

# Deterring Speech: When Is It “McCarthyism”? When Is It Proper?

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# Deterring Speech: When Is It “McCarthyism”? When Is It Proper?

Eugene Volokh

## INTRODUCTION

What may government officials do to prevent speech that they think is evil and dangerous? What may businesses, organizations, or individuals do? Some actions are clearly permitted, even laudable: Persuading people that the speech is bad is the obvious example. Neither we nor the government need sit idle when evil ideas are spread.<sup>1</sup>

It’s also quite proper to make sure that our ideological groups are not taken over by evil movements. The 1950s ACLU, for instance, rightly rejected members who supported totalitarian ideologies.<sup>2</sup> Totalitarianism is the antithesis of civil liberties: A civil libertarian organization may rightly support totalitarians’ right to speak, but it should also want to avoid involving pro-totalitarians in its decision making.<sup>3</sup> Likewise, groups that take controversial but well-meaning stands on racial issues may rightly want to exclude racists from their ranks, and especially from their leadership. That’s both good politics and good policy.

A third acceptable option is to create social norms that condemn contemptible views and the people who express them. These norms may deter even those speakers who aren’t persuaded by them—unlike pure persuasion, the norms may, in some sense, be socially coercive. Racists, for example, often feel reluctant to express their views because they fear social opprobrium. This is generally good. Likewise, people are legally free to

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1. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the judgment) (“[T]he fitting remedy for evil counsels is good ones.”).

2. See ACLU, *AMERICA’S NEED: A NEW BIRTH OF FREEDOM: 34TH ANNUAL REPORT* 128 (1954) (“The ACLU needs and welcomes the support of all those—and only those—whose devotion to civil liberties is not qualified by adherence to Communist, Fascist, KKK, or other totalitarian doctrine.”); see also Mary McAuliffe, *The Politics of Civil Liberties: The American Civil Liberties Union During the McCarthy Years*, in *THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGINS OF MCCARTHYISM* 154, 154-58 (Robert Griffin & Nathan Theoharis eds., 1974) (discussing the ACLU’s policy in more detail). The ACLU may have been partly concerned about deflecting public criticism, but that’s perfectly sensible: If it was proper, as I argue, for civil liberties advocates to want nothing to do with those who would extinguish civil liberties, it was also proper for civil liberties advocates to make this desire clear to the public.

3. I thus disagree with GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 420-21 (2004), which says this was a sign of “falter[ing]” by an “organization[] expressly dedicated to the protection of civil liberties,” and with McAuliffe, *supra* note 2, which takes a similar view.

praise rape, child molestation, or other crimes, but they tend to keep quiet about such views in most circles. That also is generally good.

Of course, such norm creation is proper only if the condemned views are indeed contemptible. Social norms that condemn thoughtful and polite criticism of race-based affirmative action, American foreign policy, or various religions are counterproductive—because they stifle potentially enlightening debate—and unfair. Yet this merely counsels caution and thoughtfulness in adopting and applying such norms; it doesn't undermine the legitimacy of anti-speech social norms as such. We should be polite and welcoming to those who have unorthodox views on social security reform. We needn't, however, apply the same social ground rules to those who have the unorthodox view that certain races are subhuman.

Other actions to combat evil views are rightly forbidden by the First Amendment—often by First Amendment doctrines that spring from reactions to the McCarthy era—or by well-accepted social norms.<sup>4</sup> The government may not throw people in prison for their bad ideas, whether Communist, racist, or pro-terrorist.<sup>5</sup> The government may not ban political parties that express those views.<sup>6</sup> The government shouldn't bar people from professions or from universities,<sup>7</sup> threaten civil liability,<sup>8</sup> or strip divorcing parents of child custody for expressing or tolerating such views.<sup>9</sup>

Likewise, both governmental critics and private critics shouldn't resort to lies or unfounded accusations. They shouldn't use excessive rhetoric that smears people with labels that they don't deserve, such as calling

4. I take it, for instance, that critics of the statements discussed in Part I—statements that assert that “our adversaries’ speech is helping the enemy”—would urge a social norm that such statements be condemned, rather than a legal rule prohibiting the statements.

5. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

6. See *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974).

7. But see *In re Hale*, 723 N.E.2d 206, 206 (Ill. 1999) (Heiple, J., dissenting) (“The crux of the [Illinois Bar Committee on Character Fitness] decision to deny petitioner’s application to practice law is petitioner’s open advocacy of racially obnoxious beliefs. The Inquiry Panel found that, in regulating the conduct of attorneys, certain ‘fundamental truths’ of equality and nondiscrimination ‘must be preferred over the values found in the First Amendment.’”).

8. Cf. Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299 (2000) (describing how hostile environment harassment law suppresses speech that expresses sexist, racist, and religiously offensive viewpoints in workplaces, educational institutions, and places of public accommodation); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (same, in more detail and only as to workplaces); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (criticizing many aspects of hostile work environment law on First Amendment grounds), available at <http://www1.law.ucla.edu/~volokh/harass/substanc.htm> in updated form.

9. See Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 80 N.Y.U. L. REV. (forthcoming 2006), at <http://www1.law.ucla.edu/~volokh/custody.pdf> (noting cases from the 1930s and 1950s in which parents’ Communist affiliations were counted against them in child custody decisions, and cases from the 1970s to the present in which parents’ racist advocacy was counted against them in child custody decisions).

everyone on the Left “[C]ommunist sympathizers,”<sup>10</sup> or calling people racists simply because they oppose affirmative action or support English-only instruction.<sup>11</sup>

Yet between the easy cases of mere persuasion and clear First Amendment violation lie practices that are rightly contested. May government officials argue that the government’s political opponents are unwittingly helping evil? May private parties properly use their economic power to retaliate against those whose views they condemn? May the government subpoena library and bookstore records to help uncover the identities of political criminals or terrorists?

Such practices sometimes trigger charges of “McCarthyism.” Critics correctly point out that these practices may deter—even without legally prohibiting—certain kinds of speech. Some of the practices may even be intended to deter such speech.

Yet as the example of social norms against racist speech shows, some deterrence of bad speech is socially and legally permissible. The hard question, which this Essay focuses on, is when such practices really deserve to be labeled “McCarthyism” and to be forbidden by the First Amendment, by statute, or by social norm.<sup>12</sup> I regret that I can’t offer a general answer, or

10. See, e.g., Helen Dewar, *A GOP Campaign Document on Metzenbaum Stirs Furor: ‘Communist Sympathizer’ Label Was Proposed*, WASH. POST, July 30, 1987, at A1 (discussing “a secret Senate Republican campaign document urging that Sen. Howard M. Metzenbaum (D-Ohio) be characterized as a ‘[C]ommunist sympathizer’” on the grounds that Metzenbaum had “sa[ajid] that ‘the long-range solution for unemployment lies in creating a healthy atmosphere for industrial expansion’ and . . . declin[ed] to rule out ‘use of WPA and Jobs Corps techniques as a pump primer’”).

11. See, e.g., Sharon Bernstein, *Storm Rises over Ex-Klansman at Debate*, L.A. TIMES, Sept. 11, 1996, at A3 (“Proposition 209 is racist, [Patricia Ewing, who heads the campaign to defeat Proposition 209,] said . . .”). Prop. 209 is the California measure that barred government officials from using race and sex preferences in employment, education, and contracting. *Id.*; see also George Cothran & John Mecklin, *The Grid*, S.F. WEEKLY (May 27, 1998), available at [http://www.sfweekly.com/issues/1998-05-27/news/columns\\_print.html](http://www.sfweekly.com/issues/1998-05-27/news/columns_print.html) (“Ron Unz, the hateful creep who supports the elimination of all bilingual education in the state, knows nothing about education policy. . . . Proposing to harm children for political reasons is a special type of sin that should earn Mr. Unz a special place in hell. Before he gets there, give him his earthly reward. Vote to defeat ugly, racist Proposition 227.”); Greg Lucas, *Brown Decries Plans to End Affirmative Action*, S.F. CHRON., Feb. 15, 1995, at A10 (“An impassioned Assembly Speaker Willie Brown lashed out yesterday at proposals to end affirmative action in California, branding them ‘pure, unadulterated exploitation of racism.’”); Kara Platoni, *Money, Sex, and Politics*, SACRAMENTO NEWS & REV., Mar. 26, 1998 (“Proposition 227, which would do away with bilingual education, also came under heavy fire [at the California Democratic Party Convention] and was roundly denounced by Steve Ybarra, Chairman of the Chicano/Latino Caucus, as ‘racist thuggery.’”). Cf. Jacques Steinberg, *Increase in Test Scores Counters Dire Forecasts for Bilingual Ban*, N.Y. TIMES, Aug. 20, 2000, § 1, at 1 (“Two years after Californians voted to end bilingual education and force a million Spanish-speaking students to immerse themselves in English as if it were a cold bath, those students are improving in reading and other subjects at often striking rates, according to standardized test scores released this week.”). This is precisely the effect that Ron Unz had predicted and worked for.

12. “McCarthyism,” according to the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1084 (4th ed. 2000), is “[t]he practice of publicizing accusations of political disloyalty or subversion with insufficient regard to evidence” or “[t]he use of unfair investigatory or accusatory

even discuss more than a few such practices. But in this Essay, I hope to offer some thoughts on the subject, thoughts which surely aren't conclusive, but which I hope will be helpful.

## I

## CONDEMNATION OF THOSE WHO MAY INADVERTENTLY HELP THE ENEMY

"To those who scare peace-loving people with phantoms of lost liberty," Attorney General Ashcroft famously said not long after September 11, "my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies . . . ." <sup>13</sup> That's McCarthyism, some replied. <sup>14</sup>

Here's another quote, this one from the president: "Our nation has felt the lash of terrorism. . . . We can't let [a certain group] turn America into a safehouse for terrorists. Congress should get back on track and send me tough legislation that cracks down on terrorism. It should listen to the cries of the victims and the hopes of our children, not the back-alley whispers of the [group]." The president was Bill Clinton, and the group that he was condemning was the "gun lobby," which opposed some gun-control proposals that Clinton favored. <sup>15</sup>

Likewise, following the Oklahoma City bombing, President Clinton argued on national television that violence is caused "not just [by] the movies showing violence. It's the words spouting violence, giving sanction to violence, telling people how to practice violence that are sweeping all across the country. People should examine the consequences of what they say and the kind of emotions they're trying to inflame." <sup>16</sup> He might have meant to condemn only those who actually urge violence, and not those who simply "giv[e] sanction to violence" by harshly criticizing the government. But his words could also have been interpreted (and were interpreted, by at least one sympathetic commentator) as a criticism of strident anti-government rhetoric more broadly. <sup>17</sup>

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methods in order to suppress opposition"; the definition I've heard used most often is the latter one, which I'm using here. Hence, to decide whether some behavior is properly called by the pejorative label "McCarthyism," we need to ask whether the behavior is indeed improper.

13. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. 313 (Dec. 6, 2001).

14. See, e.g., John W. Dean, *Liberties Disappearing Before Our Eyes*, L.A. TIMES, Sept. 21, 2003, at R3; Geoffrey R. Stone, *America's New McCarthyism*, CHI. TRIB., Oct. 17, 2004, at C11.

15. William J. Clinton, President Clinton's Weekly Radio Address, 1996 PUB. PAPERS 463, 464 (Mar. 16, 1996).

16. William J. Clinton, Interview on CBS' "60 Minutes", 1995 PUB. PAPERS 574, 578 (Apr. 23, 1995).

17. E.J. Dionne Jr., *A Time for Politicians to Look Within*, WASH. POST, Apr. 25, 1995, at A17 ("It's wrong to suggest that honest advocates of smaller government have anything in common with killers and fanatics. . . . [But m]ainstream politicians . . . have to assess whether they have stood silently as [violent] attitudes took hold [among far-right militias], whether they exploited them and whether, at times, they may even have encouraged them. . . . After the suffering in Oklahoma City, the country

Similarly, consider Winston Churchill's lament that his critics' war-time statements were (among other things) "weaken[ing] confidence in the Government," "mak[ing] the Army distrust the backing it is getting from the civil power," and "mak[ing] the workmen lose confidence in the weapons they are striving so hard to make," all "to the distress of all our friends and to the delight of all our foes."<sup>18</sup> And, finally, consider this quote from George Orwell during World War II: "Pacifism is objectively pro-fascist. This is elementary common sense. If you hamper the war effort on one side, you automatically help out that of the other."<sup>19</sup> Orwell's message, I take it, was this: The pacifists' tactics only aid the Nazis, for they erode the Allies' national unity and diminish their resolve. They give ammunition to the Allies' enemies.

Such statements have some things in common. They accuse people of doing things that help the enemy. The great majority of the accused are probably decent people, who have no desire to help terrorists or Nazis.<sup>20</sup> The statements may also deter dissenters: People don't like to be told that

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needs an extended period in which political rhetoric is toned down, words are more carefully weighed and, as the president said yesterday, 'the purveyors of hatred and division' and 'the promoters of paranoia' are resisted and condemned." *But cf.* Virginia I. Postrel, *Does Reading This Make You a Terrorist?*, REASONONLINE, July 1995, at <http://reason.com/9507/VIPedit.jul.shtml> (criticizing Dionne's article).

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What a remarkable example [the debate] has been of the unbridled freedom of our Parliamentary institutions in time of war! Everything that could be thought of or raked up has been used to weaken confidence in the Government, has been used to prove that Ministers are incompetent and to weaken their confidence in themselves, to make the Army distrust the backing it is getting from the civil power, to make the workmen lose confidence in the weapons they are striving so hard to make, to represent the Government as a set of nonentities over whom the Prime Minister towers, and then to undermine him in his own heart and, if possible, before the eyes of the nation. All this poured out by cable and radio to all parts of the world, to the distress of all our friends and to the delight of all our foes.

Winston Churchill, Speech in the House of Commons (July 2, 1942), in *NEVER GIVE IN!: THE BEST OF WINSTON CHURCHILL'S SPEECHES* 339 (Winston S. Churchill ed., 2003). Churchill stressed that he was "in favour of this freedom, which no other country would use, or dare to use, in times of mortal peril such as those through which we are passing." *Id.* But it was clear that he saw certain uses of the freedom as being helpful to the nation's enemies. *See also* Letter from Thomas Jefferson to the Republican Young Men of New London, (Feb. 24, 1809) in *16 THE WRITINGS OF THOMAS JEFFERSON* 339 (Andrew A. Lipscomb ed., 1903) ("That in a free government there should be differences of opinion as to public measures and the conduct of those who direct them, is to be expected. It is much, however, to be lamented, that these differences should be indulged at a crisis which calls for the undivided counsels and energies of our country . . ."); Letter from Thomas Jefferson To His Excellency Governor Daniel D. Tompkins, (Feb. 24, 1809), *id.* at 341 ("The times do certainly render it incumbent on all good citizens attached to the rights and honor of their country, to bury in oblivion all internal differences . . . All attempts to enfeeble and destroy the exertions of the General Government in vindication of our national rights . . . merit the discountenance of all."). Thanks to Bob Turner and to <http://etext.lib.virginia.edu/jefferson/quotations/> for pointers to these Jefferson quotes.

19. George Orwell, *Pacifism and the War*, *PARTISAN REV.*, Sept.-Oct. 1942, *reprinted in* *2 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL* 226 (Sonia Orwell & Ian Angus eds., 1968).

20. If the statements condemned people who did support terrorists or Nazis, I take it they would be clearly proper.

they are helping the nation's mortal enemies, especially when the charge comes from an official to whom millions listen. Even if the accused think the accusation is unjust, they may keep quiet, or at least tone down their arguments, to avoid such attacks in the future.<sup>21</sup> The accusers likely intended to deter dissent by making potential dissenters feel embarrassed to make certain criticisms that the accusers thought baseless and harmful.<sup>22</sup>

And the accusations may also have been factually correct. Pacifists' opposition to the Allied war effort may have helped the Nazis as much as pro-Nazi opposition would have. Excessive insistence on gun owners' rights might likewise help terrorists.<sup>23</sup> Similarly, criticisms of the administration's actions may well erode national unity, diminish national resolve, give ammunition to our enemies, and aid terrorists. This is especially true when the criticisms come from legislative leaders. Recall that Ashcroft's statement came at a hearing organized by Senator Patrick Leahy, then-chair of the Democrat-run Senate Judiciary Committee and a leading adversary of Ashcroft.<sup>24</sup> The hearing had apparently been called in part to criticize the administration's antiterrorism policy on civil liberties grounds.<sup>25</sup> Enemies who see our political leaders divided on the war on terror may well be emboldened, and foreign neutrals may see us as less likely to prevail than if we seemed united. Such internal division may well "distress . . . all our

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21. Some have argued that Ashcroft's quote was particularly threatening because he made the statement as the nation's chief federal law enforcement official. The same could be said about President Clinton's statement, since presidents give orders to federal law enforcement. But I think neither quote can reasonably be interpreted as an actual threat to prosecute those who criticize the administration's policies on some aiding-the-terrorists theory. If it were a threat, it would have been an uncommonly empty one—neither the Clinton nor the Bush Justice Departments ever engaged in any such prosecutions, either before the statements or after.

Nor did such prosecutions seem likely at the time. Only unusually fearful defenders of gun rights or of other civil liberties would have been silenced because they interpreted either statement as threatening prosecution. (Noncitizens did indeed have more to fear from the Justice Department; if they drew the government's attention, and the government then found that the noncitizens had committed technical immigration violations, they could be deported. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488-91 (1999). But Ashcroft's domestic civil-libertarian critics at the time, to whom he was responding, were overwhelmingly citizens.) Both Ashcroft and Clinton likely did want to deter people from expressing certain views—but with the threat of social opprobrium, not of criminal prosecution.

22. Of course Ashcroft and Clinton also likely hoped that some critics would be persuaded that their criticisms were simply mistaken; there can be little objection to such an outcome. But I suspect they realized that many people wouldn't be persuaded on the merits but might, nonetheless be deterred from speaking by the risk of public opprobrium.

23. I think gun controls probably won't materially interfere with terrorists' plans, but reasonable minds may differ.

24. *See supra* note 13.

25. *See Abraham McLaughlin & Dante Chinni, Ashcroft Finally Faces Hill Critics*, CHRISTIAN SCI. MONITOR, Dec. 5, 2001, at 1 ("As he sits down before the Senate Judiciary Committee tomorrow, Attorney General John Ashcroft can expect a grilling not seen since his Senate confirmation hearing. The line of questioning will likely boil down to one issue: whether he and the Bush administration have been overly authoritarian in prosecuting the war on terrorism and protecting the public.").

friends and . . . delight all our foes.”<sup>26</sup> And if Senator Leahy’s and others’ criticisms were indeed unfounded or at least exaggerated (a hotly contested position, of course, but one that Ashcroft defended on the merits in his testimony), then Ashcroft could have reasonably concluded that the critics’ actions were both unjustified and dangerous.

Good intentions may sometimes yield bad results. That’s true of well-intentioned administration actions, which the party out of power often warns about. It’s also true of well-intentioned criticisms of such actions. If such bad results seem likely, then the public ought to be warned of this danger, though of course those who disagree should likewise argue that the danger is itself a “phantom.”

And government officials are as entitled as anyone else to note such dangers. The administration, which is responsible for keeping the country safe, has a responsibility to warn of a wide range of dangers. People who ignore the danger, if the danger is real, may well deserve to be criticized. And when political leaders debate questions of liberty and national security, plausible claims that one side’s actions may jeopardize liberty may reasonably be met by plausible claims that the other side’s actions may jeopardize security.<sup>27</sup>

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26. Churchill, *supra* note 18.

27. I’ve heard some ask why, if this point was to be made, Ashcroft was the one to make it. Why not leave it to some less controversial administration official, or even to private parties? To begin with, I think that controversial attorneys general have as much right to express their views as do less controversial figures in other jobs. It may sometimes be more politic for an administration to leave some statements to less controversial officials, but political effectiveness is a different matter from propriety.

But more importantly, Ashcroft was responding to criticisms of proposals that came from his Justice Department, that were associated with him in the public mind, and that were often tied to him by name. *See, e.g.*, Gail Gibson, *Ashcroft Faulted Over Civil Liberties*, BALT. SUN, Nov. 25, 2001, at 1A (noting that a “liberal activist” called Ashcroft “the most dangerous threat to civil liberties in the federal government”); David Jackson, *Bush Defends Call for Military Trials*, DALLAS MORNING NEWS, Nov. 30, 2001, at 18A (“Next week, Mr. Leahy’s committee will hear from Attorney General John Ashcroft, who is bearing the brunt of criticism from civil libertarians.”); John Lancaster, *Hearings Reflect Some Unease With Ashcroft’s Legal Approach*, WASH. POST, Dec. 2, 2001, at A25 (“A few critics, led by Sen. Patrick J. Leahy (D-Vt.), have been vocal about what they regard as overreaching by the executive branch, Attorney General John D. Ashcroft in particular.”); McLaughlin & Chinni, *supra* note 25 (“[P]artisanship is resurrecting itself on Capitol Hill. Furthermore, Ashcroft himself, ‘has become the clear face of hard-core conservatism’ for some Democrats, ‘and that has fueled opposition to him on civil liberties and other issues,’ says [Hudson Institute congressional analyst Marshall] Wittmann. . . . [R]ecently on Capitol Hill lawmakers who have been only quietly criticizing the administration have grown bolder. . . .”).

Ashcroft’s political adversaries challenged him for allegedly threatening Americans’ liberty. Ashcroft responded by pointing out in some detail why he thought the charges were groundless, and in the process he also said that such charges were not only unfounded but harmful. It makes sense that a politician criticized by other politicians would defend himself, rather than expecting others to defend him.

Now it's true, as many critics argue, that such accusations try to move people through fear.<sup>28</sup> But terrorists ought to be feared. Many groups rightly try to influence voters by making them afraid of environmental catastrophe, crime, gun violence, terrorism, war, special interests, or suppression of civil rights. Well-founded fear is better than foolish fearlessness. Some fear is excessive or even irrational, but some is eminently justified, or is at least a reasonable response to uncertainty.<sup>29</sup>

It's also true that politicians sometimes harness fear for political advantage. That's what they're supposed to do in a democracy. When national security is a big part of an election campaign, each side likely believes that its program will protect the nation, and the other side's will (at least comparatively) endanger the nation—and each side then has the right and even the duty to make these arguments to the voters.<sup>30</sup>

In 2004 Democrats sincerely believed that re-electing George W. Bush would endanger America, because they thought that Bush's national security policy was dangerous. House Minority Leader Nancy Pelosi, for instance, argued that “the president has failed in how he has tried to protect America. . . . We are less safe—we are less safe because he is president. . . .”<sup>31</sup> Republicans sincerely believed the same of Kerry, and argued accordingly.<sup>32</sup> One might find one side's case to be erroneous or

28. See, e.g., Stone, *supra* note 14 (condemning Dick Cheney's “assertion that a vote for John Kerry would endanger the nation” as “part of a cynical campaign to frighten and confound the American people”). If one is watching for McCarthyism, one might note that Democratic vice presidential candidate John Edwards promptly denounced Cheney's remarks as “un-American.” *Judy Woodruff's Inside Politics* (CNN television broadcast, Sept. 8, 2004).

29. Cf. Stone, *supra* note 14 (distinguishing “reasoned fear of Soviet espionage” from what the author sees as “an unreasoned fear of ‘un-Americanism’”).

30. Cf. Editorial, *In Defense of Dick Cheney*, L.A. TIMES, Sept. 9, 2004, at B10:

The war on terrorism is the central issue in the campaign, and both parties' candidates have various points to make about it. But the issue boils down to one question: Which candidate would do the best job, as president, of making sure that we don't “get hit again.” That is what people really care about. Sens. Kerry and John Edwards have been criticizing President Bush's performance on terrorism since 9/11 and promising to do a better job at it if given the chance. In doing so, they surely mean to suggest that the risk of another terrorist attack will be greater if Bush and Cheney win the election. A vote for George W. Bush, in other words, is a vote for more terrorism. Or if Kerry and Edwards don't mean that, it's hard to know what they do mean.

See also Mickey Kaus, Kausfiles, SLATE (Sept. 9, 2004), at <http://www.slate.com/id/2106296>:

Why can the [New York] Times say the administration has increased the danger but Cheney can't make his arguments that the administration has reduced the danger? Isn't that what a discussion of the actual major issue of the campaign looks like? . . . In this increased/decreased argument, I tend to side with Kerry and Edwards—we've now angered enough people around the world that our chances of getting hit will probably be higher if Bush is reelected than if Kerry wins. But it's not an argument in which only Kerry's side is allowed to participate.

31. *This Week With George Stephanopoulos* (ABC television broadcast, Oct. 31, 2004).

32. See Transcript, White House, Vice President and Mrs. Cheney's Remarks and Q&A at a Town Hall Meeting (Sept. 7, 2004) (making the allegation that Professor Stone apparently refers to, in the course of a fairly detailed criticism of Kerry's proposed policies), available at <http://www.whitehouse.gov/news/releases/2004/09/20040907-8.html> (last visited Apr. 7, 2005).

even dishonest, but making fear of terrorism an “underlying theme of domestic and foreign policy”<sup>33</sup> is quite proper when terrorists are doing frightening things.

Yet at the same time, pointing out (even if accurately) that criticism of the administration is helping America’s foreign or domestic enemies has costs. To begin with, it can distract from the legitimate arguments that the critic is making. Perhaps paying more attention to civil liberties will actually help the war effort by showing us to be a humane and tolerant nation and thus making us more popular throughout the world. Or maybe broadly protecting civil liberties will hurt the war effort, but some cost to the war effort is a tolerable price to pay for preserving our traditional rights.

Moreover, arguing that critics of the government are helping our enemies can wrongly tar people with the implication of bad purpose, even if no such charge is explicitly made. This may be unfair. It may breed unnecessary political hostility—not just disagreement but contempt or hatred—that is itself harmful to the nation. It can over-deter speech by making speakers afraid to level even those criticisms that, on balance, help the country more than hurt it. As Orwell himself wrote, just two years after the lines I quote above,

We are told that it is only people’s objective actions that matter, and their subjective feelings are of no importance. Thus pacifists, by obstructing the war effort, are “objectively” aiding the Nazis; and therefore the fact that they may be personally hostile to Fascism is irrelevant. I have been guilty of saying this myself more than once. . . .

. . . .  
In my opinion a few pacifists are inwardly pro-Nazi . . . . The important thing is to discover *which* individuals are honest and which are not, and the usual blanket accusation merely makes this more difficult. The atmosphere of hatred in which controversy is conducted blinds people to considerations of this kind. To admit that an opponent might be both honest and intelligent is felt to be intolerable. It is more immediately satisfying to shout that he is a fool or a scoundrel, or both, than to find out what he is really like.<sup>34</sup>

Now perhaps Orwell’s change of mind was occasioned by the change from the dark days of 1942 to post-D-day, post-Stalingrad 1944. It is easier to be generous to those who, in your view, helped Hitler (even unintentionally) when Hitler is nearly defeated. Yet I think that Orwell’s second thoughts, whatever their reason, were objectively the right ones. Explaining why your adversaries’ arguments unintentionally help the enemy is legitimate. But expressly acknowledging that this effect is likely unintentional—

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33. See Stone, *supra* note 14 (quoting James Goodby).

34. George Orwell, *As I Please*, TRIBUNE, Dec. 8, 1944, reprinted in 3 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 288-89 (Sonia Orwell & Ian Angus eds., 1968).

even when you're tussling with a senator who you think has unfairly attacked you—is fairer, less politically divisive, and often more rhetorically effective. I suspect John Ashcroft's quote alienated more Americans than it persuaded. Likewise, the vitriolic Bush-the-Nazi attacks from some parts of the Left probably, on balance, helped Bush in the 2004 election.

So it seems to me that, first, the quotes with which I began this Part could have been put better. Second, because people tend to overestimate the bad effects of their adversaries' speech, we should often be skeptical about allegations of such bad effects. And third, such allegations provide a convenient way to evade (deliberately or subconsciously) the substantive criticisms leveled by the adversaries' speech.

Nonetheless, responding to such allegations with charges of McCarthyism is likewise a convenient way to evade the merits of those allegations. If Ashcroft, Clinton, Orwell, and Churchill were wrong in their estimates of the harm that their adversaries' arguments were causing, one should certainly call them on that. One should do likewise if the harms are exceeded by the benefit of the remedies that the adversaries propose. But these arguments need to be made on the merits. Labeling allegations as "McCarthyism" is likely to distract listeners more than it helps them assess which allegations are sound and which aren't.

## II

### PRIVATE ECONOMIC RETALIATION AGAINST SPEAKERS

#### A. *Entertainers*

The blacklist is back, we are told. After Natalie Maines, lead singer of the country music band the Dixie Chicks, told fans during a London concert, "[W]e're ashamed the President of the United States is from Texas," many stations stopped playing her music, and some stations organized rallies at which Dixie Chicks CDs were crushed by bulldozers.<sup>35</sup> MCI stopped using actor Danny Glover in its commercials, apparently because he signed various statements that harshly opposed the Iraq war and defended Fidel Castro.<sup>36</sup> Susan Sarandon and Tim Robbins were disinvited from speaking

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35. TED MORGAN, *REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA* 599 (2003) (characterizing some radio stations' refusal to carry the Dixie Chicks as "blacklist[ing]," and part of a "climate reminiscent of the [1950s] blacklist"); see also Jaret Seiberg, *Dixie Chicks Trip Up Radio Titans*, *DAILY DEAL*, July 9, 2003 ("The decision by Cumulus and Cox Radio Inc. to pull the Dixie Chicks' music from their playlists was reminiscent of the McCarthy hearings from the 1950s that resulted in actors being blacklisted in Hollywood or the Nazis burning books in 1930s-era Germany, said Sen. Barbara Boxer, D-Calif.").

36. Lara Weber & Michael Morgan, *Reaction to War Comments Dims Star Power*, *CHI. TRIB.*, May 21, 2003, at 59 ("A threatened boycott seeks to force MCI to dump Glover as its pitchman because of views he expressed about Cuba and against the Iraq war. . . . Glover said this chill comes from right-wing factions that he denounced as self-appointed thought police."). One particular statement that troubled some people was labeled "The Conscience of the World," which Danny Glover, among others, signed. *Id.* The statement expressly condemned America for "violat[ing]" the "international order" and

engagements because of their opposition to the war in Iraq; Sean Penn apparently lost an acting role for the same reason.<sup>37</sup>

How should we react when private entities economically retaliate against people based on their speech, or citizens urge those entities to do this? The retaliation is generally legal. Though some state laws restrict employers' power to retaliate against employees for their political speech,<sup>38</sup> I know of no laws that restrict companies' power to retaliate against truly independent contractors. Moreover, media organizations may have a constitutional right to fire their employees for their political views, even if state law prohibits such firings.<sup>39</sup> Calls for such retaliation by the public are likewise constitutionally protected. But are economic retaliation and calls for retaliation proper, or should we develop social norms against them? This, it seems to me, is a hard question (for its hardest aspects, see Part II.C), but let me offer a few observations.

Let me start by focusing on speech by entertainers. Entertainers are valued speakers because people like them. Danny Glover makes a good pitchman for MCI because people feel good about him: If MCI simply wanted someone who could act well in its commercials, it could have hired a nameless actor for much less. Susan Sarandon was invited to speak to the United Way because people want to hear the well-liked movie star Susan Sarandon, not because Sarandon is a national expert on women in volunteerism. People go to movies largely because they like the stars' work, but

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"inflicting grave damage to the norms of understanding, debate and mediation amongst countries"; it also condemned "harassment against Cuba," which supposedly "could serve as a pretext for an invasion." See [http://www.zmag.org/content/print\\_article.cfm?itemID=3556&sectionID=54](http://www.zmag.org/content/print_article.cfm?itemID=3556&sectionID=54).

37. Jennifer Harper, *Penn Can Sue for Loss of Film Role Due to Views*, WASH. TIMES, May 11, 2003, at A1 (discussing Sean Penn's lawsuit against producer Stephen Bing, and Bing's arguments that "Penn crosses over a bright line into unprotected speech when he publicly advocated the violent overthrow of the U.S. government" and that "Mr. Penn trashed 'any standard of decency' by posing for photographs under a portrait of Iraqi dictator Saddam Hussein and meeting with regime officials during his visit to Baghdad"); Leonora LaPeter, *Charity Calls off Event with Sarandon*, ST. PETERSBURG TIMES, Mar. 27, 2003, at 1B ("The United Way of Tampa Bay canceled an upcoming event featuring Susan Sarandon after getting three dozen complaints from donors and others about the actor's opposition to the U.S.-led war in Iraq. . . . The organization decided the event had the potential to become 'divisive' . . . . 'The focus of our whole meeting had shifted to whether or not we were creating a political platform for Susan Sarandon,' [a United Way spokeswoman] said . . . ."); Matthew Rothschild, *Enforced Conformity*, PROGRESSIVE, July 1, 2003, at 19 (giving the Glover, Sarandon, Robbins, and Penn incidents as examples of "the goon squad style," and apparently analogizing this style to "neo-McCarthyism"). Cf. Dan Howley, *Baseball Shrine Tells Actors, You're Out!*, TIMES UNION (Albany), Apr. 11, 2003, at A1 ("The National Baseball Hall of Fame and Museum has canceled a 15th-anniversary celebration of the classic baseball movie 'Bull Durham' because of anti-war views voiced by movie co-stars Tim Robbins and Susan Sarandon. . . . Hall president Dale Petroskey admonished [Robbins] for undermining U.S. military action in Iraq . . . ."). The Hall president's decision may be criticized on the grounds that he wasn't being a faithful servant of the Hall, given that he seemingly used his position to further his own political views, rather than to promote the Hall's interests. That, though, is a separate question from whether the decision was unfair to Sarandon and Robbins, or harmful to public debate.

38. See, e.g., CAL. LABOR CODE § 1101 (West 2003); WASH. REV. CODE § 42.17.680(2) (2004).

39. See *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123 (Wash. 1997).

also because they like the stars or at least like the image that the stars project; the same is true for musicians. That's a big part of why entertainers have publicists.

When people stop liking you, whether because they think that you're rude, vulgar,<sup>40</sup> or foolish, your value as a speaker or pitchman falls. People are less likely to want to hear you or buy products that you promote. Those who hire you, invite you, or play your music might understandably switch to someone who alienates fewer audience members.<sup>41</sup> What you gain from your sex appeal, coolness, or association with worthy causes, you lose from what people see as your rudeness, folly, hostility to projects they support, or association with causes they dislike. Tolerance demands that people neither beat you up for your views nor throw you in jail for them. But it doesn't demand that people continue to like you—and if they don't like you, then you won't be as effective a promoter.

Naturally this may lead entertainers to think twice before expressing controversial views. The boycott against Florida orange juice because of spokeswoman Anita Bryant's anti-gay stand surely taught many entertainers that.<sup>42</sup> But if your livelihood turns on people's affection for you, you can't protect that affection while saying things that turn people off. And tolerance doesn't require that people buy products promoted by celebrities whom they've come to distrust, hear songs by singers whom they no longer enjoy, or listen to speeches by entertainers who they've concluded are fools.

And just as entertainers derive much of their income from the public's affection for them, they also derive much of their political clout from such

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40. Cf. Dave Goldiner, *Bad-Taste Digs at W During Dem Gala Cost Big Fat Gig*, N.Y. DAILY NEWS, July 15, 2004, at 5 ("Whoopi Goldberg was . . . canned [yesterday] by the makers of SlimFast over her X-rated barbs about the President. Goldberg stoked outrage last week with an extended filthy rant [involving jokes based on the sexual connotations of President Bush's last name and Vice President Cheney's first name], which delighted the partisan crowd that packed a . . . Democratic fundraiser . . ."); Deborah Orin, *GOPers Want Whoopi's 'Fast' Exit*, N.Y. POST, July 13, 2004, at 6 ("Some Republican activists are launching a boycott of SlimFast diet products to protest SlimFast spokeswoman Whoopi Goldberg's X-rated rant against President Bush at a New York fund-raiser for Democrat John Kerry last week.").

41. My colleague Mark Kleiman suggests that it may be improper for federal radio licensees—such as Cumulus Media, which took the Dixie Chicks off its playlist—to drop songs on these grounds. But I don't think this is right: Just as a broadcaster is free to drop singers or speakers who express racist, sexist, or homophobic views and thus alienate listeners, so it should be free to drop singers or speakers who express views that many see as unpatriotic or rude.

42. See Christy Marshall, *Crisis Advertising: What's an Agency To Do?*, ADWEEK, Aug. 13, 1984, at 25 ("When Anita Bryant decided in 1978 to go public with her homophobia, the Florida Citrus Commission was in trouble. . . . Two years later when Bryant spoke out against gays, the commission received 40,000 letters. . . . The commission and its agency, Dancer Fitzgerald Sample, decided to phase Bryant out gradually. . . ."). The decision to ultimately drop Bryant was likely based partly on other factors, such as Bryant's divorce. See *Tully Becomes Rector of St. Columba's Church*, WASH. POST, Sept. 19, 1980, at B10 (stating that the Commission said the divorce was the only reason for the cancellation). But the high-profile boycott must have made many entertainers skittish.

affection and from their successes in fields quite unrelated to politics. Danny Glover's signature on the anti-Iraq-war letter was valuable because he was a movie star, not because he was learned on international law. Natalie Maines had a large audience for her expression of contempt for President Bush because she was invited to sing, not because she was invited to deliver a political lecture.

Consumers know that by supporting Natalie Maines, they are indirectly helping support Maines' political message, just as consumers know that by supporting a business, they are indirectly helping support the projects that the business or its owner funds. It seems quite legitimate for consumers to withdraw their support of entertainers and to use their economic power to pressure others to withdraw their support. Groups have organized consumer boycotts of businesses that contribute to Operation Rescue, to pro-life candidates and ballot measures, and to Planned Parenthood;<sup>43</sup> others have pressured businesses to stop advertising on conservative Sinclair Broadcasting.<sup>44</sup> Consumer retaliation against entertainers seems equally legitimate when a celebrity supports a cause by using her fame, rather than a business supporting a cause by using its money.

### B. Commentators

Six days after the September 11 attacks, Bill Maher, host of the TV show *Politically Incorrect*, was discussing the oft-repeated claim that the

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43. See Renee Graham, *The Issue for NOW*, BOSTON GLOBE, May 6, 1989, at 17 ("As the abortion argument intensifies, NOW officials have added a new tactic to the prochoice fight—boycotting businesses that support the antiabortion movement. Domino's Pizza . . . and the Tara hotels . . . have been cited by NOW as the first two businesses targeted for boycotts. 'People have a right to know where their money is going,' [the president of the Boston NOW chapter] said."); Charles V. Zehren, *Caught in Abortion Crossfire; Both Sides Pressure Firms*, NEWSDAY, Aug. 13, 1989, at 6 (noting that Tara Hotels was apparently boycotted because its CEO "contribut[ed] to backers of state anti-abortion referendums and anti-abortion legislative candidates," and that pro-life groups have also boycotted companies that have contributed to Planned Parenthood).

44. It's not clear whether the pressure succeeded. Compare Frank Ahrens, *Staples Pulls Advertising From Sinclair*, WASH. POST, Jan. 5, 2005, at E1 ("Office-supply retailer Staples Inc. is pulling its advertising from news programming on Sinclair Broadcast Group Inc. television stations, saying the decision was fueled in part by e-mails from customers angry at what they consider to be the broadcaster's right-wing bias in news and commentary. . . . Since December, Sinclair has been targeted by Media Matters for America, a liberal media group, which claimed the company was abusing the public airwaves to promote a conservative agenda and not offering politically balanced news[, and which encouraged consumers to complain to Sinclair's advertisers]."), with Greg Gatlin, *Staples Clipped by Political Fight*, BOSTON HERALD, Jan. 8, 2005, at 19 ("Staples initially said—in numerous interviews and in a news release issued by Media Matters—that its decision to stop advertising was based in part on complaints from Staples customers over the newscasts' conservative bent. But Staples later backpedaled, saying it was 'misrepresented' by Media Matters."). But in any event, Media Matters did try to exert pressure. See generally Marvin Ammori, *Shadow Government: Private Regulation, Free Speech, and Lessons from the Sinclair Blogstorm* 13-15 (working paper) (Dec. 28, 2004), at <http://ssrn.com/abstract=640942> (discussing the boycott and broader attempts to pressure Sinclair into changing its programming decisions).

terrorists were cowards. Not so, Maher said, agreeing with one of his guests, conservative commentator Dinesh D'Souza. Maher went on:

But also, we should—we have been the cowards lobbing cruise missiles from 2,000 miles away. That's cowardly. Staying in the airplane when it hits the building, say what you want about it, it's not cowardly. You're right.<sup>45</sup>

This won Maher no friends. Several stations pulled his show briefly.<sup>46</sup> Nine months later, the show was canceled, possibly partly because of this incident.<sup>47</sup> And responding to the Maher incident, then-White House spokesman Ari Fleischer famously said that “all Americans . . . need to watch what they say, watch what they do.”<sup>48</sup> Fleischer almost certainly wasn't threatening legal retaliation against Maher—but I suspect that he welcomed the outcry against Maher's remarks and the nongovernmental retaliation that Maher faced.

Yet of course commentators have long known that they “need to watch what they say” on television or in print. Their employers, after all, are watching what the commentators say. The employers rightly want to avoid using their networks and their newspapers to spread ideas that they strongly disapprove of.

The employers may be quite willing to carry some views that differ from their own; even newspapers with clear editorial policies may want to have a mix of views on their op-ed page. But some views doesn't equal all views. Few media outlets want to carry—and place their own imprimatur on—all possible views, no matter how rude, despicable, or foolish the views may be. And of course the public also watches what commentators say, and the employers watch what the public thinks.

Certainly the experience of Jimmy “the Greek” Snyder, a CBS commentator fired for making racially offensive statements in a TV interview, made this clear.<sup>49</sup> (Snyder's comments weren't explicitly anti-black—he condemned white athletes, not black ones—but they were seen as offensive chiefly because they asserted that blacks' athletic ability flows largely from slavery-era breeding practices.) Those who needed more evidence that commentators “need to watch what they say” got it when CBS News suspended Andy Rooney for allegedly remarking in a magazine interview that “most people are born with equal intelligence, but blacks have watered down their genes because the less intelligent ones are the ones that have the

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45. *Politically Incorrect* (ABC television broadcast, Sept. 17, 2001).

46. See Paul Farhi, *WJLA's Correction: Pull Maher*, WASH. POST, Sept. 22, 2001, at C7; Lisa de Moraes, *WJLA Pulls 'PI' a Second Time*, WASH. POST, Sept. 28, 2001, at C7.

47. See Paul Brownfield, *'Politically Incorrect' Canceled*, L.A. TIMES, May 15, 2002, at F3.

48. Press Briefing by Ari Fleischer (Sept. 26, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010926-5.html>.

49. See Dave Anderson, *Sports of the Times: 'Greek' Loses an Out Bet*, N.Y. TIMES, Jan. 17, 1988, § 5, at 1.

most children. They drop out of school early, do drugs and get pregnant.”<sup>50</sup> CBS rightly didn’t want to be seen as approving such views, and thus the network took steps to dissociate itself from those who promoted them.

Ari Fleischer’s remarks, in fact, criticized ethnic prejudice as well as perceived contempt for our soldiers. On September 17, 2001, Representative John Cooksey said in a radio interview, “If I see someone that comes [into an airport] that has a diaper on his head and a fan belt wrapped around the diaper on his head, that guy needs to be pulled over and checked.”<sup>51</sup> At a briefing a week later, a journalist questioned Fleischer about Cooksey’s statement, asking whether the president had a message for “members of his party . . . about this issue” of anti-Arab speech.<sup>52</sup> Fleischer said that the president was disturbed by Cooksey’s remarks; and then, a few questions later, Fleischer again condemned Cooksey, at the same time as he condemned Maher:

[QUESTION:] As Commander-in-Chief, what was the President’s reaction to television’s Bill Maher, in his announcement that members of our armed forces who deal with missiles are cowards, while the armed terrorists who killed 6,000 unarmed are not cowards, for which Maher was briefly moved off a Washington television station?

. . . .

MR. FLEISCHER: I’m aware of the press reports about what he said. I have not seen the actual transcript of the show itself. But assuming the press reports are right, it’s a terrible thing to say, and [it’s] unfortunate. And that’s why—there was an earlier question about has the President said anything to people in his own party—they’re reminders to all Americans that they need to watch what they say, watch what they do. This is not a time for remarks like that; there never is.<sup>53</sup>

Now as it happens, Fleischer may have erred in relying on press reports, if those reports tracked the questioner’s characterization of Maher’s statement. Maher didn’t condemn the “members of our armed forces who deal with missiles” as cowards. He said that *we* are cowards, and, in context, it seems likelier that he was condemning our then-existing practice—i.e., the country’s practice—of fighting terrorists using missiles rather than ground troops.<sup>54</sup> Maher, I think, got a bum rap for what he said; in the tense and emotional time following the attacks, his remarks were misinterpreted.

50. *CBS Gives Rooney a 3-Month Suspension for Remarks*, N.Y. TIMES, Feb. 9, 1990, at C30.

51. Ahan Kim, *Lawmaker Backs off Remark About Men Wearing Diapers on their Heads*, COX NEWS SERV., Sept. 20, 2001.

52. *See* Press Briefing by Ari Fleischer, *supra* note 48.

53. *Id.*

54. Maher promptly made that clear, in the next show after the controversial remarks:

Maher ma[d]e an on-air apology similar to that in a printed statement he had issued on Wednesday . . . . In that statement, Maher said that “in no way was I intending to say, nor

But other people did not get a bum rap. *New York Times* editorial cartoonist Ted Rall was rightly condemned for a cartoon that cruelly mocked the widows of those killed on September 11 and the widow of Daniel Pearl, the murdered *Wall Street Journal* reporter. The *Times* and other papers pulled that particular cartoon, and properly so.<sup>55</sup> If I were an editor, I wouldn't run Rall's cartoons at all, given the nastiness he has proved himself capable of. This editorial decision is no more reminiscent of the "House Un-American Activities Committee"<sup>56</sup> than is the firing of Snyder. Newspapers and TV networks are entitled not to carry views and speakers that they find contemptible.<sup>57</sup>

A year later, MSNBC talk-show host Michael Savage got what he deserved, too. Responding to an insult from a caller, he asked whether the caller was "one of those sodomists"; when the man said yes, Savage said, "You should only get AIDS and die, you pig." MSNBC promptly fired him, and rightly so.<sup>58</sup> Do such firings make commentators "watch what they say"? You bet. Yet media outlets such as MSNBC are nonetheless entitled to refuse to carry speech that they find repugnant.

### C. Other Workers

The tougher questions arise when we go beyond entertainers and commentators and consider the remaining 95% or more of the working public. These people don't sell their public appeal or their viewpoints.

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have I ever thought, that the men and women who defend our nation in uniform are anything but courageous and valiant . . . . My criticism was meant for politicians who, fearing public reaction, have not allowed our military to do the job they are obviously ready, willing and able to do.

De Moraes, *supra* note 46. My sense from reading a transcript of the program is that Maher's later characterization of his original purpose was indeed candid: Maher's words were quite consistent with his later explanation, and in context more consistent with the blaming-the-U.S.-policy theory than with the blaming-the-soldiers theory.

55. See Dave Goldiner, *WTC Cartoon Ripped: Mocks Victims' Families as Shallow, Greedy*, N.Y. DAILY NEWS, Mar. 6, 2002, at 2; Bill Sanderson, *Times' 9/11 Cartoon Spews All the Views Fit To Offend*, N.Y. POST, Mar. 6, 2002, at 3.

56. Eric Alterman, *Sullivan's Travails*, NATION, Apr. 8, 2002, at 10 ("[Andrew] Sullivan has set himself up as a one-man House Un-American Activities Committee. Take, for instance, Ted Rall's nasty, offensive cartoon ridiculing Marianne Pearl and 9/11 widows as money-grubbing attention grabbers. . . . [T]he commissar's decree: 'No paper should ever run Rall again.' . . . [T]he will to censorship that underlies Sullivan's rants is dangerous."). Sullivan was a journalist and publisher of a popular weblog.

57. One could try to distinguish a network's or a newspaper's decision not to run a certain statement—the exclusion of a comic strip or a column—from its decision to stop running a certain speaker altogether. Under this approach, CBS would have been wrong to fire Snyder and suspend Rooney, who made their statements in other media, though it could have rightly insisted that they not make similar statements on their CBS programs. But I don't think that media organizations must draw such a distinction: When a commentator says something that undermines his credibility or moral authority, a media outlet may properly conclude that it no longer wants to carry the speaker's speech.

58. Jim Rutenberg, *TV Program Canceled Over Remarks on Gays*, N.Y. TIMES, July 8, 2003, at C4.

They do their jobs, and it's appealing to say that if they do the jobs well, employers, co-workers, and customers should ignore the employees' off-the-job political views.

And in fact, there seems to be a robust social norm against disciplining workers based on their ideology. Refusing to hire Republicans, Democrats, pro-life voters, or pro-choice voters is generally seen as intolerant, and it can lead to public criticism that translates into embarrassment and lost business.<sup>59</sup> This isn't true for employees whose jobs involve expressing the employees' views or trading on the employees' goodwill: Opinion magazines aren't condemned for preferring columnists whose views the editors endorse, and advertisers are rarely condemned for avoiding spokespeople whose politics have caused controversy. But when other kinds of employees are fired because they have the wrong off-the-job views on gay rights, environmentalism, or various other issues, the public is more likely to disapprove. This helps explain why there have been few firings of ordinary workers for off-the-job speech criticizing the war, or faulting President Bush or Senator Kerry.<sup>60</sup>

Yet this social norm of employer tolerance does not extend to all speech (at least outside the possible special case of universities<sup>61</sup>). In the

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59. See, e.g., the incident cited *infra* note 60.

60. I know of one recent incident in which an employer fired an employee for driving to work with a Kerry bumper sticker on her car and for refusing to remove the sticker. Timothy Noah, *Bumper Sticker Insubordination*, SLATE (Sept. 14, 2004), at <http://www.slate.com/id/2106714>. This is foolish and intolerant behavior by the boss, but it at least involved speech that was brought into the workplace, which I'll set aside in this Section—employers have long restricted on-the-job speech much more than off-the-job speech, including sometimes speech in employer parking lots. Cf. *Erickson v. City of Topeka*, 209 F. Supp. 2d 1131 (D. Kan. 2002) (reversing, on First Amendment grounds, a government employer's ban on parking cars with Confederate battle flag vanity plates at work); Eric Mayne, *Marines Driven out of UAW Lot*, DETROIT NEWS, Mar. 13, 2005, at 1C (noting that the United Auto Workers International barred cars that display pro-Bush bumper stickers from its parking lot). I suspect there are other incidents that I've missed, but I'm quite sure that there is no such routine pattern of employer retaliation against allegedly unpatriotic off-the-job speech.

If one were to consider employer retaliation against employees who express unpopular views in the workplace, then I suspect one would find that the chief such retaliation today is for speech that expresses racist or sexist viewpoints. Such speech can lead to massive "hostile work environment" liability for the employer if other employees are offended by it. See articles cited *supra* note 8.

61. Universities, including private universities, have emerged as places where faculty are not fired for offensive speech, even when the speech is on the job and causes considerable friction with colleagues, students, and the public. This norm has been almost entirely adhered to even during the war on terror. The notable exception is the University of South Florida's firing of Professor Sami Al-Arian, which was apparently motivated by his earlier speech that seemed to praise some sorts of terrorism, and by the public outrage that this speech caused. Ben Feller & Michael Fechter, *USF Decides To Fire Al-Arian*, TAMPA TRIB., Dec. 20, 2001, at 1. As it happens, Al-Arian has since been indicted for illegally assisting terrorists, not just through speech but through criminal actions. Eric Lichtblau & Judith Miller, *The Money Trail; Indictment Ties U.S. Professor to Terror Group*, N.Y. TIMES, Feb. 21, 2003, at A1. Had USF fired him for such actions, it would surely have been entirely right, but USF's reasons at the time the firing took place seem to violate academic freedom principles. There were some other incidents of outrage or threatened discipline related to supposedly anti-war, anti-American, anti-Arab, or anti-Muslim speech in universities, but they generally didn't lead to any actual punishment.

1950s, it didn't extend to Communism. Today, it probably wouldn't extend to hard-core racism, or to praise of conduct that's seen as seriously illegal or immoral—rape, mass murder, pedophilia, and the like: I suspect that many employers would fire employees for such speech, and more would refuse to hire them. Even today, employees who praise al Qaeda and say that it's good that 3,000 Americans were killed on September 11 might well get fired, as would employees who praise the Ku Klux Klan and say that it should lynch more blacks. We haven't seen firings for pro-al Qaeda speech likely because very few Americans hold such views, and very few of those who do are willing to express them.

And we can easily imagine times when such firings would become more common. A genuinely menacing domestic subversive movement—for instance, consisting of anti-government anarchists or militant racists—would likely lead to a backlash in which the revolutionaries' supporters may routinely lose their jobs. The social norm appears to be broad tolerance for mainstream speech, but not for speech that's seen as evil enough to cast serious doubt on the employee's fundamental decency.

Should this exception for “evil speech” be seen as McCarthyism, or improper “blacklisting”? (Let's set aside whether employers should be legally barred from such political discrimination<sup>62</sup> and focus on whether it's right or wrong.) Or should we tolerate private employers' retaliation for evil speech, or even, in proper instances, praise it as an important tool for fighting evil views without unconstitutional use of government force?

This is a difficult question. The threat of private-employer retaliation, even for contemptible speech, does deter some views from being expressed in public debate: Such a threat may make millions of workers reluctant to participate in political groups, to express themselves in demonstrations, web-logs, or letters to the editor, or even to talk about their views to acquaintances.

Much of the deterred speech would be nasty stuff—advocacy of Communist revolution, of racism, of sex with children, and the like. Few of us would mourn the loss of such speech. But some of the speech would be valuable: Even people who propose horrible solutions might in the process offer legitimate criticisms of current legal or social problems. And the threat of job loss may deter even speakers who aren't Communist, racist, or pro-pedophile, for fear that they might be misunderstood.

On the other hand, employee speech, even off-the-job speech, can seriously harm employers. The speech can alienate customers and co-workers

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I think this social norm of academic freedom is sound, but the reasons for it are explained well elsewhere. *See, e.g.*, FREEDOM AND TENURE IN THE ACADEMY (William W. Van Alstyne ed., 1993); ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1998). I won't repeat them here, and I'll set aside universities for the remainder of this discussion.

62. *See, e.g.*, statutes cited *supra* note 38.

who are offended by the speech. It can alienate customers and co-workers who see the speech as evidence that the speaker will do bad things—will mistreat them or will commit crimes against them. And it can be used as evidence in court, if an employer is sued for crimes or torts that the employee commits.

Consider the widespread intolerance for racist speech, and, sometimes, for other bigoted speech. Atlanta Braves pitcher John Roker, for instance, was suspended and fined in 2000 by the baseball commissioner for his anti-foreigner, anti-gay, and possibly racist comments.<sup>63</sup> Cincinnati Reds owner Marge Schott was suspended for her racist remarks.<sup>64</sup> Judicial ethics rules bar judges from belonging to “any organization that practices invidious discrimination on the basis of race, sex, religion or national origin,”<sup>65</sup> even when the organization’s discriminatory rules are legal and constitutionally protected by the organization’s right of expressive association.<sup>66</sup> And I suspect that many employers are reluctant to hire managers or even line employees who are known to be racist.<sup>67</sup> In the words of the president of an NAACP chapter in Georgia, who was criticizing a student’s allegedly racist column in a college newspaper:

America is now in an era of litigation, and corporations which hire racists and adopt racist practices are finding that federal courts are willing to slap them with multi-million dollar judgments lawsuits. . . . The NAACP collects evidence of racially discriminatory practices within corporations and public institutions.

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63. Murray Chass, *Baseball Suspends Roker Till May for Comments*, N.Y. TIMES, Feb. 1, 2000, at A1 (noting that Roker’s remarks may have alienated both fans and fellow players); see also Alan M. Dershowitz, *Baseball’s Speech Police*, N.Y. TIMES, Feb. 2, 2000, at A21 (criticizing the commissioner’s decision as an improper private restraint on speech). The baseball commissioner’s relationship with players and owners is not the standard employer-employee relationship, but it is close enough for our purposes.

64. Schott was suspended in 1993 for making racial and ethnic slurs. In 1996, she agreed to give up control of the Cincinnati Reds for two and a half seasons after Major League Baseball officials threatened to suspend her again, this time for saying that Hitler “was good at the beginning” but “went too far.” See Mark Maske, *Owner Schott Surrenders Reds’ Reins; Sidelined 2 1/2 Seasons Due to ‘Insensitivity’*, WASH. POST, June 13, 1996, at A1.

65. MODEL CODE OF JUD. CONDUCT Canon 2, § C (1999).

66. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that the Scouts had a right to discriminate based on sexual orientation in choosing their members). I think its logic applies equally to discrimination based on factors other than sexual orientation.

67. For instance, there are many cases involving firing of police officers—or even clerical police employees—for their off-duty racist or allegedly racist speech. See, e.g., *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985); *Order in Gay v. Williamson County*, case no. A-02-Ca-635-SS, at 11-12 (W.D. Tex. Aug. 19, 2003); *Pappas v. Giuliani*, 118 F. Supp. 2d 433 (S.D.N.Y. 2000); *Weicherding v. Riegel*, 981 F. Supp. 1143 (C.D. Ill. 1997); *Lawrenz v. James*, 852 F. Supp. 986 (M.D. Fla. 1994); *Pruitt v. Howard County Sheriff’s Dep’t.*, 623 A.2d 696 (1993). The police departments’ theory is generally that racist employees may enforce the law in racist ways, and that the public may in any event be reasonably worried about the possibility of such racist action. See, e.g., *McMullen*, 754 F.2d at 938-39. That argument could of course apply to a wide range of jobs, and not just law enforcement.

Should [the student] ever become an employee of a corporation scrutinized by civil rights watchdog groups, he would be a major liability. Most corporations don't hire people who publicly adopt quasi-KKK or neo-Nazi ideologies because they are a public relations embarrassment and a liability in the event of EEOC investigations or civil rights lawsuits. How sad that [the student] let his racist ideology become part of the public record [and thus, among other things,] . . . damaged his own career prospects . . .<sup>68</sup>

I doubt, though, that intolerance toward genuine racism should be considered McCarthyism or otherwise faulted by decent people. And even if there is fault here, it should be placed on the buying public and on the legal system rather than on employers.

The baseball commissioner was understandably worried that Schott's and Rucker's comments would alienate fans; and though Schott and Rucker were relatively famous people,<sup>69</sup> employers can have similar worries even about much less prominent employees. Customers often frequent places because they like the people there, and because they feel welcomed there. Rucker, Schott, and others who express bigoted views—or other views that the public sees as contemptible—make customers reluctant to visit. Would blacks or Jews be eager to patronize a business where they'll have to deal with someone whom they know to be a Klansman, even if that employee is scrupulously polite when on the job? Would even white Protestants feel good about dealing with such a person?

Likewise, all of us, as judges' employers, want the judges to be impartial; and membership in certain groups may “give[] rise to perceptions that the judge's impartiality is impaired.”<sup>70</sup> Judges are naturally a special case. On the one hand, they are government employees and officeholders, which may give them a First Amendment claim to immunity from such restrictions.<sup>71</sup> On the other hand, precisely because they have such powerful jobs, we especially insist on their impartiality. But the underlying principle also applies to other jobs. Employers want their managers to be unbiased, since otherwise they can't trust the managers' evaluations. Employee morale may suffer if the employees see their managers as biased. Members of the

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68. Leigh Touchton, President of the Lowndes-Valdosta NAACP, Letter to the Editor, *VSU SPECTATOR*, Mar. 14, 2002, available at <http://www.valdosta.edu/spec/20020314/opinionmailbox.shtml>.

69. Rucker's position was partly between that of an ordinary (though highly paid) employee and a celebrity whose value to his employer derives partly from the public's goodwill.

70. MODEL CODE OF JUD. CONDUCT Canon 2, § C, *supra* note 64.

71. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (holding that judicial candidates generally have full First Amendment rights); *Bond v. Floyd*, 385 U.S. 116 (1966) (same as to sitting legislators). Cf. *Republican Party*, 536 U.S. at 796 (Kennedy, J., concurring) (“This case does not present the question whether a State may restrict the speech of judges because they are judges . . . . Whether the rationale of [the government employee speech cases] could be extended to allow a general speech restriction on sitting judges . . . in order to promote the efficient administration of justice, is not an issue raised here.”).

public may worry that an employee will treat them unfairly, and this may undermine the employer's relations with the public.<sup>72</sup>

What is evidence in the eyes of the employer, employees, and customers may also be evidence in the eyes of jurors who are deciding cases brought against an employer based on an employee's actions or motives. First, in a discrimination lawsuit, a manager's speech can be evidence of his biased motive. It wouldn't be conclusive evidence, but perhaps enough to sway the jury, together with other evidence that might not have sufficed on its own.<sup>73</sup> So if an employer knows that some manager thinks that blacks are inferior, or that fundamentalist Christians are irrational fools, the employer may be wise not to hire, promote, or keep him. And because employers are strictly liable for discriminatory employment actions by their

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72. See *McMullen*, 754 F.2d at 936 (holding that a sheriff's department could fire a clerk who was a known Klan recruiter, mostly because the area's "black community in large part would categorically distrust the Sheriff's office if a known Klan member were permitted to stay on in any position").

73. See, e.g., *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329-32 (6th Cir. 1994) (holding that the trial judge could admit evidence, in an age discrimination case, that the company's CEO had—many years earlier—said that he "[d]idn't like to be around old people," and that "[e]verybody over 30 years old needs to be put in a pen . . . [or] a concentration camp," since even such long-ago statements can help show "a pattern of behavior that would meet the heavy evidentiary burden that ADEA plaintiffs must bear to prove that a defendant's alleged discriminatory animus was not vague, ambiguous, or isolated"); *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 141 (D. Mass. 1997) (reasoning that university officials' public speeches criticizing disability claims by students—speeches which asserted that "many students who sought accommodations on the basis of a learning disability were lazy or fakers" and that "learning disabilities evaluators [were] 'snake oil salesmen'"—"reflect misinformed stereotypes," and could thus be used as evidence that the school discriminated against disabled students); see also *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 350 (1st Cir. 1989) (holding that the trial judge in a professor's sex discrimination case should not have admitted evidence that the university president had given a speech "discuss[ing] the decline of the traditional family [including the increase in working mothers] and the consequential deterioration of children's education," but suggesting that the result may have been different if the speech had "denigrate[d] women" or said that "women should not work" or "that professional women or others who might be able to obtain child care elsewhere should be denied promotion on merit"). Some courts have held, under the so-called "stray remarks doctrine," that certain statements that express bigoted views aren't by themselves adequate to prove discrimination; a few have even held that they're just inadmissible. See generally Edward T. Ellis, *Evidentiary Issues in Employment Cases*, SK013 ALI-ABA 531 (2004); Elissa R. Hoffman, Note, *Smoking Guns, Stray Remarks, and Not Much in Between*, 7 SUFFOLK J. TRIAL & APP. ADVOC. 181 (2002); Laina Rose Reinsmith, Note, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After Reeves v. Sanderson Plumbing Products*, 55 VAND. L. REV. 219, 252-57 (2002). But when the statement is made by one of the decisionmakers, the statement is often considered admissible. See, e.g., the cases cited *supra*.

Employers could avoid this danger by eliminating managerial discretion in hiring and firing decisions and coming up with rigid rules about when someone not only may, but must, be hired or fired. But stringent rules would make it much harder to fire bad workers or hire good ones, and much harder to avoid firing good workers who made a small mistake. Employers could also have each firing and hiring decision reviewed by many managers. But this would be expensive; it may make managers reluctant to fire bad people; and it may not eliminate the risk of liability flowing from managers' bigoted off-the-job comments, so long as the reviewing managers pay any serious attention to the original manager's decision.

agents,<sup>74</sup> the employer might want to investigate a bit before hiring an applicant: It might ask an applicant's references about whether the applicant has views that might redound to the company's harm, or it might even do a bit of Googling to see what public statements an applicant has made. If the applicant runs a "White Power" weblog, the employer might want to hire someone else.<sup>75</sup>

Second, employee speech and association could be used in a negligent hiring or negligent retention lawsuit against the employer. The theory in such lawsuits is that an employer knew or should have known that an employee had a propensity toward harmful conduct, and the employer should therefore be held liable for that employee's foreseeable behavior.<sup>76</sup> The classic example is an employer's hiring a worker knowing that the worker has a record of sex crimes (or not having checked to find such a record). If the worker's job sends him into customers' homes, and the worker uses the job to rape a customer, the employer is not liable under respondeat

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74. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 762-63 (1998) ("[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer," and an employer is liable for such an act.). Liability for hostile environment harassment is not necessarily strict, *see id.*, but liability for discriminatory firing or hiring is.

75. Nor can the employer assume that a more tolerant approach—hiring someone despite his stated views and hoping he will leave those views at the office door—will be protected by current First Amendment doctrine. People's speech is routinely admissible as evidence of their motives. For instance, in a hate-crime prosecution, where the prosecutors must show that the defendant's attack was racially motivated, courts routinely admit the defendant's past racist statements, even if the statements were otherwise unrelated to the crime. *See, e.g., United States v. Dunnaway*, 88 F.3d 617, 619 (8th Cir. 1996) (holding that the defendant's past statements that he "did not like black people" and that he "believed interracial relationships were wrong" were admissible as evidence that his crime was racially motivated); *United States v. Allen*, 341 F.3d 870, 885-86 (9th Cir. 2003) (holding that it was proper for the prosecution to introduce "photographs of [the defendants'] tattoos (e.g., swastikas and other symbols of white supremacy), Nazi-related literature, group photographs including some of the defendants (e.g., in 'Heil Hitler' poses and standing before a large swastika that they later set on fire), and skinhead paraphernalia (e.g., combat boots, arm-bands with swastikas, and a registration form for the Aryan Nations World Congress)"); *United States v. Woodlee*, 136 F.3d 1399, 1410 (10th Cir. 1998) (likewise allowing admission of evidence that "[defendant] planned to accompany some friends on an outing but, when [he] learned a woman of 'mixed race' would also attend, he refused to go," and stating that "[e]vidence of past racial animosity is relevant to establish" racist intent); *People v. Slavin*, 807 N.E.2d 259 (N.Y. 2004) (likewise allowing admission of racist tattoos).

Such statements aren't punishable themselves, but they can be evidence of a racist intent in a hate-crime case and, thus, may dramatically increase the defendant's sentence. The same is true in Title VII cases and other cases. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 489-90 (1993); *Street v. New York*, 394 U.S. 576, 594 (1969); *Haupt v. United States*, 330 U.S. 631 (1947). And such speech likely would be admissible under the rules of evidence. In the federal system, for instance, Rule 404 bars the use of some character evidence, but specifically allows prior bad acts—including prior bad statements—to be used as evidence of a speaker's intentions or motives. *See* FED. R. EVID. 404(b). Rule 403 bars evidence when its prejudicial effect substantially outweighs its probative value; but people's past political statements and even political associations are often quite probative of their later actions and motivations. *See* FED. R. EVID. 403.

The correlation between belief and action is of course far from perfect. But to win at trial, a party may not need a single dispositive piece of evidence—the aggregate of many probative pieces, each imperfect on its own but persuasive when put together, may suffice.

76. *See* RESTATEMENT (SECOND) OF AGENCY § 213 cmt. d (1958).

superior, since the worker's conduct was outside the scope of his employment.<sup>77</sup> But the employer would be liable under a negligent hiring theory, since the crime was foreseeable given what the employer knew or should have known about the worker's propensities.<sup>78</sup>

And these propensities can be shown through the employee's past statements, not just his past actions. Thus, in *Middlebrooks v. Hillcrest Foods, Inc.*, the Eleventh Circuit held that a restaurant could be held liable for negligently hiring a cook who insulted black patrons and had them removed from the restaurant because of their race. Part of the evidence was that a manager "testified that it would not surprise him to learn that [the cook] would use profanity or make racist remarks, although he would be surprised that [the cook] used this language in front of customers."<sup>79</sup> Likewise, in *Corbally v. Sikras Realty Co.*, a New York appellate court held that an employer may have been negligent in hiring and retaining an employee who later assaulted the plaintiff, because the employee's abusive propensities were shown by, among other things, an "apparent affinity for Nazi memorabilia."<sup>80</sup>

Naturally, such claims are hardly sure winners. The employer may argue that the employee's speech wasn't enough to make the employer realize that the employee had a dangerous propensity. The jurors may agree, perhaps because they want to cut tolerant employers some slack, and they don't want to encourage employers to fire employees because of their speech.

Or the jurors may disagree, and find that the company was indeed negligent for disregarding such powerful evidence of the employee's future dangerousness. (After all, the employee ended up being dangerous, and jurors are already tempted to infer that events which happened were foreseeable.<sup>81</sup>) And the more unpopular the employee's speech, the more likely a jury is to so decide. Many a juror will assume the worst of people who

77. See, e.g., *N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844 (N.Y. 2002).

78. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 19 (Tentative Draft No. 1, 2001); RESTATEMENT (SECOND) OF TORTS § 307 (1965).

79. 256 F.3d 1241, 1247 (11th Cir. 2001) (rejecting the dissenting judge's argument that this evidence was insufficient).

80. 554 N.Y.S.2d 839, 839-40 (App. Div. 1990); see also *Fisher v. A.W. Temple, Inc.*, No. LL-870, 2000 WL 1568684, at \*4 (Va. Cir. Ct. Aug. 4, 2000) (discussing a negligent hiring claim based in part on the defendant employer's knowledge that an employee who assaulted the plaintiff was a KKK member, but rejecting the claim because under Virginia law, negligent hiring and retention claims "can be asserted only by non-employees"); *Complaint in Ybern v. Nissan Towne*, No. C-1-98-265 (S.D. Ohio filed Apr. 9, 1998, dismissed pursuant to a settlement, Nov. 21, 1999) (claiming that defendant was liable for negligent hiring and retention because it knowingly "hired and retained certain employees who had certain connections with or were sympathetic to the beliefs of the Ku Klux Klan," and the employees had then assaulted and harassed the plaintiff).

81. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1095-1100 (2000) (discussing hindsight bias).

have contemptible views, and will assume that such people were dangerous as well as wrong-thinking. Such jurors may have little sympathy for a company that seems to have coddled those bad people and disregarded their evil propensities.

Moreover, the company has to make its decision up front: Should it hire or keep someone whose statements might open it to liability in the future?<sup>82</sup> Or should it play it safe and go with someone else? Employers faced with an often unpredictable legal system may well want to err on the side of caution. And it's wrong, I think, to condemn a company's actions as McCarthyism when the actions are needed to minimize the risk of legal liability.

Similar forces may lead employers to fire people who praise or defend illegal, harmful behavior. *Melzer v. Board of Education* is a classic scenario. Melzer, apparently a good high school teacher in most ways, turned out to be editing a newsletter for the North American Man/Boy Love Association (NAMBLA).<sup>83</sup> Parents complained, fearing that he might practice what he preached, though there was no evidence that he had done this in the past.<sup>84</sup>

Imagine a private junior high school making a similar discovery about one of its teachers.<sup>85</sup> Would most parents be comfortable sending their kids to such a school, even if the teacher has a seemingly clean record (though who can tell for sure?), and even if the teacher assured people that he would never act on his views? Would you feel comfortable sending your child to that school?

82. Both in discrimination cases and negligent hiring cases, a company will rarely be held liable based *solely* on evidence of employees' speech. The plaintiff will bring in as much evidence as he can; each item seldom will be dispositive, and some might not even be believed by the jury, but the plaintiff will hope that the aggregate of all the items—the evidence of speech as well as the evidence of other conduct—will suffice.

Conversely, the employer, to avoid liability, will want to minimize the speech and conduct that future plaintiffs could point to. The employer would, of course, have an incentive to fire or not hire employees who commit crimes, or even who do things that aren't criminal but might seem suspicious. (In *Corbally*, for instance, the court held that an employee's knife collection—quite likely a perfectly legal collection—could be seen as evidence of a propensity for violence that the employer knew about. 554 N.Y.S.2d at 840.) But the employer would also have an incentive to fire or not hire employees who make statements that future juries could interpret as evidence of a motive to discriminate or a propensity for illegal conduct.

83. 336 F.3d 185, 188-89 (2d Cir. 2003).

84. *Id.* at 189, 191. Because *Melzer* involved a public school, there were some First Amendment constraints on the employer, but *Melzer*'s firing was ultimately upheld under the *Pickering* balancing test. *Id.* at 195.

85. Private schools may be especially likely to fire teachers who participate in pro-pedophile politics: Among other things, (1) private-school parents are probably more able than most public-school parents to send their children to other schools, (2) an exodus from a private school (unlike one from a public school) directly jeopardizes the school's solvency and the school officials' jobs, and (3) private schools have less need than public schools to worry about any First Amendment lawsuits based on such firings—lawsuits that may prove expensive and burdensome even if the school wins them—because private schools aren't state actors and thus aren't bound by the First Amendment.

Or say the teacher molested a child, and the child's parents sued the school for negligent hiring or retention, arguing to the jury, "The school knew this teacher thought man-boy sex was fine; the teacher had sex with this boy; the school must have foreseen that this would happen, yet they let the teacher have access to hundreds of boys." The school can indeed respond by pointing out that not all people act on their ideological beliefs, especially when the actions are illegal. The school can argue that it had good experiences with the teacher before, and that it supervised him as closely as teachers are normally supervised. But can we confidently predict that the jury would reject the plaintiff's argument?

So a reasonable school that's interested in protecting its students, keeping them enrolled, and avoiding ruinous liability will have to fire the teacher. And the same is true for other employers (and there are many) through which an employee may become acquainted with children, especially since the employer may be held liable even if the tortious conduct happened outside the workplace, so long as the employee's job helped him engage in the conduct.<sup>86</sup>

Nor are such incentives to fire employees based on their views limited to members of the broadly loathed NAMBLA or to racists. If you ran an abortion clinic, you might want to replace a security guard if you learn that he thinks of anti-abortion terrorists as freedom fighters. If you ran a security-guard company, you might likewise want to replace a guard who believes that all property is theft, and that shoplifters are just oppressed by evil store owners.<sup>87</sup>

Right now, discrimination against people who hold such views is likely to be limited to only a few job categories. But if politically motivated terrorism or sabotage becomes more common and more broad-gauged—for instance, if radical anti-abortion, anti-globalization, anti-government, or environmentalist terrorists start attacking or threatening to attack a wide range of domestic targets—employers may become understandably reluctant to hire anyone who is found to sympathize with such views.

Naturally, the hard-core terrorists usually won't announce their ideologies; but to succeed, they may often have to rely on sympathizers who can be persuaded to help them. Say an anti-abortion terrorist strikes a local target, and it turns out that some known terrorist sympathizers used their jobs to help him—for instance, they helped him illegally buy explosives ingredients, willfully ignored his using a straw purchaser to buy a gun, or didn't report some suspicious transaction that they had a legal duty to re-

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86. See *supra* notes 71-73 and accompanying text.

87. Negligent hiring and retention claims can be made in some jurisdictions even when the only harm was to property. Compare *Welsh Mfg. v. Pinkerton's Inc.*, 474 A.2d 436 (R.I. 1984) (allowing such a claim), with *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796 (D. Minn. 1994) (rejecting such a claim).

port. Would you want to be the employer who hired or retained the terrorist sympathizers, knowing the employees' views? Do you think you would be easily forgiven this by customers, or by jurors in a negligent hiring lawsuit?

#### D. Possible Solutions

So what then is to be done? Some might argue for social norms or even laws that treat political views the same way that race, sex, and religion are treated. Employers are not allowed to discriminate based on race, sex, and religion even if hiring (say) a black or atheist employee might drive away customers, or even if the employer and its customers think that a black employee or a male employee is more likely to commit crimes. Likewise, the argument would go, employers must hire the Klansmen, NAMBLA members, and the like. If they misbehave, then you can fire them. But until that happens, you can't bow to public pressure, even if your employees quit to avoid working with a KKK member, or parents stop sending their children to your school.<sup>88</sup>

But I don't think that's right. The premise of most antidiscrimination laws and social norms is that it's wrong and generally irrational to dislike people because of their race, sex, or theological beliefs. We hope that condemning such discrimination will eventually persuade customers and employees to be more tolerant, especially since tolerance is the more rational and practical action for the customers and employees. The burden on employers of having to hire people whom others dislike will therefore decrease over time. And we assume that the correlation between behavior and race, sex, or theological belief will be quite weak.<sup>89</sup>

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88. Nor could such discriminatory hiring decisions be defended under a "bona fide occupational qualification" (BFOQ) exception to the hypothetical antidiscrimination law. Concern about co-worker or customer reaction is generally not enough to justify discrimination under the BFOQ exception, except in rare cases. See Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1370 & n.113 (1997) (discussing the BFOQ exception). Likewise, predictions that people who have a certain attribute will behave illegally or harmfully aren't accepted under the BFOQ exception. *Id.* at 1369.

For an argument that employers may have a constitutional right to refuse to hire people based on their political beliefs, see Martin Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1703-19 (2001).

89. In principle, the correlation between theological belief and behavior may sound plausible: One could argue, for instance, that people who believe that they will be punished in hell for evil behavior and rewarded in heaven for good behavior would be much better behaved than those who lack such a belief. But I think that laws banning religious discrimination generally rest in part on the empirical conclusion that these correlations, while plausible in theory, end up being very weak in practice.

The correlation between religiously motivated belief on secular subjects—for instance, whether abortion providers are murderers, whether blacks are inferior to whites, and so on—and behavior is stronger. But religious discrimination laws generally let employers discriminate based on a person's opinions on secular subjects. See, e.g., *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 604-05 (9th Cir. 2004) (holding that firing an employee based on his religiously motivated anti-gay speech wasn't

On the other hand, disliking people who have evil views is quite reasonable.<sup>90</sup> We can't persuade people to like Klansmen, and we shouldn't try. Moreover, people tend to act on their beliefs, especially when the beliefs relate to worldly matters rather than theological ones. This is probably a major reason why most jurisdictions do not prohibit ideological discrimination, though they do prohibit discrimination based on race, sex, and religion. Forcing employers to ignore employees' bad tendencies, and to ignore patrons' understandable hostility to employees with bad views, isn't fair to the employers who would have to pay the costs of this experiment.

It's true that people will sometimes err about which views are evil. And sometimes these errors can become quite common, and thus especially pernicious. A law or a norm that bars all ideological discrimination may help avoid these errors. This risk of error is indeed one reason that we deny the government the power to suppress allegedly evil ideas.<sup>91</sup>

But denying private employers the power to act on their—and their customers'—views about which speech is contemptible or probative of dangerousness goes too far. Private employer power is substantial, but it isn't as dangerous as coercive government power; typically, people can more easily switch to a more tolerant employer than to a more tolerant sovereign. Moreover, employers hire employees with the reasonable desire that the employees produce more benefits than costs. Because of this, even the government has considerable power to fire employees based on their speech, including when the speech alienates the public,<sup>92</sup> when the speech is probative of future harmful behavior,<sup>93</sup> and when the speech otherwise costs the employer too much money.<sup>94</sup> Private employers, who aren't bound by the First Amendment, deserve at least as much flexibility.

Instead of a norm that private employers may never discriminate based on employees' political views, I would suggest three much more modest steps. First, the legal system could at least minimize the degree to which it encourages employers to fire employees for their speech. The speech-as-evidence doctrine is so entrenched and so necessary to accurate

religious discrimination); *id.* at 606-07 (holding that an employer had no duty to accommodate an employee's desire to express religiously motivated anti-gay views, because requiring the employer to tolerate such views would offend co-workers, and thus impose an undue burden on the employer).

90. This is true even when those views flow from religious conviction. While religious discrimination laws (and, I suspect, social norms against religious discrimination) ban discrimination based purely on religious affiliation or theological statements—for instance, a person's opinions on transubstantiation—they leave employers broad latitude to fire employees because of their offensive speech on secular issues. *See id.*

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

92. *See, e.g., Melzer v. Bd. of Educ.*, 336 F.3d 185, 199 (2d Cir. 2003); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985).

93. *See, e.g., Wales v. Bd. of Educ.*, 120 F.3d 82, 85 (7th Cir. 1997) (noting that “what people say reflects or presages what they do, and employers . . . therefore may properly consider job-related speech when making decisions”).

94. *See Connick v. Myers*, 461 U.S. 138 (1983).

factfinding that it can't be displaced easily. But employers' knowledge of their employees' political positions—even justly unpopular ones—shouldn't be admissible as evidence of employer negligence.<sup>95</sup> Courts should conclude that, as a matter of law, it's reasonable for an employer to tolerate its employees' political views.

Even if evidence of an employer's knowledge of an employee's political views is made inadmissible, employers will still have some incentives to fire employees whose well-known views may foreshadow future misconduct. For example, an abortion clinic may refuse to hire a militantly pro-life security guard even if it's immune from a negligent hiring lawsuit—such a guard can harm the clinic much more directly than just by exposing it to possible liability. But at least preventing the guard's ideology from leading to negligent hiring liability will eliminate a government-imposed deterrent to free speech, a deterrent that involves government actors (judges and jurors) passing judgment on the dangerousness of various views.<sup>96</sup>

Second, we could further support the existing social norms that pressure employers to tolerate reasonable, decent viewpoints, even if they disagree with those viewpoints. If an employer fires an employee because the employee has a Democratic bumper sticker on her car—even when the car is parked in a company parking lot—the employer deserves condemnation. The employer should not be *legally* barred from acting this way. But such actions reflect an intolerant attitude, are unfair to employees, and risk deterring people's political activity for no real benefit. The actions deserve to be mocked, so that future employers may themselves be deterred by the social and perhaps economic costs of their actions.<sup>97</sup>

Third, we could support social norms that discourage employers from overreacting. Sometimes, co-workers or patrons get upset not by real insults but by perceived ones. The notorious case of the employee who was fired for using the word “niggardly,” which some of his listeners wrongly perceived as racist, is the classic example;<sup>98</sup> the Bill Maher incident may be

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95. To make this work, the courts would have to say that the negligence claim can't be based even in part on the employers' ignoring the speech. *See supra* note 81.

96. *See generally* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005) (arguing that even generally applicable laws must be treated as content-based speech restrictions when they are applied to impose liability based on the content of speech).

97. For the reasons given in Parts II.A and II.B, I think that companies have good reason to drop celebrity endorsers or commentators based on the celebrities' or commentators' viewpoints, even if the viewpoints are within the mainstream. A company may properly not want its public face to be associated with a certain view, and a media outlet may not want to help promote that view. The point I make here is limited to “ordinary employees.”

98. *See* Melinda Henneberger, *Race Mix-Up Raises Havoc for Capital*, N.Y. TIMES, Jan. 29, 1999, at A10.

another.<sup>99</sup> In such cases, some employers may opt for firing the speaker, rather than trying to explain the misunderstanding to the public. Publicly criticizing the employer for this, and pointing out the harms that such overreactions can cause—harm to people’s careers, to the ease and spontaneity of people’s speech, and, in the “niggardly” case, to the fight against real racism—can make the overreactions more expensive. As criticism makes such firings more expensive, the firings stop being the cheap way out.

Indeed, these are only modest steps. They may help protect mainstream speech from occasional suppression, but they will do little to protect from private retaliation the speech that most people think is contemptible. They would have done little to stop blacklists of genuine Communists, and they will do little to make racists or NAMBLA members feel free to speak their minds without fear of losing their jobs.

But I don’t think this is particularly bad. People whose ideologies are rightly condemned tend to be costly employees as well as bad people. And employers should be free to stop paying a salary to people whose costs to the employer exceed their benefits.

### III

#### SUBPOENAS OF INFORMATION ABOUT PEOPLE’S FIRST AMENDMENT ACTIVITIES

“[Rabbi Max] Wall is distressed at the echoes of McCarthyism he hears today. The USA Patriot Act, [among other things] . . . allows investigators to inspect library records. ‘It bothers me very much,’ Wall said. Just as he was bothered 50 years ago by [McCarthyism].”<sup>100</sup> Under this “New McCarthyism,” another commentator writes, “[y]ou are no longer free to patronize a bookstore without fear of government scrutiny.”<sup>101</sup>

As it happens, the Patriot Act has no special provisions regarding library subpoenas, and its general subpoena provision—section 215 of the Act—isn’t particularly novel: The government has long had the power to subpoena lots of records, including library records, simply by using the normal grand jury subpoena.<sup>102</sup> Still, while the Patriot Act isn’t at fault

99. See *supra* Part II.B. Both cases involved on-the-job speech; firings based on similar off-the-job speech would even more clearly be overreaction.

100. Brent Hallenbeck, *When McCarthyism Hit Vermont*, BURLINGTON FREE PRESS, Sept. 7, 2003, at 1A. See also, e.g., Bessy Reyna, *Poet Uses Her Art to Fight Social Injustice*, HARTFORD COURANT, Apr. 20, 2003, at G1.

101. Matthew Rothschild, *The New McCarthyism*, PROGRESSIVE, Jan. 1, 2002, at 20.

102. For a state case involving a normal subpoena served against a library, see *Brown v. Johnston*, 328 N.W.2d 510, 512 (Iowa 1983).

I have faulted section 215 for allowing the government to subpoena records and at the same time order the subpoena recipients not to disclose the subpoena’s existence. This provision and similar provisions that have long existed in other subpoena, search, or wiretap statutes are speech restrictions—they bar people from revealing certain information that may be relevant to public debate about the

here, there surely is a plausible argument against library and bookstore subpoenas:

- (1) Reading books is constitutionally protected activity.
- (2) Reading certain books can make the police suspect that you're prone to do illegal things and can make juries think you're the one who did some act suggested by those books. This may be true of bombmaking manuals, pro-Communist propaganda, or racist tracts. It may also be true of chemistry textbooks that discuss explosives, books that harshly condemn government policies, or scholarly volumes on supposed genetic differences among the races. Naturally, not everyone who reads such books will attract police attention. But if the police are trying to find out who's involved in some bomb plot, subversive conspiracy, or hate crime, they might try to use reading records to identify potential suspects.
- (3) If the police can easily learn who bought or borrowed certain books, then some people may be deterred from reading suspicious books.
- (4) Therefore, we should interpret the First Amendment as prohibiting, or at least sharply limiting, subpoenas for bookstore or library records.

In 2002, the Colorado Supreme Court accepted this very argument in holding that the Colorado Constitution barred subpoenas or searches of bookstore records unless prosecutors could “demonstrate a sufficiently compelling need for the specific customer purchase record” and in particular that there are no “reasonable alternate ways of conducting an investigation other than by seizing a customer’s book purchase record.”<sup>103</sup> This is a deliberately demanding standard, much higher than the usual standard for subpoenas (that there’s a “reasonable possibility [that the subpoena] . . . will produce information relevant to the [investigation]”<sup>104</sup>) or even the probable cause standard for searches. This logic should also apply to library records.

And there is precedent for this sort of restriction on the government’s investigative powers: The Court has long restricted the government’s ability to forcibly discover who belongs to or contributes to expressive associations, precisely because government scrutiny may deter people from

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government’s investigative practices—and I think they are unconstitutional, though understandable. See Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, especially 1100 n.29 (2005). But whether people may be ordered to remain quiet about the subpoenas is a separate issue from whether the subpoenas should be permissible in the first place.

103. *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1059 (Colo. 2002); see also *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Med. L. Rptr. 1599 (D.D.C. 1998) (reaching a similar result).

104. *United States v. R. Enters.*, 498 U.S. 292, 301 (1991).

participating in such groups.<sup>105</sup> Likewise, many circuit courts have relied on this argument in granting journalists a qualified privilege not to reveal the identities of confidential sources.<sup>106</sup>

Yet appealing as this argument might seem, consider its close analog:

- (1) Speaking or sending email is constitutionally protected activity.
- (2) Saying or writing certain things can make the police suspect you of various illegal conduct and can make juries think you're guilty of such conduct. This may be true of pro-terrorist, pro-Communist, or racist statements, as well as statements that are well-intentioned but might be interpreted as pro-terrorist, pro-Communist, or racist.
- (3) If the police (or civil litigants) can easily learn who said what, then some people may be deterred from saying or writing suspicious things.
- (4) Therefore, we should interpret the First Amendment as prohibiting, or at least sharply limiting, subpoenas demanding that people testify about what someone said or wrote.

The two arguments are similar—yet the latter argument is quite unlikely to prevail. First Amendment law doesn't bar the police from investigating what suspects have said or written to acquaintances, or who has

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105. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld a requirement that people's political contributions and expenditures be disclosed, despite the potential deterrent effect on such behavior. But *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), held that even this requirement must be waived when a minor party to which the contribution is made is unpopular enough that the deterrent effect is likely to be especially severe.

The Court has also generally struck down requirements that people identify themselves in their publications. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Such requirements, though, not only deter certain kinds of speech, but also forcibly change the content of speech: They bar speech of a certain content (unsigned material) and mandate the inclusion of content (the author's name) that the author might want to avoid. The Court thus held the identification requirements to be unconstitutional partly because they are "a direct regulation of the content of speech," *id.* at 345, a justification that doesn't apply equally to normal discovery requests, which don't directly regulate the content of a publication.

106. See, e.g., *Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden)*, 151 F.3d 125, 128-29 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993); *United States v. Long (In re Shain)*, 978 F.2d 850, 852 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977); *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 & n.9 (8th Cir. 1972). But see *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003) (reasoning, I believe correctly, that the Supreme Court's *Branzburg v. Hayes* decision should be read as foreclosing such a privilege, and disagreeing with the cases cited above); *In re Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005) (rejecting such a privilege); *Scarce v. United States (In re Grand Jury Proceedings)*, 5 F.3d 397, 402-03 (9th Cir. 1993) (likewise); *Storer Communications, Inc. v. Giovan (In re Grand Jury Proceedings)*, 810 F.2d 580, 584-86 (6th Cir. 1987) (likewise); *In re Letellier*, 578 A.2d 722 (Me. 1990) (likewise); *Capuano v. Outlet Co.*, 579 A.2d 469, 474 (R.I. 1990) (likewise).

said or written something that might make him a suspect.<sup>107</sup> Nor does it bar prosecutors from using subpoenas or other techniques to coerce the suspect's acquaintances into testifying about such things.<sup>108</sup> Say the police are investigating the killing of an abortion provider, the bombing of a federal building, or the burning of a black church. Surely they would ask around: Who has been saying things that reveal an ideological motive to commit the crime? Has this particular person sent you any email that revealed such a motive?<sup>109</sup> These are legitimate and valuable questions.<sup>110</sup>

If need be, the police might try to pressure people to talk, or subpoena them to testify before a grand jury or at trial. When they find a suspect, and have probable cause to believe that his computer contains information that might reveal (among other things) a motive, they can search the suspect's files. They may subpoena the suspect's Internet service provider for records of messages that he had sent or received, looking both for evidence against him and for evidence that others shared his motive and may thus have acted together with him. And, of course, in civil cases it's routine for litigants to demand a wide range of email and other records from the other side, hoping that these records may contain helpful evidence.<sup>111</sup>

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107. It doesn't even bar the admission of such evidence at trial, see cases cited *supra* note 74; *a fortiori*, it doesn't bar inquiries about such statements.

108. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (holding that there is no First Amendment bar to subpoenas for evidence of what people said in tenure reviews); *Herbert v. Lando*, 441 U.S. 153 (1979) (likewise as to what people said in editorial-room conferences).

109. This speech is likely to be just among friends, and not intended for publication; but such speech is an important part of political debate: Many people are more persuaded by political discussions with friends they trust than by public speech that comes from strangers. See Frederick Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217 (1979).

110. One difference between investigating what someone said and what he read is that what people read is usually less telling than what they say. Imagine that the police or jurors are trying to find out whether a person committed some hate crime, or whether the crime he allegedly committed was indeed motivated by racial hostility. Evidence that the suspect read a supposedly racist book won't be as probative of his actions or intentions as evidence that he expressed supposedly racist views. Therefore, the argument might go, the police have less need to discover the person's reading habits than to discover his past statements.

But for this very reason, the threat of discovery is less likely to deter a person from reading a book than from making a statement. If the person is contemplating reading a racist book, he knows that he can likely give a plausible innocent explanation: He was just curious about what this notorious book really said; he doesn't agree with the book's views but wanted to know what the other side was arguing; he saw something online praising the book and picked it up without really knowing what it contained. But if the person is contemplating writing a racist email, he knows that the email—were it to come to light—would likely be much more incriminating.

111. See, e.g., George Brandon, *Workers' Web Use a Growing Concern for More Employers*, Kiplinger BUS. FORECASTS, Feb. 21, 2005 ("Plaintiff attorneys routinely subpoena e-mail records in sexual harassment, racial discrimination and hostile work environment cases, says Jennifer Brown Shaw, a partner in the Sacramento office of employment law firm Jackson Lewis. And when e-mails with sexually explicit or other inappropriate content are introduced as evidence in workplace harassment lawsuits, 'the question that will inevitably come up is why the employer didn't know,' Shaw adds."); Bill Atkinson & Stacey Hirsh, *1 E-mail. Many Lives*, BALTIMORE SUN, Oct. 10, 2004, at 1C ("Chances are big brother is reading over your electronic shoulder. If you are involved in a workplace

This necessarily has a deterrent effect on speakers. Even nonviolent people who hold pro-life, anti-government, or racist views might become reluctant to express these views to acquaintances, especially in writing (such as email). It's true that because bookstore records can be subpoenaed, you aren't "free to patronize a bookstore without fear of government scrutiny" of what you read. But you have never been free to speak or email without fear of similar government scrutiny of what you say or write—yet this deterrent effect has not prevented government investigations of who said what. Courts don't even require police to show a "compelling need" for each piece of speech-related evidence for which they subpoena or search.<sup>112</sup>

We see, then, a tension in the First Amendment law related to potentially speech-detering government inquiries. On the one hand, the law restricts coercive discovery of who belongs to a group, or, in some jurisdictions, who said something to a journalist. On the other hand, it does not restrict the discovery of what a suspect said, discovery of what university professors said in tenure reviews,<sup>113</sup> or what reporters said in editorial discussions about an allegedly libelous story,<sup>114</sup> though such discovery can deter people from speaking candidly.<sup>115</sup> And notwithstanding what some lower courts have done, the Court's *Branzburg v. Hayes* opinion held—and the Court later reaffirmed—that prosecutors can indeed discover the names of a journalist's confidential sources.<sup>116</sup>

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lawsuit, whether it is sexual harassment, racial discrimination, wrongful termination, hostile work environment, you can take it to the bank . . . that e-mail is going to be subpoenaed and used as evidence for or against your case.”) (quoting Nancy Flynn, “author of several books on e-mail”).

112. See *United States v. R. Enters.*, 498 U.S. 292, 301 (1991).

113. *Univ. of Pa.*, 493 U.S. at 182. Of course, like all subpoenas, such subpoenas could seek only relevant evidence, but that's an easy standard to meet.

114. *Herbert v. Lando*, 441 U.S. 153 (1979).

115. As *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964), pointed out, the “fear of [civil] damage awards” can be at least as “inhibiting [as] fear of prosecution.”

116. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (stating that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news,” and noting as an example that “the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source”) (citation omitted); *Univ. of Pa.*, 493 U.S. at 201 (analogizing the case, in which the Court rejected a privilege, to *Branzburg*, and characterizing *Branzburg* as “reject[ing] the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary”); (Powell, J., concurring) (joining the majority opinion and specifically rejecting the qualified privilege proposed by the dissent, though elaborating that “harassment” of journalists without “legitimate need” would not be allowed under the majority's opinion).

The search for truth in the courtroom, like the search for truth in public debate, usually benefits from more information.<sup>117</sup> The First Amendment bars the government from outlawing certain speech, or making it subject to civil liability. But the legal system's investigative power may often properly be used to uncover relevant evidence even when that discovery may deter valuable speech.

What, if anything, can be done about these deterrent effects? First, courts or legislatures could indeed impose demanding standards for subpoenaing or searching library or bookstore records, though not for discovery of what people have said or written. The theory would be that people's reading habits (as opposed to people's statements) are important evidence in only a few cases, so the legal system can operate well enough without such evidence.<sup>118</sup>

Yet reading habits are potentially relevant. In the Unabomber case, the FBI combed library records for people who might have borrowed two obscure (and by themselves innocent) books that the bomber quoted in his manifesto; unfortunately, the FBI could look only in the few geographic areas to which they had linked the bomber, so the searches didn't help.<sup>119</sup> Police tracking the Zodiac serial killer noticed that the killer's modus operandi seemed to be inspired by a Scottish mystic's books (which were again by themselves innocent), and the police thus subpoenaed the records of people who had borrowed the books from local libraries.<sup>120</sup> A disclosure rule that's demanding enough to diminish readers' fears that the police can learn what they're reading will also substantially interfere with these

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117. See, e.g., *United States v. Nixon*, 418 U.S. 683, 709-10 (1974). Naturally, the analogy can only go so far: Time constraints, for instance, necessarily require some truthful evidence to be excluded as duplicative or too tangential.

118. See also *supra* note 110 (responding to another version of this argument).

119. See Lance Gay, *Suspect Fit Profile but Went Unnoticed*, *PLAIN DEALER*, Apr. 6, 1996, at 7A (noting that the police searched records in the San Francisco area and the Chicago area); Gary Marx & Peter Kendall, *Unabomber Path Leads Back to Utah*, *CHI. TRIB.*, Sept. 25, 1995, at N1 (noting that the police subpoenaed records from the Brigham Young University library, and were planning to do the same as to the University of Utah library); see also *ABC World News Tonight*, (ABC television broadcast, Apr. 8, 1996) ("FBI agents in Montana have also subpoenaed library records to see if they can tie Kaczynski to two books. One is a war novel entitled *Ice Brothers*, in which the Unabomber concealed a bomb. And the other is *Chinese Political Thought in the 20th Century*, which was mentioned in the Unabomber's manifesto."). Unfortunately, the library had apparently deleted these records. See Carol M. Ostrom, *Unabomber Case Gives Librarians Privacy Fits*, *SEATTLE TIMES*, May 1, 1996, at A1.

120. *Library Files Checked In Zodiac Investigation*, *N.Y. TIMES*, July 18, 1990, at B4; see also Kathy M. Flanders, *Whitesboro Library Posts New Privacy Law*, *POST-STANDARD* (Syracuse, N.Y.), July 28, 1998, at B1 (noting a case in which a prosecutor subpoenaed a book's circulation records to find out who had written a death threat against the president on the book's flyleaf); *Kidnapping May Have Been Copied out of Book*, *UPI*, Sept. 18, 1987 ("[P]rosecutors subpoenaed library circulation records in three cities attempting to learn if two suspects in the kidnapping and slaying of a media heir borrowed the crime plot from a book about a similar 1968 case.").

investigations.<sup>121</sup> And focusing on the rare subpoenas that deter reading without doing anything about the more common subpoenas that deter actual speech (or writing) may be a largely empty step.

Second, courts or legislatures could impose a higher threshold for bookstore and library subpoenas than on normal subpoenas, but not a much higher standard. This would interfere less with government investigations, but it will also do little to satisfy readers' concerns about a chilling effect.<sup>122</sup> We'll still be unable to patronize a library or bookstore without fear of government scrutiny, even though the scrutiny might require a bit more justification on the government's part.

Third, courts or legislatures could constrain discovery of any information related to any First Amendment-protected activities. For example, we could require the police to pass a high threshold before they could investigate what people said or wrote, at least when the speech has some ideological component. Or perhaps we could demand this threshold requirement only for coercive investigations (using subpoenas or search warrants), and not simple questioning.<sup>123</sup> The same rule may also be applied to subpoenas in civil cases, thus reversing *Herbert v. Lando* and *University of Pennsylvania v. EEOC*. Yet this would dramatically interfere with the investigation of many crimes and torts, especially those that have an ideological motive.

Or, fourth, courts and legislatures could conclude that the deterrent effects of subpoenas for library or bookstore records are acceptable, just as the deterrent effects of subpoenas for testimony about a person's statements are acceptable. In this, they would simply be following the logic of *Branzburg*, *Herbert*, and *University of Pennsylvania*.

But in any event, it's a mistake to view subpoenas of library or bookstore records as a radical innovation. They are simply special cases of a more general and well-established phenomenon, subpoenas of information related to First Amendment activities. Some such subpoenas, for instance subpoenas of membership records, are presumptively forbidden. Yet others

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121. See *Univ. of Pa.*, 493 U.S. at 194 (1990) ("Moreover, we agree with the EEOC that the adoption of a requirement that the Commission demonstrate a 'specific reason for disclosure' . . . beyond a showing of relevance, would place a substantial litigation-producing obstacle in the way of the Commission's efforts to investigate and remedy alleged discrimination.") (citation omitted).

122. See *id.* at 200 ("Moreover, some disclosure of peer evaluations would take place even if petitioner's 'special necessity' test were adopted. Thus, the 'chilling effect' petitioner fears is at most only incrementally worsened by the absence of a privilege.")

123. Bulk seizures of many copies of books and films are subject to special First and Fourth Amendment restrictions, because there is a risk that such a seizure would physically prevent people from buying, reading, or watching constitutionally protected material. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62-64 (1989). But seizures of individual items to be used as evidence are generally permissible under the normal probable cause standard, subject only to slightly increased procedural requirements. *Heller v. New York*, 413 U.S. 483, 492-93 (1973).

are generally allowed even when they may deter people from saying or writing suspicious-seeming things.

Perhaps the First Amendment test should be different for subpoenas about reading than for subpoenas about speaking or writing—but that conclusion is far from obvious. And it hardly seems McCarthyite to treat subpoenas of bookstore and library records like the subpoenas for speech-related information that the courts have routinely upheld.

#### CONCLUSION: A THOUGHT EXPERIMENT

First Amendment law rightly recognizes that laws can have a “chilling effect.” Libel laws may, on their face, prohibit only false speech, but they may also deter true speech.<sup>124</sup> Vague laws may cause people to “steer far wider of the unlawful zone” than clear laws, and may thus deter more speech than they ultimately punish.<sup>125</sup>

But not all actions that deter speech are unconstitutional or even improper. Some speech should be deterred. One reason that evil and offensive speech can remain constitutionally unpunished is that it is kept in check through social norms and economic retaliation.<sup>126</sup>

Racist speech is a classic example: Many people, including those who have some racist views, are likely reluctant to say racist things for fear of social opprobrium. Media outlets generally refuse to carry racist propaganda. Outlets that do carry racist material may face economic retaliation.

At times, this has led to too much speech being deterred. But, on balance, checking racist speech through social and market pressures—as well as through persuasion—is a good solution. It’s better than suppressing racist speech through legal sanctions. And it’s better than not trying to deter it at all, or confining ourselves to polite persuasion, much as we do for erroneous views about tax policy or highway-construction funds.

Naturally, which deterrents are proper and which aren’t is a difficult question. As a general matter, deterrence through factually accurate denunciation and social opprobrium (Part I) is likely the least troublesome. Deterrence through private economic pressure (Part II) is potentially troublesome, but still often acceptable. Deterrence as an effect of the government’s coercive investigative tools, such as subpoenas (Part III), is potentially more troublesome, but probably inevitable and proper in at least some situations. But I’m sure that there are exceptions to many of these generalities.

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124. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

125. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

126. *Cf. Dennis v. United States*, 341 U.S. 494, 589 (1951) (Douglas, J., dissenting) (reasoning that Communist advocacy ought not be criminalizable partly because the Communists had already been rendered harmless by other means, including surveillance by the FBI and “the activities in recent years of committees of Congress, of the Attorney General, of labor unions, of state legislatures, and of Loyalty Boards”).

This discussion also hasn't dealt with many other deterrents that are sometimes labeled "McCarthyism" but that can't always be dismissed so easily: infiltration of allegedly dangerous political or religious groups; infiltration of groups that are not themselves dangerous, but that may be meeting places for potential terrorists or saboteurs; firing of government employees who express certain views or belong to certain groups; legislative investigation of alleged attempts to subvert various organizations to evil ends; and more. I have no good solutions to those problems, but I thought I would close this Essay with a hypothetical scenario that we might use to think through them. I hope this scenario won't come to pass, but I am afraid it's not implausible.

The year 2022 is a dangerous one for America. The White Rights Movement (slogan: "for the race, everything; for those outside the race, nothing"), has been on the rise. While the White Rights Party itself has only a couple of hundred thousand members, civil rights activists suspect that it has millions of sympathizers.

The Party has urged its members to join other groups and covertly take them over, so that they seem to be independent voices but are actually aligned with the Party's political plans. Many civil rights leaders claim that many groups—including important political and social organizations from the National Rifle Association to many chapters of the Jaycees—have been taken over by Party faithful. The leaders of the groups, and the Party itself, deny this.

What exactly is the Party's agenda? That too is hotly disputed. Some of the Party's ideological documents suggest a desire to take over the government, by violent means if necessary, and then institute a massive campaign of governmental discrimination against non-whites: limits on non-white immigration, exclusion of non-whites from key government jobs, denial of the franchise, and eventually forcible expulsion. Similar movements in a few European countries, which had long been racked by racial hostility against Middle Easterners, have implemented such a program.

But the Party leadership dismisses these documents as mere theoretical speculation. When asked, party leaders say that the Party's goals of "protecting the race" can be accomplished through peaceful change in social attitudes, such as voluntary self-segregation by all racial groups. If that is done, Party leaders point out, there'll be no need for any harsher action.

In any event, when they have the choice, Party members don't talk theory much, at least to the public. Rather, they stress a wide range of specific policy proposals, many quite mainstream: harsher prison sentences and broader death penalty provisions for violent criminals (who still happen to be disproportionately black and Hispanic, even in 2022); restrictions on immigration; repeal of affirmative action programs, many of which are still in effect; an end to welfare; and so on.

Because these proposals have broad public support, and because many people think that major party politicians have soft-pedaled these issues in the 2010s and early 2020s, the Party has attracted substantial support from some nonmembers, despite its racist theories. “We don’t buy any of the Party’s racist nonsense,” people have been heard to say, “but they’re the only ones who are taking seriously the country’s real problems.”

Civil rights activists, and decent Americans more generally, are naturally appalled. Finally, more than fifty years after the Civil Rights Act of 1964, it looked like the battle for racial tolerance was nearly won—and now it looks like those gains might be reversed.

Serious observers don’t, of course, worry that the Party will take over the government anytime soon. About 40% of the population is now non-white, and, even among whites, only 10% tell pollsters that they have a favorable view of the Party (though some respondents might be concealing their true feelings). The Party has never gotten more than a few percent of the vote in any election. Most Americans think racism is downright un-American.

But the Party and its message are dangerous even if the Party never wins an election. First, many people suspect that Party members and sympathizers will discriminate against nonwhites every chance they get: in employment, in grading in schools and universities, in awarding contracts, in law enforcement, in political decisionmaking, in judicial decisions, in jury verdicts, and so on. There have been plenty of discrimination lawsuits in which the plaintiffs have somehow discovered that the person who fired them or arrested them was a Party member; and while the members have always claimed that their real reasons for the decisions were nonracial, naturally few people have believed them.

What’s more, many people suspect that there’s a lot more racism than is visible. Discrimination is hard to detect. When a nonwhite American is arrested or fired by a white, the thought often crosses his mind: Was this a White Rights thing? This fear is nothing new, and by all accounts there’s less discrimination in 2022 than there was in 1982 or even 2002. But the White Rights movement has heightened people’s awareness of the persistence of racism. And some controversial data suggest the movement has indeed led to an increase in discrimination from the lows seen in the mid-2010s.

So nonwhites are suffering. Institutions, private and public, are suffering, too, because nonwhites’ reasonable fear of discrimination decreases the institutions’ credibility. Police departments have worked hard to build trust among minority communities, but that trust is now disappearing. Likewise for universities, banks, and big corporations. And many whites are suffering, too: They also hate racism, and they’re troubled by the social

harm caused by this increased discrimination and reasonable fear of discrimination.

Second, people are worried about what will happen ten or twenty years from now. For the first time in many decades, university professors are openly teaching classes on supposed racial differences in intelligence or on the moral value of racial purity and racial segregation.

The professors argue that they're just trying to present a balanced perspective on important issues, but in many instances, the professors seem to be sympathizing with the White Rights line. And the mood among students has shifted, too: While the majority strongly disagrees with the pro-White-Rights professors, a vocal minority stridently (and sometimes violently) resists any attempts to criticize the White Rights view. Civil rights activists fear that the students on their side have become complacent after many decades during which racial equality has been the official orthodoxy, and that the students on the other side have energy and organization that makes them powerful far beyond their numbers.

Likewise, some private racist schools have sprung up, and the Party has seemingly made inroads among teachers even in public schools and nonracist private schools. Some former Party members also say that the Party has made it a priority to infiltrate newspapers, broadcasters, and movie studios. The Party's method seems not to be the inclusion of overt propaganda, but subtle shadings: A few more black villains here, a story twisted to make a racist character seem more sympathetic, and so on.

People worry: What will happen when these seeds grow? In Europe, the racists have made their main inroads in times of economic trouble. The American economy is slowing too, and some people are predicting a serious recession.

What will happen then, or perhaps the next time, especially if the recession is blamed on competition from Third World nations? An outright racist revolution, even an unsuccessful one, is unlikely, but will there be racist riots? Will covert Party members in the police and the National Guard help the rioters, or at least be deliberately slow in stopping them? Will we discover that the Party's proselytizing has created millions of racist white teenagers and twenty-somethings, some of whom will be angry enough and misguided enough to get violent? Will black Americans again be afraid to walk in white parts of town or be seen with white women?

Many leaders, including respected, thoughtful, and well-intentioned politicians, civic leaders, and intellectuals, demand action. When faulted for seeking "witch hunts," they respond, "Witch hunts are bad because we know there are no witches. There are racists, and they can cause real harm. Nothing needs to be done about witches. Something needs to be done about large nationwide racist conspiracies."

This scenario is, of course, not identical to Communist conspiracies of the 1950s. Racists jeopardize equality; Communists jeopardized democracy and freedom. People were worried about Communists partly because our enemies abroad were Communist; that doesn't appear in my hypothetical. Sabotage and espionage are rarer than discrimination, though each single instance of sabotage and espionage might be more harmful than each single instance of discrimination.

But I don't think these differences matter that much. Tomorrow's problems won't be identical to yesterday's, but they may be similar enough. "History doesn't repeat itself, but it rhymes."<sup>127</sup>

Someday we will again face an ideological movement that seeks to undermine fundamental American values and uses speech not just to advocate for lawful (but evil) political change, but also to promote illegal, or even violent, behavior. I give one possible example, but there are others.

How should our government and our society fight back? When speech can genuinely cause harm—and when we have rightly forsworn the ability to simply lock up the speakers or bankrupt them with damages awards—what tools do we have left to fight the harm? What can we do to protect liberty, while also effectively fighting a movement that itself threatens liberty?

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127. Often attributed to Mark Twain.