same society, and they show regularities over time, with changes in them often occurring at similar times in different societies. “Each society,” Durkheim observes, “is predisposed to contribute a definite quota of voluntary deaths.” These regular, predictable, stable patterns of “personal and private” decisions to shuffle off this mortal coil—in short, these systematic suicidal tendencies—cannot be explained purely in terms of psychological facts, individual mental states or random aggregations of dire deeds. Rather, these patterns point to underlying causes that produce suicidal thoughts and acts in groups of

138 Making it seem natural to ordinary Americans to focus on the person over the social situation when assessing black wrongdoing are two basic psychological tendencies shared by most Americans, namely, “fundamental attribution error” (the general psychological tendency to explain human behavior in terms of personality traits rather than situational factors) and race-based attribution bias (the special tendency of observers to attribute wrongdoing by blacks to personality traits rather than to situational pressures). See Bridges & Steen, supra note 116, at 554–57. So our racially biased and person-centered social psychology, on the one hand, and the popular person-centered politics of personal responsibility and rugged individualism, on the other, combine to make millions of ordinary Americans skeptical of macro-level social explanations of crime.

139 EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 297–99 (George Simpson ed., John A. Spaulding & George Simpson trans., The Free Press 1897) (wishing to show that social factors could explain much about anti-social phenomena).

140 Id. at 51.
individuals.\textsuperscript{141} The decisive question then is, "what factors explain these group-level patterns of voluntary self-destruction?"\textsuperscript{142} Earlier, I identified five macro-level social factors that explain the crack epidemic and the empirical evidence that points to them.\textsuperscript{143} But even if empirical studies persuasively establish that crime is driven by social factors like the five I identified, Deniers commonly fall back on the following seductive but false "proximate cause" defense against collective accountability for the voluntary misdeeds of wrongdoing.

B. Even if Social Facts Can Cause Crime, the Wicked Choices of Criminals Break the Causal Chain and Absolve Us as a Nation

Deniers' second and most formidable defense against America's accountability for undoing an entire generation of blacks through unnecessary and unwarranted mass incarceration runs thus: "Even if we acknowledge what the empirical evidence clearly demonstrates, namely, that macro-level social factors can cause people to commit voluntary criminal acts in the sense of dramatically increasing the rate of wrongdoing in certain neighborhoods and for certain social subgroups, why don't criminogenic social forces cause everyone subject to them to turn to crime? Why does't everyone who is poor, hungry, and socially marginalized rob convenience stores or post up under lampposts with palms full of dope? Why do so many poor and jobless people in general—and poor jobless blacks in particular—wade through criminogenic social currents without turning to violence or larceny or other wrongdoing?" To bolster the persuasive force of these denials of accountability, the person posing these skeptical questions may himself or herself be someone poor and black and extremely disadvantaged—a political poster child for bi-partisan Deniers and other champions of personal responsibility—who nevertheless resisted temptation and provocation to remain law-abiding and hence righteously critical of have-nots who have not. From this perspective, the very fact that many or most people subject to 'criminogenic' social factors do not commit such acts proves that such factors leave ample room for peoples' wills and moral character and moral agency to determine what they do. By this logic, the reason poor but law-abiding Americans suffer: the slings and arrows of outrageous fortune with self-control while criminals do not is simply

\textsuperscript{141} Durkheim's method is empirical; he searches through various sorts of data and evidence to find factors associated with suicide, but he searches for social causes or conditions that are expressed through these associations. \textit{Id.} at 297–99.

\textsuperscript{142} Durkheim tests and rejects a variety of possible non-social explanations for these stable and variable rates of suicide, such as heredity, climate, and mental illness, until he whittles down the possibilities to one, namely, the social explanation. \textit{Id.} By eliminating other explanations, Durkheim claims that these tendencies must depend on social causes and must be collective phenomena. \textit{Id.} at 149. He points out that a suicide rate is a "numerical datum" that measures and expresses each society's "aptitude for suicide," that is, "the suicidal tendency with which each society is collectively afflicted." \textit{Id.} at 48–51.

\textsuperscript{143} See supra notes 51–55 and accompanying text.
because the non-criminals have more moral fiber. For Deniers, the "vicious wills," depraved hearts, and blameworthy choices of black criminals break the causal chain between criminogenic social facts and individual criminal acts and thus absolve America of accountability for the crack plague and its aftermath.\footnote{Surely, say personal responsibility proponents, "American society cannot be held accountable for the wicked choices, bad moral character, and 'vicious wills' of a crime-prone subdivision of its population."}

Deniers can find strong support in law and everyday morality for their contention that voluntary human action breaks the causal chain and thus cuts off the accountability of earlier individuals or entities that "set the stage" for subsequent wrongdoing. A core tenet of American civil and criminal law is that for an individual or entity to be accountable for harm resulting from destructive forces it unleashes (including destructive social forces), those forces must be the "factual cause" and the "proximate cause" of the resulting harm. Factual cause (sometimes called the "but-for" or "sine qua non" requirement) means that the resulting harm (here, the cataclysmic crack plague and its festering aftermath) would not have occurred without the defendant's acts (here, without the five macro-level social facts attributable to America's collective life and social reality). Proximate cause means that the defendant's acts, in addition to being a but-for cause, must be adequately or properly related to the resulting harm in the eyes of ordinary judges and jurors. So, for Deniers and other personal responsibility proponents, even if macro-level social forces are a factual cause of voluntary crack-connected criminal conduct in that such forces can cause dramatic spikes in crime rates as a function of neighborhood demography, these social forces are not a proximate cause of the extra criminal acts. According to these Deniers, this is because the wicked choices of wrongdoers intervened between the extreme disadvantage, on the one hand, and the individual holdups, drive-bys, and street crimes, on the other.

For instance, if a gasoline truck and trailer unit spills a massive amount of gas on an open highway and malicious bystanders willfully kindle a conflagration with a book of matches, some courts refuse to hold the truck owner accountable to innocent burn victims (much less to the malicious match-strikers themselves) because these courts conclude that the volatile spill was not the "proximate cause" of the resulting flames, even though it was clearly a necessary condition or factual cause of the fire. These courts say that the malicious match-strikers are the "superseding," "efficient," or "proximate" cause of the fiery destruction, thus shifting the entire responsibility for the flames to the willful wrongdoers and away from the truck owner whose volatile spill set the stage. For these courts, results (here, fiery destruction) that follow from the voluntary actions of the subsequent persons (here, the malicious match strikers) are caused by them alone.\footnote{See Commonwealth v. Root, 170 A.2d 310, 312 (Pa. 1961) (explaining that a drag racing victim's death was caused "by him alone," not his fellow drag racer) (emphasis added); KADISH,
This notion is sometimes called the doctrine of novus actus interveniens. Under the novus actus doctrine, later voluntary human action "displaces the relevance of prior conduct by others and provides a new foundation for causal responsibility."146 Glanville Williams provides the classic defense of the doctrine:

A person is primarily responsible for what he himself does. He is not responsible, not blameworthy, for what other people do. The fact that his own conduct, rightful or wrongful, provided the background for a subsequent voluntary and wrong act by another does not make him responsible for it. What he does may be a but for cause of the injurious act, but he did not do it. His conduct is not an imputable cause of it. Only the later actor, the doer of the act that intervenes between the first act and the result, the final wielder of human autonomy in the matter, bears responsibility (along with his accomplices) for the result that ensues.147

From this perspective, the violent and non-violent criminal acts of blacks during and after the cataclysmic crack plague are caused solely by them.

By analogy, for the 30 years encompassing the crack plague and it’s still festering aftermath, America flooded black neighborhoods with combustible criminogenic conditions like extreme and concentrated social disadvantage; moreover, according to Senate transcripts and other reliable sources,148 in the critical period between 1982 and 1988, this nation, through its policymakers and high ranking government officials, helped jumpstart and fuel the crack epidemic by knowingly (but not maliciously or hatefully) helping supply many matchbooks in the form of guns and drugs to young black males wading through these volatile conditions. But, whereas combustible gas spills do not penetrate the skin of those it contacts, merely providing opportunities for wrongdoers to manifest pre-existing malice, combustible criminogenic conditions penetrate to the mental states of those immersed in them—these conditions mold mental states and thus manufacture malice itself. Specifically, extreme and hyperconcentrated disadvantage produced the hopelessness, resentment, hostility, and alienation—in a word, the malice—that motivate law-breaking, while an ample supply of guns and drugs, at least partly

supra note 24, at 529 (emphasis added) ("The results that follow from the second person’s actions are caused by him or her alone.").

146 KADISH ET AL., supra note 24, at 529.

147 Glanville Williams, Finis for Novus Actus?, 48 CAMBRIDGE L.J. 391, 391 (1989). As he goes on to explain: "The legal attitude, in general, rests on what is known to philosophers as the principle of autonomy, which enters deeply into our traditional moral perceptions, reinforced by language." Id. "The autonomy doctrine, expressing itself through its corollary the doctrine of novus actus interveniens, teaches that the individual’s will is the autonomous (self-regulating) prime cause of behaviour." Id. at 392.

148 See supra note 53 and accompanying text (addressing the Contra-CIA link).
traceable to U.S. foreign policy priorities in the critical early years of the crack epidemic, provide the means and opportunities for the malice to find expression in law-breaking. In short, at the level of motivations and at that of opportunities for wrongdoing, strong empirical evidence points to our collective responsibility for flooding black neighborhoods with combustible criminogenic conditions that tempt, pressure, and provoke, then helping supply rafts of matchbooks to the young black residents in the name of national security.\footnote{See generally Kerry Committee Report, supra note 53; Gary Webb, Dark Alliance: The CIA, the Contras, and the Crack Cocaine Explosion (1998).}

This is precisely where Deniers invoke the novus actus doctrine as a “proximate cause defense” and assert that the wicked decisions of the individuals slogging through combustible social currents to pick up matchbooks and spread fiery destruction cuts off our collective accountability for their foreseeable and even statistically inevitable but nonetheless voluntary match-striking. For Deniers, in other words, the willful and wicked intervention of match-striking wrongdoers—the voluntary rubbing of each white phosphorous match head against a rough surface to produce a flame—breaks the causal chain between social facts and criminal acts. The results that follow from their voluntary actions are caused solely by them. For Deniers, however abundant the opportunities of the situation or strong the socially molded motivations of the person, choosing to strike a match constitutes a personal and individual “moral moment” that severs the link between social forces and crimes and erects a boundary between social facts and personal responsibility.

Thus, as applied to the crack plague that bore down upon and destroyed black communities in the 80s and 90s like a raging wildfire, Deniers can concede at the level of factual causation that social forces (such as the five macro-level social factors discussed earlier) dramatically increased the rate of crime and incarceration in black America and hence orchestrated the general movement of the fire, the general symphony of the conflagration, but they may nevertheless contend that each individual decision to dance to that malicious melody by striking a match breaks the causal chain between America’s volatile social currents and the crackling flames. Put differently, mediating the relationship between social facts and criminal acts are criminal intents and vicious wills and depraved hearts, and for Deniers, these wicked inner states cut off our collective accountability for the criminal acts produced by our collective existence.

C. Competing Doctrine: Later Voluntary Wrongdoing Does Not Break Causal Chain

On the other hand, courts and juries and legislatures often refuse to treat subsequent voluntary human action as outside of causal law—that is, they refuse to treat such action as the sole cause of criminal results—and so are perfectly willing
to say that blameworthy intervening action does not break the chain of causation or constitute an “independent intervening cause,” so long as the subsequent wrongdoing was foreseeable. In State v. Bier,\(^{150}\) for instance, when the defendant’s wife said she wanted to commit suicide, he placed a loaded, cocked pistol within her reach, and she used it to kill herself.\(^{151}\) The defendant’s conviction for negligent homicide was upheld on appeal—foreseeability was enough to establish proximate cause;\(^{152}\) a driver who negligently leaves his car idling and unattended can be the proximate cause of death or serious bodily harm resulting from a car thief on a joy ride— the foreseeability of thieves and joy rides establishes proximate cause; the owner of an apartment building in a crime-ridden location who fails to install locks on entrance doors or provide exterior lighting can be the proximate cause of robberies, rapes, and other violent assaults on tenants by intervening human agents who intentionally act to produce the forbidden result—foreseeability establishes accountability;\(^{154}\) one drag racer can be liable for causing the death of his racing partner despite his partner’s voluntary choice to drive recklessly—again on grounds of foreseeability;\(^{155}\) in a game of Russian roulette, the surviving player will be liable for killing his partner even though the deceased freely chose to put the gun to his head and squeezed the trigger—foreseeability suffices; and finally courts routinely ignore or reject the novus actus or intervening-act doctrine and hold drug suppliers accountable for the foreseeable, though freely chosen, acts of their purchasers, including their purchasers’ drug overdoses and resulting deaths.\(^{157}\)

So just like everyday morality, the law does not follow a hard fixed rule about causation and accountability when subsequent voluntary human actions intervene between forces that set the stage for criminal acts and the criminal acts themselves. Rather, the law remains ceaselessly torn between two competing perspectives.

\(^{150}\) 591 P.2d 1115, 1120 (Mont. 1979).

\(^{151}\) KADISH ET AL., supra note 24 at 527 n.6.

\(^{152}\) It should be noted that this is a minority position in cases of suicide. This is contrary to the standard common law treatment of assisted suicides; under common law courts refused to find causation on novus actus grounds. See People v. Campbell, 335 N.W.2d 27 (Mich. Ct. App. 1983); People v. Kevorkian, 527 N.W.2d 714, 739 (Mich. 1994). Although a minority position, Bier shows the willingness of courts to take a flexible approach to causation in cases of voluntary intervening human action. See supra note 149 and accompanying text.


\(^{155}\) State v. McFadden, 320 N.W.2d 608, 611–13 (Iowa 1982).


Pulling one way is the perspective that underlies the *novus actus* or intervening act doctrine—indeed underlies all retributive approaches to blame and punishment—and is enthusiastically endorsed by tough-on-crime advocates, namely, the view that humans are solely and fully responsible for their freely chosen actions. As tough-on-crime advocates see it, any departure from this principle of sole and full responsibility puts us on the slippery slope to social determinism and the complete abdication of personal responsibility. Accordingly, this perspective refuses to see freely chosen human action as *caused* by preceding forces or factors. Pulling the other way is the perspective underlying the many exceptions to the *novus actus* doctrine and endorsed by advocates for the damned, a perspective which views "freely chosen" wrongdoing as caused by a combination of preceding social facts and the wrongdoer's ordinary human frailty. Accordingly, this perspective has no problem seeing voluntary human action as *caused* by preceding forces and factors. Pendulum-like, the law and our everyday moral intuitions swing back and forth between these competing conceptions of causation and accountability.

This raises the pivotal question in all debates about where to draw the line between societal accountability and personal responsibility for the harmful results of voluntary wrongdoing: What factors determine which way the causation pendulum swings in the minds of ordinary judges, jurors, lawmakers, voters and other Americans who must think about such matters in reaching decisions? What determines whether the subsequent voluntary acts of wrongdoers are deemed the *sole* causes of the criminal results? What makes ordinary people in some cases view the voluntary wrongdoing of criminals as breaking the causal chain between external factors and criminal acts (hence shifting all the responsibility for the criminal acts and harmful results to individual wrongdoers) while in other cases social perceivers and decision makers view such wrongdoing as caused by preceding factors (hence shifting accountability for those criminal acts and harmful results back to the earlier acts, facts, and circumstances)? To put it most simply, what determines how people think about proximate causation in criminal matters?

The answer is this: the perceived wickedness of wrongdoers and the urge they arouse in ordinary people for vengeance and retribution. The way perceptions of wickedness and vengeance drive our conclusions about causation is this: the more wicked wrongdoers seem, the more they stir "the retributive urge" to blame and punish; the more they stir "the retributive urge," the more likely ordinary people are to view them as "independent intervening causes" or "superseding causes" of criminal harms disconnected from earlier forces and factors. Contrary to what we might expect, first come judgments about wrongdoers' blameworthiness, then come conclusions about whether preceding forces and factors caused the results of their voluntary wrongdoing. This sounds backward and counterintuitive because

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18 This analysis assumes that we don't find the conduct of earlier actors and agents extremely wicked and reprehensible (we may even find it innocent). For if the earlier actors stir a strong retributive urge, the same logic may apply to them and there could be a pull toward finding the earlier actors to be the proximate cause of the resulting harm on that basis.
we expect the conclusion that A should be blamed for B’s death to be partly based on the judgment that A caused B’s death—“you can’t blame me for a death I never caused” sounds sensible and implies that first we exhaust all questions of causation (these become threshold questions of accountability) and only then, after finding that A caused B’s death, do we weigh A’s blameworthy wickedness. Nevertheless, the everyday reality of our actual decision making reverses the idealized roles usually assigned to blame and causation, for we routinely blame individuals before we decide whether to call them “independent,” “superseding,” or “efficient” causes of voluntary criminal actions; in other words, we base our conclusions about causation on earlier conclusions about the wrongdoers’ wickedness; once more, we base our conclusions about whether preceding forces and factors are the proximate cause of voluntary wrongdoing on conclusions about the wickedness and moral turpitude of the voluntary wrongdoers. However counterintuitive this pattern may initially sound, it pervades all moral and legal thinking. In the words of Meir Dan-Cohen,

[The statement that A caused B’s death may, in ordinary speech, be as much a conclusory statement, based on the prior tacit judgment that A deserves to be punished for B’s death, as it is an independent statement of fact which leads to that conclusion.

Put differently,

[The conclusion that A deserves to be punished may be directly and intuitively generated by the retributive urge, preceding and merely rationalized by the finding of a sufficient causal relationship between A’s acts and B’s death.]

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159 Dan-Cohen, supra note 17, at 165–66.

160 Id. at 166 (emphasis added). Meir Dan-Cohen focuses here on the impact of the retributive urge on our judgment of whether a wrongdoer who set the stage for other forces and actors to bring about a forbidden result “proximately caused” that result. I am extending his insight to include the impact of the retributive urge on another “proximate cause” judgment, namely, our judgment of whether a wrongdoer for whom the stage was set by other forces and actors was nevertheless the “superseding,” “efficient,” “sole” cause of the forbidden result. So, the retributive urge can influence proximate cause determinations by social and legal decisionmakers on two different levels: when focused primarily on earlier actors who set the stage for later wrongdoing by subsequent actors, an inflamed retributive urge can increase the willingness of decisionmakers to hold these earlier actors accountable for the later actions of subsequent wrongdoers; alternatively, when focused primarily on the subsequent actors in a causal sequence who more immediately cause the crime in question (the crime’s “immediate perpetrators”), an inflamed retributive urge can induce decisionmakers to view them as the superseding—i.e. proximate—causes of the crime, and hence to hold them solely responsible, thereby relieving earlier wrongdoers (and the criminogenic conditions they create) of any causal responsibility. When the retributive urge is aroused on both levels (that is, by both earlier and later wrongdoers), judgments about the comparative blameworthiness of such wrongdoers (along with other factors) will drive judgments about whether only the later actor was the proximate cause of the harm (its sole cause) or instead whether causal accountability rests on both.
In short, the retributive urge—rooted in contempt for wicked and blameworthy wrongdoers—routinely determines how we think about causation.\textsuperscript{161}

From this very practical perspective on how ordinary people inside and outside courtrooms actually think about and determine causation, the question of whether A was the sole or superseding cause of B’s death boils down to the question of whether punishing A is necessary to satisfy the retributive urge he arouses in us: If the fact of B’s death at the hands of A does not produce a strong retributive urge—that is, if we are willing to partially or fully excuse A for bringing about the prohibited result—then we are more willing to call other factors preceding or surrounding A’s act (including macro-level factors) the proximate cause of B’s death.\textsuperscript{162} Conversely, the more we view wrongdoers as wickedly depraved, the more they stir the retributive urge for vengeance and retribution, the easier it is for us to conclude that their voluntary wrongdoing breaks the causal chain between earlier factors and their crime, shifts responsibility for crime entirely to them, and absolves us as a nation of accountability for the abundantly foreseeable results of our own social forces and currents.

All of this has particular consequences for this project, and for Nigga Theory more broadly. Quite simply, the more we view wrongdoers as that most distilled and concentrated form of wickedness, namely, morally condemnable niggers, the easier it is for us to deny accountability for their plight, for moral judgments drive our conclusions about causation and thus drive our conclusions about our collective accountability for the criminogenic effects of extreme disadvantage. Niggerizing black wrongdoers, in other words, helps us deny our accountability for the foreseeable effects of being extremely poor, hopeless, and black in America.

But again, a core aspect of Nigga Theory is hope. Once the moral basis for the retributive urge is shown to be illegitimate, irrational, and unreliable, it may become easier for fair-minded Americans to curb (at least temporarily) their urge to condemn long enough to recognize and acknowledge the causal links between crime and our own macro-level social forces, paving the way for us to accept collective accountability for the crack plague and its consequences. Macro-level perspectives—which an inflamed retributive urge obscures—can help law-abiding Americans see the common humanity in wrongdoers by helping them think beyond the boundaries of good and evil and praise and blame in criminal matters. Of

\textsuperscript{161} And also routinely determines accountability.

\textsuperscript{162} “Posed in connection with the retributive goal of punishment, the question of causation (namely, “Is there a causal relation between A’s conduct and B’s death?”) amounts to asking whether punishing A is necessary to satisfy the retributive urge aroused by the fact of B’s death.” \textit{Id}. This explains why the \textit{novus actus} doctrine breaks the causal chain more easily for intentional intervening wrongdoing than for merely reckless or negligent intervening wrongdoing, for although both intentional and reckless wrongdoing involve voluntary action, a reckless intervening act is generally less blameworthy than an intentional intervening act. The retributive urge may also drive our tendency to attribute wrongdoing to the situation or person in applications of the “reasonable person in the situation” test.
course, it flatters those of us who are prosperous and law-abiding to believe that our material well-being and good name reflect virtue and pluck, not luck. But from the macro-level perspective, such thinking is unwarranted but nevertheless widespread and pregnant with political implications for our treatment of the truly disadvantaged.
PRIVATE EMPLOYEES' SPEECH AND POLITICAL
ACTIVITY: STATUTORY PROTECTION AGAINST
EMPLOYER RETALIATION

EUGENE VOLOKH*

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* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu); Academic Affiliate, Mayer, Brown LLP. Thanks to Charles Abernathy, Richard Carlson, Matt Finkin, and Charles Sullivan, and to Amy Atchison, June Kim, and Lynn McClelland of the UCLA Law Library for their invaluable research help.
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I. INTRODUCTION

About half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation. Some of these jurisdictions protect employee speech generally. Others protect only employee speech on political topics. Still others protect only particular electoral activities such as endorsing or campaigning for a party, signing an initiative or referendum petition, or giving a political contribution. Moreover, though the matter is not clear, federal law may often protect private employees who speak out in favor of a federal candidate. To my knowledge, these protections have not been systematically cataloged, and some have never been cited in a law review article.

Some employee free speech protections were enacted following the Civil Rights Act of 1964, which banned employment discrimination based on race, religion, sex, and national origin, and are modeled on that statute. But many of the protections long preceded the Act, and similar state civil rights laws. Indeed, the first date back to 1868.

These early protections for private employee speech and political action were likely based on the very first American laws banning employment discrimination by private employers—voter protection laws, which barred employers from discriminating against employees based on how the employees voted. (Recall that this was the era before the secret ballot.) As early as the 1700s, several colonies and states barred any “attempt to overawe, affright, or force, any person qualified to vote, against his inclination or conscience,” and some also

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1. See infra Part II.H.

2. See, e.g., MINN. STAT. ANN. § 10A.36 (West 2012).


4. An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province, § 9, 1761 Ga. Laws 109; see also An Act to Ascertain the Manner and Form of Electing Members to Represent Inhabitants of this Province, § 14, 1721 S.C. Acts 115 (prohibiting the use of certain threats to influence elections); An Act to Regulate the General Elections of this Commonwealth, § 27, 1785 Pa. Laws 351 (same); An Act to Regulate Elections, ch. 50, § 17, 1800 Md. Laws 30 (same). Other states had similar though slightly differently worded statutes, which banned attempts to “directly or indirectly” influence votes by “bribery[,] menace or other corrupt means or device.” An Act to Regulate Elections Within this State, ch. 16, 1778 N.Y. Laws 56; see also An Act Dividing the State into Districts for Electing Representatives, § 12, 1792 Vt. Acts & Resolves 15 (prohibiting bribes and threats made to influence elections); An Act
barred, "after the ... election is over, menace[ing], despitefully us[ing] or abuse[ing] any person because he hath not voted as he or they would have had him."

These voter protection laws seem to have covered threats not just of physical violence but also of legal coercion, and they may have covered threats of economic retaliation as well—a similarly general 1854 English statute was applied to threats of economic retaliation and not just those of physical attack. The bans on threats, from 1721 to the 1860s, were included alongside bans on bribery, given that offering to provide a financial benefit in

Regulating the General Elections of the Indiana Territory, § 14, 1811 Ind. Acts 254 (same); An Act to Support the Privilege of Free Suffrage in Election, §§ 4–5, 1814 La. Acts 98 (same). The New York and Vermont statutes expressly provided for enforcement by the victim, with half the penalty to be given to the victim. The other statutes were cast as normal criminal statutes, but at the time the norm for criminal law generally was that victims would act as prosecutors. A similar statute was passed in 1727 in another English colony, St. Khta. ACTS OF ASSEMBLY, PASSED IN THE ISLAND OF ST. CHRISTOPHER, FROM 1711, TO 1735, INCLUSIVE 126 (London, John Basket, 1739). [Editors’ Note: Throughout this Article, historical statutes are listed chronologically.]

5. An Act to Ascertain the Manner and Form of Electing Members to Represent Inhabitants of this Province, § 14, 1721 S.C. Acts 115; An Act to Ascertain the Manner and Form of Electing Members to Represent the Inhabitants of this Province, § 9, 1761 Ga. Laws 105; see also An Act to Regulate General Elections, § 17, 1837 Mich. Pub. Acts 206–07 (making it a crime to "on the day of election give any public threat ... with a view to obtain any ... votes for ... [any] candidate"); An Act to Preserve the Purity of Elections, § 5, 1849 Iowa Acts 183 (making it a crime to threaten or compel any elector to vote against his inclination); An Act to Preserve the Purity of Elections, § 11, 1857 Wis. Sess. Laws 105 (likewise); An Act to Regulate Elections in this State, § 57, 1859 Minn. Laws 161 (likewise).

6. Consider Fargues McDowell’s prosecution and conviction, described in Right of Suffrage, NILES’ WEEKLY REGISTER, Nov. 25, 1816, at 213–14. McDowell operated a jail in which Jacob Parker was detained before trial. Though Parker had been unable to make bail, McDowell had given Parker a bail-like release (something that a jailer was apparently allowed to do), but then threatened to revoke it if Parker voted for a candidate of whom McDowell disapproved. McDowell was prosecuted under the South Carolina statute and convicted.

7. Corrupt Practices Prevention Act, 1854, 17 & 18 Vic., c. 102, § 5 (Eng), reprinted in HENRY JEFFREY’S BUSHBY, A MANUAL OF THE PRACTICE OF ELECTIONS IN THE UNITED KINGDOM app. at 28–29 (2d ed. 1865) (barring, in relevant part, "make[ing] or threaten[ing] to make use of, or threaten[ing] to make use of any force, violence, or restraint, or inflict[ing], or threaten[ing], the infliction ... of any injury, damage, harm, or loss, or in any other manner practis[ing] intimidation upon, or against, any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrain[ing] from voting, at any election" or "by abduction, duress, or any fraudulent device or contrivance, impede[ing], prevent[ing], or otherwise interfere[ing] with the free exercise of the franchise of any voter").

8. Regina v. Burnell, 3 Weekly Rep. 557 (1857); see also FRANCIS JAMES NEWMAN ROGERS, ROGERS’ LAW AND PRACTICE OF ELECTIONS AND REGISTRATION 368 (8th ed. 1857) (likewise concluding that the statute covered "dismissal of a person employed," a "notice to quit given to a tenant," or "withdrawal of custom from a tradesman" based on the targets’ votes); 1 REPORTS OF THE DECISIONS OF COMMITTEES OF THE HOUSE OF COMMONS IN THE TRIAL OF CONTROVERTED ELECTIONS, DURING THE SEVENTEENTH PARLIAMENT OF THE UNITED KINGDOM 90–91 (J.P. Wolfert & Edward L’Estrange Dew eds., London V & R Stevens & G.S. Norton 1859) (reporting that a vote was disallowed on the grounds of "undue influence" because the voter was pressured by threat of loss of employment).
exchange for a vote was forbidden, it makes sense that threatening to deny a financial benefit in exchange for a vote would have been forbidden as well.9

And some voter protection laws enacted in the mid-1800s explicitly covered threat of economic retaliation. The proposed federal criminal code drafted in 1828 by Edward Livingston—who had earlier participated in drafting the Louisiana Civil Code, was at the time a Congressman (and soon to be Senator) from Louisiana, and would later become Secretary of State—expressly covered “threats of withdrawing custom or dealing in business or trade... or any other threat of injury”10 aimed at influencing votes. The 1832 proposed D.C. criminal code would have done the same.11 Laws using this language were enacted in Mississippi (1839), Iowa (1850), the Nebraska Territory (1855), Illinois (1871), and Delaware (1881).12

Likewise, in 1839, Pennsylvania expressly barred threats of “loss of any appointment, employment or pecuniary benefit” aimed at “influenc[ing] any voter.”13 Also in 1839, Ohio made it a crime for “any person [to]... use any threat or coercion to procure any voter in his employ...to vote contrary to the

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10. EDWARD LIVINGSTON, A SYSTEM OF PENAL LAW FOR THE UNITED STATES OF AMERICA 45 (Washington, Gales & Eaton 1828). For more on Livingston, see U.S. Dep’t of State Office of the Historian, Biographies of the Secretaries of State: Edward Livingston, http://history.state.gov/departmenthistory/people/livingston-edward. Livingston had a remarkable and varied political career, as Congressman from New York (and noted opponent of the Sedition Act), U.S. Attorney for the District of New York, and Mayor of New York City from 1796 to 1803, then state legislator, Congressman, and Senator from Louisiana from 1820 to 1832, and Secretary of State and Ambassador to France from 1831 to 1835, shortly before his death.


12. Of Offenses Against the Rights of Suffrage, § 4, 1839 Miss. Laws 151, 152; IOWA CODE § 2700 (1851); Offenses Against the Right of Suffrage, ch. 8, § 136, 1855 Neb. Laws 244; An Act in Regard to Elections, § 82, 1871 Ill. Laws 393; An Act to Secure Free Elections, ch. 329, 10 Del. Laws 534 (1881). These statutes were limited to threats of discharge aimed at influencing a future election, and didn’t expressly prohibit retaliatory discharge for a vote at a past election, though a retaliatory discharge might have been seen as covered on the grounds that it was a threat to other employees for the future. See DAVIS v. LA. COMPUTING CORP., 394 So.2d 678, 680 (La. Ct. App. 1981) (“[T]he actual firing of one employee for political activity constitutes for the remaining employees... a threat of similar firings.”). The Delaware statute also expressly provided for civil liability for such behavior.

inclination of such [employee]."14 Several years later, Connecticut (1846) and Massachusetts (1852) barred "threatening to discharge [an elector] from . . . employment" in order to influence a vote.15

By the 1860s, some states also barred discrimination based on past votes rather than just threats aimed at future votes.16 This was especially visible in a burst of such lawmaking in the Reconstruction-era South, triggered by the Republican concern that southern employers were pressuring their employees to vote against the Republicans.17 (In some instances, Union generals administering the military occupation of the South issued such rules as military orders, violations of which were triable before military commissions.18)

It is this post-Reconstruction batch of voter protection laws that led to the first protections that went beyond voting to speech. In 1868, Louisiana and South Carolina banned discrimination against most private employees based on

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15. Act of June 15, 1846, ch. 20, 1846 Conn. Pub. Acts 20 (also contemplating private prosecution by the injured voter); An Act to Protect the Right of Suffrage, ch. 321, 1852 Mass. Acts 257. The Connecticut law came in response to a proposal from the governor. See Message from His Excellency, supra note 9, at 25. The Governor of Massachusetts had also proposed such a law as early as 1840, ACTS AND RESOLVES PASSED BY THE LEGISLATURE OF MASSACHUSETTS, IN THE YEAR 1840, at 311 (Boston, Dutton & Wentworth 1840), though the statute was not ultimately enacted until 1852.
16. See, e.g., An Act in Addition to "An Act Concerning Crimes and Punishments," ch. 152, § 2, 1867 Conn. Pub. Acts 166 (expressly prohibiting "dissuad[ing] from . . . employment any operative or his family in account of any vote he may have given");
17. See An Act to Regulate Elections in this State, § 89, 1868 Ala. Acts 286 (prohibiting an employer from "disturb[ing] or hinder[ing]" an employee exercising the right of suffrage); An Act Extending Protection to Laborers in the Exercise of Their Privilege of Free Suffrage, 1868 La. Acts 64 (making it a crime for employers to discharge their employees because of their political opinions, or to attempt to control the way they vote); Intimidation of Voters, N.C. CODE § 2715 (1883) (enacted 1869), reprinted in 2 WILLIAM T. DORTCH ET AL., THE CODE OF NORTH CAROLINA 195 (New York, Banks & Bros. 1883) (prohibiting employers from threatening their employees on account of their votes); An Act Providing for the Next General Election and the Manner of Conducting the Same, § 11, 1868 S.C. Acts 155, 157 (special session) (same); An Act to Regulate the Conduct and to Maintain the Freedom and Purity of Elections, § 67, 1870 La. Acts 158 (same); An Act to Provide for the Mode and Manner of Conducting Elections, § 46, 1870 Tex. Gen. Laws 137 (same). All these expressly barred "threats of discharge from employment" aimed at influencing a person's vote; all except Alabama also banned discharge based on past votes. Mississippi already had a law banning threats of discharge from employment for votes. Of Brithney and Undue Influence, § 4, 1839 Miss. Laws 122; a proposal to specify in the state constitution that dismissal from employment based on one's past or future vote shall be a crime, JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 352 (Jackson, E. Stafford 1868), apparently wasn't enacted.
"political opinion." And several decades later, both the voter protection laws (which I will not focus on in this Article) and the statutes protecting political opinion and political activity began to spread to other states.

I am not sure such restrictions on private employers are a good idea. First, employers may have a legitimate interest in not associating themselves with people whose views they despise. Second, employees are hired to advance the employer’s interests, not to undermine it. When an employee’s speech or political activity sufficiently alienates coworkers, customers, or political figures, an employer may reasonably claim a right to sever his connection to the employee. Perhaps such statutes should not be copied by other states, and perhaps they should even be repealed, which is what happened in 1929 when Ohio repealed its "political activities" statute.

But whether the statutes are sound or not, they strike me as worth investigating. I therefore thought it would be useful to

19. The Louisiana law provided for a fine for any employers who "discharged from their employ any labor or laborers on account of their opinion or political opinions," though limited this only to discharge before the "expiration of the term of service" of the employee. An Act Extending Protection to Laborers in the Exercise of Their Privilege of Free Suffrage, 1868 La. Acts 64 (protecting laborers in the exercise of their privilege of free suffrage). This was more significant than it would be now, because many employers were then, by default, seen as having one-year contracts, rather than contracts terminable at will. Jay M. Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118, 122-23 (1976). The South Carolina law stated that any company or corporation that had a legislative charter could not "discharge, or threaten to discharge, from employment... any operative or employee,... for or on account of his political opinion, or for voting or attempting to vote as he or they may desire," and provided both for civil liability and for cancellation of the corporate charter. An Act Providing for the Next General Election and the Manner of Conducting the Same, §11, 1868 S.C. Acts 157 (special session). A similar law was proposed in Virginia in the Constitutional Convention on Dec. 9, 1867, but was "defeated after a most heated discussion." David Lloyd Pulham, The Constitutional Conventions of Virginia From the Foundation of the Commonwealth to the Present Time 134 (1901); see also Journal of the Constitutional Convention of the State of Virginia 22, 25 (Richmond, New Nation 1867) (describing the rejection of the proposal).

20. See, e.g., Voting by Ballot, U.S. Democratic Rev., July 1854, at 9, 22, 24 (supporting the secret ballot, so as to diminish the risk that poor voters will be coerced to vote a particular way by their employers or by others, but arguing that bans on "discharging an operative from employment, or withdrawing... custom from a tradesman, or changing... tenants" based on "political considerations" improperly interfere with a property owner's rights).

21. An Act Prohibiting Employers from Interfering with the Political Activities of their Employees, § 5175-26a, 1917 Ohio Laws 601, repealed by Election Laws of the State of Ohio, § 4785-234, 1929 Ohio Laws 307, 412. See also Ohio Rev. Code Ann., § 2901.43 (West 1965) ("No person shall prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of any lawful issue [or candidate].... No person shall injure any person or property on account of such support or advocacy."). repealed by Act of Dec. 14, 1972, § 2, 1971 Ohio Sess. Laws 1866, 2032.
publish a list of the statutes that I could find and a summary of some of the key court decisions interpreting those statutes.

II. THE STATUTES

I arrange the statutes roughly in descending order of the breadth of speech that they cover. I say "roughly" because some of the laws are hard to compare, and some of them have unclear scopes.

A. Cross-Cutting Questions

1. Criminal Liability, Civil Liability, or Both?

Some of the statutes expressly provide for civil liability, some for criminal liability, and some for both. But courts generally treat these sorts of criminal statutes as also generating a private right of action, either as a matter of statutory interpretation or as an application of the "wrongful discharge in violation of public policy" tort.22

2. Coverage for Existing Employees or Also for Applicants?

Some of the statutes expressly cover all employer decisions. Others only cover discharge or discipline of current employees rather than refusal to hire applicants. Note, though, that the California Supreme Court has read its statute as covering discrimination in hiring, even though the statutory text refers just to actions with regard to "employee[s]."23

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22. See, e.g., Shoelvin v. Cent. N.M. Elec. Coop., 850 P.2d 996, 1008 (N.M. 1993) (dictum) (stating that a criminal statute banning firing employees because of the employees' political activity would "support a cause of action for retaliatory discharge" for such a firing); Culler v. Blue Ridge Elec. Coop., 432 S.E.2d 91, 92-93 (S.C. 1993) (inferring a civil cause of action based on the criminal prohibition against firing people for political beliefs); cf. Carl v. Children's Hosp., 702 A.2d 159, 165 (D.C. 1997) (Terry, J., for four Justices) (reasoning that a criminal statute barring "injur[ing] any witness in [his or her] person or property... on account of... testifying or having testified" in particular proceedings supports a civil cause of action for firing an employee based on such testimony); id. at 166 (Ferrin, J., for two Justices) (endorse this analysis). Compare Bell v. Faulkner, 75 S.W.2d 612, 614 (Mo. Ct. App. 1934) (refusing to infer a civil cause of action from a criminal statute banning firing an employee for his vote in an election), with Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 877 (Mo. Ct. App. 1985) ("[W]e believe that no modern Missouri court would, on the egregious facts presented in Bell v. Faulkner, decide the case against Bell as the court of appeals did in 1934.").

3. Application Only to Established Policies, or Also to Individual Employment Decisions?

Some of the statutes expressly cover all employer actions, but others cover only policies restricting speech. Such policies need not be published ones; an accepted course of conduct would suffice.\textsuperscript{24}

The question is whether the statutes that ban speech-restrictive “polic[y]s” should also apply to individual incidents of discrimination, animated by an employer’s concerns at that moment rather than by some coherent general plan. The Louisiana Supreme Court has answered the question yes, holding that the ban on enforcing any “rule, regulation or policy” restraining political activity extends to individual firing decisions made even without any express policy. “[T]he actual firing of one employee for political activity constitutes for the remaining employees both a policy and a threat of similar firings.”\textsuperscript{25} On the other hand, the California Supreme Court has defined “policy” as “[a] settled or definite course or method adopted and followed” by the employer,\textsuperscript{26} and a California federal district court has specifically concluded that an individual retaliatory decision does not suffice to show the existence of a “rule, regulation, or policy.”\textsuperscript{27}

4. Application Only to Threats, or Also to Employment Decisions Made Without Threats?

Some of the statutes expressly cover all employer actions, but others cover only “threat[s] . . . calculated to influence the political . . . actions” of other employees.\textsuperscript{28} But, as the Louisiana case cited above notes, “the actual firing of one employee for political activity constitutes for the remaining employees both a policy and a threat of similar firings.”\textsuperscript{29} Once coworkers learn that an employee was fired based on his speech or political activities, the coworkers will perceive that action as a threat, even if no express threatening words were used. This is especially so given that, as the Supreme Court has recognized, employees’

\begin{itemize}
\item \textsuperscript{24} Lockheed Aircraft Corp. v. Superior Court, 171 P.3d 21, 24 (Cal. 1946).
\item \textsuperscript{26} Lockheed Aircraft Corp., 171 P.2d at 24.
\item \textsuperscript{28} See infra note 103 and accompanying text.
\item \textsuperscript{29} Davis, 394 So.2d at 680.
\end{itemize}
economic dependence on the employer reasonably leads them to pick up even subtle signals when their jobs are at stake.30

5. Off-the-Job Speech or All Speech?

Some statutes expressly cover only off-the-job speech, while others have no such limitation. Should courts implicitly read in such a limitation? In Dixon v. Coburg Dairy, Inc., later reversed on procedural grounds by an en banc decision, a Fourth Circuit panel held that one such statute does not include on-the-job speech.31 A contrary view, the panel held, would have the "absurd result of making every private workplace a constitutionally protected forum for political discourse."32

But the Connecticut Supreme Court in Catto v. United Technologies Corp. held that the absence of any statutory language limiting protection to off-the-job speech means that the statute may indeed apply to such speech.33 Likewise, a California Court of Appeal decision suggested that the California statute generally applies to on-the-job speech.34

6. Implicit Exceptions for Speech and Political Activity That Sufficiently Undermines Employer Interests?

Some statutes expressly allow employers to restrict speech or political activity that sufficiently undermines employer interests. These will be discussed in the next subsection.

Other statutes, though, categorically cover speech without any express accommodation of employer concerns. In Louisiana, for example, even when "the 'business' justification for firing plaintiff in this case is a real one"—such as that plaintiff's political advocacy "would antagonize persons who could withdraw business from plaintiff's employer"—"the policy of the statute is unmistakable: the employer may not control political candidacy of his employees. We see no exemption from the

31. Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 262 (4th Cir. 2003), rev'd, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state courts).
32. Id.
34. Cal. Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist., 45 Cal. App. 4th 1383, 1387 n.2 (1996). The court held that a specific state statute, Cal. Educ. Code, § 7055 (2002), that allows certain public education agencies to restrict on-the-job "political activity" carves out an exception from the general California statute protecting such political activity. But the opinion suggests that the general statute would apply to on-the-job speech in workplaces that are not exempted by a specific statute such as § 7055.
legislative purpose because of the nature of the employer’s business.”

One federal district court took a contrary view, concluding that the California statute should be read as containing an implied exception for cases “when the employee’s political activities are patently in conflict with the employer’s interests.” But this was based on what strikes me as a misreading of an earlier California state precedent. And California state courts have never read the statute as having such an implied exemption.

A few of the political activity protections come in antidiscrimination statutes that (1) ban discrimination based on various classifications, including political ideology or affiliation, and (2) carve out a “bona fide occupational qualification” (BFOQ) exception for certain antidiscrimination categories, such as sex and religion, but not for political ideology.

Such drafting strongly suggests that there is indeed no exception from the political ideology discrimination ban. “Expressio unius, exclusio alterius”; the inclusion of sex and religion in the BFOQ provision suggests that the excluded antidiscrimination categories are not subject to a BFOQ defense. This is in fact how federal courts have reasoned in holding that race cannot be a BFOQ under Title VII, given that it is “conspicuously absent from the [BFOQ] exception” (which lists religion, sex, and national origin, but not race or color).

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37. Smedley held that Mitchell v. Int'l Ass'n of Machinists, 196 Cal. App. 2d 736 (1961), suggested such a rule, but I do not see anything in Mitchell so stating.
38. See, e.g., SEATTLE, WASH., MUN. CODE § 14.04.050(A) (2011) (stating that discrimination is not forbidden “in those instances where religion, sex, national origin, or age is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise,” but not including political ideology or various other prohibited bases in the list); MADISON, WIS., MUN. CODE § 59.03(8)(e) (2010) (likewise).
7. What Is the Scope of Explicit Exceptions for Speech and Political Activity That Sufficiently Undermines Employer Interests?

Some statutes do expressly allow employers to restrict employee speech when abstaining from the speech is a BFOQ, when the speech is “in direct conflict with the essential business-related interests of the employer,” or when the speech creates “reasonable job-related grounds for dismissal.” Do these exceptions cover speech that interferes with the employer’s activities by leading customers or coworkers to dislike the employer—for instance, when the speech is critical of the employer, or when the speech offends some people?

Generally speaking, when the term “bona fide occupational qualification” is used with regard to sex discrimination or religious discrimination, customer or coworker hostility is not seen as sufficient to trigger the BFOQ exception. In the Equal Employment Opportunity Commission’s words, “the preferences of coworkers, the employer, clients or customers” “do not warrant the application of the bona fide occupational qualification exception.” Thus, for instance, that some people are offended or alienated by an employee’s religion does not justify the employer in firing the employee. When laws that ban discrimination based on off-duty conduct (including speech), speech, or political affiliation use the same phrase, this suggests that employers likewise may not fire an employee just because his

42. N.D. Cent. Code Ann. § 14-02.4-03 (West 2011).
off-duty actions offend customers or coworkers.

Nonetheless, some cases interpreting the statutes give employers a good deal of authority to restrict speech that turns customers against the employer. Thus, a district court interpreting the Colorado statute’s exception for restrictions that “relate[] to a bona fide occupational requirement” held that (1) an employer could treat an employee’s loyalty as a bona fide occupational requirement, and that (2) an employee’s letter to a newspaper complaining about alleged mistreatment of employees and poor customer service breached such a duty, though (3) public complaints about safety would not breach the duty.45

Likewise, a New York appellate court read an exception for activity that “creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest” as allowing the German National Tourist Office to fire an employee for becoming known as the translator of some Holocaust revisionist articles.46 Presumably the court’s view was that the activity could lead to public hostility to the office, and that this hostility created a “conflict of interest” between the employee and the employer’s “business interest.”

Other cases, however, consider some speech to be protected even when it does injure the employer. The Colorado case mentioned above is a partial example, because it concluded that public complaints about safety would be protected against employer retaliation even when they injure the employer. Likewise, a Connecticut case held that a statutory exception for speech that “substantially or materially interfere[s] with the employee’s bona fide job performance or the working relationship between the employee and the employer”47 did not cover an employee’s report to a state agency of “allegedly

45. Marsh v. Delta Air Lines, Inc., 952 F. Supp. 1458, 1461–62 (D. Colo. 1997). As to nonspeech conduct, see Hougum v. Valley Mem’l Homes, 574 N.W.2d 812, 822 (N.D. 1998) (concluding that a mortuary chaplain’s off-duty act of masturbating in a public restroom stall, if legal, might be covered by the BPOE exception, on the grounds that the “activity undermined his effectiveness as a chaplain and therefore directly conflicted with [the employer funeral home’s] business-related interests,” and leaving the decision to the jury).
wrongful or illegal conduct” by the employer’s customer.  

The employee, a worker for a home nursing company that sold services to nursing facilities, reported substandard care at one of the facilities.  

The court acknowledged that “[i]t may be true that [the employer’s] business relationship with their customer was impacted negatively as a result of the reporting of violations by the plaintiff.”  

But, the court concluded, such speech is “the exact kind of ‘expression[] regarding public concerns that are motivated by an employee’s desire to speak out as a citizen’ to which . . . this statute applies.”  

8. Do General Bans on “Threats” Apply to Threats of Loss of Employment?  

Though most of the statutes discussed below expressly bar discrimination in employment, or threats of loss of employment, some speak generally of threats, intimidation, or coercion. But in similar statutes, the terms “threats,” “intimidation,” and “coercion” have indeed been interpreted to include threat of economic retaliation.  

Thus, for instance, federal law bans “intimidat[ing], threaten[ing], coerc[ing], or attempt[ing] to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person . . . to vote as he may choose.”  

The Fifth and Sixth Circuits have interpreted this law as prohibiting threats of economic retaliation.  

Likewise, the Fair Housing Act makes it illegal “to coerce, intimidate, threaten, or interfere with any person . . . or on account of his having aided or encouraged any other person in the exercise or enjoyment [of housing nondiscrimination rights].”  

Circuit courts have interpreted this as barring the firing of employees...
who rented to black and Mexican-American applicants,\textsuperscript{55} and barring the denial of agency funds to an organization that complained about a discriminatory permit denial.\textsuperscript{56}

B. Engaging in Any Off-Duty Lawful Activity—Colorado and North Dakota

On, then, to the specific laws, beginning with what seem like the broadest ones. Two state statutes generally bar employers from restricting employees’ off-duty lawful activity. “Lawful activity off the premises of the employer” is broad enough to include speech, and court decisions have expressly interpreted such a statute to cover speech.\textsuperscript{57}

**Colorado:** [No employer may] terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:

(a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.\textsuperscript{58}

**North Dakota:** [No employer may discriminate against an employee or applicant] because of... participation in a lawful activity that is off the employer’s premises and that takes place during nonworking hours

[a] [unless that participation is] in direct conflict with the essential business-related interests of the employer... [or]

\textsuperscript{55} Smith v. Stechel, 510 F.2d 1162, 1164 (9th Cir. 1975); see also United States v. Bowen Prop. Mgmt., 2005 WL 1950018, at *5 (E.D. Wash. Aug. 15, 2005) (finding a possibility of illegal coercion where an employee was allegedly terminated for helping others file Fair Housing Act complaints); Hall v. Lowder Realty Co., Inc., 160 F. Supp. 2d 1999, 1323 (M.D. Ala. 2001) (treating allegation that a real estate agency employer cut off customer calls to an agent employee as an allegation of coercion).

\textsuperscript{56} Reg'l Econ. Cnty. Action Program, Inc. v. City of Middletown, 294 F.3d 35 (2d Cir. 2002).


\textsuperscript{58} COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2012) (enacted 1990).
contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities and the responsibilities of a particular employee or group of employees, rather than to all employees of that employer. 59

Colorado also has another statute, discussed in Part II.F, protecting employees’ “engaging or participating in politics.” 60

C. Engaging in Activity That Doesn’t Create “Reasonable Job-Related Grounds for Dismissal”—Montana

Montana is the only state that generally bars employers from firing people absent good cause; this would include many dismissals based on an employee’s speech or political activity.

Montana: [An employer may not discharge an employee] if . . . the discharge was not for [reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reasons61] and the employee had completed the employer’s probationary period of employment [or six months, if the employer did not establish a specific probationary period] . . . . 62

This provision is limited to actual and constructive discharge, and is not violated by minor demotions, failures to promote, or failures to hire. 63 But, as described below in Part II.G, certain Montana employers are barred from all discrimination based on certain kinds of political activities.

D. Exercising “Rights Guaranteed by the First Amendment”—Connecticut

Connecticut bars employment discrimination based on any “exercise . . . of rights guaranteed by the First Amendment.” 64 Connecticut courts have interpreted this as largely applying the same rules to private employers as are applied to public employers under the First Amendment. 65 Connecticut courts

demotion is not covered by statute), with Howard v. Conlin Furniture No. 2, Inc., 901 P.2d 116, 119 (Mont. 1995) (holding termination of managerial position and an
immediate offer of a position with 75% pay cut is covered by statute).
64. CONN. GEN. STAT. § 31-51q (2012).
apply the Connick v. Myers rule that employee speech is protected only if it is on "matters of public concern" and not motivated by the employee’s personal employment grievance. They also apply the Pickering v. Board of Education test, under which speech is unprotected if its value is exceeded by its potential to disrupt the employer’s operation. And they apply the Garcetti v. Ceballos rule, under which even otherwise public-concern and nondisruptive speech is unprotected when it is part of the employee’s job duties.

Connecticut: [No employer may] discipline or discharge [an employee] on account of the exercise by such employee of rights guaranteed by the First Amendment . . . , provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer . . . .

Courts have held that this statute does not apply to decisions denying promotion, or to decisions denying tenure (even though this would generally lead to the expiration of the employee’s contract). A fortiori, the statute would not apply to decisions not to hire.

E. Engaging in “Recreational Activities”—New York

New York bars employer retaliation for off-duty "recreational activities," including, among other things, "reading and the viewing of television, movies, and similar material." A separate part of the statute, discussed in Part II.J below, expressly protects partisan political activities.

The New York law’s protection for receiving speech suggests there is similar protection for conveying speech. Court decisions have indeed treated "recreational activities" as including arguing about politics at a social function and participating in a vigil for

72. Cavanaugh v. Doherty, 243 A.D.2d 92, 100 (NY App. Div. 1998) (creating an allegation that plaintiff was fired "as a result of a discussion during recreational activities outside of the workplace in which her political affiliations became an issue" as covered by the statute).
a man killed because of his homosexuality.\textsuperscript{73}

But one court has held that picketing is not sufficiently "recreational" to qualify.\textsuperscript{74} Other New York courts have likewise held that certain non-speech activities—dating\textsuperscript{75} and organizing and participating in "after-work celebrations with fellow employees"\textsuperscript{76}—that might normally be seen as recreational nonetheless are not covered by the statute. This suggests that "recreational activities" might likewise be read narrowly in some speech cases.

\textbf{New York:} (1) \ldots (b) "Recreational activities" shall mean any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material \ldots .

(2) \ldots (c) [No employer may discriminate against an employee or prospective employee] because of \ldots an individual’s legal recreational activities outside work hours, off of the employer’s premises and without use of the employer’s equipment or other property \ldots

(3)(a) [This section shall not be deemed to protect activity that] creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest \ldots

(4) [A]n employer shall not be in violation of this section where the employer takes action based on the belief \ldots that: \ldots (iii) the individual’s actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.\textsuperscript{77}


\textsuperscript{74} Kolb v. Camilleri, No. 02-CV-0117A(Sr.), 2008 WL 3049855, at *15 (W.D.N.Y. Aug. 1, 2008) ("Plaintiff did not engage in picketing for his leisure, but as a form of protest. While the Court has found such protest worthy of constitutional protection, it should not engender simultaneous protection as a recreational activity akin to ‘spons, games, hobbies, exercise, reading and the viewing of television, movies and similar material.’").

\textsuperscript{75} E.g., Hudson v. Goldman Sachs & Co., 283 A.D.2d 246 (N.Y. App. Div. 2001) ("romantic relationships are not protected ‘recreational activities’"); State v. Wal-Mart Stores, Inc., 207 A.D.2d 150 (N.Y. App. Div. 1995) ("dating is entirely distinct from \ldots recreational activity") (internal quotation marks omitted). \textit{But see id. at 153 (Yesawich, J., dissenting)} (arguing that dating should be seen as covered).


\textsuperscript{77} N.Y. LAB. LAW § 201-d (McKinney 2011) (enacted 1992).
F. Engaging in Political Activities—California, Colorado, Guam, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, West Virginia, Seattle (Washington), and Madison (Wisconsin)

These states bar employers from retaliating against employees for engaging in political activities. “Political activities” is broader than just partisan or electoral activities, and courts interpreting the California statute have so held. “[P]olitical activities,” the California Supreme Court has stated, “cannot be narrowly confined to partisan activity,” but instead cover any activities involving the “espousal of a candidate or a cause,” including participating in broad social movements such as the gay rights movement.78 And a federal district court, following the California Supreme Court decision, has likewise read “political activities” to cover the holding of certain views on drug and alcohol policy.79

A few federal district courts in South Carolina have taken a narrower view: The South Carolina statute’s protection of “political opinions” and “political rights and privileges guaranteed to every citizen by the Constitution,” they have held, is limited to “matters directly related to the executive, legislative, and administrative branches of Government, such as political party affiliation, political campaign contributions, and the right to vote.”80 One district court held that the display of the Confederate flag is therefore not covered.81 Another held the same about a statement that Muslims are disproportionately likely to be terrorists, and that terrorists are generally Muslims.82

This, though, seems inconsistent with the statutory language, which speaks of “political opinions” and “political rights and

81. See Dixon v. Coburg Dairy, Inc., 330 F.3d 250, 254 (4th Cir. 2003) (noting that the district court originally granted the employer’s motion for summary judgment on this ground), rev’d en banc, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state court).
82. Powell v. Media Gen. Operations, Inc., 2011 WL 4501836 (D.S.C. Apr. 26, 2011) (Magistrate Judge’s report and recommendation), approved by 2011 WL 4501864 (D.S.C. Sept. 28, 2011), settled while on appeal, Order in Powell v. Media Gen. Operations, Inc., No. 11-2204 (Dec. 1, 2011). The speech in Powell took place right after the Fort Hood massacre, which was committed by a Muslim U.S. soldier. Plaintiff told a coworker (who apparently wasn’t a Muslim, Amended Complaint in Powell (filed Jan. 7, 2011)), “That’s a shocker that a Muslim would be a terrorist!” The coworker responded, “Not all Muslims are terrorists.” Plaintiff replied, “Well, that might be so, but it seems to me that all terrorists are Muslim.” This, the court said, was not the expression of “political opinions” because it was not “of or relating to government, a government, or the conduct of government.”
privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State.83 Opining on broad current affairs topics has generally been seen as “political speech,” even when the speech does not directly connect to an election.84 And California courts have interpreted the similar terms “engaging . . . in politics” and “political activities” as covering “espousal of . . . a cause” as well as of a candidate, and including, for instance, the act of declaring oneself to be gay or lesbian.85 Likewise, a Fourth Circuit panel opinion, later reversed on procedural grounds, concluded that display of the Confederate flag could constitute the exercise of “political rights.”86

Even under the broad California view, though, some courts have held that activities aimed at improving labor conditions at the particular employer87 and advocacy of forcible or violent conduct88 do not qualify as “political” within the terms of the statute. Two related South Carolina federal district court cases have also held that testimony before a government agency, made in response to a request by that agency, does not qualify as “exercising a political right.”89 And a third South Carolina federal district court case concluded that an employee’s “expressions of concern about his coworkers”—which consisted of statements that the coworker pharmacy technicians “lacked the necessary experience and competence to safely fill

85. Gay Law Students Ass’n v. Pac. Tel. & Tel. Co., 595 F.2d 592, 610 (9th Cir. 1979).
86. Dixon v. Coburg Dairy, Inc., 350 F.3d 250, 262 (4th Cir. 2003) (treating the “political rights” language of the South Carolina statute as referring to Free Speech Clause rights generally, and concluding that the display of a Confederate flag “at a time when South Carolinians were vigorously debating whether that flag should fly atop their state capitol” would be protected by the statute against employer reprisal, if done outside work), rev’d en banc, 369 F.3d 811 (4th Cir. 2004) (concluding that the state law claim should have been brought in state courts).
customers' prescriptions"—"were not political in nature" and thus were not covered.90

**California:** No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.91

No employer shall . . . attempt to coerce or influence his employees through or by means of threat of discharge . . . to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.92

**Colorado:** It is [a misdemeanor] for any . . . employer . . . to make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from engaging or participating in politics or from becoming a candidate for public office or being elected to and entering upon the duties of any public office.93

**Guam:** Every employer . . . is guilty of a misdemeanor who within ninety (90) days of any election . . . makes or communicates . . . threats, express or implied, intended or calculated to influence the political opinions or actions of the employees.94

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92. Id. § 1102 (West 2012) (enacted 1915). California Labor Code sections 96(k) and 98.6(a) allow the Labor Commissioner to "take assignments of" any employee claims "for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises," id. § 96(k), and bar employers from discriminating against "an employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in [section 96(k)] and [section 1101]." But California courts have concluded that the statutes create no new protections, but instead merely let the Labor Commissioner take assignments of any claims already secured by existing law, such as section 1101 claims or right to privacy claims. See Grinzi v. San Diego Hospice Corp., 120 Cal. App. 4th 72, 80-89 (Cal. Ct. App. 2004) (so holding as to both § 96(k) and § 96.6), see also Haas v. Sony Elec. Prod. Co., 69 Fed. Appx. 889, 890 (9th Cir. 2003) (taking this view, but considering only § 96(k)); Paloma v. City of Newark, No. A0980922, 2003 WL 122700, at *12-13 (Cal. Ct. App. Jan. 10, 2003) (also taking this view but considering only § 96(k)); Barbee v. Household Auto. Fin. Corp., 113 Cal. App. 4th 525, 533-36 (Cal. Ct. App. 2000) (likewise); 83 Ops. Cal. Atty. Gen. 226, 228, 230 (2000) (taking this view as to § 96(k)).
93. **COLO. REV. STAT. ANN.** § 8-2-108 (West 2012) (enacted 1929); see also id. § 8-2-102 (West 2012) (enacted 1897) (banning employers from discriminating or threatening to discriminate against employees for belonging to any "political party").
94. § GUAM CODE ANN. § 14111 (2012).
Louisiana: Except as otherwise provided in R.S. 23.962, no employer having regularly in his employ twenty or more employees shall
[a] make, adopt, or enforce any rule, regulation, or policy forbidding or preventing any of his employees from engaging or participating in politics, or from becoming a candidate for public office . . .
[b] adopt or enforce any rule, regulation, or policy which will control, direct, or tend to control or direct the political activities or affiliations of his employees, [or] . . .
[c] coerce or influence, or attempt to coerce or influence any of his employees by means of threats of discharge or loss of employment in case such employees should support or become affiliated with any particular political faction or organization, or participate in political activities of any nature or character . . . .

23.962: Any planter, manager, overseer or other employer of laborers who, previous to the expiration of the term of service of any laborer in his employ or under his control, discharges such laborer on account of his political opinions, or attempts to control the suffrage or vote of such laborer by any contract or agreement whatever, shall be fined not less than one hundred dollars, nor more than five hundred dollars and imprisoned for not more than one year.96

Minnesota: [It shall be a gross misdemeanor for an individual or association . . . [to] engage in economic reprisals or threaten loss of employment or physical coercion against an individual or association because of that individual's or association's political contributions or political activity. This subdivision does not apply to compensation for employment or loss of employment if the political affiliation or viewpoint of the employee is a bona fide occupational qualification of the employment.]97

Missouri: [It shall be a misdemeanor of the part of any employer [to] make, enforce, or attempt to enforce any order, rule, or regulation or adopt any other device or method to prevent an employee from
[a] engaging in political activities,
[b] accepting candidacy for nomination to, election to, or the holding of, political office,

[c] holding a position as a member of a political committee,
[d] soliciting or receiving funds for political purpose,
[e] acting as chairman or participating in a political
convention,
[f] assuming the conduct of any political campaign,
[g] signing, or subscribing his name to any initiative, referendum, or recall petition, or any other petition circulated pursuant to law... 98

It shall be a misdemeanor and civilly actionable for any
employer to:

1. discriminate or threaten to discriminate against any
employee... by reason of his political beliefs or opinions;
or...

2. discriminate or threaten to discriminate against any... employee in this state for contributing or refusing to contribute to any candidate, political committee or separate political fund... 99

Nebraska: Any person who... attempts to influence the
political action of his or her employees by threatening to
discharge them because of their political action... shall be
guilty of a Class IV felony. 100

Nevada: It shall be unlawful for any... [employer] to make
any rule or regulation prohibiting or preventing any employee
from engaging in politics or becoming a candidate for any
public office in this state. 101

South Carolina: It is unlawful for a person to... discharge a
citizen from employment... because of political opinions or
the exercise of political rights and privileges guaranteed to
every citizen by the Constitution and laws of the United States
or by the Constitution and laws of this State. 102

West Virginia: [It is a misdemeanor for any employer or

101. NEV. REV. STAT. ANN. § 615.040 (West 2012) (enacted 1915). It is not clear
whether this also bars employers from requiring employees to make political contributions. Compare Nevalaans v. Holter, No. A365991, A366493, 1998 WL
357316, at *2 (Nev. Dist. Ct. June 10, 1998) (interpreting the statute as barring such
requirements), with Spitzmesser v. Tate Snyder Kimsey Architects, Ltd., No. 210-CV-
not barring such requirements).
enacted in 1868, see An Act Providing for the Next General Election and the Manner of
Conducting the Same, 1868 S.C. Acts 135, 136 (special session)). See, e.g., Culler v. Blue
Ridge Elec. Coop., Inc., 422 S.E.2d 91, 93 (S.C. 1992) (reading the statute as covering an
employee’s refusal to make a campaign contribution).
agent of an employer to] give any notice or information to his employees, containing any threat, either express or implied, intended or calculated to influence the political views or actions of the . . . employees . . . .

Seattle (Washington): Employers may not discriminate . . . by reason of . . . political ideology . . .] . . . with respect to any matter related to employment. 104 "Political ideology" means any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group. This term includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not interfere with job performance. 105

Madison (Wisconsin): [Employers may not] discriminate against any individual [in employment] . . . because of [such individual's] protected class membership . . . [including "political beliefs," defined as "one's opinion, manifested in speech or association, concerning the social, economic and governmental structure of society and its institutions," "cover[ing] all political beliefs, the consideration of which is not preempted by state or federal law"]; 106

The Colorado and Louisiana statutes also include clauses that effectively state, "Nothing in this section shall be construed to prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this section." 107 This language, borrowed from the California statute, is the language that California courts have interpreted as providing for tort liability for violations of the prohibition. 108 For other Colorado and Louisiana statutes that provide some protection for speech or political activity, see Part II.B and Part

105. Id. § 14.04.050(R).
107. COLO. REV. STAT. ANN. § 8-9-108 (West 2012); see LA. REV. STAT. ANN. § 23:961 (2011) ("Nothing herein contained shall in any way be construed to prevent the injured employee from recovering damages from the employer as a result of . . . the employer's violations of this Section.").
ILL, respectively.

A 1983 Third Circuit case, *Novosel v. Nationwide Ins. Co.*,\(^{109}\) suggested that Pennsylvania would follow a similar rule as a common-law matter: The court held that, under Pennsylvania law, private employers could not fire an employee for "political expression and association" unless the employee's activities substantially interfere with the employee's job.\(^{110}\) But more recent Pennsylvania state court decisions suggest that *Novosel* is no longer good law.\(^{111}\)

G. *Holding or Expressing Political Ideas or Beliefs—New Mexico and (to Some Extent) Montana*

New Mexico bars discrimination based on "political opinions."\(^{112}\) This could be read broadly, to include discrimination based on speech expressing political views, or narrowly to include only discrimination motivated by disapproval of an employee's beliefs and to exclude discrimination motivated by worry that the employee's speech expressing those beliefs is disruptive to the business.

**New Mexico:** [It is a felony for any employer of an employee] entitled to vote at any election, [to] directly or indirectly discharg[e] or threaten[] to discharge such employee because of the employee's political opinions or belief[s] or because of such employee's intention to vote or refrain from voting for any candidate, party, proposition, question, or constitutional amendment.\(^{113}\)

[It is a felony for any employer of an employee] entitled to vote at any [municipal] election [to] directly or indirectly discharg[e] or penaliz[e] or threaten[] to discharge or penalize such employee because of the employee's opinions or beliefs or because of such employee's intention to vote or to refrain from voting for any candidate or for or against any question.\(^{114}\)

\(^{109}\) 721 F.2d 894, 900 (3d Cir. 1983).


\(^{111}\) See Fraser v. Nationwide Mut. Ins. Co., 552 F.3d 107, 122–23 (3d Cir. 2008) (noting that Pennsylvania courts have not endorsed *Novosel* and concluding that "[a]s a result, we have essentially limited *Novosel* to its facts—a firing based on forced political speech"); Martin v. Capital Cities Media, Inc., 511 A.2d 830, 843–44 (Pa. Super. Ct. 1986) (seemingly reaching the opposite result from *Novosel*, but not expressly discussing *Novosel*).


\(^{113}\) Id.

Montana also imposes a similar rule for government contractors, and for health care facilities (including private facilities\textsuperscript{115}); the language seems broad enough to bar both discrimination against patrons and discrimination against employees or applicants for employment:

Montana: Every state or local contract or subcontract for construction of public buildings or for other public work or for goods or services must contain a provision that all hiring must be on the basis of merit and qualifications and a provision that there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the contract.\textsuperscript{116}

All phases of the operation of a health care facility must be without discrimination against anyone on the basis of race, creed, religion, color, national origin, sex, age, marital status, physical or mental disability, or political ideas.\textsuperscript{117}

The Montana Constitution provides that “Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas,”\textsuperscript{118} but it’s not clear whether the ban on discrimination “in the exercise of . . . civil . . . rights” include discrimination in employment.\textsuperscript{119}

H. Supporting or Advocating for a Federal Candidate—Federal Law
(Probably, in Some Circuits)

The Civil Rights Act of 1871 may prohibit some kinds of employer retaliation based on an employee’s speech supporting or advocating for a federal candidate. Section 2 of the Act, now codified at 42 U.S.C. § 1985, provides in relevant part, that it is civilly actionable for “two or more persons” to “conspire” (and to act pursuant to the conspiracy):

\begin{itemize}
\item \textsuperscript{115} MONT. CODE ANN. § 50-5-101(23) (a) (2011).
\item \textsuperscript{116} MONT. CODE ANN. § 49-5-207 (2011) (enacted 1975).
\item \textsuperscript{117} MONT. CODE ANN. § 50-5-105 (2011).
\item \textsuperscript{118} MONT. CONST. art. 2, § 4.
\item \textsuperscript{119} Compare Foster v. Albertsons, Inc., 833 P.2d 720, 725 (Mont. 1992) (noting that the trial court had quoted the constitutional provision in the jury instructions in a private employment sex discrimination case), with MONT. DEPT OF LAB. & IND., HUMAN RIGHTS BUREAU, http://ersl.dlli.mt.gov/human-rights-bureau.html (last visited Feb. 19, 2012) (stating that Montana law bans discrimination based on political beliefs or ideas only in "governmental services and employment").
\end{itemize}
to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy . . . . 120

In interpreting a closely analogous portion of the same statute, the Court has held that "injur[ing] any citizen in person or property" includes getting the person fired from his job, 121 and that an agreement among two or more managers of a company to get the employee fired from the company may constitute an actionable "conspir[acy]." 122 It thus follows that it is civilly actionable (and likely criminal 123) for two or more managers to have an employee fired for supporting or advocating for the election of a federal candidate.

In several circuits, this conclusion may usually be blocked by the "intra-corporate conspiracy" doctrine, under which a conspiracy is not actionable if the conspirators consist of employees of the same corporation (plus perhaps the corporation itself) who are conspiring to have the corporation perform an action, such as firing someone. 124 But in the Third and the Tenth Circuits, 125 and possibly also in the D.C., First, and Ninth Circuits, 126 this doctrine doesn’t apply to § 1985 claims, so

121. Haddie v. Garrison, 525 U.S. 121, 126 (1998). The conclusion in Gill v. Farm Bureau Life Ins. Co., 906 F.2d 1265, 1269 (8th Cir. 1990), that § 1985 applies only to serious violence and not just cancellation of an insurance agent’s contract by his insurance company, is thus no longer good law after Haddie. (Note that Haddie’s logic applies not just to employment contracts but to other valuable contracts as well.)
122. Haddie, 525 U.S. at 125.
124. Grider v. City of Auburn, 618 F.3d 1240, 1261-62 (11th Cir. 2010); Hardline v. Gallo, 546 F.3d 95, 99 n.3 (2d Cir. 2008); Amadasu v. Christ Hosp., 514 F.3d 504, 507 (9th Cir. 2008); Benningfield v. City of Houston, 157 F.3d 366, 376 (5th Cir. 1998); Harman v. Bd. of Trs. of Univ. of Okla., 508 U.S. 4 F.3d 465, 469-71 (7th Cir. 1995); Richmond v. Bd. of Regents of Univ. of Minn., 957 F.2d 595, 598 (8th Cir. 1992); Buschi v. Kirven, 775 F.2d 1240, 1252-53 (4th Cir. 1985).
126. Bowler v. Madidox, 649 F.3d 1122, 1131 (D.C. Cir. 2011) (declining to decide the question); Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1181 (9th Cir. 1998) (same). I know of no case on the subject in the First Circuit.
when two or more managers conspire to get an employee fired based on his support or advocacy of a federal candidate, § 1985 offers a remedy.

Now a bit more detail. Section 1985 prohibits five different forms of conspiracies:

(a) "to prevent, by force, intimidation, or threat, any person from accepting or holding [or exercising] any office . . . under the United States," or "to injure him in his person or property on account of his lawful discharge of the duties of his office";127

(b) "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, . . . or to injure such party or witness in his person or property on account of his having so attended or testified";128

(c) "[t]o impede[ ], hinder[ ], obstruct[ ], or defeat[] . . . the due course of justice in any State . . ., with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws";129

(d) "[t]o depriv[e], either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws";130 or

(e) "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy."131

All these provisions apply to private actors and not just to government officials.132 But, as the Court recognized in Kush v. Rutledge, these five kinds of conspiracy belong to two families. Provisions (c) and (d) "contain[] language requiring that the

129. Id.
131. Id.
conspirators’ actions be motivated by an intent to deprive their victims of the equal protection of the laws,“¹³³ and at the same time deal with activity that “is not institutionally linked to federal interests and . . . is usually of primary state concern.” Because of this, the Court did not want the provisions to be read as “creat[ing] an open-ended federal tort law applicable to all tortious, conspiratorial interferences with the rights of others,” and therefore required a showing of “some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”¹³⁴

On the other hand, provisions (a), (b), and (e) do not mention “equal protection,” and do not require either state action or a class-based animus. These provisions “relate to institutions and processes of the Federal Government—federal officers, [(a)]; federal judicial proceedings, [(b)]; and federal elections, [(e)]. The statutory provisions dealing with these categories of conspiratorial activity contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws.”¹³⁵

In Kush, the Court therefore expressly held that § 1985 provides a cause of action for “an alleged conspiracy to intimidate potential witnesses in a federal lawsuit,” a provision (b) claim, without any state action or class-based animus.¹³⁶ And the Court’s reasoning applies as much to provision (e) claims, which involve retaliation for supporting a federal candidate, as it does to provision (b) claims, which involve retaliation for being a witness in a federal case.

Likewise, the Court’s holding in Haddle v. Garrison, which held that two managers conspiring to get an employee fired because he was a witness in a federal case was actionable under 42 U.S.C. § 1985, would apply equally to provision (e) and provision (b) claims. “[L]oss of at-will employment,” the Court held, may be treated as “injuring” a person “in his person or property,” even though at-will employment isn’t technically a “constitutionally protected property interest” for many purposes.¹³⁷

The only court to seriously consider the argument in this subsection, the Eighth Circuit, has (twice) rejected the

¹³³. Id. at 725.
¹³⁵. Id. at 725.
¹³⁶. Id. at 726–27.
argument. The provision (e) retaliation-for-support-or-advocacy claim, the court reasoned, is limited to situations involving “State Action,” because only state action can violate a person’s First Amendment right.\(^{138}\)

But this is a misreading of § 1985: The provision (e) “support or advocacy” claim—which covers actions “injur[ing] any citizen in person or property on account of . . . support or advocacy [toward or in favor of the election of any federal candidate]”—is not limited to violations of the First Amendment. It does not require, for instance, depriving someone of “equal privileges and immunities under the laws” (a provision (c) claim). It does not require governmental interference with “support or advocacy.”\(^{139}\) It is justified by the federal Elections Clause power, aimed at protecting federal elections, and not by any Fourteenth Amendment Enforcement Clause power.\(^{140}\) Nor does it extend as far as the First Amendment does: It is limited to support or advocacy of the election of federal candidates, not speech on other matters.

Rather, the provision (e) claim, like the provision (b) claim involved in *Haddle*, is a free-standing federal statutory protection against conspiracies—whether private or governmental—aimed at retaliating against a person for a certain kind of conduct. In provision (b), that conduct is being a witness in a federal case. In provision (e), that conduct is giving “support or advocacy in a legal manner” “in favor of the election” of a federal candidate. Under *Haddle*, such conspiracies to retaliate include conspiracies to get someone fired (though if the conspiracies are purely within one corporation, they may not be actionable in those circuits that adhere to the intracorporate conspiracy doctrine).

I. Belonging to, Endorsing, or Affiliating With a Political Party—
District of Columbia, Iowa, Louisiana, Puerto Rico, Virgin Islands, Broward County (Florida), Urbana (Illinois)

These laws bar employers from discriminating against employees based on party membership. Most of them also bar

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discrimination based on the party that the employees “endorse” (D.C., Broward, Urbana) or “affiliate” with (Puerto Rico, Virgin Islands), which seems to cover speech expressing support for the party.

**District of Columbia:** [No employer may discriminate against employees or prospective employees] based upon the actual or perceived . . . political affiliation [defined as “the state of belonging to or endorsing any political party”] of any individual . . . . 141

**Iowa:** A person commits the crime of election misconduct in the first degree if the person willfully [i]ntimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, a person . . . [i]nexercise [or not exercise] a right under chapters 39 through 55 [including declaring party affiliation, IOWA CODE ANN. §§ 43.41-42]. 142

**Louisiana:** No person shall knowingly, willfully, or intentionally: [i]ntimidate . . ., directly or indirectly, any voter or prospective voter in . . . any matter concerning the voluntary affiliation or nonaffiliation of a voter with any political party. 143

**Puerto Rico:** Any employer who performs any act of prejudicial discrimination against [an employee because he is] . . . affiliated with a certain political party, shall be guilty . . . of a misdemeanor . . . . 144

**Virgin Islands:** It shall be an unlawful discriminatory practice . . . [i]n any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. 145

**Broward County (Florida):** It is a discriminatory practice for an employer: . . . [i]n any individual, with respect to compensation or the terms, conditions, or privileges of

141. D.C. CODE §§ 2-1401.02(25), 2-1402.11(a) (2001) (enacted 1973); see Blodgett v. Univ. Club, 930 A.2d 210, 221-22 (D.C. 2007) (holding that § 2-1402.11(a) is indeed limited to discrimination based on political party membership, and not based on political opinions or affiliations generally).

142. IOWA CODE ANN. § 36A.2(c)(4) (West 2012) (enacted 1994). For an explanation of why this statute, which generally bans threats, likely also applies to threats of loss of employment, see Part II.A.8.


144. P.R. LAWS ANN. tit. 29, § 140 (2011) (enacted 1942); see Santiago v. People, 154 F.2d 811, 813 (1st Cir. 1946) (applying § 140 as written).

employment, because of a discriminatory classification\textsuperscript{146} [including "political affiliation," defined as "belonging to or endorsing any political party"]\textsuperscript{147} . . . [except] where these qualifications are bona fide occupational qualifications reasonably necessary to the normal operation of that particular business or enterprise."\textsuperscript{148}

**Urbana (Illinois):** It shall be an unlawful practice for an employer . . . [to discriminate against any employee or applicant] based wholly or partially on\textsuperscript{149} [an employee's belonging to or endorsing any political party or organization or taking part in any activities of a political nature]\textsuperscript{150} . . . [except] where such factors are bona fide occupational qualifications necessary for such employment.\textsuperscript{151}

Louisiana law also provides many employees protection against dismissal for political activities and not just for party membership.\textsuperscript{152}

**J. Engaging in Electoral Activities—Illinois, New York, Washington**

New York and Washington expressly bar employers from discriminating against employees for their election-related speech and political activities.\textsuperscript{153} Illinois law would likely be interpreted the same way, given the likelihood that threats of dismissal from employment would qualify as "intimidation" or "threat" (see Part II.A.8).

**Illinois:** Any person who, by force, intimidation, threat, deception or forgery, knowingly prevents any other person from (a) registering to vote, or (b) lawfully voting, supporting or opposing the nomination or election of any person for public office or any public question voted upon at any election, shall be guilty of a . . . felony\textsuperscript{154} [and shall be subject to civil

\textsuperscript{146} BROWARD COUNTY, FLA. ORDINANCE NO. 2011-19 § 16-12-3(1)(j) (enacted 1978).

\textsuperscript{147} Id. § 16-12-3(q).

\textsuperscript{148} Id. § 16-12-3(1)(a)(3).

\textsuperscript{149} URBANA, ILL. CODE OF ORDINANCES § 12-62(a) (2011) (enacted 1975).

\textsuperscript{150} Id. § 12-39.

\textsuperscript{151} Id. § 12-62(1)(2).

\textsuperscript{152} See infra Part II.F.


\textsuperscript{154} 10 ILL. COMP. STAT. ANN. § 5/29-4 (West 2012) (enacted 1973). Use of intimidation and threats to try to prevent a person from speaking out on candidates or ballot measures would thus also be criminal attempt to violate the statute, even if the person refuses to be prevented from speaking, 720 ILL. COMP. STAT. ANN. § 5/8-4(a) (West 2012).
liability$.155$

**New York:** (1) (a) "Political activities" shall mean (i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fund-raising activities for the benefit of a candidate, political party or political advocacy group.

(2)(a) [No employer may discriminate against an employee or prospective employee because of] an individual's [legal] political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property [except when the employee is a professional journalist, or a government employee who is partly funded with federal money and thus covered by federal statutory bans on politicking by government employees]. ...$156$

(3)(a) [This section shall not be deemed to protect activity which] creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest.

(4) [An employer shall not be in violation of this section where the employer takes action based on the belief that... (iii) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.$157$

**Washington:** No employer ... may discriminate against an employee... for ... in any way supporting or opposing [or not supporting or opposing] a candidate, ballot proposition, political party, or political committee.$158$

K. **Signing Initiative, Referendum, Recall, or Candidate Petitions—Arizona, D.C., Georgia, Iowa, Minnesota, Missouri, Ohio, Oregon, Washington**

These laws are narrow, but have become especially relevant given the recent debates about retaliation against people who signed anti-same-sex marriage initiative petitions. For an explanation of why the laws that ban threats and intimidation, without mentioning employment, likely apply to threats of dismissal for employment, see Part II.A.8 above.

**Arizona:** A person who ... threatens any other person to the


$156$ See Richardson, 246 A.D.2d at 902 (applying this to cover expressions of support for a political candidate).


$158$ WASH. REV. CODE ANN. § 42.17A.495(2) (West 2012) (enacted 1995).
effect that the other person will or may be injured in his business, or discharged from employment, or that he will not be employed, to sign or subscribe, or to refrain from signing or subscribing, his name to an initiative or referendum petition [or recall] . . . is guilty of a . . . misdemeanor.\textsuperscript{159}

\textbf{District of Columbia:} Any person who . . . by threats or intimidation, interferes with, or attempts to interfere with, the right of any qualified registered elector to sign or not to sign any initiative, referendum, or recall petition, or to vote for or against, or to abstain from voting on any initiative, referendum, or recall measure . . . shall be [guilty of a misdemeanor].\textsuperscript{160}

\textbf{Georgia:} A person who, by menace or threat either directly or indirectly, induces or compels or attempts to induce or compel any other person to sign or subscribe or to refrain from signing or subscribing that person’s name to a recall application or petition . . . shall be guilty of a misdemeanor.\textsuperscript{161}

\textbf{Iowa:} A person commits the crime of election misconduct in the first degree if the person willfully . . . [i]ntimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, a person . . . [i]o sign [or refrain from signing] a petition nominating a candidate for public office or a petition requesting an election for which a petition may legally be submitted.\textsuperscript{162}

\textbf{Louisiana:} No person shall knowingly, willfully, or intentionally . . . [i]ntimidate . . . directly or indirectly, any voter or prospective voter in matters concerning voting or nonvoting or voter registration or nonregistration, or the signing or not signing of a petition, including but not limited to any matter concerning the voluntary affiliation or nonaffiliation of a voter with any political party.\textsuperscript{163}

\textbf{Minnesota:} A person may not use threat, intimidation, coercion, or other corrupt means to interfere with the right of any eligible voter to sign or not to sign a recall petition of their own free will.\textsuperscript{164}

\textbf{Missouri:} [It shall be a misdemeanor o]n the part of any employer [to] mak[e], enforc[e], or attempt[,] to enforce any order, rule, or regulation or adopt[.] any other device or


\textsuperscript{161} GA. CODE ANN. § 21-4-29(b) (West 2011) (enacted 1979).

\textsuperscript{162} IOWA CODE ANN. § 30A.2 (West 2012) (enacted 1994).


\textsuperscript{164} MINN. STAT. ANN. § 211C.09 (West 2012) (enacted 1996).
method to prevent an employee from... signing, or subscribing his name to any initiative, referendum, or recall petition, or any other petition circulated pursuant to law... .\(^{165}\)

**Ohio:** No person shall, directly or indirectly, by intimidation or threats, influence or seek to influence any person to sign or abstain from signing, or to solicit signatures to or abstain from soliciting signatures to an initiative or referendum petition.\(^{166}\)

**Oregon:** [No person may] directly or indirectly subject any person to undue influence [defined to include "loss of employment or other loss or the threat of it"] with the intent to induce any person to... [s]ign or refrain from signing a prospective petition or an initiative, referendum, recall or candidate nominating petition.\(^{167}\)

**Washington:** Every person is guilty of a gross misdemeanor who... [i]nterferes with or attempts to interfere with the right of any voter to sign or not to sign an initiative or referendum [or recall] petition or with the right to vote for or against an initiative or referendum measure [or recall] by threats, intimidation, or any other corrupt means or practice... .\(^{168}\)

L. **Giving Campaign Contributions—Louisiana, Massachusetts, and Oregon**

These statutes are limited to discrimination based on making a contribution. (More states ban discrimination based on a refusal to make a contribution.\(^{169}\))

**Louisiana:** No person based on an individual’s contribution, promise to make a contribution, or failure to make a contribution to influence the nomination or election of a person to [any political office] shall directly or indirectly affect an individual’s employment by means of [discrimination in favor or against the person in employment, or threat of such discrimination].\(^{170}\)

**Massachusetts:** No person shall, by threatening to [discriminate against or in favor of an employee]... attempt


\(^{166}\) OHIO REV. CODE ANN. § 731.40 (West 2011) (based on statute originally enacted in 1929); see also id. § 305.41 (same, though limited to referenda).


\(^{169}\) See infra note 197.

to influence a voter to give or to withhold his vote or political contribution. No person shall, because of the giving or withholding of a vote or a political contribution, [discriminate against or in favor of an employee].

**Oregon:** [No person may] directly or indirectly subject any person to undue influence [defined to include loss of employment or other loss or the threat of it] with the intent to induce any person to... [c]ontribute or refrain from contributing to any candidate, political party or political committee.

Louisiana also has a more general protection for political activity, discussed in Part II.F, which would likely include campaign contributions.

**M. Exercising the “Elective Franchise” or “Suffrage,” Which Might Include Signing Referendum or Initiative Petitions—Hawaii, Idaho, Kentucky, Tennessee, West Virginia, Wyoming, and Guam**

Some jurisdictions ban retaliation or threat of retaliation related to the “free exercise of the elective franchise” or to “suffrage.” This might just mean with regard to voting, a prohibition that would rarely be triggered because voting is now generally secret.

But it could also be read as extending to the signing of referendum or initiative petitions, and perhaps to other forms of political activity. Thus, for instance, the Wyoming Supreme Court has described—albeit in a slightly different context—the signing of initiative and referendum petitions as “relating] to the elective franchise.” Maryland’s highest court likewise concluded that “the right to have one’s signature counted on a nominating petition [for a candidate] is integral to that political

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173. *See, e.g., BLACK’S LAW DICTIONARY 1571 (9th ed. 2009) (defining “suffrage” as “[t]he right or privilege of casting a vote at a public election”); see also Guevremont v. Keefe, No. 97-CV-5210, 1998 WL 275015, at *9 (E.D.N.Y. Jan. 12, 1998) (concluding that “suffrage” is limited to the “privilege of voting,” and does not include “the right to support, approve and campaign on behalf of political candidates and to participate in the election of candidates to political office”).*
174. *Thomson v. Wyo. In-Stream Flow Comm., 651 P.2d 778, 790 (Wyo. 1982) (concluding that the state constitutional provision that “[t]he legislature shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise” authorizes the legislature to require that initiative and referendum petitions be signed by “qualified registered voters” and not just qualified voters, because “[i]nitiate and referendum relates to the elective franchise”).*
party member's right of suffrage[,]\textsuperscript{175} which suggests that signing a referendum petition is also included within the right of suffrage. An Oregon Attorney General's opinion took the same view as to the signing of recall petitions,\textsuperscript{176} as did an Ohio court decision (though with regard to the phrase "exercising [the] elective franchise").\textsuperscript{177}

The Idaho Supreme Court concluded that "[t]he right of citizens to organize, and give expression and effect to their political aspirations through political parties is inherent in, and a part of, the right of suffrage."\textsuperscript{178} The Nebraska Supreme Court held that "the right of persons to combine according to their political beliefs and to possess and freely use all the machinery for increasing the power of numbers by acting as a unit to effect a desired political end" is "[i]nherent[]" in the right to "exercise of the elective franchise."\textsuperscript{179} And several cases have generally endorsed the proposition that "[t]he right of suffrage includes the right to form political parties."\textsuperscript{180}

For an explanation of why the statutes that generally ban threats also likely apply to threats of loss of employment, see Part II.A.8.

\textbf{Hawaii:} Every person who, directly or indirectly, personally or through another, makes use of, or threatens to make use of, any force, violence, or restraint; or inflicts or threatens to inflict any injury, damage, or loss in any manner, or in any way practices intimidation upon or against any person in order to induce or compel the person to vote or refrain from voting, or to vote or refrain from voting for any particular person or party, at any election, or on account of the person having voted or refrained from voting, or voted or refrained from voting for any particular person or party; or who by abduction, distress, or any device or contrivance impedes, prevents, or otherwise

\textsuperscript{175} Md. Green Party v. Md. Bd. of Elections, 832 A.2d 214, 228 (Md. 2003); see also Nader for President 2004 v. Md. State Bd. of Elections, 958 A.2d 199, 211 (Md. 2007) (following \textit{Md. Green Party}).

\textsuperscript{176} 24 Or. Op. Att'y Gen. 513 (1949) (treating "sign[ing] a recall petition" as "merely exercising [one's] constitutional right of suffrage").

\textsuperscript{177} State \textit{ex rel. Barceu v. Leonard}, 6 Ohio Supp. 2d 345, 347 (1941) ("Now, what is meant by the expression 'exercising his elective franchise'? One of the ways in which a person may exercise his elective franchise is to sign nominating petitions.").


interferes with the free exercise of the elective franchise [shall be deemed guilty of a crime].

Idaho: Every person who, by force, threats, menaces, bribery, or any corrupt means, either directly or indirectly attempts to influence any elector in giving his vote, or to deter him from giving the same, or attempts by any means whatever, to awe, restrain, hinder or disturb any elector in the free exercise of the right of suffrage . . . is guilty of a misdemeanor.

Kentucky: No person shall coerce or direct any employee to vote for any political party or candidate for nomination or election to any office in this state, or threaten to discharge any employee if he votes for any candidate, or discharge any employee on account of his exercise of suffrage . . .

Pennsylvania: Any person or corporation who, directly or indirectly . . . by abduction, duress or coercion, or any forcible or fraudulent device or contrivance, whatever, impedes, prevents, or otherwise interferes with the free exercise of the elective franchise by any voter, or compels, induces, or prevails upon any voter to give or refrain from giving his vote for or against any particular person at any election . . . shall be guilty of a misdemeanor . . .

Tennessee: It is unlawful to discharge any employee on account of such employee’s exercise or failure to exercise the suffrage, or to give out or circulate any statement or report calculated to intimidate or coerce any employee to vote or not to vote for any candidate or measure.

West Virginia: Any person who shall, directly or indirectly, by himself, or by any other person on his behalf, make use of, or threaten to make use of, any force, violence or restraint, or inflict, or threaten to inflict, any damage, harm or loss, upon or against any person, or by any other means attempt to intimidate or exert any undue influence, in order to induce such person to vote or refrain from voting, or on account of such person having voted or refrained from voting, at any election, or who shall, by abduction, duress or any fraudulent device or contrivance, impede or prevent the free exercise of

181. HAW. REV. STAT. § 19-3 (West 2011) (first enacted before the annexation of Hawaii, in 1894).
183. KY. REV. STAT. ANN. § 121.310(1) (West 2011) (enacted 1942) (based on statute originally enacted 1900). A different portion of this section was held unconstitutional by Ky. Registry of Election Fin. v. Bliesni, 57 S.W.3d 289 (Ky. 2001), but that decision did not discuss the portion quoted in the text.
the suffrage by any elector, or shall thereby compel, induce or
prevail upon any elector either to vote or refrain from voting
for or against any particular candidate or measure . . . [i]s
guilty of a misdemeanor.186

Wyoming: [Criminal intimidation] consists of [i]nducing, or
attempting to induce, fear in an . . . elector by use of threats of
force, violence, harm or loss, or any form of economic
retaliation, for the purpose of impeding or preventing the free
exercise of the elective franchise . . . .187

Guam: Every person is guilty of a felony who, by force,
threats, menace, bribery or any corrupt means, either directly
or indirectly, attempts to influence any voter in giving his vote,
or to deter him from giving it, or attempts by any means
whatever to threaten, restrain, hinder, or disturb any voter in
the exercise of the right of suffrage.188

III. FEDERAL LIMITS ON THESE STATUTES

Some federal rules may allow some employers to limit
employees' speech or political activities, notwithstanding
contrary state statutes.

A. Unions have the federal statutory right to fire union
employees who openly disagree with the union's political
activities.189

B. State law claims for firing caused by union-related political
activity are preempted by federal labor law.190

C. Newspapers may have the First Amendment right to bar
their reporters from engaging in any political activity.191
Likewise, other organizations that create speech products may be
free to refuse to include speakers whose outside speech

188. 3 GUAM CODE ANN. § 14107 (2012).
189. Hubbs v. Operating Engineers Local Union No. 3, 2004 WL 2205555, at *8
(N.D. Cal. Sept. 29, 2004); Thunderburk v. United Food & Commercial Workers' Union,
1997); Rodriguez v. Yellow Cab Coop., Inc., 296 Cal. App. 3d 668, 673-80 (1988); Henry
also Cotto v. United Techs. Corp., 738 A.2d 623, 627 n.5 (Conn. 1999) (acknowledging
that in some circumstances, the statute "may conflict with the employer's own free
(rejecting the claim that a newspaper "has the unfettered right to terminate an employee
for any [outside-the-newspaper] speech or conduct that is inconsistent with the
newspaper's editorial policies.").
undermines the organization’s message. 192

IV. OTHER KINDS OF PROTECTIONS

I list here some narrower protections, which I thought were too narrow to discuss in detail:

A. Illinois and Michigan bar employers from “gather[ing] or keep[ing] a record of an employee’s associations, political activities, publications, communications or nonemployment activities, unless the employee submits the information in writing or authorizes the employer in writing to keep or gather the information.” An exception exists for “activities that occur on the employer’s premises or during the employee’s working hours with that employer which interfere with the performance of the employee’s duties or the duties of other employees or activities, regardless of when and where occurring, which constitute criminal conduct or may reasonably be expected to harm the employer’s property, operations or business, or could by the employee’s action cause the employer financial liability.” 193

B. Illinois, Montana, Nevada, North Carolina, and Wisconsin ban employers from restricting employees’ off-duty use of lawful products, 194 a category that is broad enough to cover blogging software, Twitter, political signs, and other products used to speak. But even if the statutes apply to such products, they likely apply only in situations where the employer punishes an employee for (say) blogging as such, and not the much more common situations where an employer punishes an employee for communicating—through whatever medium—certain messages that the employer disapproves of. 195

192. Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 892, 904-06 (1st Cir. 1988) (suggesting that symphony might well have a First Amendment right to refuse to let plaintiff narrate a performance, even if the reason for the refusal stemmed from plaintiff’s past speech and would therefore presumptively violate the Massachusetts Civil Rights Act); Gombowy v. Hartford Courant Co., 2010 WL 3025512, *4 (Conn. Super. Ct. June 29, 2010) (concluding that the First Amendment allowed a newspaper to fire someone based on his past articles for the newspaper); Eppworth v. Journal Register Co., 12 Conn. L. Rptr. 585 (1994) (Likewise).

193. 820 ILL. COMP. STAT. ANN. 49/9 (West 2012); see MICH. COMP. LAWS ANN. § 423.58(8) (West 2012) (containing substantially similar language).

194. 820 ILL. COMP. STAT. ANN. 55/5 (West 2012); MONT. CODE ANN. §§ 39-2-313(2), 313(3) (2011); NEV. REV. STAT. ANN. § 613.335(1)(b) (West 2011); N.C. GEN. STAT. ANN. § 96-28.2(b) (West 2011); WIS. STAT. ANN. §§ 111.321, 111.35(2) (West 2011).

195. McGillic v. Pine Creek Timber Co., 964 F.2d 18, 23-24 (Mont. 1992), held that placing a fictitious newspaper ad as a prank was not covered, but was ambiguous as to the reason. The Montana Supreme Court wrote that the lower court ‘noted that “lawful product,” as defined in § 39-2-313, MCA, means a product that is legally consumed, and includes food, beverages, and tobacco,” and “found that the placing of a newspaper ad
C. New Jersey, Oregon, Wisconsin, and the Virgin Islands bar employers from “requir[ing]... employees to attend an employer-sponsored meeting or participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer’s opinion about religious or political matters.” These statutes generally define “political matters” to “include political party affiliation and decisions to join or not join or participate in any lawful political, social, or community organization or activity.”

D. Several states bar employers from discriminating against employees who refuse to give campaign contributions.

E. Some states bar employers from retaliating against employees for becoming political candidates or officeholders, or for their votes as elected or appointed officials.

F. Sixteen states bar written threats that are displayed in the workplace—but not oral or individualized threats—that are “intended or calculated to influence the political opinions or actions of his employees.” Often, these statutes expressly cover
statements such as “If Candidate X is elected, we will close this plant,” but they also seem to cover threats that people who engage in certain “political . . . actions” will be fired. Some of these states limit the prohibition to statements within 90 days before an election.199

G. As the Introduction mentioned, many states ban employers from discriminating against employees based on the employees’ votes, or threatening such discrimination.200 North Carolina goes so far as to bar “discharg[ing] or threaten[ing] to discharge from employment . . . any legally qualified voter on account of any vote such voter may cast or consider or intend to cast,”201 which might extend to discrimination for expressing support for a candidate.

H. Many states have statutes that protect employees from retaliation for complaints to government officials about illegal conduct.202

V. CONCLUSION

I leave to others the evaluation of whether the laws I described above are wise—and, if so, which of the many models cataloged in this Article should be followed by other states. For now, I have simply tried to provide a listing of the various options that have so far been implemented, and a brief summary of what some of their ambiguous terms might mean.

199. ARIZ. REV. STAT. ANN. § 16-1012 (West 2012); CAL. ELEC. CODE § 18542 (West 2012); COLO. REV. STAT. ANN. § 1-15-719 (West 2012); IND. CODE ANN. § 5-14-5-21 (West 2012); MD. CODE ANN., ELEC. LAW § 15-602(a)(8) (West 2011); MONT. CODE ANN. §§ 19-35-226(1)–(2) (2011); N.J. STAT. ANN. § 19:54-30 (West 2011); N.Y. ELEC. LAW § 17-150 (McKinney 2011); OHIO REV. CODE ANN. § 3599.05 (West 2011); PA. CONS. STAT. ANN. § 3547 (West 2011); R.I. GEN. LAWS ANN. § 17-29-6 (West 2011); S.D. CODEED LAWS § 12-26-13 (2011); TENN. CODE ANN. § 2-19-135 (West 2011); UTAH CODE ANN. § 50A-3-502 (West 2011); W. VA. CODE ANN. § 3-9-15 (West 2011); WIS. STAT. ANN. § 12.07 (West 2011).


FREEDOM OF SPEECH, CYBERSPACE, HARASSMENT LAW, AND THE CLINTON ADMINISTRATION

EUGENE VOLOKH*

I

INTRODUCTION

During the height of the Clinton-Lewinsky scandal, many lawyer pundits talked about impeachment. Some talked about independent counsels and separation of powers. Some talked about the criminal law of perjury, or the rules of evidence, or whether indecent exposure constituted sexual harassment.

A few experts, though, focused on a more practical issue: Saying certain things about the scandal, they advised people, might be legally punishable. "Be careful what you say," one headline warned, when you discuss "the Starr report and Clinton/Lewinsky matter" in certain ways.1 "Talking about Clinton? Tread carefully," says another, pointing out the risk of "a lawsuit from an offended co-worker."2 Such discussions "ought to be avoided" because of the risk of legal liability.3 "[I]t's best to choose carefully who you share your remarks, your jokes, with . . . . 'Attorneys warn us about [legal liability] . . . .' Office humor in particular 'is always quicksand'. . . ." "There's no right [to make certain state-

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* Professor of Law, UCLA (volokh@law.ucla.edu).

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1. Diane Sears Campbell, Don't Cause a Scandal—Be Careful What You Say, ORLANDO SENTINEL, Sept. 23, 1998, at E4 ("Sexually explicit discussions, comments, jokes and gestures that could be perceived by a co-worker to be offensive can lead to a harassment claim, attorneys say. Here the word from John Finnigan and Aaron Zandy, Orlando attorneys: 'Workplace discussions that are sexually graphic or explicit about the Starr report and Clinton/Lewinsky matter are no different than any other workplace discussions of a sexual nature that are now inappropriate in the workplace and ought to be avoided.'").

2. Hollis L. Engley, Talking About Clinton? Tread Carefully; Chatter too much about sexual matters and risk a complaint or a lawsuit from an offended co-worker, DES MOINES REGISTER, Jan. 29, 1998, at 1 ("Should we be talking at the workplace about the president's sexual preferences? And if so, how? Very carefully, say the experts. . . . Talk too much about sexual matters of any kind and risk a complaint or even a lawsuit from an offended co-worker."); see also Julie Waresch, Can We Talk? Offices Full of Jokes on "The Affair", PALM BEACH POST, Sept. 20, 1998, at 1F ("While the Starr report may have created an atmosphere that encourages lewd remarks and innuendo, sexual harassment experts say workers should be careful.").

3. Engley, supra note 2.

ments about the Clinton/Lewinsky affair] just because it’s a public issue.” “We had quite a few clients calling us when Lewinsky jokes . . . were making the rounds.” “People think that if they hear something on TV or the radio they can say it at work [without fear of legal liability]. But that of course is not the case.”

5. L.M. Sixel, Scandal Sapping Sensitivity at Office, Houston Chron., Sept. 18, 1998, at 1 (“When exactly does the rehearsing of cigar sex and hallway encounters rise to the level of a hostile work environment? . . . That hinges on whether a reasonable person would find the conversation offensive [and pervasive enough], said Gerald Holtzman, a Houston employment lawyer . . . . There’s no right to talk offensively just because it’s a public issue.”); Geeta Sharma-Jensen, Scandal Heats Up Workplace Banter, Milwaukee J. Sentinel, Feb. 9, 1998, at 1 (“Managers must recognize that some workers may object to discussion of sexually charged politics in the workplace, said John Patzke, an employment lawyer. ‘They still need to be sensitive to those objections and enforce their sexual harassment policies, despite the political relevance,’ he said.”).

6. Yochi Dreazen, Talking About Sex: Where Do You Draw the Line in the Office?, Houston Chron., July 26, 1998, at A2 (“For Monica Ballard, whose Santa Monica-based Parallax Education company counts Burger King, Kraft Foods and Exxon among its clients, the tension between a popular culture that encourages talk about sex and a workplace mentality that seeks to restrict it was driven home in the first days of the Lewinsky scandal. ‘We had quite a few clients calling us when Lewinsky jokes, some of which were quite graphic, were making the rounds,” she said. ‘People think that if they hear something on TV or the radio they can say it at work. But that of course is not the case.”).

7. See id.; see also Carol Smith, Sexual Harassment Arena Is Broadened, Binding Employers, Seattle Post-Intelligencer, Oct. 30, 1998, at B1 (“It is sexual harassment when employees are sitting around talking about the Starr Report and making jokes about cigars? ‘It depends,’ “). Consider also the recent advice by employment experts that tolerating “blonde jokes” could expose employers to legal punishment. See, e.g., Genevieve Buck, Sexual Harassment Rulings Hit Close to Home, Chi. Trib., July 17, 1998, at C5 (“Get an anti-harassment policy in place. Specify what conduct is unacceptable, including posters, pictures, gestures, blonde jokes, language, whatever.”); Richard A. Fishel, Medicine & The Law: Employee Sues Doctor—Sexual Harassment <http://www.physician.net/med&law.html> (“Ask yourself these questions . . . . Have I told a particularly funny sexual joke or one of those current dumb blonde jokes? . . . ‘Yes’ answers to any of the above could put you at risk of sexual harassment charges. . . . Here are some guidelines that can reduce the risk of sexual harassment in your workplace . . . . Don’t allow offensive jokes . . . .”); Andrea Kay, Online Jokes Can Lead to Serious Problems: Offensive Messages Might Become Basis of Lawsuits, Cincinnati Enquirer, Sept. 14, 1998, at B15 (“Have you heard the one about the gay trucker? Or how about the dumb blond who hangs out with smart guys? . . . . Those, or one of the other so-called harmless jokes circulating on your company network, could be the impetus for a nasty harassment suit.”); Michael Stetz, E-Mail Humor in Eye of Beholder, S.D. Union-Trib., Nov. 29, 1998, at A1 (“Dumb blonde jokes? Stupid men jokes? Bill and Monica jokes? . . . This can be treacherous ground. Companies are being sued because of sexually explicit or racially offensive messages that have gone through their computer e-mail systems. . . . Lawsuits are brewing over offensive material transmitted through e-mail messages . . . .”); Carol Teegardin, How to Deal with Sexual Harassment, The Record (BERGEN COUNTY), Oct. 26, 1998, at 116 (interview with Sue Ellen Eisenberg, a sexual harassment lawyer who had earlier participated in drafting the federal sexual harassment guidelines) (giving as examples of sexual harassment “[d]umb-blond jokes, [which] characterize women as being stupid and inferior, and it’s all cloaked in humor”); cf. Spaulding v. West, 1998 WL 745717 (EEOC Oct. 16) (describing harassment claim based on three alleged incidents, including the telling of blonde jokes, concluding that these three incidents in five years weren’t severe or pervasive enough for a harassment claim, but stressing that the employer “took immediate action to prevent the recurrence of and to mitigate the impact of the alleged incidents,” and that the EEOC “does not condone the several incidents cited by appellants”); Rick Anderson, “No Blonde Jokes,” Seattle Weekly, June 3-9, 1999, at 7 (describing harassment complaints against a police detective based in part on his having made blonde jokes, and quoting a commander saying that “[I don’t think it [a dumb-blond joke, for one] is appropriate no matter what it is . . . . We are getting to a point now that if you are smart, you don’t tell jokes.”).
What body of law, one might ask, would suppress jokes about the President or discussion of the Starr Report? Not the most publicized free speech restriction of the Clinton years, the Communications Decency Act of 1996,\(^8\) which was struck down 9-0 by the Supreme Court.\(^9\)

Rather, this remarkable speech restriction is hostile environment harassment law. Under this doctrine, speech can lead to massive liability if it is “severe or pervasive” enough to create a “hostile, abusive, or offensive work environment” for the plaintiff and for a reasonable person based on the person’s race, religion, sex, national origin, disability, age, veteran status, and in some jurisdictions a variety of other attributes.\(^10\) And this rather vague and broad test has long been interpreted to cover not just face-to-face slurs or repeated indecent propositions, but also sexually themed jokes and discussions, even ones that aren’t about co-workers or directed at particular co-workers.\(^11\) The prudent employer is wise to restrict speech like this, whether it is about President Clinton, Monica Lewinsky, Kenneth Starr, or anyone else—not just because of

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\(^9\) See Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). I refer here to the most discussed and most significant part of the CDA, which barred the public posting of indecent material in places to which minors had access. Another portion, which focused on the distribution of indecent material to specific minors, was struck down 7-2; a third provision, which dealt with e-mail sent to particular people in order to annoy them, wasn’t challenged in the Reno v. ACLU litigation.


\(^11\) See, e.g., Dernovich v. City of Great Falls, Mont. Hum. Rts. Comm’n No. 94-01006004 (Nov. 28, 1995); Cardin v. Via Tropical Fruits, Inc., No. 88-14201, 1993 U.S. Dist. LEXIS 16302, at *24-25 & n.4 (S.D. Fla. July 9); U.S. Dep’t of Labor, Sexual Harassment: Know Your Rights (1994) (defining sexual harassment to include situations where “[s]omeone made sexual jokes or said sexual things that you didn’t like”); Mont. Hum. Rts. Comm’n, Model Equal Employment Opportunity Policy: A Guide for Employers (no date) (“Examples of prohibited sexual harassment include, but are not limited to . . . Repeated sexual jokes, innuendoes, or comments . . .”); Margaret Hart Edwards, Sexual Harassment: Definition, Prevention, and Treatment, 389 ALI-ABA 215 (Mar. 26, 1995) (“Some examples of behaviors that may be sexual harassment are: . . . Coffee mugs with sexual pictures or words on them . . . Telling dirty jokes or stories . . .”); When a Joke is a Crime, CHRISTIAN SCI. MONITOR, Mar. 2, 1998, at B5 (“repeated instances” of “using e-mail to send sexual jokes to other staff members” could be harassment; so could “a male and a female co-worker repeatedly talk[ing] about their respective sexual affairs and relationships during break around the office coffee pot . . . if a passerby finds it offensive”); Is a Wink as Bad as a Nod?, BOSTON HERALD, Apr. 5, 1998, at 8 (“DON’T EVER (the clear cases) . . . The following are likely to be interpreted as sexual harassment, according to the Quincy law firm of Murphy, Hesse, Toomey and Lehane . . . Sexual epithets or jokes . . . Displaying sexually suggestive objects, pictures or cartoons”); Stephen Henderson, America Re-Examines the Issues, CHI. TRIB., May 23, 1996, at 1 (“[T]elling dirty jokes in the presence of a female employee [even when the jokes are not directed at her] . . . is an example of ‘hostile environment’ sexual harassment . . . The legal thinking behind ‘hostile environment’ harassment is that people should be able to arrive at work, do their job and go home without having to hear jokes, stories or comments of a sexual nature . . .” (quoting Monica Ballard, president of a firm that teaches employees about sexual harassment and the author of six textbooks on prevention of sexual harassment)). See generally <http://www.law.ucla.edu/faculty/volokh/harass/breadth.html#JOKES>, discussing this further and citing more examples.
professionalism concerns (which some employers might care more about and others less), but because of the risk that this speech will be found to be legally punishable.\textsuperscript{12}

I was asked to participate in this symposium by discussing the Clinton Administration and free speech in cyberspace, and I will do so. But inquiring into the Clinton Administration’s role in cyberspace speech regulation may be asking the wrong question. I’m not sure that particular Administrations generally have much of a direct impact on free speech law (as opposed to the indirect impact, often not seen for decades, flowing from the decisions of the judges they appoint). The Clinton Administration, for instance, has mostly confronted free speech law incidentally and sporadically; the high-profile direct attempts to seriously restrict speech, such as the CDA, have largely come from Congress.\textsuperscript{13}

Moreover, the words “in cyberspace” in the phrase “restrictions on free speech in cyberspace” are generally, in my view, not terribly significant; the medium by and large does not and should not affect the protection—or lack of protection—given to the content. The CDA and the Child Online Protection Act\textsuperscript{14} do pose some interesting cyberspace-specific questions, but even with these laws, most of the important issues are broader free speech questions: May speech be restricted if the restriction is in fact necessary to effectively serve a compelling government interest? What burdens may be placed on adults in order to shield children?\textsuperscript{15}

Instead of directly confronting Clinton, free speech, and cyberspace, I’d therefore like to instead present four cyberspace speech controversies that involve what I think is the most interesting modern body of speech restrictions: hostile environment harassment law. And these examples, I think, will help illustrate three things.

\textsuperscript{12} Some have claimed that these examples are just overreactions or “bizarre ... misapplications” of otherwise sound harassment law principles. See, e.g., Deborah Epstein, Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech, 84 GEO. L.J. 399, 418 (1996). But given (1) a standard as vague as “severe or pervasive enough to create a hostile, abusive, or offensive work environment for the plaintiff and a reasonable person,” (2) the many statements by courts and government agencies explaining that sexually themed jokes can form the basis of a harassment lawsuit, and (3) the dozens of statements to this effect from independent employment experts, it is eminently plausible that such speech may lead to liability, and that reasonable and prudent employers will want to restrict it to avoid the risk of liability. For a more developed discussion, see sources cited supra note 10.

In the words of Justice Brennan, “[i]f there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.” NAACP v. Button, 371 U.S. 415, 438 (1963).

\textsuperscript{13} Proposals for restricting speech in the name of protecting intellectual property are a noteworthy exception; as Jamie Boyle has pointed out, this Administration has proposed quite a few of these, though Congress has also independently gotten into the act. See generally James Boyle, The First Amendment and Cyberspace: The Clinton Years, 63 LAW & CONTEMP. PROBS. 337 (Winter/Spring 2000).

\textsuperscript{14} 47 U.S.C. § 231.

First, in most of the controversies, the result should largely be driven not by the medium, but by the relatively medium-independent underlying free speech principles. Second, the Clinton Administration’s role in these areas has been comparatively slight: The Administration has been involved primarily as a consumer of existing law rather than as a producer of new law. And third, each of the controversies shows that there is considerable truth to the much-maligned concept of the slippery slope. Speech restrictions generally do not spring full-grown from the head of Leviathan; rather, especially in a system built on precedent and on litigation by many plaintiffs in many courts, they accrete over time, each victory for restriction laying the groundwork for broader restrictions in the future. This tendency can, of course, be resisted—but it ought not be ignored.

II
THE HIDDEN COMMUNICATIONS DECENCY ACT

In 1997, the Equal Employment Opportunity Commission filed a workplace harassment lawsuit, which is still pending, against the Federal Home Loan Mortgage Corporation, also known as Freddie Mac. The lawsuit alleged various misconduct by Freddie Mac employees, including the following item: Some employees allegedly sent to a department-wide distribution list “derogatory electronic messages regarding ‘ebonics’”—a list of jokes mocking the black dialect, seemingly a response to the then-current Oakland School Board proposal to treat “ebonics” as a separate language. This, the EEOC claimed, contributed to a racially hostile work environment, and it was thus illegal for Freddie Mac to tolerate such speech; Freddie Mac had a duty to “take prompt and effective remedial action to eradicate” it.

Nor was this an isolated incident. In 1997, for instance, R.R. Donnelly, Morgan Stanley, and Citibank were all sued based in part on offensive jokes sent through e-mail. Newspaper articles reporting on these lawsuits featured headlines such as “Defusing the E-Mail Time Bomb . . . Establish Firm Workplace Rules to Prevent Discrimination Suits,” “E-Mail Humor: Punch Lines Can Carry Price; Jokes Open Employers To Discrimination Suits,” and “Firms Get Sobering Message; E-mail Abuses May Leave Them Liable.” In a less widely reported case,

16. Primarily, but not entirely: As Jeff Rosen points out, the Clinton Administration did support important evidentiary changes that made some harassment claims easier to bring. JEFFREY ROSEN, THE UNWANTED GAZE 128-58 (2000).
17. On Sept. 10, 1999, Arlene Shadoan, the EEOC attorney in the case, told Kevin Gerson of the UCLA School of Law library that the EEOC and Freddie Mac were still in conciliation, hoping to resolve the case without going to trial.
21. See Matthew H. Meade, Defusing the E-Mail Time Bomb; E-Mail is Mail: Establish Firm Workplace Rules to Prevent Discrimination Suits, PITTSBURGH POST-GAZETTE, Apr. 25, 1997, at A-17; see also
the New Jersey Office of Administrative Law recently found a single incident of a long joke list being forwarded by e-mail to the whole department to be “sexual harassment,” creating an “offensive work environment.” The judge “found [that] the ‘jokes’ degrade, shame, humiliate, defame and dishonor men and women based upon their gender, sexual preference, religion, skin pigmentation and national and ethnic origin” and are thus illegal.22 Similarly, in Trout v. City of Akron, a jury awarded a plaintiff $265,000 based on part on coworkers viewing pornographic material on their computers.23

Most of the other allegations in the Freddie Mac lawsuit involved offensive conduct that is entitled to no First Amendment protection; the EEOC’s case is not entirely based on protected speech, although some harassment cases have in fact been so based.24 Nonetheless, as the Supreme Court has held, judgments that are based even in part on constitutionally protected speech must comport with First Amendment principles25—and the experience of harassment law makes clear why this settled doctrine is eminently sound.

Imagine how a cautious employer would react to a decision imposing liability in the Freddie Mac harassment case or even to the EEOC’s decision to sue Freddie Mac. Though in theory individual offensive political statements are not actionable under harassment law unless they are aggregated with at least some other speech or conduct, in practice the employer can’t just tell its employees, “It’s fine for you to e-mail political statements that some may find racially, religiously,
or sexually offensive, unless there have been other incidents in which other people have also been mistreating the offended worker in other ways—incidents of which you, the employee, might not even be aware.” So long as constitutionally protected speech can be part of a hostile environment claim, the cautious employer must restrict each individual instance of such speech: After all, this particular statement might make the difference between a legally permissible, nonhostile environment, and an illegal hostile environment. The employer must say, “Do not circulate any material, even isolated items, that anyone might find racially, religiously, or sexually offensive, since put together such material may lead to liability.”

This is exactly what employment experts are counseling employers to do. For instance, according to an article called Employers Need to Establish Internet Policies, “avoiding potential sex-harassment liability is a major incentive for companies to establish Internet policies.” To prevent “incuring liability under state and federal discrimination laws,” businesses should have written policies that bar, among other things, “download[ing] pornographic picture[s]”—not just distributing them but even simply downloading them—and sending “messages with derogatory or inflammatory remarks about an individual or group’s race, religion, national origin, physical attributes, or sexual preference.” The advice is, of

27. Cohen, supra note 26; A Model Internet Policy for Companies, supra note 26, see also Ross May Lurk as You Surf the Web, L.A. TIMES, Aug. 9, 1999, at E3 (“When workers circulate lewd e-mail or X-rated Web sites, it opens [businesses] to multimillion-dollar harassment lawsuits. The discovery of an off-color electronic message at the St. Louis investment firm of Edward Jones in April forced the company to dismiss 19 employees and to reprimand 41 others.”); More Firms Monitoring E-Mail, PATRIOT LEDGER (Quincy, Mass.), Mar. 4, 1999, at B (“Do you like sending dirty jokes by E-mail? Don’t try sending one to Fidelity Investments employees. The Boston-based company last month disciplined an unspecified number of employees for abusing their E-mail privileges and access to company computers. . . . There’s a good reason for employer monitoring of offensive e-mail: A recent string of legal cases has underscored E-mail’s power as a key prosecution weapon, raising concern among employers that offensive messages could become a legal hot potato down the road. . . . Further dogging corporate legal departments, twin Supreme Court rulings last spring made it easier for employees to sue for sexual harassment in the workplace . . . .”); Paul van Slambrouck, E-Mail Culture Goes to Court, CHRISTIAN SC. MONITOR, Oct. 23, 1998, at 1 (“Company personnel offices are increasingly dealing with the problems that arise from e-mail. An off-color joke, uninvited or sent to others, can constitute sexual harassment if the company doesn’t take action.”); see also Matt Roush, E-Mail Can Spell Trouble, So Think Before You Hit “Send,” CRAIN’S DETROIT BUSINESS, Sept. 20, 1999, at 16 (“E-mail . . . can be used to buttress claims of hostile work environment in a sexual harassment case.” [said a partner at a Detroit law firm]. . . . [Employers’ e-mail policies should make it clear that hacking and spreading hate or pornography can be firing offenses.”]; Risk Managing the E-Mail Exposure, MANAGING RISK, May 1996 (“Sex-Related E-Mail: HarassmentStats Waiting to Happen . . . . Sample E-Mail Policy . . . . Be especially careful to avoid messages that may be interpreted as sexual harassment.”); Carleen Hempel, You Are Being Watched, RALEIGH NEWS & OBSERVER, June 21, 1998, at E1 (“Porn left on screens can result in sexual harassment or hostile work environment suits.”); Erica Roberts, The Lawyer’s in the Mail, DATA COMM., Sept. 1, 1998 (“Here’s a message for corporate networkers: Develop an effective e-mail policy or get a good lawyer. Better yet, do both. Companies are being held liable for offensive e-mail.”); Companies Tighten Monitoring of Worker Web Use, TULSA WORLD, Nov. 22, 1998 (“The possibility of lengthy and expensive lawsuits stemming from claims of sexual harassment, discrimination and hostile-workplace environments has many firms rushing to put ironclad restrictions in place before a problem comes to light. . . . ‘The equation I would look at if I had to decide how to manage these resources is this: One sexual-harassment claim can cost millions” [quoting Eric Goldman, a leading cyberspace lawyer.”]; Sherry L. Katz-Crank, Avoid Misuse of
course, not to "bar downloading pornographic pictures and sending messages with derogatory remarks when they are severe or pervasive enough to create a hostile, abusive, or offensive work environment"; rather, the advice is to bar any such downloading and any such messages. 28

Likewise, an article called Preventing Internet-Based Sexual Harassment in the Workplace, published in a legal newspaper and aimed at employment lawyers, pointed out the risk of liability flowing from the aggregate of various employees' speech:

[If] sexual and sexist communications were allowed to flourish in the workplace, unchecked and uncensored, an employer may be liable for sexual harassment..... With the increasing popularity of the Internet in the workplace, employers face new risks of a hostile environment developing right under their electronic noses. One employee may be downloading pornographic pictures and using them as screen savers, or printing them at his printer, often located in a common area. Another may be receiving and distributing sex jokes through the employer's e-mail system. Yet another may be spending time surfing the X-rated territory of the World Wide Web, with his monitor open to be seen by passers-by.

For the benefit of its employees as well as to avoid liability, an employer should attempt to prevent the creation of a hostile environment. First, the employer can choose to use technology against technology. The same software sold to parents to block children's access to sex-related Web sites can be used by employers to control its employees' activities. 29

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28. See, e.g., Sample E-Mail Policy, 14 EMPLOY. COORDINATOR ¶ PM-10,133 (available on WESTLAW) ("Sample E-mail Policy. . . Anti-harassment policies applicable. Company policies prohibiting sexual or other harassment are applicable to E-mail and voice mail systems. Messages that contain foul, inappropriate, or offensive language, or those containing racial or ethnic slurs, or sexual innuendo, are prohibited."); Companies Need Policies to Govern Computer Use, FLORIDA TIMES-UNION (Jacksonville), May 1, 2000, at FB-11 ("[E]mployment attorney Alisa] Arnow explained: 'Education is the key to reducing exposure for liability for sexual harassment.' She suggests disseminating a written policy that includes the following: . . . E-mail communications that contain harassing, discriminatory, obscene, sexual or demeaning content are prohibited."); Judith N. Mott, IT's Newest Role: Web Watchdog, INTERNETWEEK, June 1, 1998 ("[I]ndustry insiders say companies are locating or inhibiting sex-related content. "Most companies have policies in place," says判断 lawyer Ruth Hill Bro]; Sharon Machlis, Employers: State Policies, Monitor Internet Use, COMPUTERWORLD, July 20, 1998, at 20 ("[T]he law on the Internet is still evolving, and it is clear that companies need to take a pro-active approach.")."

29. Hao-Nhien Vu, Preventing Internet-Based Sexual Harassment in the Workplace, L.A. DAILY J., Oct. 3, 1997, at 5; see also Cheryl Blackwell Bryson & Michelle Day, Workplace Surveillance Paves Legal, Ethical Issues, NA'T. L. J., Jan. 11, 1999, at B8 (saying that the Morgan Stanley lawsuits "may have been more easily resolved had the company monitored its e-mail system, removed 'offensive' material and disciplined employees for circulating these jokes").
The suggestion that filters are needed to avoid liability appears to have become conventional wisdom. A USA Today article, for instance, concludes that, "In this new hyper-technical world, companies have but one easy call: Block sex Web sites. They have no business application, can spur sexual harassment suits and can be largely stopped with software costing $1,000 to $5,000 a year."

Moreover, the suggestion includes not only Web filters, but also filters that censor internal e-mail in order to prevent e-mail containing legally punishable offensive speech. Praising this e-mail filter software, one securities firm official said that "it's a good idea... There's already been three cases this year where someone sent out a joke about Ebonics or with an X-rated picture, and they got sued for having a hostile work environment.

Likewise, a recent article titled Avoiding E-Mail Horror Stories: Policies and Filters the Best Defense pointed out that "many of the e-mail harassment cases could have been prevented if filters had been used because the e-mail would not have been sent." What's more, as employment experts are stressing, an employer may be liable even when offended employees merely hear about offensive speech that was said

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30. Del Jones, Balancing Ethics and Technology, USA TODAY, Apr. 27, 1998, at 1A; Tim Wilson, Monitoring Employee Web Usage Is Desirable and Necessary, INTERNETWEEK, Aug. 11, 1997, at 28 ("Another reason for monitoring Web activity is legal liability... [Y]our company may be held liable in a harassment suit because one employee was offended by a particular screensaver that another employee downloaded via the Net."); see also Jason Compton, Surfing on the Job: Is Personal Internet Use Really Bad for the Company?, Chi. TRIB., July 4, 1999, at C3 (quoting expert from George Mason University Institute of Computational Sciences and Informatics as saying that “sending inappropriate e-mails... open[s] the organization up to civil liability for harassment”).


Several brokerage houses are beta testing software, dubbed Assentor, which analyzes E-mail messages for everything from U.S. Securities and Exchange Commission violations to political correctness.

The product goes beyond looking for SEC violations. It also looks for possible sexual harassment or politically incorrect statements that might offend employees or customers... "It's a good idea," said one official from a securities firm who asked to remain anonymous. "There's already been three cases this year where someone sent out a joke about Ebonics or with an X-rated picture, and they got sued for having a hostile work environment."

See also Lee Copeland, VAR Helps Companies Survive the Age of E-Lawsuits, COMPUTER RESSELLER NEWS, Mar. 22, 1999; Anti-Harassment Software To Be Unveiled Today, NEWSBYTES, July 27, 1998, Sabrina Jones, Some Don't Get the Message, RALEIGH NEWS & OBSERVER, July 24, 1999, at D1 ("More employers are beginning to scan the content of e-mails to filter out profanity, pornography, ethnic jokes and other blue language that could land a company in court."); Diana Kunde, Watched Words, DALLAS MORNING NEWS, July 22, 1998, at 1D (saying that “[f]irms worried about lawsuits and armed with sophisticated surveillance tools are monitoring employee e-mail," and citing e-mail hostile environment harassment cases as the reasons); Paul McNamara, Keeping an Eye on E-Mail, NETWORK WORLD, Oct. 5, 1998, at 80 ("[E]mployees increasingly are using e-mail surveillance software to guard against sexual harassment lawsuits and the loss of trade secrets... [E]mployees caught red-handed by e-mail filters can and do lose their jobs, as bosses increasingly fear being accused of fostering a hostile work environment.").

only to consenting listeners. Thus, an article, entitled Downloading Liability: Employers Could Face Harassment Claims Arising from Internet Use, points out:

[By simply "surfing" the net employees or students can be creating an uncomfortable and hostile environment for their colleagues. This can occur whether sexually-oriented material is accidentally seen or deliberately pointed out.

Esther Nevarez, a sex-harassment educator for the New Jersey Division on Civil Rights, says that even if the employee is not directly exposed to the material, if others are sitting around watching it and laughing, etc., this "affects the esprit de corps in an office because it eliminates certain groups of people from participating." . . .

To avoid liability employers must take the necessary steps to prevent sexual harassment. These steps should include a strong management directive clearly forbidding it and regulating the use of computer equipment. . . .

Although a school [in context, referring to colleges and universities] by its very nature must provide for the guarantees of free speech as to classroom expression and assignment, the use of computers, [including] access to the Internet in open computer labs, should be appropriately regulated to avoid a hostile environment for offended students.

Not to take such preventive actions at the work place or school is to place the employer or school at risk. 33

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33. Consider Schwapp v. Town of Avon, a Second Circuit case holding that "twelve incidents of racially derogatory comments and acts" during a more than 20-month period were enough for a harassment claim, even though only four of the incidents occurred in the plaintiff's presence. "The district court," the Circuit held, "erred in failing to consider the eight . . . incidents that did not occur in Schwapp's presence," one of which was "made before Schwapp was hired." "[T]he fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment . . . ." Schwapp v. Town of Avon, 118 F.3d 106, 108, 111-12 (2d Cir. 1997); see Barbeta v. Chemlawn Services Corp., 609 F. Supp. 569, 572 (W.D.N.Y. 1987); Sims v. Montgomery County Comm'n, 766 F. Supp. 1052 (M.D. Ala. 1990):

The department argues that [some uses of the word "nigger"] . . . were made between white officers only. This argument not only misses the point, it reflects a total insensitivity to just how demeaning and insulting the term "nigger" is . . . when black officers hear second-hand that a white officer whom they know and should respect has used the term on the job. Indeed, with this argument, the department fails to appreciate that racial harassment in the department can never be adequately redressed until all officers, in both their private and public comments at work, come to decounce the term. But see Keenan v. Allan, 889 F. Supp. 1320, 1374-75, 1375 n.68 (E.D. Wash. 1995) (concluding that plaintiff "cannot rely on statements made to others, especially non-employees, to defeat summary judgment . . . . The Constitution is far better served by permitting unneighborliness, in the pursuit of free expression, than it is by outlawing it and rendering every working citizen mute."); Gleason v. Mesirow Financial, Inc., 1995 WL 561039, at *6 n.11 (N.D. Ill. Sept. 18) (noting that "hearing about comments directed toward others may still result in the plaintiff's experiencing a hostile work environment, but such secondhand observations have an emotional impact which ordinarily is less than the firsthand experiences of a direct target").


Recent news accounts indicate that male employees are rummaging through cyberspace for sexually explicit images. The viewing of these X-rated webpages in the workplace could create an uncomfortable and humiliating atmosphere for female colleagues.
This makes sense as a matter of substantive harassment law: For instance, if I (a Jew) know that my co-worker says virulently anti-Semitic things outside my presence, I might find it hard to work around him even if he's never rude to my face. Having to work around people who hate you, even politely hate you, might well create a "hostile, abusive, or offensive work environment." In the words of a California Court of Appeal case, "personal observation is not the only way that a person can perceive, and be affected by, harassing conduct in the workplace. One can also be affected by knowledge of that harassment." Thus, harassment law provides no safe harbor even when one is talking to co-workers who one knows won't be offended—any bigoted statements made at work may lead to harassment liability.

And employers seem to be getting the message—better to restrict any potentially actionable speech than to risk a lawsuit. Two Salomon Smith Barney executives were recently fired for accessing pornography and transmitting it between themselves. This likely wouldn't have happened but for Salomon's fear of legal liability, especially since executives' time is generally not closely monitored by management: In fact, one of the plaintiffs in an earlier sexual harassment lawsuit against Salomon has been quoted as saying, "They wouldn't have been fired four years ago, before our lawsuit. . . . [Before the lawsuit] male co-workers used fax machines to send pornography and passed around explicit materials. Nothing was ever done about it." Likewise, the New York Times recently fired twenty staffers for sending "inappropriate and offensive" e-mail, "citing a need to protect itself against liability for sexual harassment claims." 35

Based on civil rights case law, companies need to recognize and address this emerging issue before it reaches the courts.

Pornographic Material in the Workplace

There is a growing legal recognition that pornographic and obscene material in the workplace can constitute sexual harassment and violate state and federal civil rights laws [citing an EEOC policy and court decisions]. . . .

Visual Displays Alone Can be Harassment

. . . Pornography, explained the court [in Robinson v. Jacksonville Shipyards], "creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong, that they are welcome in the workplace only if they subvert their identities to the sexual stereotypes prevalent in that environment." . . .

. . . The Robinson court, as part of the order and judgment, directed the employer to implement the Shipyard's Sexual Harassment Policy, which included a prohibition against "reading or otherwise publicizing in the work environment materials that are in any way sexually revealing, sexually suggestive, sexually demeaning or pornographic." The implications for employers are that [c]ompanies should consider updating their harassment policies to prohibit the viewing of sexually explicit sites in the workplace and explore the installation of software to block employee access to "adult" material.

38. Michael Clark, 20 Office Workers in Norfolk Fired for Pornographic E-Mail Exchanges, NORFOLK VIRGINIAN-PILOT, Dec. 1, 1999, at A1; see also, e.g., 7 at 1st Union Fired for X-Rated E-Mail, AMERICAN BANKER, Sept. 1, 1999, at 5 (quoting company spokesperson as saying that the com-
The government, through threat of massive legal liability, is pressuring people to block access to material that it finds offensive. Obviously, private employers may, on their own, choose to restrict speech on their computers—just like private publishers may choose (and routinely do choose) not to publish profane, insulting, or politically offensive material, and just as Internet service providers may choose to restrict the material that they carry and to which they allow access. But when the law uses the threat of legal liability to pressure publishers or service providers into restricting speech on their property, the First Amendment is implicated. This is exactly what happens with harassment law.

True, the law isn't demanding a total ban: People whose Web access is blocked and whose e-mail is restricted because of the legal pressure can still read and write from home, though even from home they should not send e-mail to coworkers who might be offended, since a hostile environment at work may be created by speech sent from one employee's home e-mail address to another's. But the Communications Decency Act didn't impose a total ban, either—it would have still let people read and post what they wanted, so long as the material was difficult for minors to access, which probably meant that the sites would have had to charge for access using a credit card. The Supreme Court correctly concluded that this burden, even though it wasn't a total ban, violated the First Amendment; the same should go for the burden imposed on speech by harassment law.

What's more, harassment law is in many ways broader than the CDA; the CDA, at least, didn't purport to cover allegedly racist, sexist, or religiously insulting statements. The CDA would not have imposed liability for ebonics jokes (unless they contained highly explicit sexual or excretory references), or for most Clinton-Lewinsky jokes. And the one other body of law that refers to "indecent speech"—the regime governing television and radio broadcasting— tolerates such jokes, as long as they aren't extraordinarily graphic.

pany does not allow e-mail that "interferes with another person's work performance or creates an intimidating, offensive, or hostile environment," language clearly borrowed from the legal definition of workplace harassment: Janice C. Sipior & Burke T. Ward, The Dark Side of Employee Email, COMMUNICATIONS OF THE ACM, July 1, 1999, at 88 ("To minimize potential [harassment] liability, employers are beginning to take action against employees whose e-mail is deemed inappropriate. After sending coworkers several sexually explicit jokes, Michelle Murphy, a former customer service representative, was fired from [an insurance company]. The jokes included 'A Few Good Reasons Cookie Dough is Better Than Men' and 'Top 10 Reasons Why Trick-or-Treating Is Better Than Sex'.")

40. See, e.g., Inlekefer v. Turnage, 973 F.2d 773, 775 (9th Cir. 1992) (relying in part on a co-worker "telephoning [Inlekefer] at her home" to support a hostile environment claim); Berrie v. Zycad Corp., 399 N.W.2d 141, 143, 146 (Minn. Ct. App. 1987) (relying in part on a co-worker "calling [Berrie] at home" to conclude that plaintiff had made a prima facie showing of harassing behavior); cf. Bartlett v. United States, 835 F. Supp. 1246, 1262 (E.D. Wash. 1993) (finding that two instances of sexually suggestive conduct, including "[p]laintiff receiving a sexually explicit card at her home from a co-worker," did not rise to the level of sexual harassment, but not even hinting that the card was somehow categorically disqualified because it was received outside the workplace); Myer-Dupuis v. Thomson Newspapers, No. 2:95-CV-133 (W.D. Mich. May 9, 1996), reported in MICH. LAW. WKLY., May 27, 1996, at 12A. These cases are eminently consistent with the standard definition of harassment: It's quite plausible that speech by co-workers outside the workplace may create a hostile environment within the workplace.
41. See Volokh, supra note 15, at 143.
But harassment law is not limited to indecency; it operates to generally suppress speech, whether or not sexually explicit or highly profane, that is potentially offensive based on race, religion, sex, and so on. And the evidence of harassment law's chilling effect on protected speech is much more concrete than the speculative (though plausible) evidence on which the Court relied in *Reno v. ACLU*.

Harassment law goes where the CDA was forbidden to tread—and so far it hasn't been stopped.

I have detailed elsewhere why such application of harassment law is unconstitutional. Here, I want to make three observations, foreshadowed in the Introduction, about cyberspace speech, harassment law, and the Clinton Administration.

First, the constitutional status of harassment law's suppressing cyberspace speech and from private workplaces has little to do with any special attributes of cyberspace, but much to do with broader medium-independent free speech issues. True, the cyberspace examples may show harassment law's constitutional problems especially starkly, because the availability of filters makes it particularly easy for prudent employers to be pushed by the law into restricting speech. True, cyberspace speech is somewhat unusual in that many employers provide free cyberspace access, and therefore many people use cyberspace overwhelmingly from the workplace. But generally the issues are the same as they would be outside cyberspace; as another article, entitled *Workplaces Wage War on Internet Porn*, says (quoting Elizabeth du Fresne, an employment lawyer):

> We all know you can't hang up a Penthouse calendar in the workplace. We know you can't make a racist joke. It would be the same if you got either from the Internet.

The source is not the issue. It's that during the day, you got it and brought it into the workplace.

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42. On the other hand, sexually indecent speech will in general be potentially punishable by harassment law (though exorbitantly indecent speech might not be).

43. See Volokh, supra note 10.

44. 521 U.S. at 871-72.


46. Susana Barciela, *Workplaces Wage War on Internet Porn*, MIAMI HERALD, Aug. 4, 1996, at 1F (quoting Elizabeth du Fresne, an employment lawyer); see also Mark Grossman & Sarah Santoro, *Employee E-Mail Presents Problems*, LEGAL TIMES, June 14, 1999, at 21 ("[E]mployees who visit adult sites while at the office could be creating a 'hostile work environment' under sexual harassment law.... [P]rohibiting access to adult material on the Internet is an essential part of your [acceptable use policy]. ... Your [policy] should restrict the use of any type of offensive, harassing, fraudulent, defamatory or otherwise illegal language in e-mail."); Denise Grady, *Keeping Track of Employees' On-Line Voyeurism*, N.Y. TIMES, May 7, 1998, at G3 (advising the use of filters because “people who daily with Net pornography at work may leave a corporation open to sexual-harassment lawsuits by co-workers offended by the lewd images”); David Plotnikoff, *Online Overnight*, SACRAMENTO BEE, Nov. 22, 1998, at G1 (“The possibility of lengthy and expensive lawsuits stemming from claims of sexual harassment, discrimination and hostile-workplace environments has many firms rushing to put ironclad restrictions in place before a problem comes to light.”); Katy Robinson, *On-the-Job Surfers Cost Firms Big Bucks*, IDAHO STATESMAN, Feb. 23, 1998, at 1D (advising use of filters because “[t]here is increased corporate exposure to potential liability in harassment cases”); Wayne Tompkins, *More Companies Let Their Workers Surf Web at Work*, COURIER-JOURNAL (LOUISVILLE), June 13, 1999, at 1E ("An employee surfing an adult side... opens the door to
The medium “is not the issue”—the issue is whether, in a nation that’s supposedly protected by the First Amendment, racist jokes or Penthouse calendars may be made legally punishable.

Second, this section began with a case brought by the Clinton Administration’s EEOC, but the EEOC isn’t really taking the lead in this area. Many of the other cases cited above were filed by private plaintiffs and litigated under doctrines that were mostly developed by courts with fairly little help from the EEOC. Still other important cases in which harassment law has restricted free speech have been litigated under state harassment laws.47

Here, as elsewhere, the Clinton Administration has had no campaign focused on remodeling First Amendment law or suppressing some sort of speech. Rather, various government players and private litigants are trying to accomplish other policy goals—for instance, improving the culture of American business in a way that they hope will lead to a more just society, or simply winning a harassment claim against an ex-employer—and free speech defenses are only an incidental barrier to be overcome. If the Clinton Administration does substantively damage free speech through harassment law—or does substantially protect free speech against harassment law—this will happen through its judicial appointments, not its executive or legislative agenda.48

Third, it is doubtful that in 1980, when hostile environment harassment law was still in its infancy and was rarely applied to otherwise protected speech, the federal government would have claimed that the law requires that certain jokes be “eradicate[d].” Likewise, if the Internet had arisen in 1980, there would have at that time been little legal pressure to filter Web access and e-mail. Perhaps a highly ideological Administration might have tried to assert such claims, but I doubt that a 1980 version of the Clinton Administration would have.

But as radical proposals are accepted and become part of the status quo, the unthinkable or unlikely becomes eminently plausible. Harassment law started by going after face-to-face racial slurs; few people wanted to defend those on


48. So far, very few court decisions have confronted the tension between the freedom of speech and workplace harassment law; I list virtually all such cases at <http://www.law.ucla.edu/faculty/voikoh/harass/courts.htm>. About a dozen opinions have expressed some sympathy for the free speech defense, at least in some situations; a few have actually accepted it, in limited contexts; another half dozen or so opinions have rejected it in particular contexts, while leaving open the possibility that it may be valid in other cases; and several have generally rejected it out of hand. The great majority of the cases are from trial courts.
First Amendment grounds," though such a defense is not frivolous. Then it went after workplaces plastered with massive amounts of pornography. Then it went after sexist speech about women not belonging in the workplace. Then it went after religious proselytizing and sexually themed jokes.

This tendency was exacerbated by the fact that harassment law is enforced by dozens of government agencies and thousands of litigants all over the country. Even if some hesitate to bring claims based on speech that has not historically been seen as "harassing," others won't. And once these plaintiffs win, they set a precedent that others may use, and their victory redefines formerly unactionable speech as potential fodder for a harassment lawsuit.

Given all that, even a relatively middle-of-the-road Administration can now find it easy to sue over ebonics jokes, and many employers rightly fear that politically offensive e-mail or pornographic images glimpsed on co-workers' computers will lead to liability. Narrow speech restrictions do over time lead to broader ones.

III

THE HIDDEN CAMPUS SPEECH CODE

In late 1994, the Santa Rosa Junior College newspaper ran an advertisement containing a picture of the rear end of a woman in a bikini. A student, Lois Arata, thought the advertisement was sexist; when the newspaper refused to let her discuss this concern at a staff meeting, she organized a boycott of the newspaper and wrote to the College Trustees to express her objections.

This led to a hot debate in a chat room on SOLO, a college-run online bulletin board for students, and some of the debate contained personal attacks on Arata and on Jennifer Branham, a female newspaper staffer. Some of the messages referred to Arata and Branham using "anatomically explicit and sexually derog-
tory" terms.\textsuperscript{53} Arata and Branhm quickly learned of the messages (the two weren't chat room members themselves) and complained to the college, which put the journalism professor who had set up the bulletin board on administrative leave pending an investigation.

This suspension naturally intensified the controversy. Some of the new SOLO posts insulted Arata's personal appearance and said that she was protesting the ad because she was jealous. Others called Arata a "fascist" and a "feminazi fundamentalist."\textsuperscript{54} Branhm, the newspaper staffer, was especially criticized. At two newspaper staff meetings, many of her fellow staffers "directed angry remarks at [her] and blamed her for the journalism professor's absence." Another staff member produced a parody "lampoon[ing] the newspaper's coverage of Branhm's complaint, implying that the complaint was trivial."\textsuperscript{55}

I have no doubt that Arata and Branhm were genuinely upset by this speech; but, especially on a college campus, such speech, warts and all, seems to be the sort of "uninhibited, robust, and wide-open" debate\textsuperscript{56} that we must expect when people debate issues that are important to them. Likewise, I had thought people were free to criticize classmates who organize boycotts or file complaints against a newspaper, bulletin board, or a respected community figure, even if the criticisms are unfair, personal, and intemperate.\textsuperscript{57}

The U.S. Department of Education Office for Civil Rights, however, took a different view. The students' speech, the OCR concluded, created a "hostile educational environment" for Branhm based on her sex, and for Branhm and Arata based on their actions in complaining about the original posts.\textsuperscript{58} What about the First Amendment? Well, the OCR reasoned,

\begin{quote}
[s]tatutes prohibiting sexual harassment have been upheld against First Amendment challenges because speech in such cases has been considered indistinguishable from other illegal speech such as threats of violence or blackmail. \ldots The Supreme Court has repeatedly asserted that the First Amendment does not protect expression that is
\end{quote}

\textsuperscript{53} Letter from John E. Palomino, Regional Civil Rights Director of the United States Department of Education Office for Civil Rights, to Dr. Robert F. Agrilla, President of Santa Rosa Junior College, in case no. 09-93-2202, at 2 (June 23, 1994).
\textsuperscript{54} Id. at 12.
\textsuperscript{55} Id. at 13-14.
\textsuperscript{56} New York Times, Inc. v. Sullivan, 376 U.S. 254, 270 (1964); see also UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1179 (E.D. Wis. 1991) (specifically mentioning this in the context of a university ban on speech that creates a "hostile educational environment").
\textsuperscript{58} Letter, supra note 53, at 7, 13, 15. The OCR concluded that the seven original posts criticizing Arata weren't enough to create a hostile environment for her, but the four original posts about Branhm were enough, apparently because they were written by Branhm's fellow staffers, whom "she had considered \ldots to be her friends prior to her discovery of the message," and because as a result of the posts "she was unable to work effectively on the newspaper staff after that time." The OCR concluded that the posts that followed Arata's and Branhm's original harassment complaints were enough to create a hostile environment both for Arata and Branhm. The message was posted in a men-only chat room—because women students had requested women-only chat rooms, SOLO included men-only and women-only chat rooms as well as integrated ones, see MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 103 (1998)—but this factor didn't affect the OCR's harassment analysis.
invidious private discrimination. Thus, the First Amendment is not a bar to determining whether the messages . . . created a sexually hostile educational environment.\textsuperscript{59}

Moreover, the OCR had a plan to prevent such "illegal speech" in the future. "A new paragraph," the plan said, "shall be added to the [Santa Rosa Junior College] "Administrative Computing Procedures," which shall bar (among other things) online speech that "harass[es], denigrates or shows hostility or aversion toward an individual or group based on that person's gender, race, color, national origin or disability, and . . . has the purpose or effect of creating a hostile, intimidating or offensive educational environment." And this prohibition shall cover "epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts . . . that relate to race, color, national origin, gender, or disability," including "acts that purport to be 'jokes' or 'pranks,' but that are hostile or demeaning." This is of course at least as broad as many of the campus speech codes that were struck down in the late 1980s and early 1990s\textsuperscript{60}—again, harassment law goes where the government has before been told it may not tread. Rather cryptically, the proposed speech code ends with "Nothing contained herein shall be construed as violating any person's rights of expression set forth in the Equal Access Act or the First Amendment of the United States Constitution."\textsuperscript{60}

The College settled the case by paying the complainants $15,000 each, and by adopting the OCR's policy.\textsuperscript{61} At a college run by the state government, and under pressure from the federal government, cyberspace communications containing "negative stereotyping," "denigration," and "hostility or aversion" based on race or sex are now "illegal speech." And other administrators and legal experts agree; in the words of a New Jersey Law Journal article co-written by a computer science professor and a state court judge,

[although a school [in context, referring to colleges and universities] by its very nature must provide for the guarantees of free speech as to classroom expression and assignment, the use of computers, [and] access to the Internet in open computer labs, should be appropriately regulated to avoid a hostile environment for offended students. Not to take such preventive actions at the . . . school is to place the . . . school at risk.\textsuperscript{63}

\textsuperscript{59} Letter, supra note 53, at 7.


\textsuperscript{61} Letter, supra note 53, attachment 3 (Proposed Remedial Action Plan).

\textsuperscript{62} See <http://www.santarosa.edu/polman/2govern/2.13.p.htm> (visited Mar. 27, 2000); <http://grimmey.santarosa.edu/normal/pol.html> (visited Mar. 27, 2000); Agreement between Arata, Branham, and Humphrey and the Sonoma County Junior College District, Sept. 14, 1994; see also, e.g., North Georgia Tech, Computers: Acceptable Use Policy <http://www.clarkes.tec.ga.us/general/acceptuse.html> (visited Mar. 20, 2000) (imposing a similar online speech code); Policy and Procedures for Computer and Electronic Communication Access and Usage at Anne Arundel Community College §§ II, III.B <http://www.aacc.edu/ computerusage.htm> ("Students, faculty, staff and authorized guest users have a right to be free from electronic harassment by any member of the college community on the basis of their sex, sexual orientation, race, national origin, age, religion, handicap or veteran status. Creating a sexually and/or racially intimidating, hostile or offensive environment is prohibited by college policy. . . . [I]nappropriate use includes . . . [h]arassment of any type or form.").

\textsuperscript{63} Powals & Powals, supra note 34, at 33.
I think that such restrictions are unconstitutional, but again the details of this argument (and of the counterarguments) have been amply discussed elsewhere. Here I only want to suggest that this incident, like the incidents discussed in Part I, lends support to my three basic points.

First, the free speech issue here has little to do with the speech being in cyberspace. The Santa Rosa incidents started with online posts, but then went on to include a printed parody and oral comments at a newspaper staff meeting; the OCR correctly treated them similarly, because there was no real reason to treat them differently. And the hostile educational environment theory is already being used elsewhere to justify general speech codes that likewise apply equally to cyberspace speech and to other speech: Consider, for instance, a 1996 Kansas Attorney General Opinion, which argues that campus speech codes are constitutionally permissible, so long as they are written by analogy to hostile work environment law,66 or the Central Michigan University speech code, which prohibited any behavior creating a “hostile or offensive” educational environment and was struck down in Dambrot v. Central Michigan University.67

Second, the Clinton Administration is again mostly just tagging along for the ride. True, the Department of Education is pushing for speech restrictions. Besides the SOLO case, consider the Department of Education’s Sexual Harassment in Higher Education—From Conflict to Community, which lists “sexist statements and behavior that convey insulting, degrading, or sexist attitudes” as examples of “sexually harassing behavior.” Likewise, consider the OCR publication Sexual Harassment: It’s Not Academic, which states that even in universities, “displaying or distributing sexually explicit drawings, pictures and written materials” may constitute harassment if it is unwelcome and “severe, persistent, or pervasive” enough.

Still, the OCR is only doing what the Kansas Attorney General, Central Michigan University, and others are doing. Maybe a more ideological Administration might have tried to lead some sort of anti—“hate-speech” crusade, but that’s not what happened under Clinton. Rather, we have a specialist agency quietly trying to implement its own goal (protecting people against racist or sexist behavior) and seeing the First Amendment as largely an incidental barrier to be overcome if it’s easy to do so.

64. Kan. Att’y Gen. Op. 96-1, 1996 WL 46866; see also Rutgers, The University’s Policy Prohibiting Harassment <http://www.rci.rutgers.edu/~msgriff/webdoc5.htm> (effective Sept. 1, 1997) (transplanting workplace harassment definition into educational context, and giving “[d]isplay of offensive material or objects” and “[i]n some instances, innuendo or other suggestive, offensive or derogatory comments or jokes about sex, gender-specific traits” or “race, religion, color, national origin, ancestry, age, sex, sexual orientation, disability, marital or veteran status” as examples of potentially prohibited speech).
65. 55 F.3d 1177 (6th Cir. 1995); see also UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991).
Third, we see here how narrow speech restrictions beget broader ones. The OCR’s argument starts with the uncontroversial assertion that threats and blackmail are punishable as "illegal speech." Then comes the assertion, which the OCR treats as uncontroversial, that harassing speech in workplaces (the subject of the statutes to which the OCR must have been referring) is likewise illegal speech. Then it follows that such speech in colleges is illegal speech.

Similarly, consider the OCR’s argument that "The Supreme Court has repeatedly asserted that the First Amendment does not protect expression that is invidious private discrimination." It’s true that the Court held that the First Amendment does not protect discriminatory acts, such as refusals to admit people into a school, university, or club, refusals to promote people, or the selection of a victim for a physical assault. It’s also true that in R.A.V. v. City of St. Paul, the Court said in dictum that a "content-based subclass of a proscribable class of speech" such as "sexually derogatory ‘fighting words,’ among other words" might be punishable by harassment law, without discussing whether harassment law may constitutionally punish otherwise nonproscribable, constitutionally protected speech. But from here the OCR makes an analogical jump, inferring from cases discussing bans on conduct and on constitutionally unprotected speech (such as fighting words) that the government may punish as "illegal speech" any expression that may create a "hostile, abusive, or offensive" environment and that thus supposedly constitutes "invidious private discrimination."

Analogy is a powerful force in our legal system. Supporters of workplace harassment law regularly use existing restrictions—such as obscenity law and bans on fighting words—as justification. It’s hardly surprising that workplace harassment law would then itself be used as an analogy to justify educational harassment law.

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68. Letter, supra note 53, at 7.
70. 505 U.S. 377, 389 (1992) (emphasis added). The Court made clear that "proscribable" refers to the traditional First Amendment exceptions, such as obscenity, fighting words, and defamation. I discuss R.A.V. and its impact on the constitutional questions surrounding harassment law at <http://www.law.ucla.edu/faculty/volokh/harass/substanc.html#RAV> (visited Mar. 27, 2000), which elaborates on my earlier argument in Workplace Harassment, supra note 45, at 1829-32.
IV
HOSTILE PUBLIC ACCOMMODATIONS ENVIRONMENT LAW

Katherine Kavanagh used Goddard College as her Internet service provider; she had been a graduate student and a lecturer there, but no longer was—her relationship to the College was the same as yours might be to America Online.

The site http://www.kinkycards.com, which describes itself as “Electronic Greeting Cards Tastefully Designed for Friends and Lovers,” can be used to e-mail someone a sexually themed electronic greeting card. The site prompts for your choice of card, a text message to go with the card, your e-mail address, and the recipient’s e-mail address; it then sends the recipient an e-mail pointing to the selected greeting card, and sends you a confirmation e-mail. In June 1998, Alex Johnson—a Goddard employee who knew Kavanagh—apparently went to kinkycards.com and, pretending to be Kavanagh, sent two greeting cards to himself. Kavanagh got the confirmation e-mails, checked out the cards, became upset, and filed a complaint with the Vermont Human Rights Commission.

The Commission concluded that because these two e-mails “came into Ms. Kavanagh’s home and as a result [were] particularly threatening” and led her to close her e-mail account, they “created a hostile [public accommodations] environment.”72 And the Commission’s syllogisms on this score were, as a matter of statutory interpretation, impeccable:

1. Hostile environment harassment is a form of discrimination—the very theory under which harassing speech was first found to be punishable in employment.
2. Vermont law bans sex discrimination in places of public accommodations.73
3. Therefore, speech that creates a hostile environment in places of public accommodation and on Internet services is also discrimination, and also illegal.74
4. Internet access services are places of public accommodation no less than, say, restaurants, theaters, and libraries, which are quintessential examples of places of public accommodation.75 (Certainly if America Online, for instance, refused to sell accounts to blacks or

73. Id. at 4-5.
75. See Eugene Volokh, Freedom of Speech in Cyberspace from the Listener’s Perspective, 1996 U. Chi. LEGAL F. 377, 390-97 (discussing this in more detail); Stuart Biegel, Hostile Connections, L.A. DAILY J., Aug. 22, 1996, at 7 (endorsing such an approach, and suggesting that service providers may have a duty to restrict certain speech under hostile public accommodations environment law).
Jews or women, many people would argue that this discrimination is just as actionable as a restaurant refusing to sell food to these groups.]

(5) Goddard College is thus the proprietor of a place of public accommodation—an Internet access service. As such, it has a legal obligation to “take immediate and appropriate steps . . . reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again”—which is to say prevent offensive speech that’s severe or pervasive enough to create a hostile, abusive, or offensive environment based on race, religion, sex, and so on.

The Commission didn’t discuss the First Amendment implications of all this, apparently because the constitutional defense was not raised by Goddard College. After the Commission’s decision, the College settled the case on undisclosed terms.77

The speech involved in this case—a prank played on an acquaintance—may not seem that important, but the implications of importing hostile environment law into the public accommodations context are dramatic. We know hostile environment law goes far beyond pranks: If the Vermont Human Rights Commission is right, then posts to America Online discussion groups containing, say, ebonics jokes, sexist criticisms of a perceived troublemaker, or Clinton-Lewinsky jokes can also be illegal hostile public accommodations environment harassment. America Online will have a legal duty to delete these posts as soon as it gets a complaint, and perhaps even filter them out if it can (for instance, in discussion groups moderated by its employees or contractors).

Nor is the Vermont Human Rights Commission alone in accepting a hostile public accommodations environment theory:

• Several state statutes explicitly prohibit “communication of a sexual nature” that creates “an intimidating, hostile, or offensive . . . public accommodations environment.”78

76. Investigative Report, Kavanagh v. Goddard College, charge no. PA99-0002, at 14-16 (Mar. 10, 1999); see also Final Determination, Kavanagh (concluding there was probable cause to hold Goddard liable).

77. E-mail from UCLA School of Law librarian Kevin Gerson to me based on his conversation with the college’s lawyer, Mar. 16, 2000.

78. MICH. COMP. LAWS ANN. § 37.2103(i) (2000); see also MINN. STAT. ANN. § 363.01, subd. 41 (2000); MONT. ADMIN. R. 24.9.609(2)(c) (1999) (covering harassing speech based on race, religion, and other attributes, as well as sex); N.D. CENT. CODE § 14-02.4-01 to –02 (2000) (prohibiting discrimination in public accommodations and defining discrimination to include sexually harassing speech); COOK COUNTY, ILL. ord. no. 93-0-13 art. V(c); EAST LANSING, MI. CITY CODE §§ 1.120(1), 1.22(4), 1.27(3)(b) (covering harassing speech based on race, religion, and other attributes, as well as sex); CAMBRIDGE, MASS. HUMAN RIGHTS ORDINANCE § 2.76.120(N) (“It is an unlawful practice for any person to harass any person in or upon any public accommodation because of the race, color, sex, age, religious creed, disability, national origin or ancestry, sexual orientation, gender, marital status, family status, military status or source of income of such person, or attempt to do so.”); cf. Pennsylvania Human Rel. Comm’n publication (no date) (saying that Pennsylvania state discrimination law bans public accommodations harassment “on the basis of your race, color, religion, national origin, ancestry,
- Other statutes that speak only of discrimination have also been interpreted as barring harassment; for instance, a Wisconsin administrative agency has concluded that an overheard (though loud) discussion that used the word "nigger" created an illegal hostile public accommodations environment for black patrons, even though the statements weren't said to or about the patrons.  

- The Minnesota Supreme Court has held a health club liable for creating a hostile public accommodations environment, based on the club owners' "belittl[ing]" a patron's religious views (expressed in a book the patron had written) and "lectur[ing] her on fundamentalist Christian doctrine."

79. Bond v. Michael's Family Restaurant, Wisc. Labor & Indus. Rev. Comm'n, Case Nos. 9150755, 9151204 (Mar. 30, 1994). The case suggested that this theory may be limited only to speech by the restaurant owner, and a later case by the same agency made clear that the proprietor can be held liable for a hostile environment created by its patrons, so long as it is able to eject the patrons but declines to do so. Neldaughter v. Dickeyville Athletic Club, Wisc. Labor & Indus. Rev. Comm'n, Case No. 9132522 (May 24, 1994); see also D'Amico v. Commodities Exchange, Inc., 1997 N.Y. App. Div. LEXIS 506 (holding that proprietor of a place of public accommodations was responsible for harassment of a patron by fellow patrons).

See also Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995) (passenger sued airline based on racist statement made by a fellow passenger; court held that the airline context such state claims are preempted by federal aviation law, overruled by Charles v. TransWorld Airlines, 160 F.3d 1259 (9th Cir. 1998) (en banc) (holding that federal law does not preempt such claim); Hodges v. Washington Tennis Service Int'l, Inc., 870 F. Supp. 386 (D.D.C. 1994) (health club member sued club over racist statements made by employee; claim dismissed because health club took remedial action); In re Totem Taxi, Inc. v. New York State Human Rights Appeal Bd., 480 N.E.2d 1075 (N.Y. 1985) (passengers sued taxi company over racist statements and threats made by taxi driver; claim dismissed because company had taken reasonable steps to prevent such conduct); Comm'n on Human Rights & Opportunities v. Mills, case no. 9510408 (Aug. 5, 1998), CONN. LAW TRIB., Sept. 21, 1998 (recognizing hostile public accommodations environment cause of action); cf. King v. Greyhound Lines, Inc., 656 P.2d 349, 351 n.6 (Or. App. 1982) (customer sued bus company over racist statements made by an employee; court held for customer, but suggested that the law might not cover racist statements made by a fellow patron, and that employment harassment law might not be an apt analogy).

80. In re Minnesota by McClure v Sports & Health Club, Inc., 370 N.W.2d 844, 853 & n.16 (Minn. 1985); id. at 867 n.25, 872-75 n.40 (Peterson, J., dissenting); see also Department of Fair Emp. & Housing v. University of Cal., 1993 WL 726830, *14 (Cal. F.E.H.C. Nov. 18) (interpreting California public accommodations law as applying to sexual and racial harassment). But see Haney v University of Ill. No. 1993SP0431, 1994 WL 880359 (Ill. Hum. Rts. Comm'n Sept. 1) (holding that state public accommodations law does not bar the creation of a hostile environment, in large part because of free speech concerns).
The Massachusetts Commission Against Discrimination has filed a complaint claiming that it's illegal for bars to put up racially offensive displays. The case involved a seasonal display containing some stuffed monkeys, a large stuffed gorilla wearing a crown, a wooden figure holding a spear, and coconuts painted with black faces and large red lips; a bartender allegedly told some patrons that the display was meant to "mock[] the celebration of Black History Month," and "the crowned gorilla was intended as a derogatory reference to Martin Luther King, Jr." The bar owner settled the case by agreeing to issue an apology, to contribute money to cosponsor events "addressing the topic of the history and contributions of Irish Americans and African Americans," and to fire the bartender (whose statements the bar owner had earlier disavowed).  

The New Hampshire Human Relations Commission held an Elks Lodge liable for hostile public accommodations environment harassment on the grounds that its members made offensive statements to women who wanted to join the lodge. The Commission also held that the Lodge discriminated against the women when it failed to accept them as members, but it independently held the Lodge liable for its members' "derogatory and anti-female comments to them and about them to other members," and for the lodge's secretary writing in the Elks' newsletter "that the 'women's actions might destroy the lodge.'" The Elks had to pay a total of $64,000 in damages and fines, based largely on the offensive speech.  

An official publication of the South Dakota agency in charge of state antidiscrimination law says that "racist or sexist statements displayed in a public accommodation which affect a person's ability to use and enjoy those accommodations" are illegal.  

Maine Human Rights Commission regulations specifically state that "unwelcome comments, jokes, ... and other verbal ... conduct related to [physical or mental] handicap" that creates an "intimidating, hostile,  


83. South Dakota Dep't of Commerce & Reg. Div'n of Human Rights, Sexual Harassment (no date).
or offensive environment on [a] public conveyance” (a commercial bus, boat, airplane, and the like) may be actionable hostile public accommodations harassment. The owner of the conveyance may be held legally liable for allowing such speech by its patrons so long as it “knows or should have known” of the speech and fails to take “immediate and appropriate corrective action.”

- A Rhode Island state administrative agency found that the name “Sambo’s Restaurants” was offensive to blacks and therefore violated public accommodations laws.

- In one Chicago Commission on Human Relations case, a customer had told a group of waitresses that “if it were his restaurant, he would probably fire all of them”; when he turned around and walked away, a waitress said “I don’t know who he thinks he is, that holier than thou damn faggot.” The Commission concluded this speech constituted hostile public accommodations environment harassment based on sexual orientation.

- In another Chicago case, the Commission found that speaking to a customer in a “derogatory matter” because he was a ticket broker—someone who legally scalped tickets—constituted public accommodations harassment based on “source of income.”

- A recent Harvard Law Review Note argues that American Indian team names, including not just the oft-condemned Redskins but also the Braves, Blackhawks, Indians, and Chiefs, are illegal because they create a hostile public accommodations environment. The U.S. Department of Justice Civil Rights Division likewise began an investigation of a high school whose teams were named the Warriors and the Squaws, on the

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85. In re Urban League v. Sambo’s, No. 79 PRA 674-006/06 (R.I. Comm’n for Hum. Rts. Mar. 16, 1981). But see Sambo’s Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686 (6th Cir. 1981) (saying that use of Sambo’s name was protected by the First Amendment even if it was offensive to black customers); id. at 696 (Keith, J., dissenting) (arguing the contrary); Sambo’s v. City Council of City of Toledo, 466 F. Supp. 177 (N.D. Ohio 1979) (holding that it was unconstitutional for a city to deny sign permits to Sambo’s because of its name).


87. In re Ploch, No. 92-PA-46 (Chi. Comm’n Hum. Rel. Oct. 4, 1992). A Chicago city ordinance bans discrimination—and, according to the commission, therefore bans harassment—based on “lawful source of income.” Id.; cf. CONN. GEN. STAT. ANN. § 46a-64 (likewise banning discrimination in public accommodations based on “lawful source of income”); D.C. CODE. ANN. § 1-2515(a) (same); see also N.D. CENT. CODE ch. 14-02-4-14 (same for discrimination based on “status with respect to . . . public assistance”).

grounds that the district “allow[ed] the use of American Indian religious symbols at [the high school] that demean American Indian religious practices” and that because of the team name classmates would call male students “warriors” and female students “squaws,” which created a “racially hostile [educational] environment.” The district settled by renaming the Squaws to the presumably less Indian-sounding Lady Warriors.

- Three judges of New York’s highest court would have held a gift shop liable under public accommodations law for selling novelty gifts that contained Polish jokes.

- Government agencies have begun to use hostile public accommodations
  environment law as a tool to try to suppress political speech that they consider improper. Daley Union College in Chicago, for instance, sued a professors’ union, claiming that a caustic anti-affirmative-action article in the union newsletter created a “hostile public accommodations environment” at the college; the Chicago Commission on Human Relations rejected the claim, but only on the grounds that a college (unlike a restaurant or a theater) is not a place of public accommodations. Likewise, the
  Human Rights Director for the city of St. Paul, Minnesota filed a complaint against the St. Paul Press newspaper claiming that a racially themed cartoon created a hostile public accommodations environment, but eventually dropped it as a result of public pressure.

So far, hostile public accommodations environment claims have been rarer than hostile work environment claims, perhaps because the damages awards available under most public accommodations discrimination laws are much smaller than those available under employment discrimination law. Because the field is still in its infancy, many of the cases involve fact patterns that some agencies might find especially offensive, for instance speech that’s said to a particular patron rather than speech aimed at the clientele at large, or speech said by a public accommodation employee rather than by a fellow patron.

But there’s no reason to think courts will draw any such distinctions as a matter of law. They do not draw them in hostile work environment harassment law, where speech is punishable even if it’s said to a broad audience that includes many willing listeners as well as some unwilling ones, and even if it’s said

89. Letter from U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section to Mr. Bob Bowers, Superintendent, Buncombe County Public Schools, Jan. 22, 1999.
91. In re Board of Trustees and Cook County College Teachers Union, Case No. 97-PA-84, 1999 WL 543884 (Chi. Comm’n Hum. Rel. June 11).
by a co-worker rather than by a supervisor.\textsuperscript{93} Nor, as Part III shows, does the
government draw such distinctions in hostile educational environment law.

Again, I think that holding ISPs or their users liable for offensive speech
generally violates the First Amendment. Here, I can’t refer the reader to
published constitutional arguments on this topic—to my knowledge, no-one else
has written on the free speech issues raised by hostile public accommodations
environment law, and my work has only touched on the issue;\textsuperscript{94} still, I hope that
many readers will find this conclusion pretty self-evident.

I also hope that this conclusion reinforces the argument that hostile work
environment law likewise poses First Amendment problems. Some (though not
all) arguments made by defenders of the constitutionality of workplace harass-
ment law would apply equally to validate public accommodations harassment
law. Consider, for example, the arguments that harassment law is constitutional
because:

(1) speech in private workplaces is already subject to the workplace
owner’s control and thus the government should also be free to
suppress speech in those private workplaces;\textsuperscript{95}

(2) harassment law doesn’t involve state action because the speech is
restricted by the workplace owner, albeit under government pres-
sure;\textsuperscript{96}

(3) harassment law is content-neutral under the “secondary effects”
doctrine and is thus not subject to strict scrutiny;\textsuperscript{97}

(4) harassment law is merely part of a ban on discriminatory conduct
and thus isn’t really a speech restriction as such;\textsuperscript{98} and

(5) harassment law is constitutional because the First Amendment
doesn’t protect “invidious private discrimination.”\textsuperscript{99}

All these arguments, if they are valid, could apply equally to public accommo-
dations harassment claims. Either these arguments are sound in both the work-
place harassment context and the public accommodations harassment context—

\textsuperscript{93} Consider the joke e-mail cases, \textit{supra} text accompanying notes 17-24, and many others.

\textsuperscript{94} See Volokh, \textit{supra} note 75, at 414-21. available in updated form at http://www.law.ucla.edu/
faculty/volokh/harass/pubaccom.htm, which documents many of the cases I mention here.

\textsuperscript{95} See, e.g., Amy Horton, Comment, \textit{Of Supervision, Centerfolds, and Censorship: Sexual Harass-

(making this argument).

\textsuperscript{97} See \textit{id}.

\textsuperscript{98} See \textit{id}. at 1535; Suzanne G. Lieberman, \textit{Recent Development: Current Issues in Sexual Harass-
defense to hostile environment sexual harassment claims, however, omit several factors which deserve a
place in the analysis. These include the purposes and public policies underlying Title VII, which is to
punish discriminatory conduct, not speech.").

\textsuperscript{99} See the position of the Department of Education’s Office for Civil Rights, quoted above in the
text accompanying note 59.
in which case the government may indeed ban offensive speech on America Online—or they are unsound in both contexts.

Moreover, even if hostile public accommodations environment law didn’t exist, hostile work environment law would itself restrict speech in places of public accommodation: Most such places, after all, are also someone’s workplace.

Consider, for instance, restaurants. A patron wearing a Nazi uniform or a sexually suggestive T-shirt in a restaurant, or making racist or religiously offensive statements to his dinner companions, may well be quite offensive to other patrons. His speech may create such a “hostile public accommodations environment” that the offended customers may leave the restaurant and feel uncomfortable about ever returning. I hope, though, that most people would agree that the government may not use the threat of legal liability to pressure restaurant owners into banning such offensive speech in their restaurants. Speech in restaurants should be protected against government suppression.

But what if the complaint is brought by an offended waiter, under a workplace harassment theory? Employers, after all, are “responsible for the acts of [patrons]” that create a hostile environment for their employees, where the employer is told of the offensive conduct “and fails to take immediate and appropriate corrective action.” Hence the following advice to restaurant managers from an article in the Society for Human Resource Management’s HRMagazine, titled Harassment by Nonemployees: How Should Employers Respond?:

For mild forms of harassment, a polite request, such as simply asking the offending nonemployee to refrain from engaging in the harassing behavior can be used. An employee using this technique might say, “Would you please not tell religious jokes in my presence? I take my religion seriously and don’t appreciate the jokes.” [Or] “Would you please not tell ethnic jokes in the presence of our wait staff. Some of them find these jokes offensive. We appreciate your cooperation.”

The nonemployee harasser [must] be stopped from committing additional harassment, be told that the harassing conduct will not be tolerated, and be warned about sanctions for any future harassing conduct in the workplace.

Good advice as a matter of avoiding employer liability; but it means that, with or without public accommodations harassment law, the government is pressuring employers to impose “sanctions” on people for what they say to their dinner companions in a restaurant. Likewise, with or without educational harassment

101. 29 C.F.R. § 1604.11(c); see also Crist v. Focus Homes, Inc., 122 F.3d 1107 (8th Cir. 1997) (applying this approach); Folkerson v. Circus Circus Enterprises, Inc., 107 F.3d 754 (9th Cir. 1997) (same); David S. Warner, Note, Third-Party Sexual Harassment in the Workplace: An Examination of Client Control, 12 HOFSTRA LAB. L.J. 361 (1995).
law, speech on campus that offends employees—such as faculty, teaching assistants, or staff—may lead to workplace harassment liability.

To return to this article’s three recurring points: First, whether the government may punish speech that is severe or pervasive enough to create an offensive online environment turns primarily on general free speech doctrine, not on some specific rules of “cyberspace law.” True, there are some possible cyberspace-related twists; for instance, cyberspace speech may be read in people’s homes, and not just heard in restaurants, health clubs, or sports arenas. But these shouldn’t affect the basic question, which is whether the government may suppress speech that expresses ideas offensive to certain groups in order to make life easier or more equal for members of those groups.

Second, the Clinton Administration is almost entirely absent from these cases. Again we have a body of law that, though ultimately derived from federal employment discrimination precedents, is now enforced by state and local government agencies and private litigants nationwide. The speech restriction will progress with the Administration or without it. Likewise, even if the Administration deliberately decided to refrain from suing based on harassing speech in places of public accommodation, its judgment wouldn’t have been terribly influential (though it might have carried some persuasive weight). The influence of the Administration will eventually be felt through the decisions of the judges it appoints, not through its legislative or executive agenda.

Finally, we again see how narrower speech restrictions grow into broader ones. Hostile work environment law leads to hostile educational environment law and then to hostile public accommodation environment law. The slide may not be inevitable: One can imagine courts drawing a line between, say, hostile work environment law on one side and hostile educational and public accommodations environment law on the other. Still, legal analogies have force in a system built on such analogies. So far quite a few agencies have been willing to endorse the broadening of prohibitions on harassing speech; it remains to be seen how many more will join them, and how far the courts will let them go.

V

Harassment by Library Internet Access

In 1997, the Loudoun County Public Library made the news by installing filters on all library computers. Such policies are usually justified by the desire to

103. See, e.g., Nat Hentoff, Sexual Harassment by Francisco Goya, WASH. POST, Dec. 27, 1991, at A21 (describing complaint by a Penn State professor that a copy of Goya’s painting Naked Maja hanging in her classroom constituted sexual harassment: “Whether it was a Playboy centerfold or a Goya,” the professor said, “what I am discussing is that it’s a nude picture of a woman which encourages males to make remarks about body parts.”); Nat Hentoff, Trivializing Sexual Harassment, WASH. POST, Jan. 11, 1992, at A19 (reporting that school management took the painting down, citing fear of workplace harassment liability as one reason for its action).

block children from accessing sexually explicit material, but here the stated rationale—reflected in the policy's title, *Policy on Internet Sexual Harassment*—was quite different:

1. Title VII of the Civil Rights Act prohibits sex discrimination. Library pornography can create a sexually-hostile environment for patrons or staff... Permitting pornographic displays may constitute unlawful sex discrimination in violation of Title VII of the Civil Rights Act. This policy seeks to prevent internet sexual harassment [by installing software that blocks sexually explicit material, including "soft core pornography"].

The policy's author, library trustee (and lawyer) Dick Black, echoed this:

The courts have said, for example, that someone can have materials—racist materials dealing with the Ku Klux Klan—in their home. However, the courts have upheld very strict limitations on having that in the workplace because of the racially discriminatory environment.

Same thing applies here. People can do certain things in the privacy of their own homes that they cannot do in the workplace.

Now this is not limited strictly to libraries. But the courts have said that whether it's a public state facility or whether it's a manufacturing plant, people cannot deprive women of their equal access to those facilities and their equal rights to employment through sexual harassment.

Nor is this an isolated incident; other libraries throughout the country have been doing the same thing, and offering the same justification. In the words of one article,
Blue movie night in the computer lab [where users accessed sexually explicit material online] was not the end of the world as we know it. Left unaddressed, however, it could have become a problem of sexual harassment, with charges that such usage created an uncomfortable situation for many library users—not to mention library staff. Linked to other instances of insensitive, arguably sexist behavior, it could contribute to charges that a hostile environment existed—and could become evidence in a lawsuit.

... Playboy pinups in work areas invite sexual harassment suits. Why should the Internet be any different? 108

Again we see how some speech restrictions are used as analogies to support other ones, though here the analogy is not from workplaces to colleges or to service providers but the much more direct analogy from "normal" workplaces to libraries as workplaces. "Racist materials dealing with the Ku Klux Klan" are limited in workplaces generally; "same thing applies here" in libraries. Sexually suggestive materials are illegal in "a manufacturing plant"; same goes for libraries. "Playboy pinups in work areas invite sexual harassment suits. Why should the Internet be any different?"

The library case is different in an important way from the other three areas described above. Here, a government agency is acting as proprietor to restrict what is done with its own property, and thus may have far more authority than it would if it were acting as sovereign. 109 It might be legitimate for the library board members as managers to try to shield library users or employees from involuntary exposure to offensive material, or even to entirely refuse to participate in disseminating material that they think offensive and harmful. Whether a government-owned library may install filters, quite apart from the harassment issues, remains an unsettled matter.

But the harassment question is nonetheless significant, because if libraries must filter to prevent harassment claims, then this rationale extends equally to private libraries and other private Internet access centers. A publicly accessible
library at Duke University, for instance, would be obligated by state and federal law to install filters to prevent workplace harassment complaints by librarians and public accommodation harassment complaints by patrons;\textsuperscript{110} likewise for an Internet cafe. Here, the government would indeed be acting as sovereign controlling what private institutions do: Even if a private library wanted to provide unlimited access, it would face legal liability for doing so.

Judge Leonie Brinkema's decision in \textit{Mainstream Loudoun v. Board of Trustees of the Loudoun County Library}\textsuperscript{111} struck an early blow against library Internet filtering. Such filtering, the decision held, violated the First Amendment (at least when it wasn't limited to child-only computers), notwithstanding the potential risk of harassment liability.

One of Judge Brinkema's rationales—that the defendants could point to very few harassment complaints that were brought as a result of patrons accessing sexually explicit materials—isn't promising for the long term, because such complaints are now piling in. For instance, seven librarians recently filed an EEOC complaint based on what they say is "repeated exposure to sexually explicit materials," and an environment "which is increasingly permeated by [pornographic] images on computer screens, [and] is also barraged by hard copies of the same, created on Library provided printers."\textsuperscript{112} Forty-seven of the 140 or so library employees signed a letter saying, in response to a library patron's complaint about other patrons accessing sexually explicit material, that "Every day we, too, are subjected to pornography left (sometimes intentionally) on the screens and in the printers. We do not like it either. We feel harassed and intimidated by having to work in a public environment where we might, at any moment, be exposed to degrading or pornographic pictures."\textsuperscript{113}

In response the library enacted a new policy that, among other things, bars even adult patrons from accessing material that is "harmful to minors"—a category of speech that includes material that's constitutionally protected as to adults—and also from otherwise "[e]ngag[ing] in any activity that . . . creates an intimidating or hostile environment." "The Library," the policy says, "is committed to providing its employees and patrons with an environment that is free from all forms of harassment, including sexual harassment, and prohibiting the display of obscene material, child pornography, and material that is harmful to minors."\textsuperscript{114}

\begin{footnotesize}
\begin{enumerate}
\item Libraries are covered by public accommodation laws. See, e.g., \textit{ARIZ. REV. STAT.} \textsection 41-1492 subd. 9(h) (West 1999); \textit{COLO. REV. STAT. ANN.} \textsection 24-34-601(1) (West 1990); \textit{ME. REV. STAT. ANN. tit. 5, \textsection 4555 subd. 8(H)} (West 1999).
\item 24 F. Supp. 2d 552 (E.D. Va. 1998).
\item Charge of Discrimination filed with the EEOC, Adamson v. Minneapolis Public Library; Letter from Robert S. Halagan (plaintiffs' lawyer) to the Minneapolis Public Library, May 2, 2000, at 2.
\item \textit{Letters from Readers, STAR TRIB.} (Minneapolis), Feb. 12, 2000, at 18A.
\item Minneapolis Public Library, \textit{Internet Use Guidelines}. Policy #1130 (adopted May 17, 2000). available at <http://www.mpls.lib.mn.us/policy.htm>; see also Jeremy Olson, Library Sets New Policy for Internet, \textit{OMAHA WORLD-HERALD}, Mar. 17, 2000, at 15 (describing a public library policy that bans all access to "obscene or sexually explicit materials"); Jeremy Olson, \textit{Library May Expand Online Com-
Nor is the Minneapolis incident an isolated one; librarians in other places have likewise complained about patrons accessing material that they feel is sexually harassing. Judge Brinkema’s argument that “[s]ignificantly, defendant has not pointed to a single incident in which a library employee or patron has complained that material being accessed on the Internet was harassing or created a hostile environment” thus seems to be no longer available. If that were the only argument in support of her decision, we would face the specter of harassment law being used to punish private and public libraries and Internet cafes that allow unfiltered access.

The judge’s second justification—that the library could avoid harassment liability by placing computers in places where passers-by couldn’t routinely see them, or installing privacy screens that make the screen visible only from the place where the user is sitting—seems, however, to be more robust. Such alternative solutions would not be perfect; a library patron may sit down to use a terminal and find that a pornographic site had been left on the screen by a previous patron, someone who’s accessing a pornographic site might have technical trouble and ask a librarian for help, privacy screens may be imperfect, and patrons or librarians may see offensive material in a printer output bin. But courts might conclude that these situations are rare enough that when the proper measures are taken, technology does let libraries largely avoid the risk of harassment liability and at the same time provide unfiltered access.

Here, then, might be a case where the speech being in cyberspace does make a difference. To begin with, in the pre-cyberspace world, libraries generally did not stock illustrated pornography. Because buying and shelving books cost money, library decisions not to get a certain book were practically and perhaps even doctrinally immune from review, and to my knowledge few libraries decided to spend their funds on Hustler. They may have stocked a few “legitimate” books that included sexually explicit pictures, and it was possible that a

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115. See, e.g., Ann Donnelly, Porn Access Unbearable for Some on Library Staff, THE COLUMBIAN, July 26, 1998, at B13; see also David Burt (of the Family Research Council), Dangerous Access, 2000 Edition: Uncovering Internet Pornography in America’s Libraries, at 17-19 (reporting several such complaints), available at <http://www.frc.org/misc/bl063.pdf>. David Burt is a partisan in these debates, but I have no reason to doubt that the people whom he quotes were indeed genuinely offended by being involuntarily exposed to sexually themed material.

116. 24 F. Supp. 2d at 556.

117. This risk might be diminished, though not eliminated, by having the computer reset itself when it has been idle for a certain length of time.

118. “The black polarized privacy screens on some library computers don’t prevent anyone directly in front of the computer from catching a full view.” Paul Levy, Cyberporn Poses Tough Questions for Libraries, STAR TRIB. (Minneapolis), Feb. 22, 2000, at 1A.

119. See Charge of Discrimination, supra note 112.

120. See Board of Ed. v. Pico, 457 U.S. 553, 862, 871-72 (1982) (plurality) (acknowledging that the Court’s holding, which limited the power of libraries to remove books from the shelves, might not apply to decisions not to buy the books to begin with).
patron might leave such a book open on the table, but I suspect this happened quite rarely.

The "hostile environment" concern arose largely because libraries that provide Internet access need not decide on an item-by-item basis what cyberspace material to "stock" and what not to stock. Pornography is thus by default included in any Internet-connected library's "cyber-collection," which means that most libraries now for the first time face the prospect of being major access points for pornography. And this factual change also potentially changes the doctrinal question: The Pico plurality drew a distinction between "choos[ing] [which] books to add to the libraries" and "discretion to remove books," and while refusal to buy Hustler falls in the first category, the decision to block the Hustler site seems to fall in the second.

On the other side of the ledger, computer technology makes it easier to decrease the risk that offended patrons or librarians will inadvertently see offensive material. Privacy screens on computers generally ensure that casual passers-by won't see what's going on. Any attempts to control offensive print materials (once the library had bought them) would probably be much less effective.

The Clinton Administration has been involved in two ways in library cyberspace issues. The first, and fairly slight, involvement is quite recent, and limited to the question of shielding children rather than protecting potentially offended bystanders. The Communications Act of 1996 authorizes the Federal Communication Commission to give subsidies to public schools and libraries for wiring and for discounted Internet connections, and a pending bill in Congress would require that subsidy recipients install filtering software. In April 1999, the Department of Commerce urged the FCC to take a different view:

[T]he federal government should not require that schools and libraries adopt any particular type of technology such as filtering or blocking, but rather adopt "user policies" that offer parents reasonable assurances that safeguards will be in place that permit them to have educational experiences consistent with their values when using the Internet.

How exactly these "user policies" are to be enforced is unclear, but at least the Administration seems to think the federal government should not be requiring filters.

The second involvement is much more important, though doubtless not explicitly planned by the Administration. In 1993, President Clinton, on the advice of Democratic Senator Charles Robb, appointed Judge Brinkema to the

121. Id. at 871.
federal district court. Judge Brinkema’s *Loudoun* opinion has been very influential. Newspapers have widely reported it, it is the only opinion that has been published on this subject, and the Library Board decided not to appeal it. Of course, the opinion is not binding precedent for other libraries, but its existence is a powerful political and prudential argument against libraries implementing similarly broad filtering software. Since the decision, the anti-pornography forces seem to have shifted primarily (though not entirely, as the Minneapolis incident shows) to asking for filtering on library computers used by children, a policy whose constitutionality Judge Brinkema’s opinion didn’t resolve.

The *Loudoun* case was genuinely close; it’s quite plausible to argue that the government acting as library manager should have considerable power to select what to allow inside the library. A different judge may have decided the matter quite differently, and the precedent would have come out the other way. Such a pro-filtering decision would probably have been appealed—the opponents of filtering policies seem more aggressive in this respect than pro-filtering libraries are—so eventually there would have been at least a few court of appeals cases on the subject, rather than a single district judge’s decision. Still, the ultimate result might have been different.

Finally, here we see a judge stopping or at least delaying the expansion of harassment law, though based on a peculiar factual circumstance: the technical ease, not present in most cases, of protecting speech while at the same time largely preventing harassment claims. What the result would have been in a different situation—for instance, given a harassment claim brought by a patron or a librarian based on a painting of a nude displayed in a private library foyer—is hard to tell. (This hypothetical is hardly implausible, as the incidents


127. Note that this may not be an option in the traditional employment context I describe in Part I. Privacy screens may make it impossible for people to show material on their computers to co-workers—something that many employees sometimes have to do as part of their jobs (if only to show technical support a problem that they’re encountering when using the computer). Likewise, office layouts may prevent many computer screens from being reoriented to prevent passers-by from seeing them.

128. The judge did not rest her decision on the theory—which some people have urged—that libraries are somehow different from other workplaces (because they are somehow more devoted to First Amendment activities), and that speech which may be actionable sexual harassment in other places is not actionable in libraries. In any event, such a distinction would probably not work: One cannot say that librarians have “assumed the risk” of encountering offensive material by going to work in a library, because the right to be free from sexual harassment can’t be waived this way, *see* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (noting that “[i]n this case there can be no prospective waiver of..."
an employee's rights under Title VII'), and many librarians started working long before libraries started providing Internet access and thus created the risk of exposure to Internet pornography.

129. See, e.g., supra note 103 (discussing the complaint brought based on a copy of Goya's Naked Maja hanging in a classroom); Vogel, Kelly, Knutson, Weir, Bye & Humke, Ltd. [a law firm], Political Correctness Gone Too Far or Serious Concern for Employers?, NORTH DAKOTA EMP. LAW LETTER, Nov. 1997 ("[The Goya incident illustrates that workplace conduct—and, yes, even paintings—that once may have been considered acceptable may no longer be"); this is said in an article aimed at "provid[ing] a basic definition of sexual harassment and outline[ing] steps employers can take to prevent harassment in the workplace and avoid liability if harassment occurs."); Memorandum from Mary Harding, Affirmative Action Officer, Lower Columbia College, Sept. 25, 1995:

During the past few months, complaints have been filed with me regarding various forms of art posted on campus and the sexual harassment felt by members of the campus community when they view the art. In order to provide a work and learning atmosphere free from harassment and intimidation, and to protect the college and all employees from costly legal defense resulting from sexual harassment and discrimination claims, I remind you that it is college policy that employees and students shall be provided a place to work and study that is absent an intimidating, hostile, or offensive environment. . . . Staff members and students will be expected to comply with [the affirmative action officer's] request or with the president's decision regarding removal of bothersome pieces of art in the interest of protecting the college and the accused employee or student from claims of discrimination and harassment, and in the interest of providing a harassment-free working and learning environment.

Likewise, when a City Hall employee in Murfreesboro, Tennessee complained about an impressionist painting hanging in a hallway depicting a partly naked woman, the City Attorney had it taken down, saying,

I feel more comfortable seeing the painting on a canvas or in a library than under the First Amendment. . . .

Jennifer Goode, It's Art vs. Sexual Harassment, TENNESSEAN, Mar. 1, 1996, at 1A.

Though the complaint probably couldn't win a sexual harassment suit over the picture, Murfreesboro still has to protect itself against future lawsuits, [the City Attorney] said. If the city did nothing about the complaint about the painting or other complaints of harassment, a court could conclude the city was ignoring the rights of its female employees.

Catherine Trevison, Court to Decide If Nude Is Naughty, TENNESSEAN, Feb. 13, 1997, at 1B. See Eugene Volokh, Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment, 17 BERKELEY J. EMP. LABOR L. 305, 304 (1996), or <http://www.law.ucla.edu/faculty/volokh/harass/data/painting.htm>, for a photograph of the painting. A federal district court held that the government's taking down the painting violated the First Amendment, Henderson v. City of Murfreesboro, 960 F. Supp. 1292 (M.D. Tenn. 1997), but the city attorney's response to that judgment is instructive:

"Sexual harassment is a very dangerous area for any employer today. You really can't be too cautious," [City Attorney Thomas L.] Reed said. "This judgment was for $1 and costs. A sexual harassment judgment usually has six zeros behind it. Quite frankly, I'm an advocate of the First Amendment, but a very conservative lawyer when it comes to giving advice.

Sharon H. Fitzgerald, Free Speech Wins, TENNESSEE TOWN & CITY, Apr. 14, 1997, at 1; see also PEOPLE FOR THE AMERICAN WAY, ARTISTIC FREEDOM UNDER ATTACK 29, 59, 92, 156, 214, 221 (1994) (listing eight other instances where employees claimed that public art involving nudity constituted workplace harassment; in each case the work was taken down—most employers would much rather do this than litigate—though in two instances it was later reinstalled); see also id. at 111, 208 (describing two more incidents, in which the complaints did not specifically refer to harassment but city officials nonetheless concluded that the work might be harassing); L.A. TIMES, Oct. 31, 1986, S 1, at 2 (describing how Los Angeles county officials objected that a sculpture of a naked man displayed in the County Hall of Justice and Records "might interfere with programs on sexual harassment," and asked the county Arts Council to cover it); Art of Birth Raises Hurdles, VANCOUVER SUN, May 25, 1992 (describing how critics condemned as "a form of sexual harassment" a painting in a city hill gallery depicting a woman who symbolizes Mother Earth giving birth to a child poisoned by chemicals); Mont. Hum.
VI

CONCLUSION

Forty years after the end of the Eisenhower Administration, what can we say about how it affected the freedom of speech? Not that much, probably, except for the way the Eisenhower appointees to the Supreme Court (and perhaps to lower courts) affected Free Speech Clause case law. Free speech concepts may have changed during the Eisenhower years, but little of that change comes from the legislative or executive agenda of the Eisenhower White House. This is true of many presidencies, and it will probably be true of the Clinton Administration.

Likewise, what can we say now about freedom of speech in movies, on telephones, via faxes, on television, in cyberspace, and in other media? By and large, the answer is that free speech jurisprudence has evolved to be comparatively medium-independent. Early holdings that movies are constitutionally unprotected have been reversed. In its very first cyberspace case, the Court refused to create a medium-specific test. While broadcast television and radio are still subject to different rules than other media, even this traditional distinction is now somewhat precarious. Medium does matter with regard to content-neutral distinctions that are justified by noncommunicative concerns, because different media raise different noncommunicative concerns—soundtrucks are loud, billboards block the view, cable television systems are often monopolies. As to content-based distinctions, though, medium is not terribly relevant.

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130. Clarissa Rentschler, Model Equal Employment Opportunity Policy: A Guide for Employers (no date) (“Examples of prohibited sexual harassment include, but are not limited to: . . . . Displays of magazines, books, or pictures with a sexual connotation”); Nat Hentoff, A “Pinup” of His Wife, WASH. POST, June 5, 1993, at A21 (describing how a harassment complaint was filed at the University of Nebraska at Lincoln against a graduate student who had on his desk a 5” x 7” photograph of his wife in a bikini, the employer ordered that the photo be removed).

131. Of course all this is only to be expected. When the law tries to root out “pornography,” especially using a definition as vague as “speech severe or pervasive enough to create a hostile or offensive environment for a reasonable person based on sex,” attacks on legitimate art are sure to follow. Finally, note that harassment law’s ban of sexually suggestive materials is not at all limited to nudity. See, e.g., In re Grievance of Butler, 697 A.2d 659, 664 (Vt. 1997) (concluding that “a poster . . . of a woman in a skimpy bikini” could count as harassment, because “the posting or display of any sexually oriented materials in common areas that tend to denigrate or depict women as sexual objects may serve as evidence of a hostile environment”).


132. See, e.g., Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994) (referring to “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the case of the other cases”) acknowledging that “courts and commentators have criticized the scarcity rationale,” and declining to extend it to cable television). Compare Denver Area Educ. Telecom. Consortium v. FCC, 518 U.S. 727 (1996) (plurality) (upholding a cable television speech restriction by analogy to FCC v. Pacifica Foundation, 438 U.S. 726 (1978), a case that rests on the special character of over-the-air broadcasting) with id. at 805 (Kennedy, J., joined by Ginsburg, J., concurring in part and dissenting in part) (insisting that strict scrutiny, not the lower standard applicable to over-the-air broadcasting, ought to be applied) and id. at 813 (Thomas, J., joined by Scalia, J., and Rehnquist, C.J., concurring in part and dissenting in part) (same).
But the basic concepts underlying the free speech exceptions remain important for decades. For instance, incitement, bad tendency, commercial speech, obscenity, libel, and now speech that creates a hostile environment are powerful concepts that can mold free speech thinking over a wide range of cases. Some of these free speech exceptions are eventually discarded (for instance, bad tendency). Others are changed (commercial speech, obscenity, libel), though many of the principles underlying them remain. Still others, such as "speech that creates a hostile environment," spread from their roots in narrow situations where they seem proper and even morally imperative into considerably broader areas, and can provide indirect precedential support for even broader restrictions.

Free speech law certainly must recognize exceptions to the core First Amendment principle that the government acting as sovereign generally may not restrict speech because of its content. But before endorsing any such exception, we should consider it carefully, and try to come up with principles that can limit its scope. The risk of speech restrictions growing by analogy in a legal system built on analogy is very real. And so far, the harassing speech exception has not gotten the judicial and academic scrutiny that it deserves, and that is needed to properly cabin the exception and to prevent its unchecked growth.