Free Speech 101: The Assault on the First Amendment on College Campuses
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Frederick M. Lawrence*
Secretary and CEO, The Phi Beta Kappa Society
Senior Research Scholar Yale Law School
Visiting Professor of Law, Georgetown University Law Center
Visiting Professor of Public Policy, McCourt School of Public Policy, Georgetown Univ.

At times of great historical moment in our society, we tend to look back to our founding over two and a quarter centuries ago. We look not only to the founding of our governmental institutions but also to the institutions that form the basis of our civil society as well. De Tocqueville famously observed that associations, those institutions that play an intermediate and intermediary role between citizens and the state, are critical to the life of civil society, and thus to a healthy and thriving democracy. Phi Beta Kappa, founded during the winter of 1776 in the cauldron of the American Revolution, is one such association. The iconic founding story of the five William & Mary students who gathered at the Raleigh Tavern in Williamsburg, Virginia inspires still – they were committed to the pursuit of liberal education, intellectual fellowship, and free inquiry. These values capture the tension that exists on campuses across America today – how to pursue liberal, rational open learning, and at the same time celebrate a spirit of academic community. In short, to exercise free expression and maintain civility.

It is not easy and it was not meant to be easy to strike this balance, or better put, to live with this tension. I am motivated by the very motto from whose initials Phi Beta

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Kappa draws its name: *Philosophia Biou Cybernetes*. We ordinarily translate this as "love of learning is the guide of life." We may draw a more evocative translation from the literary definition of *Cybernetes* as "helmsman" or "pilot". A "guide" takes a path that already exists. The "helmsman" steers a course, sometimes through uncharted waters. We find ourselves today in uncharted waters indeed, and choppy ones at that. It is the love of learning that will be our helm as we find our way.

In exploring the contours of free expression on our campuses, I begin with an exploration of the boundaries of free speech, especially in the troubling context of hate speech. I will argue that this boundary must be expansive, and that difficult, challenging, and, even hateful speech, ought to be protected under our system of free expression. This view is largely consonant with accepted First Amendment doctrine. Because I refer to our campuses generally, both public and private, this testimony is not restricted to a "First Amendment analysis" per se. Rather, my concern is the nature and limits of expression on all campuses.

I will address two issues. First, where is the limit on expression? Where does protected, hateful speech cross over into being a prohibited hate crime? On our campuses, this question is not typically about criminal behavior per se. But the question is the same: when does behavior cross over from being protected, however hateful, and become the proper subject of disciplinary action or even expulsion. In making this distinction, it is tempting to draw the line between "speech" and "conduct"; "speech" is protected and conduct may be proscribed. The distinction is tempting, but it will not hold up to careful analysis. Instead, the division between that which we should protect and that which we may prohibit should be based on the intent of the actor. When we do so, we see that

certain verbal behavior – think of it as verbal assault – will in fact *not* fall into the category of protected hate speech, but rather into the category of punishable hate crimes.

The second issue I will address concerns hateful speech that is in fact protected. To say that it is protected, however, is not the end of the discussion. We must still ask: what is the proper response to such speech? This will bring us to the compelling topic with which America generally, and academia particularly, is preoccupied today: the relationship between free expression and civility in the public square.

Three Stories to Set the Context

I begin with three stories – from over the past two decades:

- In the spring of 2001, I gave a paper at University College London about hate speech. I was a Senior Research Fellow at UCL at the time, studying racial violence law in the UK. A UCL colleague, puzzled at the depth of attention with which I dissected an actor's intent in determining whether expressive conduct could be prohibited, posed the following hypothetical: would I prohibit a skinhead who had painted racist slogans on a van, from driving it into the heart of Brixton, a London neighborhood with a predominant community of African or Caribbean descent? As I began my answer with the need to ascertain the skinhead's mental state or intent, he stopped me: "Why is this so hard for you? We all know it's wrong."
- The second story took place took place at Williams College, where I was a Trustee. A Jewish student complained that a faux eviction notice had been placed on her dorm room door. "If you do not vacate the premises by tomorrow at 6PM, we reserve the right to demolish your premises without

delay," the notice read. "We cannot be held responsible for property or persons remaining inside. Charges for demolition will be applied to your student account." The student understandably felt terrible. The President wanted my opinion on what should be done to those responsible.

- The third story is the most recent, December of 2014, and occurred on the Brandeis University campus, when I was President of the University. It occurred right after the murder of two police officers in "revenge" for the death of Eric Garner and Michael Brown. A prominent student member of the campus Black Lives Matter movement tweeted that she had no sympathy with the police officers. Knowing this student, I believe that what she meant was that she was deeply frustrated and troubled that, in her view, vastly more attention had been paid to the deaths of officers Wenjian Liu and Raphael Ramos in the broader community than was given to the deaths of Garner and Brown. But alas, that is not what she said. And, with "help," if that is the right word, from one of the sixty or so students who received the tweet, who posted it on what can best be described as an extremist website, her tweet went viral. As you would imagine, I received enormous pressure from all sides on this set of events. Some urged that the student be thrown out of school or at least lose her financial aid package. Others argued that I should issue a short statement supporting free speech and the right of all members of the community to say what they wished. I will return to the Williams and Brandeis stories later on in my remarks.

The first story calls for us to begin by contextualizing the discussion. Our discussion today is fundamentally different from what it would look like in most, if not all other advanced democracies, which punish pure hate speech. Consider these excerpts from the statues of other nations as they define punishable speech:

- Canada – "hatred against any identifiable group where such incitement is likely to lead to a breach of the peace"
- Denmark -- statements "by which a group of people are threatened, derided or degraded because of their race, colour of skin, national or ethnic background"
- Germany -- attacks on "the human dignity of others by insulting, maliciously maligning or defaming segments of the population"
- New Zealand – "threatening abusive or insulting … words likely to excite hostility against or bring into contempt any group of persons … on the ground of their colour, race, or ethnic or national or ethnic origins of that group of persons"
- UK – "threatening, abusive or insulting words, or behavior" intended to "stir up racial hatred" or when "having regard to all the circumstances racial hatred is likely to be stirred up thereby"

So, as my interlocutor at University College London put it, "why is this so hard for us?"

In the context of hate speech, and for now I will add hate crimes as well, we understand that we are working at the intersection of three sets of significant individual and societal rights and interests: 1) freedom of expression; 2) personal safety; and 3) personal dignity. How do we define something as amorphous as 'personal dignity"? What I have in mind is the concept as developed by Jeremy Waldron in his important book *The Harm in Hate Speech*.[1] Dignity to Waldron is concerned with a person's basic social standing, and the interest in being recognized as "proper objects of society's protection and concern." If the right to one's safety is inherently individualistic and about liberty, the right to one's dignity is inherently comparative and about equality – to have one's dignity respected is to be accorded the same basic social standing as any other member of

the society. As Lyndon Johnson is said to have answered a question concerning the moral necessity for the Civil Rights Act of 1964, "A man has the right not be insulted in front of his children."

Free Expression as a Core Value, Which Extends to Most Hate Speech

When we discuss hate speech and hate crimes in America, we are concerned with legitimate and significant rights on all sides, i.e. for the speaker and the listener. And so, we must proceed with great caution protecting rights where we can, and limiting rights only when we must. So "why is this so hard for us?" It is of course hard for us because free expression is a core value of our system of government and our society.

This is particularly true on our campuses. Our colleges and universities cover a wide range of models and identities – small liberal arts schools, large private universities, large public universities, and community colleges. There are non-sectarian and religiously-based schools; there are coeducational and single sex. But I believe that most if not all schools share a similar mission – to discover and create knowledge, and to transmit that knowledge through our teaching and our scholarship, for the betterment of our local, national and even international communities. For this mission, free expression and free inquiry are essential.

I thus start from the position that all speech, including hateful speech, is presumed to be protected. By hateful speech I mean that which offends or insults a group along racial, ethnic, national, religious, gender or sexual identity lines. The definition of the German statute puts it well -- attacks on "the human dignity of others by insulting, maliciously maligning or defaming segments of the population" -- and allows us to draw on Waldron's idea of dignity.

I ally myself here with the arguments presented by such scholars as the late Professor Edwin Baker and Yale Law School Dean Robert Post. Baker based his free expression understanding in a fundamental concept of autonomy. In his essay "Autonomy and Hate Speech," he wrote, "Law's purposeful restrictions on [the speaker's] racist or hate speech violate [that person's] formal autonomy." Post, in his influential 1995 book *Constitutional Domains* and elsewhere, has recognized the harm inflicted by hate speech, but also argued persuasively that the fundamental societal interests of public discourse will almost always outweigh this harm. In America, Post believes "public discourse is an arena for the competition of many distinct communities, each trying to capture the law to impose its own particular norms." He adds that public discourse in our democracy thus has the "extraordinarily difficult task of ensuring democratic legitimacy in a climate of comparatively severe suspicion and distrust."[2]

The Right to Hold Opinions That are Offensive to Many or Most

The normative argument of Post, Baker and others finds deep resonance in American case law where we find that free expression jurisprudence, at a starting point, provides protection for hate speech. This begins with the underlying premise that a state may not punish a person for holding an opinion regardless of how obnoxious the opinion may be to the general public, or even how good a predictor it might be for future anti-social conduct. It is striking that in 1951, Chief Justice Fred Vinson, not renowned as a strong advocate of a robust view of the First Amendment, saw no need to provide any support for his assertion that "one may not be imprisoned or executed because he holds particular beliefs."[34]

Consider the context of flag burning which continues to press the limits of the right to express unpopular views. The Supreme Court, even as it has become more conservative over the past three to four decades in its approach to numerous areas of the

law, has repeatedly upheld the right to burn an American flag. In 1989 in *Texas v. Johnson*, in which the Texas flag burning prohibition was struck down, the Court held that "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[5]

Similarly hate speech has generally been held to be constitutionally protected. We see this in the much-discussed context of university speech codes. Beginning in the 1980s, many schools, concerned over the increase in racial tensions on campuses, adopted policies proscribing the expression of bigotry. None of these codes has survived a First Amendment challenge in court. Campus speech codes at public universities have been viewed as prohibitions of speech based solely on the content of that speech. Although sympathetic with the goals of the campus speech codes, the district courts that struck down such regulations as those adopted by the University of Michigan and the University of Wisconsin in the 1980s, for example, ruled that the regulations impermissibly interfered with the First Amendment.[6]

This broad protection of speech on campus, both under the First Amendment and under basic principles of free expression and free inquiry as integral to the academic mission, still permits universities to protect students from being threatened and protect classes from being disrupted. Where is the line to be drawn?

The Flawed "Speech vs. Conduct" Distinction

As I said earlier, it is tempting to draw the line as a distinction between speech and conduct: speech is protected whereas conduct may be regulated or prohibited. This was the distinction that a unanimous Supreme Court relied upon in the 1993 case, *Wisconsin v. Mitchell*, which upheld the Wisconsin bias crime law from a challenge that it unconstitutionally punished thought or expression. The Court held that bias crimes

were conduct and could be punished whereas hate speech was expression and was protected.

The speech-conduct distinction is tempting because it promises a predictable and logical way to draw lines: once we can differentiate speech from conduct, we can effectively protect the former and regulate or even punish the latter. The promise, however, is ephemeral because the speech-conduct distinction does not work.

In application, the speech-conduct dichotomy is far too brittle. Speech and action are not merely intermingled. They are inextricable. Thus, the dialectic encompassing speech and conduct precludes not only a neat separation of the two, but also even efforts to determine whether "act or expression" is the "predominant element" in certain behavior. Consider two examples: flag burning, which as we have already briefly discussed, is constitutionally protected and draft card burning, which the Supreme Court has held may be punished.[7] The Court considered the burning of a flag to be expression, whereas the burning of a draft card was conduct.

The slipperiness of the speech-conduct distinction is apparent. Flag burning is surely an expression of political views, but is it not also an act? And what is the conduct in burning a draft card? The conduct of burning? It is at least plausible that, both in terms of the actor's own understanding of the card burning and in terms of the state's concern with punishing this behavior, the "conduct" of no longer having a draft card predominates in the act. As Professor John Hart Ely wrote in his classic article on the draftcard-burning case,

> burning a draft card to express opposition to the draft is an undifferentiated whole, 100% action and 100% expression. It involves no conduct that is not at the same time communication, and no communication that does not result from conduct.[8]

We could say the same of flag burning. And yet one is protected and one is not.

The point here is that the purported distinction between speech and conduct will not add rigor to any attempt to distinguish protected from proscribable behavior. The

flying of a swastika flag or even a confederate flag from one's dorm room or home cannot be objectively described as expression alone. It is action as well. Accordingly, applying the distinction between conduct and expression requires a process that assumes its own conclusions. That which we wish to punish we will term "conduct" with expressive value, and that which we wish to protect we will call "expression" that requires conduct as its means of communication. The critical decision -- which behavior may be punished and which should be protected -- is wholly extrinsic to this process. If a meaningful distinction exists, we must find it elsewhere.

Replacing Speech-Conduct with Focus on the Actor's Intent

My proposed distinction finds its roots in basic criminal law doctrine. As every first-year law student learns, crimes require both an act and an intent – or *actus reus* and *mens rea* in the traditional law Latin. We see immediately that we are not relying on a speech-conduct distinction because an "act" may include physical activity, or verbal activity. Speaking itself is a kind of act. Our attention instead is focused on the intent side of the ledger – the actor's *mens rea*. Is the actor intending to cause harm to a particular victim or is the actor intending to communicate views, however hateful or unpleasant those views may be? This is not to suggest that the speaker's act of expressing himself is purely deontological. To the contrary, all expression has ramifications. As Oliver Wendell Holmes put it "every idea is an incitement."[9] But the expression we should protect does not seek to cause injury to a particular victim.

Several examples will help make the point here. The first two examples, drawn from *Virginia v. Black*,[10] involve the Virginia cross-burning statute, struck down by the Supreme Court. The third example is the case I described earlier that occurred at Williams.

The Virginia Law in the *Black* case began by making it a crime for anyone, "with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a

cross on the property of another, a highway or other public place." The Court would have upheld that part of the law. Writing for the majority, Justice O'Connor held that "the First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation."[11]The Court struck down the statute because of what came next in the law "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."[12]

Not every cross burning is in fact intended to intimidate a victim, and the two cases before the Court in *Virginia v. Black* made the point. Like textbook examples, the two cases represented the two poles of cross burnings – domestic terrorism and expression of white supremacy. In one case, Barry Black led a Ku Klux Klan rally on private property, at the conclusion of which a twenty-five to thirty-foot cross was burned. In the other case, Richard Elliott and Jonathan O'Mara were prosecuted for attempting to burn a cross on the lawn of an African-American, James Jubilee, who had recently moved next door. Elliott and O'Mara were trying to "get back" at Jubilee because, among other things, he had complained when they used their back yard as a firing range.[13]

The "prima facie evidence" clause of the cross-burning statute impermissibly blurred the lines between the two meanings of burning a cross. As described by Justice Souter in his separate opinion, "its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning."[14] To be constitutional, the statute would have to require proof on an intent to intimidate – proof of a cross burning alone is insufficient.

Let me now return to the case that occurred at Williams College involving the faux eviction notice that had been placed on a student's dorm room, in imitation of the notices placed on Palestinian homes that are to be demolished by Israeli authorities due to the connection between residents and acts of terrorism. The College President asked what I thought should be done to those responsible for the notice. "This," he said to me, is not just speech – this is actual conduct. Can we sanction these students?"

We talked about *Virginia v. Black* and the role of intent. "But how would we know the student's intent?" he asked. I suggested looking into the way the notices were posted. Were only the leaders or a Jewish student organization targeted? For that matter, were only Jewish students targeted? As it turned out, every student in that dorm regardless of affiliation received one. That the complaining student honestly felt intimidated is not the issue. The issue was the actual intent of those who posted the notices – to intimidate and threaten individual Jewish students or to make a dramatic statement about their views concerning the Israel – Palestine conflict.

Verbal Assaults

We may apply a similar analysis to cases of pure speech. Words alone can sometimes constitute a crime. Behavior designed to instill serious fear certainly may be criminalized and it does not matter whether it takes the form of spoken words alone, physical conduct alone, or some combination of the two. Many states have some form of assault law that proscribes the creation of fear or terror in a victim.[15] These laws, variously enacted as "menacing," "intimidation," and "threatening" statutes, may be violated through the defendant's use of words alone.[16]

Reviewing courts have upheld various forms of verbal assault statutes, if sufficiently narrow in focus. For example, "intimidation" statutes which criminalize words used to coerce others through fear of serious harm, are constitutional so long as it is clear that they apply only when the words are purposely or knowingly used by the accused to produce fear and that the threat is real.[17] "Menacing" statutes differ from "intimidation" statutes. Whereas "intimidation" statutes focus upon coercion, the gravamen of menacing is the specific intent to cause fear.[18] Finally, "terroristic threatening" statutes are similar to "intimidation" laws in that they criminalize the use of fear to achieve specific results.[19] In each case, verbal assault statutes make words alone the basis for a criminal charge when those words are used purposely or knowingly to create fear in another.

Thus, even pure speech may in some cases cross the line from protected expression to that which may be sanctioned or punished. But punishment is only appropriate, whether verbal or physical behavior is involved, when the purpose of the behavior is to instill fear of imminent serious harm. A racial epithet, when screamed at another student in a menacing manner, or a confederate flag, when brandished on the lawn of a black student fraternity to terrorize them, is no longer protected expression. Now, it has crossed over into that which may be punished by the university.

Responding to Protected Hateful Speech

I now turn to what is a subtler and more perplexing question -- if in fact we protect most hateful verbal activity as free expression, is there nothing more to be said about it? How should we respond to hateful speech on campus?

I am reminded of Robert Hughes' essay concerning the controversial exhibition of photographs by Robert Mapplethorpe in the early 1990s in Cincinatti, Ohio.[20] Hughes

observed that the questions concerning the exhibition of Mapplethorpe's photographs had become largely constitutionalized, focusing on whether the exhibition was constitutionally protected. The debate, therefore, became whether, as a matter of a constitutional right, a museum may exhibit this work, or whether a city may, as Cincinnati did, shut down such an exhibition.[21] Hughes wrote that when we focus solely on questions of constitutional limits of expression, we fail to ask an arguably more important question: as a matter of art criticism and aesthetics, not constitutional doctrine and theory, is this art any good?

The constitutional and jurisprudential questions that have occupied us thus far are critically important, but are best seen as threshold issues, and not the ultimate societal issue. To address them, there must be a context for a moral response to constitutionally protected hate speech, just as there must be room for aesthetic questions as to the merits of constitutionally protected art. This is especially true of residential campuses where the very mission of the institution includes building a community and preparing future citizens.

The moral response to hateful speech is to describe it as such, and to criticize it directly. Supreme Court Justice Louis D. Brandeis famously wrote in *Whitney v. California* that except in those rare cases, such as we have discussed earlier, in which the harm from speech is real and imminent, the answer to harmful or hateful speech is not "enforced silence," but it *is* "more speech."

This allows us to return to the story I shared at the outset from my own campus at the time. Recall the student tweet of "no sympathy" with the murdered New York City police officers a little over two years ago. Strictly speaking this is not hate speech, but

the case remains relevant. I rejected the idea of expelling the student from the university, or of pursuing any student disciplinary charges or other sanctions such as terminating financial aid. That would have been to engage in "enforced silence." I believed her tweet to be protected speech. But I also believed that this was a case that called for more than a mere statement confirming her rights. In the same statement that defended her freedom of expression and her academic freedom, I added a criticism of my own, saying that in my view, her comments were contrary to the highest values of the university and that I found them to be abhorrent.

Consider now the case that occurred at the University of Oklahoma, two years ago, March, 2015. Members of the Sigma Alpha Epsilon fraternity, on their way to a fraternity "Founders Day" event, engaged in horrific racist chanting that included the use of the n-word as well as a celebration of violence. Two student leaders of the fraternity were expelled from the university. I am highly sympathetic to the impulse for this expulsion and share in full the university president's statement that he was "sickened" by the event. But I question the case for the expulsion. Had the context been different, that is, had this occurred outside of a predominately African-American fraternity house, for example, one can imagine how this could have been a case of a verbal assault, warranting full punishment. As it was, with the actors instead singing on a chartered bus in the presence solely of their own members, this was an instance of protected hate speech – vulgar, disgraceful, and yes, sickening, but also protected. There was no intent to threaten or cause direct harm to anyone. I believe that the well-intended impulse to punish the leaders stems in large part from a correct sense that this behavior required the

strongest possible condemnation but also from an incorrect assessment of the possible responses.

We bind ourselves to an impoverished choice set if we believe that we can either punish speech or else we validate it. There is the middle position, Brandeis's dictum of "more speech" that allows us to respond without punishing. In the face of hate speech, the call for more speech is not merely an option. It is a moral obligation.

When I criticized the student tweet, and on one similar occasion when I protected but criticized a faculty listserv that included vulgar and disgusting language directed at, among others, my predecessor and the State of Israel, I was accused by some of creating a "chilling effect" on their right and ability to express themselves. Let me conclude with my response to that charge.

Not all "chilling effects" are bad. Some are the cases of enforced silence of which Justice Brandeis spoke; this is classically what we mean by a chilling effect and these are pernicious, and contrary to our system of free expression. But then there are those that are cases in which we influence each other for the good, when we are touched, as Lincoln said in his first inaugural address, "by the better angels of our nature." We should indeed seek to have that effect on each other. After all, having that kind of effect on each other, especially through the ways in which we discuss and disagree, is at the heart of the enterprise of a college or university.

These verities will continue to be put to the test as we navigate the choppy waters in which we find ourselves, facing new and increasingly unfamiliar challenges. *Philosophia Biou*. It is the love the learning that will be our helm. Pursuing the love of learning requires us to help the campuses that we influence and lead, to search for respectful ways

to disagree, whether we debate and discuss in person or virtually in social media. I would advance three principles for respectful disagreement:

- Look for common ground even when we disagree and articulate that common ground as part of the discussion;
- Assume the best in each other, and not suspect the motives of those with whom we disagree; and
- Disagree without attacking each other personally – dispute, without delegitimizing.

Among my law school mentors was the late Charles Black, a legendary figure in constitutional law and one of the architects of the anti-segregation arguments that led to, among others, *Brown v. Board of Education*. One of the other giants of constitutional law at Yale was the late Alexander Bickel. Unlike Black, an advocate of judicial activism, Bickel argued for judicial restraint. When Bickel passed away, Black wrote an article in his memory in the *Yale Law Journal*. "Bickel and I" he wrote, "agreed on everything except for our opinions." It is as powerful a statement of respectful, even loving, disagreement as I know. If we have lost the ability to say to those with whom we disagree that we "agree on everything except our opinions," we have lost something very precious and perhaps irreplaceable. But if we can strive to do so, we will be building the most important kind of community that there is, and one worthy of the great shared mission America's colleges and universities.

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[1] Jeremy Waldron, The Harm in Harm Speech (2012).

[2] Robert C. Post, "Hate Speech," in Extreme Speech and Democracy (Ivan Hare and James Weinstein, eds) (2009) at 133, 137. See Robert C. Post, Constitutional Domains (1995).

[3] American Communications Associate v. Douds, 339 U.S. 382, 408 (1950). This is the same Justice Vinson who applied the "clear and present danger" standard to permit the prosecution of leaders of the Communist Party in *Dennis v. United States*. 341 U.S. 495 (1951) (Vinson, C.J., plurality opinion).

[4] Dennis v. United States, 341 U.S. 495 (1951) (Vinson, C. J., plurality opinion).

[5] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[6] See Doe. v. University of Michigan, 721 F. Supp. 852 (E. D. Mich. 1989) (striking down speech code at University of Michigan as violation of students' First Amendment right of free expression); UWM Post, Inc. v. Board of Regents of the University of Wisconsin, 774 F. Supp. 1163, (E.D. Wis. 1991) (striking down the speech code at University of Wisconsin as violation of students' First Amendment right of free expression).

[7] See O'Brien, 367 (upholding conviction for burning of a draft card); Watts v. United States, 394 U.S. 705 (1969) (upholding facial validity of 18 U. S. C. §871 which criminalizes threats of violence against the President of the United States; specific threat in Watts held to be insufficient to satisfy requirements of section 871).

[8] Ely, "Flag Desecration," 1495.

[9] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[10] 538 U. S 343 (2003).

[11] 123 Sup. Ct. at 1549.

[12] Va. Code. Ann. §18.2-423 (Michie 1991) (enacted in 1950). The prima facie provision was added to the statute in 1968.

[13] *Id*. at 1543.

[14] *Id*. at 1561 (Souter, J.).

[15] See, e.g., Model Penal Code §211.1(1)(c) (Official Draft 1985) ("A person is guilty of assault if he … attempts by physical menace to put another in fear of imminent serious bodily injury."); ibid., §211.3 (one is guilty of a "terroristic" threat if one "threatens to commit any crime of violence with the purpose to terrorize another…"); ibid., §250.4(2) (one is guilty of harassment if one taunts another in a manner likely to provoke a violence response). See also, e.g., Iowa Code §708.1(2) (West 1989); Fla. Stat. §784.011 (West 1992).

[16] See generally Kent Greenawalt, Speech, Crime, and the Uses of Language 90-104 (1989); Rodney A. Smolla, Free Speech in an Open Society 48-50 (1992) (government interest in restricting speech is highest where that speech threatens physical harm); Greenawalt, "Insults," 298 (speech that is intended primarily to hurt the listener has limited expressive value and may properly subject the speaker to criminal punishment).

[17] The Montana Intimidation Statute, for example, provides as follows:

> (1) A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, he communicates to another, under circumstances which reasonably tend to produce a fear that it will be carried out, a threat to perform without lawful authority any of the following acts:
> (a) inflict physical harm on the person threatened or any other person;
> (b) subject any person to physical confinement or restraint; or
> (c) commit any felony.
> (2) A person commits the offense of intimidation if he knowingly communicates a threat or false report of a pending fire, explosion, or disaster which would endanger life or property.

Mont. Code Ann. 45-5-203 (1991). An earlier version of this statute required only a threat without any requirement that there be a reasonable tendency that the threat would produce fear. This earlier version was held to violate the First Amendment in a federal habeas corpus proceeding. See Wurtz v. Risley, 719 F. 2d 1438 (10th Cir. 1983). The statute was amended to conform with the court's decision and has not been challenged since. See also State v. Lance, 721 P. 2d 1258 (Mont. 1986) (upholding section (1)(b) of the un-amended statute).

[18] The Colorado Menacing Statute, for example, provides that:

> A person commits the crime of menacing if, by any threat or physical action, he knowingly places or attempts to place another person in fear of imminent serious bodily injury.

Co. Rev. Stat. §18-3-106. See, e.g., Colorado v. McPherson, 619 P. 2d 38 (Col. 1980) (construing Colorado Menacing Statute); State v. Garcias, 679 P. 2d 1354 (Or. 1984) (upholding Oregon Menacing Statute, Or. Rev. Stat. 163.190(1), against challenge under First Amendment).

[19] The Alaska Terroristic Threatening Statute, for example, provides that a person commits the crime of terroristic threatening if the person:

> (1) knowingly makes a false report that a circumstance dangerous to human life exists or is about to exist and
> (A) places a person in fear of physical injury to any person;
> (B) causes evacuation of a building; or
> (C) causes serious public inconvenience; or
> (2) with the intent to place another person in fear of death or serious physical injury to the person or the person's immediate family, makes repeated threats to cause death or serious physical injury to another person.

Alaska Stat. 11.56.810 (1991). See, e.g., Allen v. State, 759 P. 2d 451 (Alaska Ct. App. 1988) (upholding constitutionality of Alaska Terroristic Threatening Statute); Thomas v. Commonwealth, 574 S. W. 2d 903 (Ky. 1978) (upholding constitutionality of Kentucky Terroristic Threatening Statute, Ky. Rev. Stat. §508.080 (Baldwin 1984)).

[20] Robert Hughes, "Art, Morals, and Politics, The New York Review of Books 21-27, April 23, 1992.

[21] Eric Harrison, "Mapplethorpe Display Brings Smut Charges," L.A. Times, April 8, 1990, at A1; Isabel Wilkerson, "Cincinnati Gallery Indicted In Mapplethorpe Furor," N.Y. Times, April 8, 1990, § 1, at 1; Isabel Wilkerson, "Cincinnati Jury Acquits Museum In Mapplethorpe Obscenity Case," N.Y.Times, October 6, 1990, § 1, at 1.