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On Racist Hate Speech and the Scope of a Free Speech Principle

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1. Introduction

As a liberal society, we are deeply committed to a principle of free speech. In fact, this commitment is so entrenched that it often seems to trump other very important liberal values, such as equality. Critical race theorists, among others, have argued that (some) racist hate speech ought to be regulated because it harms racial minorities in ways that are incompatible with racial equality, and so, in ways that a liberal society ought to prevent. A standard liberal response to these arguments accepts the connection between racist hate speech and harm, but claims that such harm is just the price we pay for our commitment to free speech.

Given our very substantial commitment to free speech, it is crucial that we be as clear as possible about what precisely that commitment involves. Despite this, there is (at least) one important source of confusion here, regarding what counts as speech for these purposes. It is generally agreed that our commitment to free speech entails assigning to speech a special status (in particular, a status that makes it harder to regulate) that we don't extend to other actions. But there is less agreement regarding the following question: how should the term 'speech' be understood here?[1] Is the term being used in its ordinary sense, or in some special technical sense? If the latter, what is this special technical sense? In other words, which actions should be taken to fall within the scope of a free speech principle?

In this paper, we describe an approach to these questions according to which 'speech' for the purposes of understanding a principle of free speech is (and ought to be) given a special technical sense. On this approach, plenty of speech in the ordinary sense (e.g., "I hereby hire to you to kill the provost") may fall outside the scope of such a principle, while some actions that are not speech in the ordinary sense (e.g., wearing a T-shirt with a peace sign emblazoned on it) may fall within that scope. (In what follows, we will use the First Amendment as our example of a free speech principle that (we claim) is best understood in accordance with this approach.[2]) We offer some reasons to find this approach attractive, and so, adopt it for the remainder of this paper.

We thank audiences at Syracuse University and the University of Oslo, an anonymous referee from *Canadian Journal of Law and Jurisprudence*, as well as Ken Baynes, Fred Schauer, and Brian Weatherson for helpful discussions about this material.

1. For an excellent discussion of this issue, see Frederick Schauer, "Speech and 'Speech'—Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language" (1979) 67 Geo. L.J. 899.
2. We focus on the First Amendment partly because the theorists we consider in this paper do the same. Nevertheless, we think that the approach we describe here is the best way to understand other free speech principles as well. Though the free speech principle contained in the First Amendment is peculiar in many ways, we don't think that it is peculiar in this respect.

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This approach immediately raises the question of what special technical sense the term 'speech' should be given in free speech doctrine. The central claim of our paper is a partial answer to this question. To a first approximation, our view is that *significantly obligation-enacting utterances* (and we have much to say about what this means) should not count as speech in the relevant sense, and so, should fall outside the scope of a free speech principle. Roughly, obligation-enacting utterances are ones that create (or dissolve) obligations. Suppose Joan tells her neighbor's son Jimmy, "I'll pay you $10 if you remove the snow from my driveway." In uttering this, Joan makes a verbal contract with Jimmy. Her utterance obligates her to pay Jimmy if he performs the specified task. Her utterance is therefore an obligation-enacting utterance in our sense. According to our central thesis (and we are here simplifying a little), a sub-class of obligation-enacting utterances ought to be regarded as falling outside the scope of a free speech principle. In this paper, we explain and clarify this thesis. We then defend our thesis by showing that it returns the right results on a range of cases, and by responding to certain objections to it.

Our thesis offers a partial account of what a principle of free speech ought to cover. Our account differs in some important respects from other accounts in the current philosophical and legal literatures. To highlight what is novel about our view, we compare it to some of these other accounts, namely, those due to Kent Greenawalt, Cass Sunstein, and Joshua Cohen. In each of these cases, we argue that our thesis has some distinct advantages. In particular, whereas these other views treat all political speech on a par, and therefore generate counter-intuitive consequences for some cases of political speech, our view offers the resources for distinguishing between different kinds of political speech, thereby avoiding these problematic consequences.

Using our central thesis, we then go on to argue for the following conditional claim. Again simplifying a little, *if* certain critical race theorists (e.g., Charles Lawrence) are right about what (some) racist hate speech does, then such speech should fall outside the scope of a free speech principle.[3] If this is right, then it also follows that such racist hate speech should be as regulable as any other action. This result has obvious and important consequences for the standard liberal defense of such speech.

One of our major aims in this paper is to make clear the philosophical importance of the question about what counts as speech for the purposes of free speech doctrine. This question has been largely ignored in the philosophical literature on free speech.[4] However, as we shall argue, much of the supposed conflict between our commitment to free speech and our commitment to equality disappears once we notice that not everything that is speech in the ordinary sense should be taken to fall within the scope of a free speech principle. Therefore, we conclude that there is good reason to address this question about the scope of such a principle.

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3. See Charles R. Lawrence III, "Crossburning and the Sound of Silence: Antisubordination and the First Amendment" (1992) 37 Villanova L. Rev. 787 [Crossburning] and Charles R. Lawrence III, "If He Hollers, Let Him Go: Regulating Racist Speech on Campus" in M. Matsuda, C.R. Lawrence III, R. Delgado & K. Crenshaw, eds., *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993) 53 [If He Hollers].

4. There are a few exceptions. See, e.g., David Braddon-Mitchell & Caroline West, "What is Free Speech?" (2004) 12 J. Pol. Phil. 437.

2. The Distinction Between Coverage and Protection

As mentioned in the previous section, it is generally agreed that our commitment to free speech involves assigning to speech a special status that we don't extend to other actions. At the same time, it is also generally supposed that it is consistent with this commitment that some kinds of speech be regulated. This raises the following questions. First, what has to be established to show, for some given kind of speech, that our commitment to free speech is compatible with regulation of that kind of speech? That is to say, to what *standards of justification* should proposed regulations be subject? Second, is the required standard the same for every kind of speech, or does it vary from one kind to another? In this section, we describe our approach to these crucial questions. This approach, which draws heavily on the work of Frederick Schauer, is not the only one available. However, later in the section, we briefly offer some reasons for thinking that our preferred approach is an attractive one.

To motivate our approach, it will help to begin with the observation that free speech principles don't generally extend to all and only what we would ordinarily consider speech. By way of illustration, consider the First Amendment. Plenty of actions that are *not* speech in the ordinary sense (e.g., burning a U.S. flag, wearing a T-shirt with a peace sign emblazoned on it, wearing an armband in political protest, contributing to a political campaign) are taken to fall within the purview of the free speech principle enshrined there. So, the scope of that principle extends beyond what we would ordinarily consider speech. On the other side, regulations of many actions that are speech in the ordinary sense (e.g., insider trading, contracts) don't seem to excite any First Amendment concern. This suggests that the scope of that free speech principle does not include everything that we would ordinarily consider speech. For the purposes of the First Amendment, then, 'speech' seems to get a technical sense that cross-cuts what we ordinarily count as speech.

If this is right, then it matters because actions that fall outside the scope of a free speech principle do not receive the special status that goes along with that principle. In the U.S. context, proposed regulations of actions that fall outside the scope of the First Amendment are subject to relatively low standards of justification, such as *rational basis review*. In order for a regulation to survive rational basis review, it need only be established that first, the state has a legitimate interest in regulating what it proposes to regulate, and second, the regulation bears a rational relation to that interest. Thus, rational basis review is emphatically not a demanding standard. Following Schauer, we shall say that actions that are outside the scope of a free speech principle (including some actions that are speech in the ordinary sense) are *uncovered* by that principle.[5] In the case of the First Amendment, speech that constitutes insider trading, speech that is used to create contracts, and speech that constitutes criminal solicitation (e.g., saying seriously and sincerely to a known assassin, "I hereby hire you to kill the provost"), as well as much non-speech action

5. Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge: Cambridge University Press, 1982) at 89-92.

are included in this category. In all such cases, regulations raise no free speech concerns at all.

Of course, much ordinary speech (and some non-speech action, such as wearing a T-shirt with a peace sign on it) does fall within the scope of any (reasonable) free speech principle. All of this, in Schauer's terminology, is *covered* by such a principle. Some of what is covered may be regulated as well. However, for the most part, regulations of covered speech (and action) have to meet a raised standard of justification, such as (in the U.S. context) *strict scrutiny*. In order for a proposed regulation to survive strict scrutiny, it must be shown that, first, the state has a compelling interest in regulating what it proposes to regulate, and second, the regulation is narrowly tailored to serve that interest. There is controversy in the legal literature about what precisely this standard requires.[6] But at the very least, the following seems clear. For a proposed regulation to survive strict scrutiny, it is not enough to show that what it proposes to regulate is harmful. Something may be harmful without the government having any *compelling* interest in regulating it.[7]

Compelling state interest and narrow tailoring constitute a significantly raised standard of justification as compared to legitimate state interest and rational relation. Thus, strict scrutiny is a significantly higher standard of justification than rational basis review. Where a proposed regulation (of covered speech or action) survives the relevant raised standard of justification, we shall say, again following Schauer, that although the speech or action is covered, it is *unprotected* by the free speech principle.[8] Again in the case of the First Amendment, defamation falls in this category: though it is within the scope of that free speech principle, at least some defamatory speech is currently regulated.

Finally, some speech (and action) is both covered and protected by a free speech principle. That is to say, it falls within the scope of that principle, so that proposed

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6. For a survey of some difficulties in interpreting strict scrutiny, see Eugene Volokh, "Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny" (1996) 144 U. Pa L. Rev. 2417.

7. If, in addition, the harms caused by the covered speech (or action) clearly outweigh the harms that would be caused (to our commitment to free speech, for example) by regulating it, then that is some reason to think that the state has a compelling interest in regulating the speech (or action). That is, such balancing of harms is some evidence of a compelling interest, though more may be required to establish this as well.

8. By treating all covered speech as subject to the same raised standard of justification, we are simplifying a little. In the U.S., the courts have occasionally recognized intermediate standards of justification. With these intermediate levels, the picture becomes this. Though regulations of all covered speech (and action) must meet raised standards of justification, there are different raised standards for different categories of covered speech (and action). So-called 'low value' speech (e.g., some commercial speech) must meet the intermediate standards, while so-called 'high value' speech (e.g., political speech) must meet the highest standards, i.e., strict scrutiny. For a recent discussion of the distinction between high- and low-value speech, see David O. Brink, "Millian Principles, Freedom of Expression, and Hate Speech" (2001) 7 Legal Theory 119.

For other versions of a two-tiered approach, see also Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993) and Joshua Cohen, "Freedom of Expression" (1993) 22 Phil. & Pub. Affairs 207. These versions will be discussed in §§ 4.2 and 4.3 respectively.

The possibility of intermediate standards will not matter for our purposes in this paper. Therefore, when we talk about the First Amendment, we will talk about the raised standards of justification relevant to its free speech principle, while remaining neutral about whether these raised standards include just strict scrutiny, or the intermediate standards as well.

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regulations of the speech (or action) are subject to a raised standard of justification. But, because the regulations do not meet the raised standard, the speech (or action) is not regulable.[9] In most systems of free speech, much political speech and action is included in this category. (We shall return to the issue of political speech below in §§ 4.2 and 4.4.)

Thus far, we have distinguished three different statuses that actions can have with respect to a free speech principle. Actions can be uncovered, covered but unprotected, or both covered and protected. On this approach, we can capture the observation with which we started this section, namely, that free speech principles don't generally assign special status to all and only what is considered speech in the ordinary sense. This is just to say that what is covered by such a principle is not co-extensive with 'speech' in the ordinary sense: some non-speech actions are covered (and perhaps protected as well), while some speech is not covered.[10]

There are, we think, several compelling reasons to adopt this approach. We will offer two such reasons. First, as we have been emphasizing, this approach makes room for the possibility that what is covered by a free speech principle is not co-extensive with 'speech' in the ordinary sense. This is an important possibility to leave open if it is supposed (as many do) that the justifications for affording speech a special status succeed only if the term 'speech' is understood in a special, non-ordinary sense. For instance, it is often pointed out that Mill's argument from truth doesn't seem to encompass everything that is ordinarily considered speech, simply because some speech in the ordinary sense isn't conducive to the discovery of

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9. To say that such speech (or action) is not regulable is to say that proposed regulations have not met (and perhaps could not meet) the relevant raised standards of justification.

10. Thus far, we have illustrated our approach with respect to the First Amendment. But the approach can be illuminating (and should be adopted) when thinking about other free speech systems as well. For a further illustration, consider the Canadian system. To determine whether a proposed regulation violates the free speech guarantee contained in the 1982 Charter of Rights and Freedoms, the Canadian courts must engage in a two-step inquiry. First, they must ask whether the regulation in question infringes section 2(b) of the Charter, which contains the free speech guarantee. Second, if the first question is answered affirmatively, the courts must determine whether the infringement can be justified in the manner required by section 1 of the Charter, which explicitly allows some limitations on the fundamental rights guaranteed in the Charter. See Kathleen Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" (1992) 55 Law & Contemp. Probs. 77 at 78 and L.W. Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto, ON: University of Toronto Press, 2004) at 56.

For a proposed regulation to survive the second step of the inquiry, it must pass the *Oakes* test (laid out by the 1986 Canadian Supreme Court decision in *R. v. Oakes*), which fleshes out the requirements of section 1. To pass this test, it must be shown that, first, the regulation serves a "pressing and substantial" purpose, and second, the limitations it imposes are proportional to the purpose to be achieved (Mahoney at 84-85).

All of this can be neatly rendered within the approach we've been considering in this section. The first of the two steps mentioned above corresponds to determining coverage. If the proposed regulation does not infringe section 2(b), then the actions it seeks to regulate are not covered by the free speech guarantee. The second step corresponds to determining protection. If the actions that are to be regulated are covered, then the proposed regulation must meet a higher standard of justification than it would have had to meet otherwise. That higher standard is given by the *Oakes* test described above.

Although our approach thus fits the Canadian system as well as the U.S. system, it is important to note that there are significant differences between the two systems. For one thing, compared to the U.S., coverage is more extensive, though protection more limited (Sumner at 56).

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truth.[11] One attractive way of accommodating this idea is to say that speech (in the ordinary sense) that is not conducive to the discovery of truth should be considered uncovered, whereas, perhaps, speech that is conducive to the discovery of truth but that results in some very significant harms should be covered but not protected. Within the approach we have outlined, there is room for this important distinction.

Second, this approach offers an explanation of certain facts about free speech law that are inexplicable on other approaches. For example, consider the fact that, in most contexts, regulations of certain types of speech in the ordinary sense don't seem to attract the attention of the courts at all. Regulations of such speech are rarely even considered by the courts, much less found unacceptable. Much of contract law falls into this category. On the current approach, this can be explained by the hypothesis that the relevant courts regard such speech to be uncovered, and so, as beyond the scope of the free speech principle altogether.

We take this to be sufficient reason to adopt the current approach. But doing so immediately raises the following question: given a particular free speech principle, what class of actions *ought* it cover? (In the jargon used in § 1, the question becomes: for the purposes of such a principle, what should count as speech in the special technical sense?)

There are, in fact, at least two different ways of construing this question. First, one might be concerned with the Broad Normative Coverage Question: which actions ought to be covered by the free speech principle we ought to have? This question is doubly normative, for it is concerned both with which free speech principle we ought to have, and with which actions ought to be within the scope of that principle.[12] Second, one might be concerned with the Narrow Normative Coverage Question: which actions ought to be covered by the principle we actually have? Applied to the U.S. context (which is our primary focus), the question becomes: which actions ought to be covered by the free speech principle enshrined in the First Amendment?

As we shall see, answering either of the Normative Coverage Questions is a significant undertaking. To appreciate why, it will be useful to begin by considering how one might approach the Broad Normative Coverage Question. One approach (though perhaps not the only one) is this. Start with the Justificatory Question for a principle of free speech: what is the (best) justification for affording speech a special status that we don't extend to other actions? Usually, any answer to the Justificatory Question will single out some property (or properties) that justify the special status. For example, if the best justification is Mill's argument from truth, then truth-conduciveness may be the crucial property. Then, find the class of actions that have the property (or properties) in question. This class constitutes the answer to the Broad Normative Coverage Question.

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11. On some interpretations, Mill offers an argument from knowledge, rather than truth. That difference in interpretation does not affect the point being made here.

12. Answers to the Broad Normative Coverage Question may turn out to be context-relative, for it may be that the free speech principle that we ought to have in one context is quite different from the free speech principle we ought to have in another context.

But now, there are several difficulties. First, we can reasonably disagree about which justification for a principle of free speech is the best. Given the variety of justifications that have been offered, this is by no means a trivial matter.[13] Further, and perhaps more importantly, it is possible to find several of these justifications equally attractive. If so, and if (as is very plausible) the justifications in question don't yield the same answers to the Broad Normative Coverage Question, what then? That is to say, if one justification privileges actions having one property, while another justification privileges actions having a different property (with a different extension), what should we say about what ought to be covered? It is not clear how one should proceed in such a case.

Fortunately (for us), we are not here trying to answer the Broad Normative Coverage Question. Unfortunately, the question we *are* trying to answer—namely, the Narrow Normative Coverage Question, especially as it applies to the U.S. context—brings with it its own set of difficulties. Recall that the question was this: which actions ought to be covered by the free speech principle enshrined in the First Amendment? A complete answer to this question would require a specification of that principle. But, as we know, this is a matter of deep disagreement, even among scholars of the U.S. Constitution.

To keep our project manageable, therefore, we only offer a *partial* answer to the Narrow Normative Coverage Question, as applied to the U.S. context. More specifically, we offer and defend a sufficient condition for *non*-coverage under the First Amendment. According to our thesis, all utterances of a certain type (i.e., significantly obligation-enacting utterances) ought to be outside the scope of the First Amendment. We argue that, in the U.S. context, this thesis correctly predicts the coverage status of several core cases of uncovered speech. Core cases of uncovered speech are those that are most uncontroversially uncovered (e.g., contracts, criminal solicitation). Since our thesis correctly predicts the status of such core cases of uncovered speech under current First Amendment law, we take it to be compatible with the free speech principles that we currently have in the U.S. context. In addition, we offer some reason to believe that our thesis generalizes to free speech principles in other legal systems as well. Finally, we argue that *if* certain theorists are correct about what (some) racist hate speech does, then *by the law's own lights*, such speech ought not be covered by the First Amendment (or, for that matter, by any other free speech principle that agrees with the First Amendment on the core cases).

Finally, we will not here be concerned with the Justificatory Question for a principle of free speech (which is concerned with what makes speech valuable in the first place). Our particular (partial) answer to the Narrow Normative Coverage Question is intended to be compatible with a wide variety of answers to this Justificatory Question. We take this to be an advantage of our view.

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13. For a very useful survey of justifications, see Kent Greenawalt, *Speech, Crime, and the Uses of Language* (New York: Oxford University Press, 1989) at 9-39.

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3. A Partial Answer to the Narrow Normative Coverage Question

In this section, we offer our (partial) answer to the Narrow Normative Coverage Question, focusing especially on the U.S. context. We argue that if an utterance enacts a change in significant obligations, then it should not fall within the scope of the First Amendment. Moreover, this is so, we contend, by the law's own lights. Note that this is but a partial answer to the Narrow Normative Coverage Question even as applied just to the U.S., for it says nothing about the status of utterances that do not enact a change in significant obligations. As far as we are concerned, there will be other sufficient conditions for non-coverage. But we shall not attempt to say what they are here.

3.1 Obligation-Enacting Utterances

To introduce the category of obligation-enacting utterances, it will be useful to begin by considering some examples. Donald Trump says, "You're fired" to an employee. Joan says, "I'll pay you $10 if you remove the snow from my driveway" to her neighbor's son Jimmy. The boxing instructor says, "Go ahead and punch me in the face" to a trainee. In each of these cases, the utterance enacts a change in someone's obligations.

Note that, in each of the above cases, the speaker performs an action merely by uttering the right words under the right circumstances. The utterance *constitutes* the action in question. (In J.L. Austin's terminology, the action constituted by the utterance is an *illocutionary* act.[14]) For example, Trump's utterance constitutes a firing. Given his position *vis-à-vis* the employee, once Trump has uttered those words, nothing further has to be done for the employee's status to be changed. His saying "You're fired" makes it so. Of course, the same utterance will also have several causal consequences: it may cause the employee to be embarrassed; it may make him angry; it may even strike terror into the hearts of Trump's remaining employees. But whereas these (as Austin would say, perlocutionary effects) are merely caused by the utterance, the firing (illocutionary act) is constituted by the utterance. Obligation-enacting utterances, then, are utterances that *constitute* actions of a particular kind, namely, obligation-changing actions.

Keep in mind that, at least on the surface, there are several different sorts of obligations.[15] Some are legal. Citizens are legally obligated, for example, to drive within existing speed limits. Other obligations are moral. Although the law does not require that Cindy care for her elderly mother, she is nevertheless morally obligated to do so. Plenty of obligations (e.g., the obligation to refrain from killing persons who pose no threat) are both legal and moral. Finally, and most importantly for our purposes, some obligations are neither legal nor moral. Social norms, for example, dictate that we must refrain from picking our noses in public places. This is so even

14. J.L. Austin, *How to Do Things with Words*, 2nd ed., ed. by J.O. Urmson & M. Sbisá (Cambridge, MA: Harvard University Press, 1975) at 98-132.
15. This commitment to a *prima facie* pluralism about obligations is perfectly compatible with all obligations, in the final analysis, turning out to be of one sort.

though we are neither legally nor morally obligated to do so. Such obligations, we shall say, are merely *social* obligations. Just as many philosophers have thought that there are different kinds of reasons—moral, legal, prudential, epistemic, aesthetic, and others—we think that there are many different kinds of obligations—moral, legal, prudential, social, and others. Obligations of these various kinds share several features. They are generally captured by 'must' talk ('Thank you notes *must* be handwritten, not typed,' 'Officers *must* report for duty by 8 a.m.'). They give rise to reasons for action. They are often used to explain behavior, and they form the basis for criticism of those who fail to satisfy them. At the same time, there are also important differences between the various kinds of obligation. Not all obligations are equally weighty, for example: it seems plausible to say that moral obligations outweigh other sorts when there is conflict.

In addition, we also think that there can be obligations to perform actions that are immoral. Here are two relatively quick examples. First, imagine a society that has a law requiring that runaway slaves be returned to their owners for whipping. Assuming that the society satisfies certain conditions, such a law seems to create a legal obligation to turn in runaway slaves, even though doing so will result in those slaves being tortured. Second, suppose that the 'Officers must report for duty by 8 a.m.' sign hangs at a Nazi prison camp. Such a sign seems to create an obligation on the part of Nazi officers to report for work as required, though clearly, reporting for duty might well be immoral in their case. In keeping with these examples, we will say that there can be obligations to perform immoral actions, and further, that sometimes the obligations in question are merely social.

There is, of course, a lot more to be said about these points. Unfortunately, a full defense of them is beyond the scope of this paper. Nevertheless, we hope that we have said enough to make our broad notion of obligation intelligible. On our view, an utterance that enacts changes in *any* obligation—whether it be moral, legal, or otherwise—is an obligation-enacting utterance.

It is intuitively plausible that at least some obligation-enacting utterances ought not be covered by a free speech principle. Suppose Laura says to John, "I'll sell you this desk for $100." John agrees to the sale. Laura's utterance is an obligation-enacting utterance, because it creates obligations on her part. The next day, Paul offers Laura $200 for the same desk. If Laura now sells the desk to Paul for $200, she cannot defend her behavior (and avoid paying damages to John) on free speech grounds. Regulations enforcing such contracts do not (and ought not) raise First Amendment concerns. Further, this is so even though, arguably, John is not seriously damaged by Laura's behavior. Thus, regulation of such contracts cannot be justified on the grounds that failure to honor them regularly results in serious harms.

This suggests a very simple answer to our (restricted) Narrow Normative Coverage Question: perhaps all obligation-enacting utterances should not be covered by the First Amendment. Unfortunately, this simple answer cannot be correct, because (as we shall see below) very many of our ordinary assertions are also obligation-enacting utterances. If all such assertions were left uncovered, there would be nothing much left within the scope of the resulting principle, and hence, nothing much left of our commitment to free speech.

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3.2 Significance

Consider the following ordinary assertions. While out plowing the sidewalk, one neighbor says to another, "Nasty weather we're having." One regular says to another at the bar, "All politicians are liars." Given the rules of politeness in our society, each of these utterances creates an obligation on the part of the addressee to respond in some way (though they both leave open a broad range of acceptable responses).[16] Accordingly, both assertions are obligation-enacting utterances. Nevertheless, it would be contrary to our general commitment to free speech to say that they ought not be covered.

In response to these considerations, we contend that only some obligation-enacting utterances ought to be outside the scope of the First Amendment, namely, those that enact changes in obligations that are (as we shall say) *significant*. The idea is that the assertions mentioned in the previous paragraph do not enact changes in significant obligations: after all, the obligations they create are easily met, and there would be no serious repercussions even if those obligations went unmet. By contrast, Trump's utterance ("You're fired," said to an employee) is significantly obligation-enacting, since it frees the employee from significant obligations (i.e., those that accompany being an employee) and creates significant new obligations (e.g., the obligation to not demand a paycheck from Trump's corporation). Our thesis is just that significantly obligation-enacting utterances ought to be uncovered by the First Amendment.

Significance in our sense concerns the nature of the obligations affected, not the degree of change wrought by the utterance. As mentioned above, whether an obligation is significant depends, among other things, on how difficult it is to meet, and what the repercussions might be if the obligation goes unmet (or, for that matter, is met). Consider two kinds of examples. First, some obligations are such that failures to meet them are actionable under the law. Many obligations between employers and employees have this status, as do those between landlords and tenants. In addition, our shared obligations to refrain from criminal actions have this status. Second, other obligations are such that meeting them is actionable under the law. Obligations to perform criminal acts, as well as obligations to participate in illegal practices, have this status. Since the possibility of legal action is a particularly serious repercussion, we shall say that obligations of both of the kinds mentioned above—i.e., obligations that are such that failures to meet them are actionable under the law, and ones that are such that meeting them is actionable under the law—are significant obligations. This gives us a pair of sufficient conditions for significance.

Notice that all of the obligations mentioned above are of interest to the law *regardless* of the manner in which they are enacted, respected, or violated. In particular,

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16. Again, the obligations in question here seem to be neither legal nor moral. Etiquettial obligations are plausibly one kind of (non-moral, non-legal) social obligation, but not the only kind.

Note that these particular obligations would not come into being if the rules of politeness were sufficiently different. But that's not to say that the obligations are due entirely to those rules. If the rules of politeness remained exactly as they are, but (in the first example) the first neighbor made no remark to the second, the latter would have no obligation to respond. Thus, the second neighbor's obligation is partly due to the first neighbor's utterance, and partly due to the rules.

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they are of interest to the law regardless of whether speech is implicated in any of the ways just mentioned. Consider, for example, the obligation to refrain from harassment. Failure to satisfy this obligation is actionable under the law. But this is so regardless of whether the harassment is verbal. Similarly, consider the obligation to refrain from committing acts of discrimination. Again, failures to satisfy the obligation are actionable regardless of whether the discriminatory act is verbal.

Plugging these notions of significance into our thesis about non-coverage, we get the following consequences. Since failures to satisfy the terms of contracts are actionable under the law, utterances that create, alter, or dissolve contracts are significantly obligation-enacting utterances, and so, uncovered on our view. This result squares with current First Amendment doctrine. Speech that constitutes the enacting of a contract is simply outside the scope of the First Amendment. One cannot legitimately appeal to free speech in defending oneself on a charge of breaking a legally binding contract.

For similar reasons, utterances that create, alter, or dissolve obligations to commit criminal acts are also not covered on our view. Thus, saying seriously and sincerely to a known assassin "I hereby hire you to kill the provost" is also a significantly obligation-enacting utterance. In this way, our thesis also returns the right result about speech that constitutes criminal solicitation. Such speech is simply beyond the scope of the First Amendment, and so afforded no special status.

As one can see, our thesis returns the right results—i.e., results that accord with current First Amendment law—for these core cases of uncovered speech. Elsewhere, we have argued that it returns the right results for other core cases of uncovered speech as well (e.g., anti-discrimination law, workplace sexual harassment, and insider trading).[17]

In addition to getting the right results in the U.S. context, our thesis also gets the right results in all other systems in which the regulation of contracts, criminal solicitation, discrimination, harassment, and market transactions raise no free speech concerns. Though we shall not defend this point here, we take this to be the case in many free speech contexts. If that's right, then our thesis generalizes to those contexts as well. That is to say, in all systems in which the prevailing free speech principle agrees with the First Amendment on the core cases, significantly obligation-enacting utterances ought not be covered by that principle.

Moreover, our thesis also has intuitive appeal. Although a full and proper defense is well beyond the scope of the current paper, we offer the following intuitive rationale. All speech (and for that matter, all action) both expresses or communicates something, and makes other changes in the world. Nevertheless, there is a sense in which the point of some speech is primarily expressive/communicative, while the point of other speech is primarily to make other changes in the world. (Much speech falls somewhere in between these two extremes.) Significantly obligation-enacting utterances belong at the latter extreme. It is fair to say (no matter how one settles the Justificatory Question regarding what makes speech valuable in the first

17. See Ishani Maitra & Mary Kate McGowan, "The Limits of Free Speech: Pornography and the Question of Coverage" (2007) 13 Legal Theory 41.

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place) that it is the expressive/communicative function that makes speech so very valuable (see Schauer, text above at note 5). If this is right, then significantly obligation-enacting utterances can be safely regarded as beyond the scope of even a robust free speech principle. In this way, it makes intuitive sense that such utterances ought to fall outside the scope of a free speech principle.

3.3 'Whites Only' Signs

As an additional illustration of the importance and appeal of our thesis, consider the 'Whites Only' signs that were once such an integral part of segregated America. Suppose that Charlie, a restaurant owner, posts such signs at his establishment primarily to express his personal opinion (that only white people should eat at his restaurant). It is clear that, whatever his intention, Charlie is breaking the law. Although these signs are speech in the ordinary sense, it would be preposterous for Charlie to defend his postings on free speech grounds. Even if his postings express a political opinion, they clearly do more than that. Moreover, what they do is (and should be) illegal, according to current First Amendment law.

By posting these signs, Charlie enacts policy for his restaurant. More specifically, his postings enact obligations for non-whites to stay away from his restaurant, and for whites to behave in ways that enforce (or at least acquiesce in) that segregation. It is worthwhile to reflect a bit about the nature of the obligations enacted by Charlie, for they are neither legal nor moral. Clearly, Charlie has not enacted a new law by posting this sign. After all, he lacks the requisite legislative authority. Nor has Charlie enacted new moral requirements. He does not have the authority to do this either. Rather, Charlie has simply enacted a new policy for his restaurant. This, he plainly has the authority to do.

Charlie's postings are thus obligation-enacting utterances. Since the obligations in question are obligations to participate in the illegal practice of segregation, the postings are also significantly obligation-enacting. As such, and according to our thesis, Charlie's posting of these signs should not be covered by the First Amendment. Regulations of such postings should raise no free speech issues at all.

Happily, this result accords with actual legal practice. As far as U.S. law is concerned, a proprietor's posting of a 'Whites Only' sign in a public establishment is an illegal act of segregation. Such postings are simply outside the scope of the First Amendment. Moreover, this is as it should be. After all, Charlie certainly should not be able to appeal to the First Amendment in defending his behavior. Our thesis, therefore, generates the right result in this case too.

3.4 A Potential Challenge

Before turning to a discussion of how our thesis compares to some influential accounts of free speech, we first consider a potential challenge to our view.[18]

18. This challenge is based on an example that is much like Greenawalt's flash flood example. See Greenawalt, *supra* note 13 at 61-62.

Suppose that Joe and Pete, two Emergency Medical Technicians, are in the process of conveying a patient in critical condition to a hospital. Their ambulance can take either of two routes to the hospital, one of which includes a stretch of Interstate 95. As they head to the Interstate, they hear a radio broadcast that informs them that there are significant traffic delays on the relevant stretch of I-95. Since Joe and Pete now know about the traffic delay, they are liable for any harm caused to their patient in the event that their ambulance gets stuck in traffic on the Interstate. Thus, the radio broadcast seems to create legal liability on their part.[19] Moreover, because legal liability is a significant obligation, the broadcast seems to be significantly obligation-enacting. Thus, according to our thesis, the broadcast ought to be outside the scope of the First Amendment.

This result seems both wrong and troubling. It seems wrong because the radio broadcast is merely an assertion of fact (since it just describes the traffic conditions on I-95), and as such, definitely ought to be covered. The result seems troubling because if even ordinary assertions of fact turn out to be uncovered, then perhaps not much remains within the scope of the First Amendment, and so, of our commitment to free speech. Additionally, the result also seems troubling because it suggests that normative coverage can be difficult to determine in a rather surprising way. If the radio broadcast ought to be uncovered because of the circumstances of some hearers (Joe and Pete), then that raises the possibility that *any* utterance, no matter how ordinary, might be uncovered if overheard by hearers in the right sort of circumstances. Therefore, to determine whether a given utterance is uncovered, we would need to know the circumstances of everyone who hears it. In many cases, this will not be a trivial undertaking.

Despite initial appearances, however, this case (and others like it) do not undermine our thesis. To see why this is so, it is first necessary to distinguish between two different types of legal liability. First, one might be liable for what one knows. Second, one might be liable for what one *ought* to know. Suppose that the liability in question is of the first type, i.e, dependent on what one knows. The radio broadcast (or any other utterance) creates this type of liability only if it makes it the case that someone knows the relevant information. But an utterance can make it the case that the addressee knows something only by *causing* the addressee to know it. The utterance cannot *constitute* the addressee's knowing. So, if the liability here depends upon Joe and Pete knowing that there is a traffic jam, the radio broadcast does not *enact* that liability. Since we are here concerned with (a subset of the) obligation-*enacting* utterances, our thesis does not apply. Thus, it does not generate the result that the radio broadcast is uncovered.

Next, suppose instead that the liability in question concerns what one *ought* to know. If someone ought to know something, he is (at least sometimes) obligated to know it. As we've seen, utterances can enact obligations. But it does not follow from the fact that someone knows something that he ought to know it, for he may

19. To make the case for legal liability even clearer, we might imagine that the patient being transported will die unless she has surgery within the next thirty minutes, and the radio broadcast announces that the Interstate will be closed for the next hour. In such a case, the EMTs may be liable even if they would be shielded from liability in other less severe cases.

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well know more than he ought to know. Accordingly, to determine whether the radio broadcaster's utterance enacts liability in this second sense, we need to know whether the broadcaster's utterance *makes it the case* that Joe and Pete ought to know that there is a traffic jam. But this is not at all clear.

Perhaps traffic advisories broadcast over the radio do sometimes make it the case that everyone (or at least listeners) ought to know that, for example, there is a significant traffic jam on Interstate 95. This is plausible if the advisory is sufficiently widely broadcast, issued by the relevant authorities, and sufficiently specific about the traffic conditions. In such a case, however, the result that the utterance in question is uncovered (because it is significantly obligation-enacting) is no longer obviously wrong. In fact, in such a case, we think that this result is correct. However, even if this broadcast does enact the relevant sort of liability, there is no reason to think that ordinary assertions would do the same. After all, ordinary assertions are different from traffic advisories in several relevant respects. Among other things, ordinary assertions are neither widely broadcast, nor issued by speakers who are authoritative in the appropriate way. So, our thesis does not entail the unpalatable result that most ordinary assertions ought not be covered by the First Amendment. Moreover, since the liability in question is enacted only if the utterance is sufficiently widely broadcast, authoritative, and so on, that liability depends in large part on facts accessible to the speaker. Thus, the worry that normative coverage depends solely on (peculiar and hard to discover) circumstances of the hearers is misplaced.

In sum: we have in this section (§ 3) introduced and clarified a partial answer to the Narrow Normative Coverage Question as applied to the U.S. context. Our central thesis is that any significantly obligation-enacting utterance ought to fall outside the scope of the First Amendment. We have argued that our thesis generates the right results with respect to various cases (e.g., contracts, criminal solicitation, and 'Whites Only' signs). We have suggested that the thesis also generalizes to other (i.e., non-U.S.) free speech systems, and we have offered an intuitive rationale for the thesis. Finally, we have defended our thesis against the objection that it generates the unpalatable result that all (even ordinary) assertions ought to be uncovered.

4. Comparison to Other Views

In this section, we compare our view with some recent and very influential accounts of free speech, due to Kent Greenawalt, Cass Sunstein, and Joshua Cohen. This comparison allows us both to highlight some of the novel features of our account, and to describe some of its major advantages.

4.1 Greenawalt

Among these theorists, Greenawalt's position is closest to our own.[20] Greenawalt is concerned with the Narrow Normative Coverage Question as applied to the U.S.

20. Greenawalt, *supra* note 13 at 40-76.

context, just as we are. He too offers a partial answer to this question, in the form of a sufficient condition for non-coverage. On his view, all dominantly and substantially situation-altering utterances ought to be beyond the scope of the First Amendment.

As we read Greenawalt, his notion of situation-altering utterances is (basically) the same as our notion of obligation-enacting utterances. We say that it is only basically the same because it is not clear that Greenawalt is exclusively interested in cases of enacting (as opposed to causing) changes in obligations. Moreover, his notion of substantiality is akin to our notion of significance.[21] The main difference between his position and ours is that he thinks that only a sub-class of substantially situation-altering utterances—i.e., those that are also *dominantly* situation-altering—ought to be uncovered, while we maintain that the entire class (not merely this sub-class) should be uncovered.

Greenawalt introduces his notion of dominance, and restricts the realm of non-coverage to the sub-class of dominantly and substantially situation-altering utterances, in order to cope with cases like the one described in § 3.4 (the radio broadcast case). On his view, a situation-altering utterance is dominantly so if the speaker has certain intentions or purposes. Greenawalt offers several different characterizations of dominance.[22] We've argued elsewhere that on each of these characterizations, his view of normative coverage runs into trouble.[23] Moreover, we also showed in § 3.4 that the kind of problem raised by the radio broadcast case can be handled without recourse to the notion of dominance.

Though we disagree with the details of Greenawalt's view, we take him to be engaged in the same sort of project as we are. In other words, like us, he is mainly concerned with which actions ought to be within the scope of the First Amendment, given the free speech principle underlying current First Amendment law. As a result, Greenawalt is, for the most part, working *within* the current system of First Amendment law.[24] Some further differences between Greenawalt's view and ours will be discussed in §§ 4.4 and 5.

4.2 Sunstein

Sunstein is also primarily interested in a normative project.[25] But in his case, the project is to describe the principle of free speech one ought to have (rather than to focus on the principle underlying any particular system of free speech), and to

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21. Greenawalt's notion of substantiality, unlike our notion of significance, is at least partly concerned with the degree of change in obligations effected by the utterance. For a more complete discussion of the relationship between Greenawalt's view and ours, see Maitra & McGowan, *supra* note 17.

22. At different points, he suggests that a situation-altering utterance is dominantly situation-altering if: (i) the speaker's primary illocutionary intention is to enact changes in someone's obligations; (ii) the standard illocutionary purpose of the words used is to enact changes in someone's obligations; (iii) the speaker's primary perlocutionary intention is to cause changes in someone's obligations; or, (iv) the speaker's direct purpose is to enact changes in someone's obligations. See Greenawalt, *supra* note 13 at 57-71.

23. Maitra & McGowan, *supra* note 17 at 56-59.

24. Greenawalt's focus, unlike ours, is largely on the criminal law.

25. Sunstein, *supra* note 8 at 17-51.

trace the consequences of his preferred principle for regulations of speech. As such, Sunstein is concerned with the Broad Normative Coverage Question.

According to Sunstein, speech is valuable primarily because of the role it plays in political deliberation. On this Madisonian view, a free speech principle ought to foster the sort of exchange in information and ideas that is crucial to the deliberative democratic process. Rejecting the marketplace metaphor for free speech that has come to dominate much discussion of free speech, Sunstein argues (rightly, we think) that market forces are unlikely to foster this sort of deliberative exchange.

Sunstein recommends a two-tiered principle of free speech. Since political speech is the most valuable sort of speech in his system (because it contributes most to political deliberation), it is top-tier speech. That is to say, political speech is afforded the highest status, and is thus regulable "only on the strongest showing of harm."[26] Other speech contributes less to political deliberation and is thus less valuable. Such lower-tier speech (e.g., commercial speech) is regulable on a lesser showing of harm than top-tier speech. But regulating even lower-tier speech requires "an invocation of legitimate, sufficiently weighty reasons."[27] As such, on Sunstein's picture, regulating even lower-tier speech is more difficult than regulating any non-speech action.

Sunstein's conception of political speech is quite broad. Any utterance that is both intended and taken as a contribution to an issue of public concern is political speech in his sense. This is so even if the speaker does not consider what she says to be political in any sense. Suppose, for example, that Cindy says that good parents don't dump their kids at daycare. Cindy does not think that her utterance is political. (She is just expressing her disdain for those yuppies who have children only to hire other people to raise and entertain them.) Still, because her utterance is a contribution to an issue of public concern (it is both intended and received as such), Cindy's utterance is top-tier political speech, according to Sunstein.

Further, although an utterance must be viewed as a contribution to an issue of public concern in order to be political speech on Sunstein's view, it is not the case that everyone needs to view it as such. Suppose, for example, that a particular abstract painting strikes most people as a content-less mess. Nevertheless, so long as some take it to express a view about, say, the good life, it counts as political speech in Sunstein's sense.

Given this broad conception of political speech, Sunstein would extend the highest protections (or, in our parlance, coverage along with the highest standards of justification applying to any proposed regulations) to a lot of speech. In this respect, his view fits well with much of current U.S. free speech law. At the same time, however, his view would also require some significant changes to current U.S. law. In particular, when regulation of speech would *promote* political deliberation, Sunstein suggests that regulation is not only permissible, but even obligatory. For example,

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26. *Ibid.* at 123. As will become clear in what follows, some of the theorists we discuss in this section, including Sunstein, use 'protected' and 'protection' to mean what we do by 'covered' and 'coverage,' respectively. On their usage, speech is "protected" in virtue of falling within the scope of a principle of free speech.

27. *Ibid.* at 124. According to Sunstein, such lower-tier speech "may be regulated only on the basis of a persuasive demonstration that a strong and legitimate government interest is promoted by the regulation at issue" (123).

he favors government regulation of television and newspaper content, to encourage responsible contributions to public debate. In addition, he advocates campaign finance reform, changes in laws governing access to public forums, changes in libel law, and several further reforms as well.

Unlike Greenawalt (and us), Sunstein does not explicitly recognize the distinction between coverage and protection. Nevertheless, he does sometimes acknowledge that some speech in the ordinary sense (e.g., obscenity) is excluded "from First Amendment protection altogether."[28] Such speech is to be distinguished from both lower-tier and top-tier speech, for both of the latter get some First Amendment "protection" (i.e., coverage in our sense). This suggests that Sunstein's view can be translated into our framework thus: on his picture, some speech in the ordinary sense is uncovered, both top-tier speech and lower-tier speech are covered, and the standards of justification relevant to top-tier speech are significantly higher than the ones relevant to lower-tier speech.[29]

There are some important differences between Sunstein's position and ours. As already suggested, we are engaged in different normative projects. Sunstein is arguing for a *new* (Madisonian) system of free speech. As such, his view departs from current First Amendment law in a variety of important ways. His main concern is the Broad Normative Coverage Question. We, by contrast, work within the current U.S. system, and are concerned with the Narrow Normative Coverage Question (as applied to the U.S. context). Moreover, as we shall see in §§ 4.4 and 5, there are important differences in the consequences of our respective positions for certain categories of speech.

4.3 Cohen

Like Sunstein, Cohen is also primarily concerned to describe and defend a principle of free speech.[30] Cohen's aim is to describe a principle that affords "stringent protections of expressive liberties," while permitting regulations of speech under certain limited circumstances.[31] Further, he intends to show that both these "stringent protections" (in our parlance, coverage along with the highest standards of justification), as well as the limited regulations can be justified without recourse to implausible views about either the value of speech (e.g., the view that speech is so valuable that every regulation of speech constitutes "an intolerable violation of human dignity") or the costs of speech (e.g., the view that speech is costless).[32] Cohen, like Sunstein, is also concerned with the Broad Normative Coverage Question, though Cohen's preferred system of free speech may depart less from the current U.S. system than Sunstein's does.

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28. *Ibid.* at 124.

29. Even if this translation is correct, however, it is worth noting that Sunstein disagrees with us about which categories of speech fall within and outside the coverage boundaries. For example, he believes that criminal solicitation is lower-tier (and so, covered) speech, whereas we think that it is uncovered.

30. Cohen, *supra* note 8 at 213-50.

31. *Ibid.* at 209-10. See also note 26.

32. *Ibid.* at 220.

By "stringent protections of expressive liberties," Cohen has in mind a principle of free speech which incorporates four themes that are familiar in First Amendment jurisprudence. These are: (i) a general presumption against content-based regulation; (ii) "lesser protection" for speech within "a small set of categories" (e.g., bribery, espionage, fighting words, etc.), for which, intuitively, content-based regulation is less troubling than it is for other categories of speech;[33] (iii) recognition that the fact that speech has costs is not generally sufficient to justify regulations of speech; and (iv) a requirement of fair access which, among other things, supports a presumption against regulations of speech (even content-neutral ones) that disproportionately burden those having a lower socioeconomic status.

Cohen suggests that speech is valuable because it tends to promote certain fundamental interests. Of these, he particularly emphasizes two, namely, the expressive interest and the deliberative interest. Briefly, the expressive interest is an interest in articulating our thoughts and feelings on matters of personal or broader human concern, and perhaps influencing others via that articulation. The deliberative interest is an interest in living a worthwhile life, which in turn requires knowing which lives are worthwhile. According to Cohen, the "stringent protections of expressive liberties" are justified by the need to secure these fundamental interests, together with certain assumptions about the costs of speech (e.g., that these costs can in most cases be effectively fought with more speech) and about the nature of human motivation (e.g., that we have a general tendency to undervalue speech, that renders it particularly vulnerable to over-regulation).[34]

Cohen's view has a lot in common with Sunstein's, at least in outline. First, like Sunstein, Cohen recognizes two levels of protection (in our parlance, two levels of coverage) within the free speech principle. For Cohen, categories of speech that are less closely connected to the deliberative and expressive interests get lesser protections (i.e., coverage along with lower standards of justification applying to any potential regulations) than categories that are more closely connected. For each of these less protected categories, Cohen's principle would specify conditions under which content-based regulations of speech would be permissible.

Second, again like Sunstein, Cohen does not explicitly recognize the distinction between coverage and protection, and does not address the issue of whether all speech in the ordinary sense belongs within the scope of a free speech principle. In our terms, his main concern is with speech that is covered.

Third, Cohen, like Sunstein, is concerned with the Broad Normative Coverage Question, and hence, with the free speech principle we ought to have (rather than one currently in place anywhere). Cohen, for example, says explicitly that he does not intend

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33. *Ibid.* at 214.

34. Though we cannot discuss these assumptions in any detail in this paper, it is worth noting that they are not uncontroversial. For example, if one of the costs of some speech is that it *disables* (i.e., silences) others' speech, then it seems less likely that the costly speech can be fought with "more speech." Such silencing and its relevance to free speech has been extensively discussed in the recent literature. See, e.g., Rae Langton, "Speech Acts and Unspeakable Acts" (1993) 22 Phil. & Pub. Affairs 293; Jennifer Hornsby, "Disempowered Speech" (1995) 23 Phil. Topics 127; Caroline West, "The Free Speech Argument Against Pornography" (2003) 33 Can. J. Phil. 391; Ishani Maitra, "Silencing Speech" (2009) 39 Can. J. Phil. 309; Mary Kate McGowan, "On Silencing and Sexual Refusal" (2009) 17 J. Pol. Phil. 487.

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to offer an interpretation of the U.S. Constitution.[35] In this respect, both Cohen's and Sunstein's projects differ from ours, for we are concerned with the Narrow Normative Coverage Question especially as applied to the U.S. system. Additional differences between Cohen's position and ours will emerge in §§ 4.4 and 5.

4.4 The Catholic Church Example

By way of making clear how our view differs from those discussed in §§ 4.1-4.3, consider the following example. Suppose that the Catholic Church (in the U.S.) were to issue an official statement to the effect that abortion is immoral, so any Church employee who votes for a pro-choice candidate will be fired. Clearly, this statement enacts obligations for employees of the Catholic Church. Moreover, since failure to meet these obligations can result in firing, and because such firing can constitute the basis of a wrongful termination lawsuit, these obligations are significant in our technical sense. As a result, the Church's statement is a significantly obligation-enacting utterance. Thus, according to our thesis, it ought to be outside the scope of the First Amendment, and so, ought to be as regulable as any non-speech action.

This result may seem preposterous. We maintain that it is not. First, notice that being regulable is not the same as being regulated. When someone scratches her nose (alone in her office, say), her action is not within the scope of the First Amendment, and so, is regulable as far as that principle is concerned. But this action is not, as a matter of fact, regulated. Second, and relatedly, not everything that is regulable *ought* to be regulated. Scratching one's nose in the privacy of one's office is not the sort of thing that ought to be regulated. There are sufficiently weighty considerations, such as regard for personal privacy, that tell strongly against such regulations. Putting this together, even if the Catholic Church's statement is beyond the scope of the First Amendment, there may be other (non-speech) considerations that tell strongly against its regulation.

Third, suppose that a husband tells his wife that she must vote as he prescribes, or else be subjected to a beating. Such an utterance appears to enact significant obligations. (Of course, following H.L.A. Hart, one might think this is merely a case of obliging, as opposed to obligating, but, given our more expansive view of obligations, we shall say that this is a prudential obligation.[36]) If the husband's utterance does enact significant (prudential) obligations, then our view entails that his utterance ought to be outside the scope of the First Amendment. But that seems intuitively the right result: surely, the husband should not be able to defend his utterance on free speech grounds. Whether the state has an interest in regulating such "speech" is a further question. We contend only that such an utterance should not fall within the scope of the First Amendment, and that it should be beyond that scope exactly because of what it *does*.

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35. Cohen, *supra* note 8 at 213.

36. H.L.A. Hart, *The Concept of Law*, 2nd ed., P.A. Bulloch & J. Raz, eds. (Oxford: Clarendon Press, 1994) at 82-83.

Applying these thoughts to the Catholic Church example: we think that the statement made by the Catholic Church functions in much the same way that the husband's threat does. In both cases, though the statements pertain to political subject matter, they do other things besides recommend a particular stance regarding this subject matter. It is what the Church's statement *does*—in addition to conveying a political opinion—that puts it beyond the purview of the First Amendment, on our view. However, to say this is not to settle the issue about whether the statement should be regulated. Contrast this case with a different statement that the Church could have issued, to the effect that being an employee of the Catholic Church is incompatible with voting for a pro-choice candidate, but without adding any penalties for voting this way. The latter statement might still have enacted obligations (for employees of the Church), but it is less obvious that these would be significant obligations. Accordingly, on the account we are offering, nothing is said about whether the latter statement should be covered.

Notice that the Church's statement (in the original case) is clearly both intended to be and taken as a contribution to an issue of public concern. As a result, it is political speech in Sunstein's sense. Therefore, in his scheme, it counts as top-tier speech, and as such, can be regulated only on the strongest showing of harm. On this point, and despite considerable agreement elsewhere, we disagree with Sunstein. As we see it, Sunstein ignores the fact that speech is complex, in the sense that a single utterance can do several different things at once. Consequently, an utterance can be political speech in his sense, and yet do much else besides, such as enact significant obligations. We maintain that, at least in some cases, the something else matters as well.[37]

Consider now Cohen's view, with its particular emphasis on the deliberative interest. For practicing Catholics, the Church's statement in part provides information about what is permissible for them to do, and so, about what is compatible with leading a worthwhile life. As a result, for practicing Catholics, the Church's statement is clearly connected to the deliberative interest. The same is true, however, for both non-Catholics and non-practicing Catholics. Since, on Cohen's view, the consideration of alternative conceptions of the worthwhile life are an important part of deliberating about such a life, the Church's statement is clearly connected to the deliberative interest for them as well. Therefore, on Cohen's view, the Church's statement seems to be covered by his principle of free speech. What level of protection (in Cohen's sense) is afforded by that principle will depend on how close the connection between speech of this kind and the deliberative (and other

37. There is some tension in Sunstein's view between his answer to the Justificatory Question (regarding what makes speech valuable in the first place) and his characterization of political speech. According to Sunstein, speech is valuable insofar as it contributes to a deliberative democratic process. But not all political speech in Sunstein's sense contributes to this process. Although the Church's statement clearly satisfies his definition of political speech, it is nevertheless anti-Madisonian in virtue of being instructive rather than deliberative. After all, in making the statement, the Church does not mean to be offering considerations to be used as one deliberates further on the question of abortion. Rather, the Church intends to *dictate* that individuals think (and vote) a particular way. It is just this dictatorial force that renders the Church's statement both anti-Madisonian and obligation-enacting.

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fundamental) interests turns out to be.[38] Since Cohen seems to treat the Church's utterance as covered, we disagree with him on this point as well.

Finally, consider Greenawalt's position. According to Greenawalt, any situation-altering (i.e., obligation-enacting) utterance that is both substantially (i.e., significantly) and dominantly so ought to be outside the scope of the First Amendment. Since the Church's statement is significantly obligation-enacting, it is substantially situation-altering. Thus, whether the Church's statement ought to be covered, on Greenawalt's view, depends entirely on whether it is *dominantly* situation-altering. According to one characterization of dominance that Greenawalt considers, a situation-altering utterance is dominantly so if the speaker's primary illocutionary intention is to enact changes in someone's obligations.[39] Suppose that, in the case at hand, the Church's primary illocutionary intention is to clarify the Church's doctrine. In such a case, where the Church's *primary* illocutionary intention is not to enact changes in obligations, Greenawalt's thesis does not generate the result that the Church's statement is uncovered. We, by contrast, think that what an utterance does (sometimes) matters more than what the speaker intended (primarily or otherwise) it to do.

In sum: the Catholic Church example serves two purposes for us. First, it functions as an additional illustration of our thesis. Since the Church's statement is a significantly obligation-enacting utterance, it ought to be outside the scope of the First Amendment, on our view. Second, the example also draws attention to differences between our view and those of Sunstein, Cohen, and Greenawalt. As we have seen, each of these theorists would treat the Church's utterance as covered by their respective principles, though each would do so for quite different reasons. Since we maintain, by contrast, that the Church's utterance should not fall within the scope of the First Amendment, we clearly disagree with each of these theorists.

5. Racist Hate Speech

In what follows, we consider how our thesis applies to racist hate speech. In addition, we compare our position on racist hate speech to those of Greenawalt, Sunstein, and Cohen. Although we all agree that at least some racist hate speech both is and ought to be regulable under the First Amendment, we nevertheless disagree about the grounds for regulating such speech, and about the standard of justification that proposed regulations must meet.

By way of background, we begin this section by presenting some recent arguments for the regulation of (some) racist hate speech. We focus on two types of arguments, namely, causal arguments, and constitutive arguments. Each of the theorists mentioned above offers a causal argument for the regulation of such speech.

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38. On the other hand, as mentioned in note 37, there is a sense in which the Church's statement is instructive rather than deliberative. As such, it is not intended to play a role in further deliberations (on the parts of Catholics, or anyone else) about what is right to do. This is some reason to think that, even if there is a connection between speech like this and the deliberative interest, the connection is not after all a close one.

39. See discussion in note 22.

That is, they each focus on the harms *caused* by such speech. Constitutive arguments, by contrast, focus on what racist hate speech *does* as speech. We point out that proponents of both of these types of arguments tacitly assume that racist hate speech ought to be covered by the First Amendment. We argue here that if racist hate speech does what at least some theorists claim it does, then, *contra* this tacit assumption, it should not be covered by the First Amendment (or by any other free speech principle that agrees with the First Amendment on the core cases). Moreover, once uncovered, there are sufficient and even uncontroversial grounds for regulating such speech.[40]

5.1 Causal Arguments

Many recent arguments for the regulation of racist hate speech focus on the harms allegedly *caused* by such speech. Critical race theorists, for example, argue that the harms caused by racist hate speech outweigh any harms that would result from its regulation. Racist hate speech is alleged to cause a wide variety of harms (e.g., racial violence, racial discrimination, and political disenfranchisement). In addition to these (social) harms, such speech is also alleged to cause more direct harms to its immediate targets, including "immediate mental and emotional distress," anxiety, high blood pressure, and other physical ills.[41] Finally, it is also suggested that racist hate speech functions as a self-fulfilling prophecy.[42] When a person in a position of authority says that Qs are inferior, Qs can come to believe that they are inferior, and others can come to believe that Qs are inferior. This can, in turn, cause the underperformance, and hence the inferior performance, of Qs. In this way, racist hate speech allegedly brings about the truth of the derogatory claims made by such speech.

Clearly, such causal arguments rely on the truth of complex causal claims, which are notoriously difficult to establish. In addition to trying to establish the truth of these claims, however, proponents of this sort of argument also attempt to establish that the harms caused by racist hate speech outweigh the harms that would be caused by its regulation. By assuming that this balancing is required, such arguments tacitly assume that proposed regulations of racist hate speech must meet the raised standards of justification associated with a free speech principle. In other words, these arguments tacitly assume that racist hate speech is covered by such a principle.

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40. We believe that a parallel case could be made for pornography. See, e.g., Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard University Press, 1987); Catharine A. MacKinnon, *Only Words* (Cambridge, MA: Harvard University Press, 1987); Langton, *supra* note 34; Mary Kate McGowan, "Conversational Exercitives and the Force of Pornography" (2003) 31 Phil. & Pub. Affairs 155; Maitra & McGowan, *supra* note 17.

41. Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling" in M. Matsuda, C.R. Lawrence III, R. Delgado & K. Crenshaw, eds., *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993) 89 at 93.

42. *Ibid.* at 95.

5.2 Fighting Words

As already mentioned, Greenawalt, Sunstein, and Cohen agree that some racist hate speech both is and ought to be regulable under the First Amendment. In addition, these theorists also agree that some such speech ought to be regulable because it constitutes fighting words. On most views, fighting words are regarded as a class of covered but unprotected speech.[43] They are defined in the landmark case *Chaplinsky v. New Hampshire*, in which the U.S. Supreme Court said:

> There are well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—*those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.* ... [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[44]

Note that fighting words are here disjunctively defined. They do one of two things: inflict injury by their very utterance, or incite an immediate breach of the peace. For reasons that are not entirely clear to us, theorists tend to focus on the second disjunct, which identifies fighting words by their causal effect. Accordingly, regulations of fighting words (in this sense) are often justified by reference to the interest in avoiding harm (or violence). An example may help. Suppose that an angry mob is assembled outside the house of a black man suspected of the brutal rape-murder of a young girl. Someone in the mob says, "That damn dirty ni**er is gonna get away with it because all them fuckin' porchmonkeys play that race card!" Such an utterance (in such a context) is likely to cause an immediate breach of the peace. As a result, it is regulable under the fighting words doctrine.[45]

According to Sunstein and Cohen, some racist hate speech is regulable under the First Amendment exactly because it constitutes fighting words, and as such, "tend to incite an imminent breach of the peace." Since fighting words are already a regulable (and hence, in our terminology, unprotected) class of speech, both Sunstein and Cohen advocate singling out the sub-class of race-related fighting words for

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43. Both Schauer and Greenawalt are exceptions here, for they both take (at least some) fighting words to be uncovered. Schauer acknowledges that fighting words are not a clear case. See Frederick Schauer, "The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience" (2004) 117 Harv. L. Rev. 1765 at 1777. We discuss Greenawalt's position on fighting words later in this section.

44. *Chaplinsky v. New Hampshire* [1942] 315 U.S. 568 at 571-72 [emphasis added].

45. There are complications here. Consider, for example, racial slurs directed at an elderly black woman in the presence of only strong young white men. Although in this case the addressee is unlikely to respond with violence, Greenawalt argues that such words *would* cause an immediate breach of the peace under different "equalized" conditions. As a result, on his view, this utterance counts as fighting words even though it does not actually cause an immediate breach of the peace. See Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton, NJ: Princeton University Press, 1995) at 47-70.

special regulation. However, as they both acknowledge, the Constitutionality of this approach is controversial.[46]

Greenawalt agrees with Sunstein and Cohen that some racist hate speech ought to be regulable under the First Amendment exactly because it constitutes fighting words. Further, he also agrees that *some* fighting words ought to be regulable because of their causal effects. But there is an important difference between Greenawalt's position, and that of the others. Greenawalt maintains that some fighting words (including some fighting words that also constitute racist hate speech) ought to be *uncovered* by the First Amendment. Some such utterances, on his view, challenge their addressees to fight, and as such, are situation-altering. Some of these are also dominantly and substantially situation-altering, and thus, outside the scope of the First Amendment, for Greenawalt.[47]

Greenawalt, Cohen, and Sunstein thus have much in common on the question of regulating racist hate speech. First, all three theorists argue that (some) racist hate speech is regulable under the First Amendment, and further, that such speech is regulable under the fighting words doctrine. Second, since fighting words are those that cause "an imminent breach of the peace," each of these theorists is offering a causal argument for regulation.[48] By doing so, these theorists advocate regulating (some) racist hate speech in virtue of the harm it *causes*. (We, by contrast, advocate regulating (some) racist hate speech in virtue of what it *does*. We defend this view in § 5.5.) Third, by appealing (only) to the existing fighting words doctrine, these theorists are not recommending a change from current U.S. law. Rather, on their views, (some) racist hate speech ought to be regulated by the *law's own lights*. Finally, for the most part, these theorists treat such speech as covered but unprotected.[49]

5.3 Constitutive Arguments

A more radical approach contends that racist hate speech actually *constitutes* harm. On this approach, such speech can be regulated under a free speech principle not

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46. Although there is precedent for subject-based discriminations amongst regulable utterances (e.g., threats against the President are punished more severely than other threats), there is a worry that doing so here would not be viewpoint-neutral. After all, one might think that only *racist* race-related utterances would cause an immediate breach of the peace, and therefore qualify as fighting words in the first place. If so, the singling out of race-related fighting words may be (tacitly) viewpoint-based, and hence unconstitutional. This is essentially the concern expressed by the U.S. Supreme Court in *R.A.V. v. City of St. Paul*. See *R.A.V. v. City of St. Paul* [1992] 505 U.S. 377 at 391. Both Sunstein's and Cohen's preferred principles of free speech depart from the Supreme Court's view on this matter.

47. Greenawalt does not favor legislatively singling out race-related fighting words. Since the U.S. courts are likely to take issue with the Constitutionality of any such singling out, Greenawalt favors using the fighting words doctrine to regulate *all* fighting words, not merely the race-related sub-class.

48. As noted above, however, Greenawalt acknowledges that at least some regulable racist fighting words ought to be uncovered. However, he does not consider the possibility (as we do) that such utterances can constitute acts of racial discrimination. Moreover, as we have argued elsewhere, there are other difficulties with his account, especially having to do with his notion of dominance. See Maitra & McGowan, *supra* note 17.

49. As noted above, Greenawalt is an exception here, for he treats some racist fighting words as uncovered.

because it describes or expresses harm, and not because it causes harm, but because it *is* harm. Advocates of this more radical approach contend that racist hate speech ought to be regulable because of what it *does*, and because of what it does *as speech*. But one may well wonder how racist hate speech (mere words) could actually *be* harm. In what follows, we will briefly sketch one way of spelling out this idea, due to Charles Lawrence.

Lawrence argues that (some) racist hate speech ought to be regulated under the First Amendment because it constitutes an unlawful act of racial discrimination.[50] Such speech ought to be regulated, on his view, because of what it does. To understand his reasoning, it is best to start with his intriguing but non-standard interpretation of *Brown v. Board of Education*, the landmark case in which the U.S. Supreme Court deemed segregation in schools to be unconstitutional. According to Lawrence, segregation was here deemed unlawful not because physical separation of racial groups is itself unlawful, and not because the funding for black schools and white schools was unequal, but because the very practice of segregation sends a message of racial inferiority. As Lawrence sees it, U.S. anti-segregation law criminalizes the *message* of racial inferiority. Segregation is unlawful because it stamps blacks as inferior, so any racist hate speech that does the same, reasons Lawrence, is unlawful on the same grounds.[51]

One might interpret Lawrence as confusing the legal prohibition of a practice (i.e., segregation) with the legal prohibition of a message allegedly expressed by that practice (i.e., blacks are inferior). Just about any action whatsoever expresses some message or other. Suppose, for example, that we kill the provost. This action would surely express our contempt for the provost. Despite this, it would surely be a mistake to suppose that by prohibiting this act of murder, the state is thereby prohibiting the expression of this message.

As we see it, though, such an interpretation of Lawrence's reasoning is unduly uncharitable. First, he views U.S. anti-segregation law as an important precedent for regulating *speech*, even for *content-based* regulation of speech.[52] According to Lawrence, segregation is treated as speech by the Court because it is deemed unlawful *in virtue of* the message it conveys. He says:

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50. See Crossburning, *supra* note 3. In addition, Matsuda can also be read this way. See Mari Matsuda "Public Response to Racist Speech: Considering the Victim's Story" in M. Matsuda, C.R. Lawrence III, R. Delgado & K. Crenshaw, eds., *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, CO: Westview Press, 1993) 17. Although her argument appears to us to be both causal and constitutive, both Lederer and Butler interpret her as maintaining that the speech in question *constitutes* an act of subordination, and thus as offering (in our terms) a constitutive argument. See Laura Lederer, "Pornography and Racist Speech as Hate Propaganda" in L. Lederer & R. Delgado, eds., *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* (New York: Hill & Wang, 1993) 131 at 131 and Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997) at 73.

51. For this argument, see Crossburning, *supra* note 3.

52. Unlike Lawrence, we don't think that U.S. anti-segregation law provides a precedent for *content-based* regulation of speech. Since the speech in question is regulated because of what it *does* (and not because of what it says), this is not a content-based regulation. This is so even if what it does depends, in some way, on what it says.

> [T]he practice of segregation, the practice the Court held inherently unconstitutional, was *speech*. ... *Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys.[53]

Second, segregation is here deemed unlawful in virtue of the message it conveys because of what that message *does*. As he says, it "stamps a badge of inferiority upon blacks."[54] Thus, as we interpret him anyway, Lawrence maintains that the practice of segregation ought to be unlawful in virtue of what it does, as speech, to the social status of blacks.

His treatment of racist hate speech is similar. According to Lawrence, some racist hate speech makes it the case that people of color are stamped as socially inferior. Such speech thus enacts a social hierarchy in which people of color are situated in an unjust and subordinate position. Therefore, on Lawrence's view, this sub-class of racist hate speech ought to be regulated because it constitutes unlawful acts of racial discrimination.[55]

Note that this constitutive argument assumes that racist hate speech is covered by the First Amendment. As mentioned above, Lawrence views *Brown* as an important precedent for allowing content-based regulation of speech. But concerns about whether content-based regulations are permissible do not even arise beyond the scope of the First Amendment. So, by addressing such issues, Lawrence appears to view racist hate speech as covered by the First Amendment.[56] By contending that certain forms of racist hate speech constitute unlawful acts of discrimination, Lawrence maintains that these (discriminatory) forms of racist hate speech ought to be unprotected, even though covered.

5.4 The Standard Liberal Response

Thus far, we have outlined two sorts of arguments (causal and constitutive) for regulating (some) racist hate speech. These arguments share the tacit assumption that such speech is covered by the First Amendment, and therefore, that proposed regulations must meet the raised standards of justification relevant to the free speech principle enshrined there.

As is well known, the standard liberal line on racist hate speech is that it (mostly) ought to be both covered and protected, perhaps with the exception of the sub-class of such speech that also qualifies as fighting words. This standard liberal stance concedes that racist hate speech causes (or even constitutes) harms, and further, that these harms are ones that a liberal society has an interest in preventing.

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53. If He Hollers, *supra* note 3 at 59 [original emphasis].

54. *Ibid.*

55. One might be concerned that racist hate speech cannot enact a(n unjust racial) hierarchy because doing so requires that the speakers have and be exercising the authority to do so. We will discuss this concern in the next section (§ 5.5).

56. There may be some tension in Lawrence's view on this point. Lawrence also likens (some) racist hate speech to 'Whites Only' signs. Since such signs are not speech in the First Amendment sense, Lawrence may also be suggesting that (some) racist hate speech should not even be covered by the First Amendment. See § 3.3.

Nevertheless, the standard liberal line says that such harms, however serious they may be, are simply the price we pay for valuing speech in the first place. The idea is that the harms that would result from the regulation of racist hate speech (in particular, the alleged harm of undermining of our commitment to free speech) outweigh the harms that this speech either causes (or constitutes).

In acknowledging that (some) racist hate speech is harmful, but taking this to be insufficient grounds for regulating such speech, the standard liberal stance (like the causal and constitutive arguments considered above) also assumes that such speech is, and ought to be, covered by any free speech principle. In the next section, we argue against this shared assumption.

5.5 Our View on Racist Hate Speech

In § 3, we defended the thesis that all significantly obligation-enacting utterances ought to be outside the scope of the First Amendment (as well as outside the scope of any free speech principle that agrees with the First Amendment with respect to the core cases). Such utterances, even if they are speech in the ordinary sense, are as regulable as any non-speech action.

If Lawrence is correct about what certain forms of racist hate speech do, then such speech is significantly obligation-enacting. According to Lawrence, such speech marks people of color as socially subordinate (to whites), and legitimates discriminatory behavior towards them. As such, these utterances are obligation-enacting, for they enact changes in obligations towards people of color. Of course, the obligations in question are neither legal nor moral. If Lawrence is correct, some racist hate speech enacts *social* obligations (that are constitutive of an unjust social hierarchy in which persons of color are systematically disadvantaged). Moreover, these obligations are significant ones, since they are obligations to perform illegal acts (i.e., acts of racial discrimination). Therefore, these utterances also turn out to be significantly obligation-enacting. Thus, if Lawrence is right, then (some) racist hate speech is significantly obligation-enacting, and so, according to our thesis, should not be covered by the First Amendment (or, again, by any other free speech principle that agrees with the First Amendment on the core cases).

One might object that Lawrence cannot be right to suggest that ordinary racist hate speech can enact an unjust social hierarchy in the manner just described. A speaker can enact social norms, it might be thought, only by having and exercising the authority to do so. But the speakers in question here, i.e., the utterers of racist hate speech, clearly fail to have the requisite authority. This is an important and familiar objection.[57] Although a full discussion of this worry cannot be attempted

57. See, e.g., Butler, *supra* note 50; Leslie Green, "Pornographizing, Subordinating, and Silencing" in R.C. Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles, CA: Getty Research Institute for the History of Art and the Humanities, 1998) 292-97; Martin P. Golding, *Free Speech on Campus* (Lanham, MD: Rowman & Littlefield, 2000); Sumner, *supra* note 10; Nancy Bauer, "How To Do Things with Pornography" in S. Shieh & A. Crary, eds., *Reading Cavell* (London: Routledge, 2006) 68. Several of these theorists address this concern (about how apparently non-authoritative speakers can construct unjust social hierarchies) in the context of discussions of MacKinnon's claims about pornography. See MacKinnon, *supra* note 40.

here, it is worth mentioning that there are several different responses to it. Some have argued that although formal authority is lacking, *de facto* authority is not.[58] Others have argued that because the state fails to regulate racist hate speech, the utterers of such speech have the authority of the state behind them.[59] Still others have argued that enacting social norms does not require any peculiar authority at all.[60]

As we see it, Lawrence's view of racist hate speech is much like the U.S. law's view of 'Whites Only' signs. According to Lawrence, (some) racist hate speech constitutes acts of racial discrimination. Such speech makes it the case that non-whites are socially subordinate to whites. Consequently, if Lawrence is right, then such speech ought to be uncovered by the First Amendment (and related free speech principles) for the same reasons that 'Whites Only' signs ought to be uncovered. Such utterances enact significant changes in obligations. Therefore, according to our thesis, regulations of such speech should raise no free speech concerns at all.

It is worth stressing here that we are only arguing for a *conditional* claim. That is, we are arguing that something very important (but overlooked) follows from Lawrence's views on racist hate speech. If he is right about what (some) racist hate speech does, and if we are right about what constitutes a sufficient condition for non-coverage, then these utterances do not count as speech in the sense relevant to a principle of free speech. As a result, such utterances are regulable on grounds conceded by even the staunchest defenders of free speech. Recall that, if a class of actions is uncovered, proposed regulations of actions in that class need only meet relatively low standards. In the U.S. context, uncovered actions need only meet the standard of rational basis review. As we shall see, there is ample reason to believe that both the causal and constitutive arguments afford the resources for meeting this (lower) standard.

Consider, first, the causal arguments against racist hate speech. If racist hate speech causes the harms alleged (as is conceded even by the standard liberal defense), then the state certainly has a legitimate interest in regulating it. Further, it is clear that some regulations would bear a rational relation to the state's interest. Thus the causal argument provides sufficient grounds for regulation under rational basis review, and thus under current U.S. law.[61]

Further, once (some) racist hate speech is uncovered, there is little reason to

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58. Rae Langton, "Subordination, Silence, and Pornography's Authority" in R.C. Post, ed., *Censorship and Silencing: Practices of Cultural Regulation* (Los Angeles, CA: Getty Research Institute for the History of Art and the Humanities, 1998) 261 and Rae Langton, *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford: Oxford University Press, 2009) at 89-116.

59. Matsuda, *supra* note 50.

60. See McGowan, *supra* note 40 and Nellie Wieland, "Linguistic Authority and Convention in a Speech Act Analysis of Pornography" (2007) 85 Australasian J. Phil. 435.

61. According to this reasoning, the causal argument succeeds in showing that (some) racist hate speech may be regulated only once it is established that such speech ought to be uncovered (and so, that proposed regulations need meet no standard higher than rational basis review). But showing that racist hate speech ought to be uncovered required a (constitutive) argument to the effect that racist hate speech is significantly obligation-enacting, and hence ought not be covered. Thus, on this view, the success of the causal argument requires the prior success of a constitutive argument.

think its regulation would actually cause the kind of harm envisioned by the standard liberal line. Once it is recognized, for example, that such speech is not speech in the sense relevant to the First Amendment, its regulation does not compromise (and thus harm) our commitment to free speech. Moreover, since it is not speech in the relevant sense, our commitment to free speech affords no reason to tolerate its harms.

Consider next the constitutive argument against racist hate speech. If (some) racist hate speech constitutes the harms alleged (e.g., acts of racial discrimination), then again the state has an interest in regulating it. Moreover, some such regulation would bear a rational relation to that interest. So, the constitutive argument also provides sufficient grounds for the regulation of racist hate speech under current First Amendment law.

In sum: we have argued in this section that if our central thesis about non-coverage is correct, and also if Lawrence is right about what (some) racist hate speech does, then it follows that such speech should be beyond the scope of the First Amendment (and, indeed, any free speech principle that agrees with the First Amendment on the core cases). Moreover, once such speech is uncovered, there are sufficient grounds for regulating it. That is to say, once such speech is uncovered, its harms (which are recognized by all parties to the debate) constitute sufficient grounds for its regulation.

6. Conclusion

We began this paper with the following question: which actions ought to fall within the scope of a free speech principle? We then went on to argue for the following claim: significantly obligation-enacting utterances should not be covered by the First Amendment (and related free speech principles). We compared our view to those of Greenawalt, Sunstein, and Cohen, and argued that our thesis has distinct advantages over each of their views. Finally, we showed that this thesis, when paired with a particular view about how (some) racist hate speech works, has far-reaching implications for potential regulations of such speech.

Discussions of free speech in the philosophical literature typically concentrate on comparing the value of permitting speech against the harms sometimes caused (or constituted) by doing so, while largely ignoring the question of what ought to count as speech in the relevant sense. This paper makes clear the importance of the latter question. As we have argued, some speech in the ordinary sense not only expresses (and communicates) ideas, but also does much else. Our commitment to free speech should not blind us to what speech does, especially (but not only) where what it does is in tension with considerations of equality. Moreover, recognizing that some speech ought to be beyond the scope of a free speech principle (because of what it does) should not be regarded as compromising our commitment to free speech. Rather, it clarifies that commitment. By getting clear on what counts as speech in the relevant sense, we illuminate, and arguably strengthen, our commitment to free speech.

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Finally, there is a lot of talk of an alleged clash between free speech, on the one hand, and equality, on the other. If what we have suggested here is correct, however, there may be no such clash. If (some) racist hate speech should be beyond the scope of a free speech principle altogether, then at least with respect to such speech, we have only an equality issue on our hands. Thus, in such cases, the way is clear for substantive regulations.

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