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Therapeutic Expression

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THERAPEUTIC EXPRESSION

Jennifer M. Kinsley*

ABSTRACT

Words have the power to uplift, and words have the power to inflict damage. Modern free speech debate has emphasized the latter, resulting in two divergent schools of thought around the connection between speech and harm. On the one hand, progressive legal scholars argue in favor of safe spaces, trigger warnings, and other restrictions on expression based on the idea that speech inflicts secondary trauma on vulnerable people. On the other hand, constitutional purists dismiss the notion that the First Amendment is concerned with resultant harm at all, focusing instead on the legality of the speech itself unrelated to its impact in society. Neither of these approaches strikes the correct balance between the right of individuals to speak their minds and the interpersonal and societal damage that sometimes results from an unregulated free speech marketplace.

Against that backdrop, this Article explores the relationship between free speech and psychological and physical harm. Examining the historical justifications for the First Amendment and its exceptions, it argues that harm is in fact a relevant criterion in determining the scope of free speech protection. Indeed, all of the historical exceptions to First Amendment protection, including child pornography and true threats, are based upon the perception that the speech lacks value and causes injury to others. But this Article also exposes flaws in the notion that speech should be restricted solely based upon the harm it may inflict, demonstrating instead that the freedom to speak freely actually forestalls rather than leads to individual and societal harm. Drawing upon prevailing psychological and sociological theories related to the treatment of violent and sexually aggressive perpetrators, the Article posits that the ability to engage in free and unrestricted expression is critical to preventing physical and emotional damage to others. As the psychosocial research indicates, individuals who have the ability to speak freely about their emotions, thoughts, opinions,

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and identities are less likely to engage in rebellion, aggression, and crime. In this way, the right of free speech provides a therapeutic alternative to harmful behavior, and the therapeutic qualities of expression provide a justification for protecting rather than silencing it.

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INTRODUCTION

“Say what you need to say. Say what you need to say.”

—John Mayer, “Say”¹

On July 20, 2012, James Holmes entered the Century 16 movie theater in Aurora, Colorado and opened fire on a midnight showing of the film *The Dark Knight Rises*.² Dressed in tactical gear, he set off tear gas grenades and shot at the audience using multiple firearms.³ Twelve people died, and seventy others were injured.⁴

Prior to the shooting, Holmes sought treatment from psychiatrist Lynne Fenton, who managed the student mental health clinic at the university Holmes had been attending.⁵ Dr. Fenton testified at Holmes’ criminal trial that he disclosed non-specific violent thoughts to her during treatment, but that she was unable to place him under psychiatric hold because he did not identify a direct target.⁶ Holmes eventually discontinued his sessions with Dr. Fenton when he dropped out of school, saying he was no longer able to afford psychiatric care.⁷ Hours before the Aurora massacre, Holmes mailed Dr. Fenton a detailed notebook in which he described the theater, his plans to attack it, and his reasons for the shootings.⁸ He later told another mental health professional that he created the notebook because it was important for people to understand him.⁹

Several years later, supporters of the far-right political movement, including white nationalists and members of several militias, gathered in Charlottesville, Virginia for a march they named the “Unite the Right” rally.¹⁰ The City of Charlottesville initially granted a permit for the rally at a small urban park

¹ JOHN MAYER, *Say*, on CONTINUUM (Aware Records & Columbia Records 2006).

² *Colorado Theater Shooting Fast Facts*, CNN, <https://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/index.html> (last updated July 16, 2018); see also Diane A. Wade, *James Holmes Appears in Court Being Accused of Killing 12 People in Aurora Cinema Shooting*, BELLE NEWS (July 23, 2012), <https://www.belleneews.com/2012/07/23/world/us-news/james-holmes-appears-in-court-being-accused-of-killing-12-people-in-aurora-cinema-shooting/>.

³ *Colorado Theater Shooting Fast Facts*, *supra* note 2.

⁴ *Id.*

⁵ Ann O’Neill & Sara Weisfeldt, *Psychiatrist: Holmes Thought 3-4 Times a Day About Killing*, CNN, <https://www.cnn.com/2015/06/16/us/james-holmes-theater-shooting-fenton/index.html> (last updated June 17, 2015).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?noredirect=on&utm_term=.e8330693cf7a.

containing the statue of Confederate General Robert E. Lee, but later attempted to move the rally to a larger, less centrally located park.¹¹ The night before the rally, a federal court in Charlottesville issued a temporary restraining order barring city officials from moving the event and allowing it to go forward in its original location.¹²

On the morning of the rally, large swaths of Unite the Right participants appeared in military gear and openly carried semiautomatic firearms, shields, and clubs.¹³ Several incidents of violence against persons of color and counter-protesters were reported.¹⁴ By 11:00 a.m., the City of Charlottesville declared a state of emergency and cancelled the event.¹⁵ A few short hours later, James Alex Fields, Jr., a Unite the Right supporter, drove his car into a group of counter-protesters, killing one person and injuring nineteen others.¹⁶ Fields was charged with murder, but claimed he was acting in self-defense.¹⁷ He was convicted by a state court jury, which recommended a sentence of life in prison.¹⁸

While extreme in terms of their violence and risk to human life, these examples highlight the significant, latent connection between thought, speech, violence, and harm. Both Holmes and Fields clearly harbored thoughts of hurting other people, in Holmes's case for months at a minimum before he carried out his deadly attack.¹⁹ Both Holmes and Fields engaged in acts of violence that inflicted serious physical harm and death to a multitude of people.²⁰

¹¹ Bryan McKenzie, *Judge Allows Unite the Right Rally to Stay in Emancipation Park*, DAILY PROGRESS (Aug. 11, 2017), https://www.dailyprogress.com/news/local/judge-allows-unite-the-right-rally-to-stay-in-emancipation/article_9965d0be-7ee6-11e7-ab0e-f342e0cf9488.html.

¹² *Kessler v. City of Charlottesville*, No. 3:17CV00056, 2017 WL 3474071, at *1 (W.D. Va. Aug. 11, 2017).

¹³ Heim, *supra* note 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Steve Almasy et al., *Teacher, Ex-Classmate Describe Charlottesville Suspect as Nazi Sympathizer*, CNN, <https://www.cnn.com/2017/08/12/us/charlottesville-car-crash-suspect-idd/index.html> (last updated Aug. 15, 2017).

¹⁷ Jorge L. Ortiz, *Accused Charlottesville Killer James Fields to Argue Self-Defense in Heather Heyer's Death*, USA TODAY (Nov. 26, 2018, 2:44 PM), <https://www.usatoday.com/story/news/2018/11/26/james-fields-accused-charlottesville-killer-argue-self-defense/2115898002/>.

¹⁸ Julia Jacobs, *Jury Recommends Life in Prison for James Fields in Fatal Charlottesville Attack*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/us/james-fields-charlottesville-sentence.html>; Jonathan M. Katz & Farah Stockman, *James Fields Guilty of First-Degree Murder in Death of Heather Heyer*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/us/james-fields-trial-charlottesville-verdict.html>. At the time of the publication, Fields was also awaiting trial on federal hate crime charges which could result in the death penalty. Jacobs, *supra*.

¹⁹ Almasy et al., *supra* note 16; O'Neill & Weisfeldt, *supra* note 5.

²⁰ Wade, *supra* note 2; see Katz & Stockman, *supra* note 18.

And both Holmes and Fields appeared to be seeking a speech-related outlet for their ideologies immediately prior to engaging in these behaviors, although neither was fully able to be heard, to completely articulate their perspective, or to avoid violence through psychological therapy. At least to the extent that Holmes worked on his notebook and that Fields participated in the Unite the Right march, they were not actively undertaking physical violence at the time they were engaged in expressive activities. Rather, their expression was either a precursor to violence or a mechanism for delaying violence, or both. This progression of events leaves one to wonder: What if Holmes had been able to share his notebook with Dr. Fenton before he opened fire in the theater? What if Fields had been able to continue marching through Charlottesville with his alt-right comrades rather than being told to disperse and go home? What role did foreclosing an expressive speech outlet play in the violent decisions made by each of these men? And, on a broader level, what if, in place of normatively distancing and suppressing disturbing, hateful, offensive, even violent speech, we instead encouraged the free flow of ideas that might give insight into why people behave and think as they do?

The answers to these questions are no doubt complex and beyond the power of law, standing alone, to solve. Nevertheless, the role of law in protecting the freedom of expression, despite the emotional, societal, or ideological harms it may occasionally cause, is an important one. To be sure, just as words have the power to uplift, they also have the power to inflict damage. A reasonable person reading Holmes's notebook may no doubt experience fear and anxiety after confronting his plans to shoot and kill complete strangers innocently watching a movie. Similarly, a reasonable person—particularly a person of color or member of another marginalized group—may feel traumatized by the bigoted and hateful ideas expressed by the Unite the Right protesters and may fear for her safety as a result. But the harm imposed by the actions of these speakers—serious physical injury and death—starkly outweighs the emotional injury to individuals encountering speech they disdain.²¹ This is not to dismiss the very real and very present power words have over individual well-being, but rather to point out that, on balance, death is worse than the experience of psychological or emotional pain. An oversimplification, yes, but one worth exploring.

As this discussion underscores, the current debate over the scope of free expression has improperly conflated notions of physical and psychological harm

²¹ This observation is not a new one. More than fifty years ago, Thomas Emerson observed the power of speech to cause harm that “expression is normally conceived as doing less injury to other social goals than action.” Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 881 (1963).

and, as a result, has overemphasized the emotional harm that flows from certain kinds of speech in an effort to cabin or silence it. There currently exist two primary divergent schools of thought around the connection between speech and psychological harm. On the one hand, progressive legal scholars argue in favor of safe spaces, trigger warnings, and other restrictions on expression based on the idea that speech inflicts secondary trauma on vulnerable people.²² These scholars advocate assessing the potential psychological harm caused by categories of speech as a first step in determining the scope of First Amendment protection, and then either distancing the speech or silencing it altogether if the idea being expressed is sufficiently harmful.²³ Their approach focuses on what this Author will call “speech safety,” that is, the creation of either literal or metaphysical zones of protection around vulnerable or unwilling listeners.²⁴ This Article is not intended to debate the societal or interpersonal value of speech safety ideologies or the concrete solutions to psychological trauma offered by speech safety advocates, but rather focuses on the contributions the speech safety dialogue makes to our understanding of how words impact the actions of other people.

Those who oppose the speech safety movement also offer valuable insights on the connection between speech and harm and how that nexus, or lack thereof, drives First Amendment jurisprudence. In response to the speech safety movement, these free speech purists argue that the First Amendment should not be concerned with the outcome of particular types of expression, but instead ought to focus on the notion that all speech deemed valuable in society is deserving of protection.²⁵ As a result, the purists contend, the appropriate inquiry

²² For a general discussion of the attributes of safe spaces, see Trevor N. Ward, *Protecting the Silence of Speech: Academic Safe Spaces, the Free Speech Critique, and the Solution of Free Association*, 26 WM. & MARY BILL RTS. J. 557 (2017).

²³ See, e.g., Rory K. Little, *Hating Hate Speech: Why Current First Amendment Doctrine Does Not Condemn a Careful Ban*, 45 HASTINGS CONST. L.Q. 577, 581–82 (2018) (cataloging harms caused by hate speech before addressing limited ways to ban hateful expression under the First Amendment); Christina Paxson, *Brown University President: A Safe Space for Freedom of Expression*, WASH. POST (Sept. 5, 2016), https://www.washingtonpost.com/opinions/brown-university-president-safe-spaces-don-t-threaten-freedom-of-expression-they-protect-it/2016/09/05/6201870e-736a-11e6-8149-b8d05321db62_story.html?utm_term=.1b33a12f218c.

²⁴ See Little, *supra* note 23.

²⁵ For a critical, free speech-oriented response to the speech safety movement, see generally Robert Shibley, *Current Threats to Free Speech on Campus*, 14 FIRST AMEND. L. REV. 239, 240 (2016) (“Instead of boldly defending the right to free speech in the face of violent attempts to suppress ‘erroneous’ viewpoints, however, our institutions—governments, universities, corporations, the media, and even civil society—are increasingly choosing to act as a censor themselves, relying on institutional and bureaucratic power and influence to try to accomplish what the terrorists cannot: the suppression of dissenting opinions. Not only is this ultimately doomed to fail—it is anathema to a free society of autonomous individuals.”).

is one rooted in the value of the expression itself, unconnected to any resultant damage or injury.²⁶ In this way, words can be decoupled from their precipitating cause and their ultimate effect, standing on their own validity and assessed on their own merit.

Both the speech safety and free speech purist approaches make prescient observations about the ability of words to generate harm and the role that resultant harm ought to play in making legal determinations about the value, meaning, and scope of protection of the speech itself. But neither of these approaches strikes exactly the right balance between the right of individuals to speak their minds and the interpersonal and societal damage that sometimes results from an unregulated free speech marketplace.²⁷ The speech safety movement, on the one hand, is too quick to justify restrictions on otherwise-protected expression based on the psychological trauma that may result to its listeners, without considering whether and to what extent these restrictions actually encourage more damaging behaviors. And the purist philosophy is too rigid in its stance that speech and harm are unrelated, focusing too narrowly on the message the expression conveys without regard to the impact that message may have on others.

Against that backdrop, this Article explores the relationship between free speech and psychological and physical harm. Examining the historical justifications for the First Amendment, it argues—contrary to the purist approach—that harm is in fact a relevant criterion in determining the scope of free speech protection, because harm is an integral component of speech-related value. Indeed, all of the historical exceptions to First Amendment protection, including libel and slander,²⁸ child pornography,²⁹ and true threats,³⁰ are based

²⁶ For examples of speech-positive purism, or the notion that speech should be protected because it has intrinsic value and not because it generates no harm, see David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223, 240–41 (2003); Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL RTS. J. 765, 770 (2009).

²⁷ For further critiques of these opposing schools of thought, see Terri R. Day & Danielle Weatherby, *Speech Narcissism*, 70 FLA. L. REV. 839 (2018). Day and Weatherby argue that the increasing polarization of speech perspectives—those who defend free speech at all costs and those who desire to censor certain perspectives in educational settings as a way of accommodating vulnerable students—is destroying the notion of a productive speech marketplace. *Id.* at 844–45.

²⁸ See, e.g., *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 150 (1967) (“The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others.”).

²⁹ See, e.g., *New York v. Ferber*, 458 U.S. 747, 758 (1982) (identifying injury caused to children depicted in child pornography as basis for excluding it from constitutional protection).

³⁰ See, e.g., *Virginia v. Black*, 538 U.S. 343, 357 (2003) (discussing the damage caused when the target of threatening communication is placed in fear of physical harm).

on the perception that the speech in question has no societal value precisely *because* it causes injury to others.

This Article also exposes flaws in the notion that speech should be restricted solely based upon the harm it may inflict, demonstrating instead that the freedom to speak freely actually forestalls rather than leads to individual and societal harm. Drawing upon prevailing psychological and sociological theories related to the treatment of violent and sexually aggressive perpetrators, this Article posits that the ability to engage in free and unrestricted expression is critical to preventing physical and emotional damage to others. As emerging psychosocial research indicates, individuals who have the ability to work through difficult emotions, thoughts, and feelings by speaking freely about them are less likely to engage in rebellion, aggression, and crime.³¹ In this way, the right of free speech provides a therapeutic alternative to harmful behavior, and the therapeutic qualities of expression provide a justification for protecting rather than silencing it.³²

Part I of this Article discusses the connection between speech and the harms it may cause to others. It examines the prevailing schools of thought on the role that harm plays in First Amendment doctrine: speech safety theory on the one hand and doctrinal free speech purism on the other. Part II introduces current psychological theories on the role that speech plays in psychosocial development, both individually and collectively. Part II also proposes a new approach to the speech/harm dichotomy by suggesting that speech, given its therapeutic qualities, forestalls rather than generates greater harm. Through case studies addressing sexually oriented expression and threats of violence, Part III concludes that preservation of the right of free speech is in the general public interest, because individuals who speak freely are less likely to impose physical and emotional harm on others. The Article concludes that speech in general tends to be more therapeutic than harmful and that, as a result, the First Amendment's protection of even distasteful, hateful, and unpopular expression has ongoing vitality in protecting individuals and society from physical danger.

³¹ See, e.g., Thomas Feucht & Tammy Holt, *Does Cognitive Behavioral Therapy Work in Criminal Justice? A New Analysis from CrimeSolutions.gov*, NAT'L INST. JUST., <https://nij.gov/journals/277/Pages/crimesolutions-cbt.aspx> (last visited Apr. 9, 2019) (analyzing data from criminal justice programs to conclude that cognitive behavioral therapy, which focuses on correcting flawed or maladaptive thoughts and beliefs through talk therapy, can be effective in some cases in reducing recidivism rates, particularly among juveniles).

³² In their fascinating article, *Speech Narcissism*, Terri Day and Danielle Weatherby argue that both poles of the speech-tolerance spectrum—the speech safety camp and the free speech defenders—do serious harm to the principle of free speech by insisting on all-or-nothing approaches. See Day & Weatherby, *supra* note 27, at 842–43 (arguing that in either refusing or demanding political correctness, neither side is appropriately functioning in the free speech marketplace, where ideas ought to flow freely).

I. SPEECH, HARM, AND THE FIRST AMENDMENT

“*Sticks and stones may break my bones, but words will never hurt me.*”
—The Christian Recorder³³

The relationship between speech and harm, as a practical matter, if not a legal one, is obvious. Despite the ancient sticks-and-stones adage, which boldly proclaims that words lack the power to cause bodily injury, it is beyond dispute that speech has the power to inflict emotional and psychological harm.³⁴ In the interpersonal context, the harsh words of others can undoubtedly influence a person’s self-image and emotional well-being. Indeed, the literature on cyberbullying is replete with harrowing accounts of mental illness, self-injury, and suicide caused in large part by speech-related aggression.³⁵ In one Hawaiian study, for example, researchers determined that high school students who experienced cyberbullying—defined as aggressive, intentional electronic contact including derogatory text messages, threatening emails, the dissemination of confidential digital communication, the exclusion of individuals from digital platforms for judgmental reasons, and the cyber-control of a dating partner’s digital communication—were 2.5 times as likely to engage in binge drinking and marijuana use, and 3 times more likely to attempt suicide.³⁶ In yet another study, chronic adolescent victims of both in-person bullying and cyberbullying reported “the lowest levels of school satisfaction, social support, future optimism, and self-esteem” and “the highest levels of school hassles, perceived discrimination, peer rejection, anxiety, depression, and externalizing behaviors.”³⁷ As these studies show, speech can and often does

³³ Robert Pelton, *Ethics and the Law: Sticks and Stones*, VOICE FOR DEF. ONLINE (July 22, 2016), <http://www.voiceforthedefenseonline.com/story/ethics-and-law-sticks-and-stones-robert-pelton>.

³⁴ Indeed, there would be no need to proclaim the powerlessness of words if there was not some truth to the notion that words in fact affect their targets.

³⁵ See, e.g., Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705, 711–13 (2012) (discussing the distinctions between single-incident cyberattacking, traditional face-to-face bullying, and cyberbullying, all of which involve an imbalance of power between the attacker and the target).

³⁶ Deborah Goebert et al., *The Impact of Cyberbullying on Substance Abuse and Mental Health in a Multiethnic Sample*, 15 MATERNAL & CHILD HEALTH J. 1282 (2011). Professor Waldman offers this definition of cyberbullying:

What social scientists call cyberbullying is, like traditional or face-to-face bullying, the deliberate and repeated hostile behavior by a strong individual or group intended to harm a weaker individual or group. The distinction is in the media of harm, such as websites, email, chat rooms, mobile phones, text messaging, and instant messaging.

Waldman, *supra* note 35, at 712 (citations omitted).

³⁷ Paul R. Smokowski et al., *The Differential Impacts of Episodic, Chronic, and Cumulative Physical Bullying and Cyberbullying: The Effects of Victimization on the School Experiences, Social Support, and Mental Health of Rural Adolescents*, 29 VIOLENCE & VICTIMS 1029 (2014).

cause harm, particularly when it is personalized to a vulnerable listener and capitalizes on her distorted self-image.

Beyond individual harm, exposure to negative expression can also generate dangerous or unwanted collective harm. For example, even with respect to basic daily decision-making, market researchers have determined that negative word of mouth about a brand or product impacts consumer choice as to which brands or products to purchase.³⁸ In other words, people are less likely to purchase products based on word of mouth opinion that the products are substandard, regardless of the truth of that assertion.³⁹ On a more serious note, modern terrorism movements frequently originate with radicalization, which focuses on exposing vulnerable people to extremist views and then integrating those views into the targets' decision-making processes.⁴⁰ In Myanmar, for instance, social media has notoriously been used to incite hatred and oppression of Rohingya Muslims.⁴¹ And it appears that the elections of certain countries, the United States among them, have been influenced at best and rigged at worst by false social media advertisements posted by foreign government operatives.⁴² It is true, then, that the spread of negative information, uninformed opinion, and hateful rhetoric can lead to social disruption.

Unquestionably, words—the currency of almost all interpersonal interaction—have the ability to negatively affect us, individually and collectively. Words indeed have impacts, and not all of those impacts are desired by the speaker or desirable to the listener. But the power of words to produce ill outcomes has not necessarily formed a legal or logical basis for their censure, historically or categorically. The Framers, for instance, explicitly protected speech designed to undermine or criticize the government, and for good

³⁸ Judith A. Chevalier & Dina Mayzlin, *The Effect of Word of Mouth on Sales: Online Book Reviews*, 43 J. MARKETING RES. 345, 354 (2006).

³⁹ *Id.*

⁴⁰ Randy Borum, *Radicalization into Violent Extremism I: A Review of Social Science Theories*, 4 J. STRATEGIC SECURITY 7, 30 (2011).

⁴¹ April Glaser & Will Oremus, *Facebook's Alleged Role in Myanmar's Violence Is "Deeply Concerning," Says Facebook's News Feed Chief*, SLATE (Mar. 15, 2018, 3:13 PM), <https://slate.com/technology/2018/03/facebooks-alleged-role-in-myanmars-violence-is-deeply-concerning-says-facebooks-news-feed-chief.html>.

⁴² Dan Keating et al., *The Facebook Ads Russians Targeted at Different Groups*, WASH. POST (Nov. 1, 2017), https://www.washingtonpost.com/graphics/2017/business/russian-ads-facebook-targeting/?utm_term=.df3353a24bd0. In the run-up to the Irish abortion referendum vote, Facebook actually disallowed ads related to the referendum that originated from sources outside of Ireland. Rachel Lavin & Roland Adorjani, *How Ireland Beat Dark Ads*, FOREIGN POL'Y (June 1, 2018), <https://foreignpolicy.com/2018/06/01/abortion-referendum-how-ireland-resisted-bad-behaviour-online/>.

reason.⁴³ The very existence of the United States arose from the ability of colonists to organize around anti-taxation and religious freedom ideals.⁴⁴ But the Framers also recognized that at some point free political expression may lead to movements designed to discredit the new American regime, a harm they were reluctant to tolerate for the sake of the free speech right generally.⁴⁵

As First Amendment doctrine has developed, courts have equally protected speech that, in individual circumstances, may create or has already led to negative outcomes. The constitutional protection of depictions of animal cruelty at issue in *United States v. Stevens* provides a poignant example of this phenomenon.⁴⁶ At issue in *Stevens* was the constitutionality of a federal law that criminalized “the creation, sale, or possession of certain depictions of animal cruelty.”⁴⁷ The law was passed primarily to target the sale of so-called crush videos, which sexualize the torture of animals by depicting women in high heels slowly crushing animals to death, but *Stevens* was prosecuted for selling dogfighting videos online.⁴⁸ Both the crushing of animals and dogfighting were illegal in all fifty states, evidence of the universal belief that the abuse of animals inflicts intolerable harm.⁴⁹

In attempting to justify the law, the government argued in favor of what the Court termed a “startling and dangerous” proposition: that depictions of animal cruelty, while not historically excluded from the protections of the First Amendment, could now be wholly excised from free speech coverage based upon a “free-floating” balancing test.⁵⁰ It equated expressions of animal cruelty to other categories of speech—like child pornography and obscenity—that are so lacking in societal value as to fall outside the protection of the Constitution.⁵¹ And, more broadly, it suggested that the value of any particular category of expression—not just depictions of animal abuse, but any speech deemed by the

⁴³ *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

⁴⁴ *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that there is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

⁴⁵ LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 173–85, 249 (1985).

⁴⁶ 559 U.S. 460, 471–82 (2015).

⁴⁷ *Id.* at 464.

⁴⁸ *Id.* at 465–66.

⁴⁹ *Id.* at 466.

⁵⁰ *Id.* at 469–70.

⁵¹ *Id.* at 469–71.

government to be unlawful—could be balanced against its harm to society to assess the scope of the First Amendment.⁵²

The Court emphatically rejected this proposition. It refused to separate that speech which is constitutionally protected from that speech which is not covered by the First Amendment solely on the basis of a cost-benefit analysis.⁵³ While the Court acknowledged that speech which is categorically unprotected generally lacks serious value and inflicts serious harm, it noted that those qualities were descriptive, rather than objective.⁵⁴ And it declined to carve out a new category of unprotected expression, despite the government's invitation to do so.⁵⁵

The Court's opinion in *Stevens* thus expressly rejects the idea that speech can be relegated to unprotected status merely because it imposes negative societal costs or generates impacts that some people do not like. This idea was already implicit in the Court's First Amendment precedent holding that a range of potentially harmful or offensive speech—including false assertions of military accomplishment, flag burning, depictions of realistic violence in video games, and nonobscene pornography—are constitutionally protected, even though they may be said by some to lead to normatively bad outcomes.⁵⁶

The question then becomes: May speech be restricted, outlawed, or punished solely because it generates harm? And if so, what type of harm is required? Two primary approaches have arisen in response to this question. The first—which is rooted in feminist and critical race theory—argues in favor of restricting or cabining speech based on its potential harms. Scholars advocating this approach suggest remedies designed to distance the targets of harmful expression from the words themselves so as to mitigate the damage caused by speech-related exposure. Out of this approach come calls for speech safety—namely, safe spaces and trigger warnings on college campuses and in other educational

⁵² *Id.*

⁵³ *Id.* at 470–72.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012) (reversing conviction of local water board member who falsely claimed at a public meeting that he earned a Congressional Medal of Honor on free speech grounds); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 800–02 (2011) (summarizing research of Dr. Craig Anderson and other psychologists suggesting that childhood exposure to violent video games correlates with aggressiveness in adulthood); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (holding that flag burning is a form of protected expression covered by the First Amendment); Andrew Koppelman, Essay, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1636 (2005) (“The harm that the [obscenity] doctrine seeks to prevent is not offense to unwilling viewers. It is not incitement to violence against women. It is not promotion of sexism. Rather, it is *moral* harm—a concept that modern liberalism finds hard to grasp.”).

institutions—as well as laws banning certain kinds of expression and punishing those who advocate for controversial right-leaning ideals.⁵⁷ On the other hand, free speech purists counter that the First Amendment is unconcerned with harm and instead focuses on the speech itself to determine the scope of constitutional protection. Considering themselves the ultimate defenders of the right of free expression, the purists dismiss harm, or the outcome of speech, as a factor in assessing its value at the outset.⁵⁸

A visible example of how the two schools of thought approach free expression from radically divergent points of view can be found in the recent, raging debate over the Baraboo High School prom photograph. The image, which has widely circulated the Internet, depicts a large group of high school seniors, dressed in full prom attire, standing in the *sieg heil* Nazi salute position. All but one of the boys is white, and many of them are laughing. When the popular liberal journalist Shaun King posted the photograph on his Instagram page, the post drew over 7,000 comments, almost all of which called for the students to be expelled from school, kicked out of college, and banned from any pending internships.⁵⁹ Many of the posters who commented on the picture, particularly those who visually represent ethnic or racial minorities, expressed fear or a concern that they would face similar racial intimidation in their own communities as a result of their exposure to the photograph.⁶⁰ Following an investigation by the high school and local police, the school issued a statement that it would not discipline the students in the picture, “because of students’ First Amendment rights.”⁶¹ On the one hand, those who felt harmed by the image

⁵⁷ *Extremist Files: Groups*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/groups> (last visited Apr. 9, 2019) (cataloging conservative groups expressing extremist ideas and agendas); Jenny Jarvie, *Trigger Happy: The “Trigger Warning” Has Spread from Blogs to College Campuses. Can It Be Stopped?*, NEW REPUBLIC (Mar. 3, 2014), <https://newrepublic.com/article/116842/trigger-warnings-have-spread-blogs-college-classes-thats-bad>.

⁵⁸ See, e.g., Brief for the Cato Institute as Amicus Curiae in Support of Respondent, *United States v. Stevens*, 559 U.S. 460 (2015) (No. 08-769) (discussing categories of protected expression that would be at risk of criminalization should the courts measure the scope of the First Amendment based on the lack of value or harm caused by particular types of expression).

⁵⁹ See Shaun King (@shaunking), INSTAGRAM (Nov. 12, 2018), <https://www.instagram.com/p/BqFkN3FIKbf/?hl=en>. In the interest of full disclosure, this Author ardently follows Shaun King, has contributed financially to his media development efforts, and was one of the people who posted a comment on this photograph.

⁶⁰ See, e.g., Rachel Wyse (@rachel.wyse), INSTAGRAM, <https://www.instagram.com/p/BqFkN3FIKbf/?hl=en> (commenting on note 59, *supra*, as follows: “it’s people with attitudes like yours that get marginalised groups (not just POC, but LGBT+ people like me) abused, casually discriminated against, and killed. So thank you so much for that . . .”).

⁶¹ Suzannah Weiss, *Baraboo High School Students Who Went Viral for Seeming Nazi Salute Photo Won’t Be Punished*, TEEN VOGUE (Nov. 26, 2018), <https://www.teenvogue.com/story/baraboo-high-school-students-seeming-nazi-salute-prom-photo-wont-be-punished>.

sought to punish those involved in its creation; on the other, those who were only mildly offended by or reacted neutrally to the image's content tolerated it as a product of free speech. In other words, where some people saw in the image intimidation and threats to resurrect violence against a religious minority, other people saw the right to engage in expression despite its tendency to inflict pain, fear, and trauma.

Despite their polarized perspectives, both the speech safety movement and those who vigorously defend the First Amendment teach us something about the connection between speech and harm. Both schools of thought therefore warrant further exploration.

A. *The Call for Speech Safety: "Trigger Warnings," "Safe Spaces," and "Microaggressions"*

Contrary to the perception that safe spaces align solely with gender—and race—based social movements,⁶² the concept of socially safe spaces actually originated in large corporations as an outgrowth of organizational psychology and not as an outlet for progressive social change.⁶³ The idea was first introduced in the 1940s by social psychologist and MIT professor Kurt Lewin.⁶⁴ Lewin was asked to develop leadership training programs for large corporations, which led to the creation of sensitivity training modules.⁶⁵ Prospective corporate leaders were placed into groups and given honest feedback on their undermining behaviors in the workplace.⁶⁶ Lewin's theory was that people would only change their harmful behaviors if they worked in an environment of psychological safety that existed without judgment.⁶⁷ He therefore structured the leadership sensitivity groups to be "safe spaces" that were confidential, free of judgment, and encouraging of positive personal growth.⁶⁸

⁶² See, e.g., Ward, *supra* note 22, at 561–62 (tracing the origins of the safe space concept to American feminism).

⁶³ Victor J. Friedman, *Revisiting Social Space: Relational Thinking About Organizational Change*, in 19 RESEARCH IN ORGANIZATIONAL CHANGE AND DEVELOPMENT 233–35 (Abraham B. (Rami) Shani et al. eds., 2011); Vaughan Bell, *The Real History of the 'Safe Space'*, MIND HACKS (Nov. 12, 2015), <https://mindhacks.com/2015/11/12/the-real-history-of-the-safe-space/>.

⁶⁴ Friedman, *supra* note 63.

⁶⁵ IRVIN D. YALOM & MOLYN LESZCZ, *THE THEORY AND PRACTICE OF GROUP PSYCHOTHERAPY* 527–29 (5th ed. 2005).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

The safe space concept was later borrowed from corporate America by progressive social movements.⁶⁹ The feminist movement of the 1960s and 1970s latched onto the idea by creating not only physical spaces where women would be safe from the harms of male-dominated society (think, for example, safe houses for victims of domestic violence), but also by envisioning ideological safety for women as well.⁷⁰ A place was considered safe to feminists if it guaranteed the absence of physical violence and the protection of female bonding around resistance strategies.⁷¹ Safe spaces in this domain were therefore protectionist and isolationist in nature, designed simply to remove women from dangerous male-dominated environments.

The early gay rights movement also incorporated aspects of safe space theory. Spaces—both literal and ideological—were considered safe for gay and lesbian people if they could openly behave as homosexuals.⁷² In this regard, safe spaces were not necessarily free from violence, physical oppression, or risk, but rather afforded LGBT individuals the freedom to act in ways they were unable to in their daily lives. In this context, safety coincided with freedom of choice and not necessarily with withdrawal from any particular group deemed to pose a threat to LGBT existence.⁷³

The concept of safe spaces regained traction in the early twenty-first century as a mechanism for mitigating the perceived damage to racial and ethnic minorities caused by controversial speech, topics, and ideas on college campuses. Paired with trigger warnings—in which a speaker advises that planned discussion may trigger certain sensitivities—safe spaces are intended to offer marginalized groups a mechanism for retreating from dialogue that exposes them to secondary trauma.⁷⁴ An additional benefit of safe spaces is the ability of

⁶⁹ Friedman, *supra* note 63; Ward, *supra* note 22, at 562.

⁷⁰ MOIRA RACHEL KENNEY, MAPPING GAY L.A.: THE INTERSECTION OF PLACE AND POLITICS 24 (2001).

⁷¹ *Id.*

⁷² *See id.* at 20–24.

⁷³ *See id.* at 20–25.

⁷⁴ For a more detailed discussion of how safe spaces and trigger warnings work in institutions of higher education, see Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863, 1867–76 (2017).

The terms “safe spaces” and “trigger warnings” sometimes include a variety of common sense rules about communications in classrooms, such as having students think before speaking, being empathic when speaking about sensitive topics, and discussing students’ sense of harm in response to various complex social issues. “Trigger warnings” are explicit statements that certain material discussed in an academic environment might upset sensitive students, especially those who have been traumatized by such harms as rape or discrimination. The administration of trigger warnings includes allowing students uncomfortable with classroom materials to leave and not participate. “Safe spaces” refers to a range of environments where students join likeminded companions at particular locations on campus.

those seeking refuge from harmful speech to engage in their own form of free expression or decompression, without fear of being misunderstood or stigmatized.⁷⁵ In this regard, safe spaces offer both freedom *from* free speech and freedom *to* free speech.⁷⁶

While safe spaces and trigger warnings are generally intended to offer sanctuary from expression that either causes or induces psychological harm, some proponents have used these tactics to outright silence debate in the classroom and elsewhere. For example, when controversial alt-right political commentator Milo Yiannopoulos was scheduled to speak at U.C. Berkeley, critics of his ideology argued against his presence on campus, claiming that he was promoting hate speech in a way that caused harm.⁷⁷ In another striking example, UCLA law professor Robert Goldstein was chastised for being racially insensitive after including a final exam question related to the police shooting of Michael Brown in Ferguson, Missouri.⁷⁸ As a result of these incidents and others like them, the movement to restrict harmful speech has been labeled by its opponents as anti-free speech and pro-censorship.⁷⁹ And it has been dismissed by academics for implicitly supplanting into free speech jurisprudence an

Id. at 1868 (citations omitted).

⁷⁵ Educational research that predates safe space terminology supports the idea of creating affinity groups, or groups of demographically and racially similar students who may be exposed to the same harmful speech, ideology, or stigmas, and suggests that offering a place where minority students can freely speak their minds improves educational and psychosocial outcomes. *See, e.g.*, BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” 52–74 (2003) (discussing success of high school affinity groups in loosely integrated high schools); *see also* Ward, *supra* note 22, at 564 (quoting the president of Brown University, who argues that safe spaces are “places where students from marginalized groups can come together to feel comfortable discussing their experiences and just being themselves”).

⁷⁶ For example, one black high school student who attended a predominantly white suburban Boston high school noted that her participation in an all-black affinity group increased her ability to process her experience as a minority student and made her more focused on achievement and success. TATUM, *supra* note 75, at 71–72. Another student observed, “[i]t’s like we’ve all become like one big family, we share things more with each other . . . We always stay on top of each other ‘cause we know it’s hard with African American students to go to a predominantly White school . . .” *Id.* at 72–73.

⁷⁷ Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused \$100,000 in Damage*, CNN (Feb. 2, 2017), <https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>.

⁷⁸ Maxim Lott, *UCLA Law Professor Learns Ferguson-Related Exam Question Taboo*, FOX NEWS, <https://www.foxnews.com/us/ucla-law-professor-learns-ferguson-related-exam-question-taboo> (last updated Nov. 23, 2015).

⁷⁹ *See, e.g.*, Bernstein, *supra* note 26; Chemerinsky, *supra* note 26 (“A public university simply cannot prohibit the expression of hate, including anti-Semitism, without running afoul of this principle. Punishing speech because of its hateful message is inherently a content-based restriction on speech and would violate the First Amendment. In other words, speakers generally have the right to go on to any public university campus and proclaim the most vile racist or homophobic or anti-Semitic ideas. Any attempt to silence or punish them based on the content of their message would infringe upon the First Amendment.”).

equality principle—that words be used to advance the basic equality of all races and genders—that does not exist.⁸⁰

The speech safety perspective has also been heavily criticized for its propensity to discourage the development of what this Author will call “speech fortitude,” that is, the ability to withstand exposure to ideas and expression one finds personally offensive or traumatizing. Greg Lukianoff and Jonathan Haidt’s book *The Coddling of the American Mind* chronicles the psychological damage that occurs when children and young adults are shielded from confrontational ideas.⁸¹ As Lukianoff and Haidt argue, young people are unable to develop both speech fortitude and the resulting ability to combat and resist extremist philosophies when they are taught from a young age to retreat and seek sanctuary from those ideals.⁸² Speech safety may, therefore, result in worse psychological damage than it seeks to avoid.

But this is not an article about the relative validity or perceived weaknesses of the speech safety movement that has so dominated discussions of free speech on college campuses. Instead, this Article focuses on what can be gleaned from speech safety proponents about the impacts of speech and its ability to inflict damage on its listeners. To be sure, despite its flaws, the speech safety movement imparts important observations about the nexus between speech and harm. First, the speech safety philosophy reminds us, quite forcefully, that words can indeed inflict pain and interpersonal damage. Indeed, the entire school of speech safety thought focuses, explicitly and subtly, on the idea that speech is dangerous. Even the nomenclature popularized by proponents of speech safety theory—*trigger*

⁸⁰ Catharine MacKinnon, for example, has argued that the Fourteenth Amendment imposes on the First Amendment right of free speech the requirement that speech not be used to undermine racial and gender equality. See CATHERINE A. MACKINNON, ONLY WORDS 106–08 (1996). This idea has faced strong opposition from proponents of a robust First Amendment. See, e.g., Michael Kent Curtis, “Free Speech” and Its Discontents: *The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 433–34 (1996) (criticizing proponents of hate speech restrictions for imposing a Fourteenth Amendment non-discrimination guarantee on First Amendment free speech rights).

⁸¹ See GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE 40–50, 58–59, 70–73 (2018). The book expands upon Lukianoff and Haidt’s essay of the same name which appeared in *The Atlantic*. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>.

⁸² *Id.* at 70–71, 140.

warnings, *safe spaces*, *microaggression*⁸³—resounds of weaponry and war.⁸⁴ For some people, the harms arising from prolonged exposure to targeted, hateful expression is extremely damaging, and speech is therefore viewed as something to retreat from and regard with suspicion.⁸⁵

Second, the speech safety movement reminds us that there are reasoned responses to harmful speech that do not involve its censure. For example, a person likely to experience trauma by virtue of being exposed to certain words or ideas can retreat from them for the express purpose of using her own expression, uttered among other like-minded speech victims, to create sanctuary and repose.⁸⁶ Speech can therefore hurt, but it can heal as well, particularly when offered in a peaceful, accepting setting in a way that is sensitive to the needs of listeners.

In this way, speech safety proponents are perhaps not as strongly aligned with censorship as their critics would believe. The arguments in favor of safe spaces and trigger warnings, which do not explicitly silence expression but instead offer a separate place to retreat from it, implicitly embody the notion that speech contains therapeutic qualities that can bind similarly marginalized or traumatized individuals and promote their progress.⁸⁷ The speech safety movement is frequently maligned as being anti-free speech, but its acceptance of expression as a therapeutic outlet can also be interpreted as a speech-positive solution to preexisting social division.

B. Free Speech Purism: An Absolutist Reading of the First Amendment

In response to the progressives, who demand restrictions on speech that is harmful to vulnerable people, First Amendment purists have argued that safe spaces, trigger warnings, and increasing efforts to censor right-leaning ideas contravene the right of free speech.⁸⁸ In so doing, these scholars adopt what is

⁸³ “Microaggressions are the everyday verbal, nonverbal, and environmental slights, snubs, or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized group membership.” Derald Wing Sue, *Microaggressions: More than Just Race*, PSYCHOL. TODAY (Nov. 17, 2010), <https://www.psychologytoday.com/us/blog/microaggressions-in-everyday-life/201011/microaggressions-more-just-race>.

⁸⁴ See LUKIANOFF & HAITT, *supra* note 81, at 97 (“In 2017, the idea that speech can be violence (even when it does not involve threats, harassment, or calls for violence) seemed to spread, assisted by the tendency in some circles to focus only on perceived impact, not on intent. Words that give rise to stress or fear for members of some groups are now often regarded as a form of violence.”).

⁸⁵ See Ward, *supra* note 22, at 577–78.

⁸⁶ See *supra* notes 75–76.

⁸⁷ See Ward, *supra* note 22, at 565.

⁸⁸ See Cecilia Capuzzi Simon, *Fighting for Free Speech on America’s Campuses*, N.Y. TIMES (Aug. 1,

in essence a preference for presumptively protecting speech.⁸⁹ They argue that even controversial or radical ideas, like white supremacy and Holocaust denial, are protected by the First Amendment because they contribute to the marketplace of ideas and, further, that institutions of higher learning are the appropriate place at which to vet, critique, and accept or reject these theories.⁹⁰ This position tends to focus not on harm, but instead on whether the speech in question is constitutionally protected at the outset without regard to what happens psychologically and socially to either the speaker or the listener once the speech has been uttered.⁹¹

Free speech absolutism can at times appear patriarchal,⁹² privileged, and insensitive, and can cause proponents of free speech as a principle to appear aligned with the content of the speech they defend.⁹³ Its focus on ideas espoused solely by white male landowners can disenfranchise demographically different audiences who might otherwise be receptive to a rights-based interpretation of constitutional meaning.⁹⁴ But the free speech purists are not entirely wrong in refocusing the free speech debate not on the possible outcomes of expression, but instead on the value of the ideas (or lack thereof) before they come into

2016), <https://www.nytimes.com/2016/08/07/education/edlife/fire-first-amendment-on-campus-free-speech.html>. An additional criticism of the safe space movement has been that it produces students who are unable to effectively respond to criticism and who lack the emotional wherewithal to overcome adversity. See generally Lukianoff & Haidt, *supra* note 81. In the wake of their wildly popular article in *The Atlantic*, Lukianoff and Haidt have recently published their theory—that speech safety produces young adults who lack speech fortitude—in expanded book form. See LUKIANOFF & HAIDT, *supra* note 81.

⁸⁹ Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2007 (2017).

⁹⁰ *Id.* at 2002–03; see also LUKIANOFF & HAIDT, *supra* note 81.

⁹¹ For an example of this position, see Chemerinsky, *supra* note 26, at 765–68 (responding to Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1025 (2008)).

⁹² Notably, the First Amendment was written at a time when access to the speech marketplace was controlled by white male landowners, whose critiques of one another's points of view may have inspired anger or discomfort but were unlikely to spurn the serious psychological trauma that occurs when people in power speak in demeaning terms to oppressed, underrepresented, and powerless populations. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2327 (1989).

⁹³ For a strident critique of Lukianoff and Haidt, see Moira Weigel, *The Coddling of the American Mind Review – How Elite U.S. Liberals Have Turned Rightwards*, GUARDIAN (Sept. 20, 2018, 2:30 PM), <https://www.theguardian.com/books/2018/sep/20/the-coddling-of-the-american-mind-review> (criticizing Lukianoff and Haidt's defense of free speech as though it were a defense of the contested speech itself). More political than legal, Weigel focuses her attention on rightward shifts by educated white males in the wake of new, fresh-faced liberalism. *Id.* For example, she notes: "The media has made much of the leftward surge lifting Bernie Sanders and Alexandria Ocasio-Cortez. But as this new left-liberalism gains strength, a growing number of white men who hold power in historically liberal institutions seem to be breaking right." *Id.*

⁹⁴ As Weigel points out, for example, Lukianoff and Haidt cite a white male scholar who works at an elite left-leaning think tank for the definition of "identity politics," rather than referencing the Combahee River Collective, a group of black socialist lesbians, who actually created the term. *Id.*

being. They simply fail to recognize that value and harm—meaning and impact—are inextricably linked to one another and have been since the First Amendment was written.

Since its inception, the First Amendment has excluded speech that, because of its dangers and lack of value, is undeserving of constitutional protection. Child pornography, for example, falls within the categories of expression so utterly devoid of value that it is outside the scope of the free speech right.⁹⁵ The worthlessness of the expression connects directly with the harm it inflicts on the real children it depicts. As the Supreme Court observed in *New York v. Ferber*, each time an image of child pornography is viewed or exchanged, the child suffers new and secondary harm.⁹⁶ Other categorical exceptions to the First Amendment—including true threats,⁹⁷ libel and slander,⁹⁸ and obscenity⁹⁹—also arise from the recognition that the speech at issue inflicts some form of societal degradation or interpersonal damage and therefore falls outside the ambit of the Constitution.¹⁰⁰

⁹⁵ Michael J. Ritter, *Child Pornography, The First Amendment, and Mistakes of Age: An Age-Old Debate*, 88 TEX. L. REV. 1101, 1108, 1116–17 (2010) (identifying the harms child pornography foists on its victims as “difficulties forming relationships, more incidents of sexual molestation, and increased risks of drug and alcohol abuse”).

⁹⁶ 458 U.S. 747, 758–59 (1982) (“The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child . . . [T]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”).

⁹⁷ See, e.g., *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“Thus, for example, a State may punish those words ‘which by their very utterance inflict injury or tend to incite an immediate breach of the peace.’” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992))).

⁹⁸ Indeed, the justification for excluding false and defamatory statements from First Amendment protection is entirely about the prevention of resultant harm:

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual’s right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (citation omitted).

⁹⁹ Over the years, the Court has advanced a variety of rationales for the exclusion of obscenity from constitutional protection, including the protection of juveniles and unwitting adult viewers, the desire to maintain orderly places of public accommodation, and “the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.” *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–58 (1973). All of these justifications embody the idea that obscene expression is harmful to those who view it and potentially to society in general. See *id.* at 59–61 (discussing societal harms that arise from the dissemination of sexually oriented expression).

¹⁰⁰ The Supreme Court has consequently held that fighting words—“those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction”—are generally proscribable under the First Amendment. *Cohen v. California*, 403

An approach focused on doctrinal free speech purism must therefore embrace the reality that free speech protection began with implicit assumptions about words and their relative value. Underlying the concept of the First Amendment is the notion that speech is a net positive, and that protecting the free flow of debate and ideas contributes to a more meaningful, learned, and advanced society.¹⁰¹ Inherent to this understanding is the idea that even normatively or morally incorrect words prompt a more fully fleshed out discussion and that, as a result, bad ideas can generate even more good ones.¹⁰² But there are empirical as well as logical reasons to doubt the utility, efficacy, and correctness of an unregulated free speech marketplace.¹⁰³ For example, despite hundreds of years of opportunity, the free speech universe has yet to fully stomp out ideas, like white supremacy, that are nearly universally rejected as immoral, unjust, or bad.¹⁰⁴ And in the era of “fake news,”¹⁰⁵ where false information is rapidly spreading online and, as a result, influencing human behavior on a daily basis, can we continue to rely on the good, true, right, and pure speech to simply sort it all out?¹⁰⁶

U.S. 15, 20 (1971).

¹⁰¹ As John Stuart Mill famously discussed in *On Liberty*, the freedom to fully vet and debate ideas leads a population to more easily identify truth, reject falsity, refine truths previously acknowledged, and integrate new sources of knowledge. See Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1166 (2015) (discussing, and rejecting, the marketplace of ideas rationale for the First Amendment).

¹⁰² *Id.* at 1164–65 n.13 (discussing Supreme Court, academic, and popular support for the marketplace of ideas rationale for protecting the right of free speech).

¹⁰³ *Id.* at 1162.

¹⁰⁴ For a religious-based rejection of white supremacy, see, for example, Bob O’ Bannon, *3 Reasons White Supremacy Is Wrong*, NEW LIFE PRESBYTERIAN CHURCH (Aug. 18, 2017), <https://www.newlifepca.org/blog/2017/8/18/3-reasons-white-supremacy-is-wrong>. For a medically based rejection of white supremacy, see, for example, Michelle Samuels, *White Supremacy Is Bad for Health*, B.U. SCH. PUB. HEALTH (May 3, 2018), <https://www.bu.edu/sph/2018/05/03/white-supremacy-is-bad-for-health/>.

¹⁰⁵ The “fake news” phenomenon has been the subject of prolific cultural debate, even prompting numerous tweets from the President labeling true information as “fake.” See, e.g., Amanda Wills & Alysha Love, *All the President’s Tweets*, CNN, <http://cnn.com/interactive/2017/politics/trump-tweets/> (last updated Jan. 17, 2019). But perhaps there is no more poignant account of what exactly “fake news” is and how damaging it can be to the world view of the people who believe it than Eli Saslow’s recent Washington Post article, which documents the posts of a liberal blogger in Maine who generates fake alt-right news and an isolated retiree in Nevada who reads, likes, and believes it. See Eli Saslow, *Nothing on this Page Is Real: How Lies Become Truth in Online America*, WASH. POST (Nov. 17, 2018), https://www.washingtonpost.com/national/nothing-on-this-page-is-real-how-lies-become-truth-in-online-america/2018/11/17/edd44cc8-e85a-11e8-bbdb-72fdbf9d4fed_story.html?noredirect=on&utm_term=.1fb3218ad.

¹⁰⁶ Ho and Schauer argue, based on empirical research, that the concept of a perfect marketplace of ideas is no longer valid, if it ever was, and that the notion that good ideas and true information will simply drown out bad ideas and false information is not grounded in the reality of how modern society functions. See generally Ho & Schauer, *supra* note 101.

As this discussion highlights, the doctrinal purists perhaps overvalue the positive contributions speech can make to an individual's psychosocial development, resilience, and autonomous identity, as well as to society's progress. As an ideal, and despite its flaws, the marketplace of ideas works to sort out the good from the bad, generally moving society forward on a positive trajectory. But in practice, and particularly in the age of social media and government by tweet,¹⁰⁷ the free speech marketplace looks more like a messy, undefined pendulum, shifting perpetually back and forth from one idea to another without ever landing anywhere at all.

II. BETWEEN SPEECH SAFETY AND DOCTRINAL PURISM: A NEW APPROACH TO HARM

The debate over the role harm can and should play in free speech doctrine has become too polarized.¹⁰⁸ On the one hand, the First Amendment purists overemphasize free speech jurisprudence in critiquing the speech safety movement without acknowledging that speech may indeed create cognizable harms to distinct individuals and groups.¹⁰⁹ On the other hand, the progressive movement on college campuses goes too far in using the safe space concept as a sword and not a shield, imposing safe space theory everywhere and at all times to such a degree that it potentially transforms into censorship and a rejection of the positive value that free speech can have.¹¹⁰

There is a way to reconcile these schools of thought to consider harm as a factor in First Amendment analysis without compromising the strength of the free speech right, and that is by recognizing the therapeutic value of free expression as a mechanism for forestalling more serious physical, emotional, and societal harm. The free speech purists are correct that speech can be protected despite its negative outcomes, but they draw the line too short in determining when harm is relevant to First Amendment jurisprudence. And while speech safety advocates are correct that harm can be considered in assessing the scope of free speech protection, they focus too narrowly on the potential dangers associated with offensive or unsound ideas without considering their prophylactic ability to forestall greater damage. Speech can in fact prevent harm, and this is particularly true for speech that is distasteful,

¹⁰⁷ President Donald Trump has infamously announced numerous government decisions and positions via his Twitter account. *See* Wills & Love, *supra* note 105.

¹⁰⁸ Day and Weatherby agree, blaming the polarization of free speech ideals for breakdowns in the modern-day free speech marketplace. *See* Day & Weatherby, *supra* note 27, at 881.

¹⁰⁹ *See supra* Section I.C.

¹¹⁰ *See supra* Section I.B.

disturbing, or degrading. The power of speech as an outlet for negative emotions should be weighed in determining whether the speech is protected by the First Amendment.

A. *The Psychology of Speech*

“*Say what you wanna say, / And let the words fall out, honestly . . .*”
—Sara Bareilles, “Brave”¹¹¹

The right to engage in free expression has long been thought to be central to self-realization and individual psychological well-being.¹¹² By protecting a person’s right to engage in democracy and the political process, while also ensuring individual autonomy and decision-making, the First Amendment enables, ensures, and is the touchstone of personal development.¹¹³ Expanded to its logical ends, the notion of free will envisions personal and collective decision-making both benefitting from an unrestricted and open free speech marketplace.¹¹⁴

The Court’s early free speech jurisprudence embodied this understanding that the right of free expression was at the core of personhood in the American

¹¹¹ SARA BAREILLES, *Brave*, on THE BLESSED UNREST (Epic Records 2013).

¹¹² In his groundbreaking work, Professor Redish observed that:

[T]he constitutional guarantee of free speech ultimately serves only one true value, which I have labeled “individual self-realization.” This term has been chosen largely because of its ambiguity: it can be interpreted to refer either to development of the individual’s powers and abilities—an individual “realizes” his or her full potential—or to the individual’s control of his or her own destiny through making life-affecting decisions—an individual “realizes” the goals in life that he or she has set. In using the term, I intend to include both interpretations. I have, therefore, chosen it instead of such other options as “liberty” or “autonomy,” on the one hand, and “individual self-fulfillment” or “human development,” on the other. The former pair of alternatives arguably may be limited to the decisionmaking value, whereas the latter could be interpreted reasonably as confined to the individual development concept.

Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982). The converse is also true. Removing the right of free expression by silencing individual creativity and exploration results in systemic and individual damage, a topic this Author plans to explore in future work. *See, e.g.*, LUKIANOFF & HAITT, *supra* note 81 (arguing that removing students from speech they find offensive results in depriving individuals of the opportunity to develop coping skills); Emerson, *supra* note 21, at 885.

¹¹³ Redish, *supra* note 112, at 594. This idea is not without its critics, who observe that corporate and governmental domination of the speech marketplace artificially limits individual growth. *See generally, e.g.*, TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

¹¹⁴ *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (holding that, consistent with the First Amendment, public debate must be “uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

republic.¹¹⁵ Dissenting in *Olmstead v. United States*, which addressed the admissibility of illegally obtained wiretapping evidence under the Fourth Amendment, Justice Brandeis observed as follows:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.¹¹⁶

More recently, Justice Kennedy has advanced this romanticized view of First Amendment ideals. In striking down the Child Pornography Prevention Act, which prohibited the creation and possession of material that appeared to depict minors engaged in sexual conduct, but need not contain actual minors, Justice Kennedy wrote extensively about the fundamental connection between speech and human existence:

The government “cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.” First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.¹¹⁷

A person's words, and his ability to access the words of others, then become synonymous with the person's very existence and independence as an autonomous human being.¹¹⁸ In this way, speech and identity are inextricably intertwined, perhaps explaining why the Framers elevated the right of free

¹¹⁵ For a more detailed discussion of the rationale that speech is connected to being, see Alan K. Chen, *Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381, 403–10 (2015) (discussing the government participation, truth-seeking, and self-realization functions of the right of free expression).

¹¹⁶ 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part* by *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

¹¹⁷ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)).

¹¹⁸ See, e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 216 (1972) (“An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.”).

expression to the first clause of the First Amendment. The right of free speech is the bedrock freedom by which all other rights are secured, protected, and given meaning.¹¹⁹

The understanding that the right of free speech promotes self-realization and autonomy is predicated on the notion that the ability to speak freely can shape one's own outlook and individuality.¹²⁰ But a new way of thinking, promoted most prominently by lawyers and scholars at the Foundation for Individual Rights in Education (FIRE), emphasizes the role that exposure to the free speech of others plays in shaping human development.¹²¹ According to Lukianoff, a free speech lawyer and the president of FIRE, and Haidt, a social psychologist, exposure to words and ideas that one finds distasteful and even personally offensive is a necessary component of developing coping skills and in taming destructive patterns of thinking.¹²² Drawing from psychotherapeutic approaches to depression and other disorders, Lukianoff and Haidt argue that the opportunity to wrestle with difficult sociological concepts enables young people to develop what this Author will call "speech fortitude": the ability to withstand psychological distress in the face of damaging ideologies.¹²³ As the theory goes, by confronting controversial expression, rather than seeking safety from it, individuals will develop strong mental health and emotional control.¹²⁴

Freedom of speech therefore embodies two significant psychological truths. First, people who are able to think and speak freely on a wide range of topics are more self-realized, self-actualized, and better positioned to participate fully in a free democracy.¹²⁵ In this way, the individual right of free speech promotes a

¹¹⁹ Emerson, *supra* note 21 ("In the first place thought and communication are the fountainhead of all expression of the individual personality. To cut off the flow at the source is to dry up the whole stream. Freedom at this point is essential to all other freedoms.").

¹²⁰ Redish, *supra* note 112, at 604 ("Free speech fosters the [self-realization] goal *directly* in that the very exercise of one's freedom to speak, write, create, appreciate, or learn represents a use, and therefore a development, of an individual's uniquely human faculties.").

¹²¹ See LUKIANOFF & HAITT, *supra* note 81; see also *About FIRE*, FIRE, <https://www.thefire.org/about-us/> (last visited Apr. 9, 2019).

¹²² LUKIANOFF & HAITT, *supra* note 81, at 31 ("Like the immune system, children must be exposed to challenges and stressors (within limits, and in age-appropriate ways), or they will fail to mature into strong and capable adults, able to engage productively with people and ideas that challenge their beliefs and moral convictions.").

¹²³ *Id.* at 50–51.

¹²⁴ *Id.*

¹²⁵ This view of the First Amendment conjoins the self-realization rationale for protecting free speech with the government participation justification for free speech. As described by Professor Meiklejohn, the leading proponent of the democratic theory of the First Amendment, the government participation justification argues that the primary reason for protecting free speech is to ensure an informed electorate. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 254, 263 (1961).

stable, high-functioning society, as the personal right contributes to the vitality of the collective as a whole.¹²⁶ Second, people who are able to receive, process, and filter ideas and expression with which they disagree are more likely to be well-adjusted, critical thinkers with appropriate emotional control.¹²⁷ In this way, the collective right to consume the speech of others reinforces the development of the individual and the personal right of free expression and realization. In other words, a person must be exposed to the speech of others in order to fully develop her own ideas, perspectives, ideology, and identity.¹²⁸ The dual components of the right of free speech—the right to speak on the one hand and the right to listen on the other—are therefore mutually reinforcing and critical to both personal development and social stability.

B. Individual Speech Benefits

Beyond the theoretical benefits of protecting free speech in society, the right of free speech is critical on an individual psychological level, because it provides an outlet for the expression of negative and troubling emotions that may otherwise spur a person to take destructive action. In this way, speech serves a different and more focused role in identity formation, one that is therapeutic and prophylactic.

An examination of the psychological benefits of free expression to the individual must necessarily start with an understanding of what it means to be therapeutic. In common parlance, one might assume that to be therapeutic is to treat a preexisting ailment, disease, or condition, and this is partially true in a dictionary sense of the word.¹²⁹ But the term “therapeutic” does not necessarily reference the healing of an underlying problem; instead, it may also refer to states of being that simply “hav[e] a beneficial effect on the body or mind” in the absence of an initial trauma.¹³⁰ To be therapeutic, then, in a free speech sense is to leave a person in a more positive mental, psychological, or educational state than she was in prior to uttering or receiving the communication.

Given the propensity of free expression to promote self-realization and the development of autonomous identity, it is easy and logical to describe free speech as generally therapeutic. People are better off when they can express

¹²⁶ *Id.*

¹²⁷ LUKIANOFF AND HAITT, *supra* note 81.

¹²⁸ *Id.*

¹²⁹ *See Therapeutic*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2008).

¹³⁰ *Id.*

themselves.¹³¹ But the ability to freely speak one's mind also has therapeutic benefits in terms of forestalling the physical action, aggression, and decision-making that result when a person feels marginalized.

In the case of Aurora theater shooter James Holmes, for example, one wonders how long in advance of the attack he began working on the notebook outlining his plans. At least during the time that he spent making a written outline of the attack, he was not actively engaging in the shooting itself. In a literal sense, then, his speech therefore postponed, rather than caused, his violent actions. And the fact that he submitted the notebook to his former psychiatrist for her review suggests that Holmes himself derived some psychological relief or saw some psychological benefit from its creation.¹³² Although perhaps overly simplified, and most certainly outside the mainstream, the Holmes notebook exemplifies the fact that speech has the power to forestall action by providing an alternative space for negative ideology.

This phenomenon exhibits itself in more quotidian daily life, too, outside the mass shooting context. For instance, it is not uncommon to hear friends and co-workers say, "I need to vent," followed by lengthy diatribes about other people's bad habits, idiosyncrasies, and pet peeves. Organizational psychologists sometimes note the benefits of providing reflection time for professional workers, where individuals are allowed to digest and discuss their workplaces.¹³³ Venting also has tangible psychological benefits that can mitigate harmful behaviors caused by stress, anxiety, and trauma.¹³⁴ Giving expression to one's own anger and frustration often helps the speaker "feel better" by releasing negative emotion.¹³⁵

¹³¹ Emerson, *supra* note 21, at 881–85.

¹³² See James Holmes Sent Notebook to Psychiatrist Before Colorado 'Dark Knight' Massacre, Report Says, HUFFINGTON POST (July 25, 2012, 1:50 PM), https://www.huffingtonpost.com/2012/07/25/james-holmes-sent-notebook-psychiatrist_n_1702216.html.

¹³³ See, e.g., Deanna Geddes & Lisa T. Stickney, *Muted Anger in the Workplace: Changing the 'Sound' of Employee Emotion Through Social Sharing*, in NEAL M. ASHKANASAY ET AL., EXPERIENCING AND MANAGING EMOTIONS IN THE WORKPLACE 85 (2012) (noting that management's response to this type of venting is important in contributing to the psychological benefits). In fact, as discussed in Section I.A, *supra*, the concept of safe spaces originated in workplace theory and was designed to create small groups where workers could debrief about their experiences without fear of negative job repercussions. See generally YALOM & LESZCZ, *supra* note 65. Studies have also shown that persistent venting in the workplace can have negative impacts on productivity. See Leon F. Seltzer, *6 Virtues, and 6 Vices, of Venting*, PSYCHOL. TODAY (Apr. 2, 2014), <https://www.psychologytoday.com/us/blog/evolution-the-self/201404/6-virtues-and-6-vices-venting>.

¹³⁴ See, e.g., *id.*; see also Jennifer D. Parlamis, *Venting as Emotional Regulation: The Influence of Venting Responses and Respondent Identity on Anger and Emotional Tone*, 23 INT'L J. CONFLICT MGMT. 77 (2012).

¹³⁵ Parlamis, *supra* note 134.

In addition, speech is also seen as the gateway to expressing one's own unique truth and experience. For example, the process of "coming out"—or exposing one's lesbian, gay, bisexual, or gender identity to family, friends, and the general public—is frequently described as giving outward expression to one's internal feelings and desires. The Human Rights Campaign's Resource Guide to coming out contains specific instructions about how to have conversations with loved ones about sexual orientation and includes the following poignant, speech-focused introduction:

Being brave doesn't mean that you're not scared. It means that if you are scared, you do the thing you're afraid of anyway.

Coming out and living openly as a lesbian, gay, bisexual, transgender or supportive straight person is an act of bravery and authenticity.

Whether it's for the first time ever, or for the first time today, coming out may be the most important thing you will do all day.

Talk about it.¹³⁶

Talking—to family, to friends, to co-workers, to oneself—is therefore the first step in owning one's gender identity and sexual orientation and in living as an authentic and realized person in the context of one's social relationships.¹³⁷ Talking is critical to coming out.

As these examples highlight, speech itself is therefore the cornerstone of psychological wellness and emotional well-being. Speech can be therapeutic by forestalling hasty, aggressive, or detrimental actions, and speech can be therapeutic in the sense that it enables fully ideated and realized identity. Free speech therefore encourages a state of being that is undoubtedly better than a world without self-directed expression.

C. *Collective Speech Benefits*

*"Picket lines and picket signs, / Don't punish me with brutality,
Talk to me, so you can see / Oh, what's going on . . ."*

—Marvin Gaye, "What's Going On"¹³⁸

¹³⁶ HUMAN RIGHTS CAMPAIGN, A RESOURCE GUIDE TO COMING OUT, https://assets2.hrc.org/files/assets/resources/resource_guide_april_2014.pdf?_ga=2.247745984.698972786.1545854783-1235317987.1545854782 (emphasis in original).

¹³⁷ *Id.*

¹³⁸ MARVIN GAYE, *What's Going On*, on WHAT'S GOING ON (Tamla Records 1971).

Protecting free expression also has collective benefits for the societal greater good. On a theoretical level, historians have argued that the perception of free will reduces the likelihood that people will rebel.¹³⁹ Thomas Emerson, for example, famously advocated that the value of free speech, as a principle, is in its ability to serve as a safety valve for social resistance.¹⁴⁰ As Emerson hypothesized, individuals whose expression is silenced are less likely to understand the reasons behind governmental decisions that negatively impact them, and are therefore more likely to participate in underground opposition movements.¹⁴¹ Underlying this assumption is the understanding that the ability to “let off steam” enables those of opposing political or social persuasions to more peacefully accept the common judgment or majority rule.¹⁴² As Emerson’s theory goes, people will more likely gravitate towards debate, rather than force, as a mechanism for social change when they are permitted to fully express themselves.¹⁴³ As a result, the suppression of expression is actually much more likely to lead to physical violence than the tolerance of offensive ideas,¹⁴⁴ an idea embodied by Justice Brandeis in his concurrence in *Whitney v. California*.¹⁴⁵

Emerson wrote more than fifty years ago, prior to the civil rights movement, and his work was focused on legal theory rather than scientific fact, but at least one modern-day empirical study supports Emerson’s hypothesis. For example, groundbreaking new research by Stanford psychologists suggests a marked distinction in the effectiveness of peaceful and violent protests.¹⁴⁶ Protesters who engage in speech-related activities, like holding signs and chanting political slogans, are far more likely to generate support for their cause than protesters

¹³⁹ See, e.g., JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 140 (1993) (ebook). Although not original to him, this observation came from my fourteen-year-old son Luke. As he explained, a child who is told “you can jump on the trampoline” is less likely to jump on the bed than a person who is only told “you cannot jump on the bed.” Having been told by his mother that he was not allowed to do either, I am quite certain he has jumped on them both.

¹⁴⁰ Emerson, *supra* note 21, at 844–45.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* (explaining that “resistance to the political order is unlikely to reach the stage of disorder unless a substantial section of the population is living under seriously adverse or discriminatory conditions”).

¹⁴⁴ *Id.* at 885–86.

¹⁴⁵ 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[The Framers] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . .”).

¹⁴⁶ Shankar Vedantam, *Researchers Examine the Psychology of Protest Movements*, NPR (Apr. 18, 2017, 5:04 AM), <https://www.npr.org/2017/04/18/524473948/researchers-examine-the-psychology-of-protest-movements>.

who engage in extreme, conduct-based activities, like blocking traffic or damaging personal property.¹⁴⁷ Speech can therefore fill the gap in understanding between divergent groups in a way that violence cannot. This research reinforces the speech/harm dichotomy: speech provides a meaningful social outlet that can be an effective tool for forestalling tangible physical harms.

III. CASE STUDIES

An examination of how speech and violence interact in specific case contexts can prove useful to observing how, when, and under what conditions the right of free expression and the concept of harm intersect. Sex offenders, those who possess child pornography, and those who make online threats to specific persons offer tremendous insight into the interrelation of constitutionally protected expression, whether it is permitted to be expressed or is instead suppressed—either through force of law or through societal norms and expectations—and physically dangerous or harmful outcomes. These case studies, and the way the criminal justice system approaches offenders whose speech causes or potentially causes harm, provide valuable insights into how the regulation of speech may not actually reduce resultant harm. Stated another way, examining contexts in which speech provides individuals who are inclined to engage in more damaging action with a therapeutic outlet reinforces the notion of constitutional protection for harmful or offensive expression.

A. *Sex Offender Treatment*

While the connection between sex offenses and speech may not be immediately obvious, the government at times argues in sex offense prosecutions and in defending constitutional challenges to statutes that criminalize sexually explicit speech that exposure to sexually oriented expression leads to sexually violent behavior.¹⁴⁸ Feminist scholars also advocate for increased restrictions on pornography based on their view that the consumption of sexually violent expression causes the viewer to replicate the damaging behaviors he observes in the depictions.¹⁴⁹ These arguments have

¹⁴⁷ *Id.*

¹⁴⁸ *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250–53 (2002).

¹⁴⁹ *See, e.g.*, MACKINNON, *supra* note 80. The idea that viewing pornography leads men to commit crime has been widely dismissed as “junk science.” Carlin Romano, *Between the Motion and the Act*, NATION, Nov. 15, 1993, at 563, 566–67. As one commentator has observed, “there’s good reason to believe that pornographic materials, like prostitutes, also enable men to act in ways they don’t or can’t in their non-commercial intimate relationships, thus making porn a safety valve for male urges.” *Id.* at 567; *see also* Jennifer C. Nash, *Bearing Witness to Ghosts: Notes on Theorizing Pornography, Race, and Law*, 21 WIS. WOMEN’S L.J. 47, 47–49 (2006).

failed to gain traction in the courts,¹⁵⁰ but remain a frequent source of popular debate and online media coverage.¹⁵¹

Nevertheless, the cause/effect approach advanced in the mainstream media ignores the psychological reality that the discussion of and exposure to expression about sex is effective at preventing unlawful sexual behavior.¹⁵² Indeed, the prevailing psychological approach for treating sex offenders is rooted in cognitive behavioral therapy (CBT).¹⁵³ “[CBT] is based on the cognitive model that posits that distorted and dysfunctional thinking is a common symptom of all psychological problems and illnesses and that these distorted thoughts influence a person’s moods and behaviors.”¹⁵⁴ The first step in a CBT sex offender treatment program is to have the offender describe in detail and out loud the circumstances of his offense.¹⁵⁵ For offenders who struggle with deviant sexual arousal, CBT employs masturbatory and verbal satiation techniques¹⁵⁶:

Masturbatory satiation involves the offender masturbating to a healthy fantasy, such as sexual intercourse with a consenting adult, until ejaculation, while being asked to verbalize the fantasy. After the offender reaches orgasm, he is asked to continue masturbating and is instructed to this time use an inappropriate fantasy, such as nonconsensual adult sex or sexual acts with children, for a period of 50 minutes to 2 hours, while once again being asked to verbalize the fantasy. If the deviant masturbation results in arousal, the offender is asked to switch to a healthy fantasy. According to Abel and Annon

¹⁵⁰ See, e.g., *Free Speech Coal.*, 535 U.S. at 250–54 (rejecting the argument that virtual child pornography “whets the appetite of pedophiles” and causes them to sexually abuse children); *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (striking down MacKinnon-authored anti-pornography ordinance on the basis that it improperly discriminated between speech conveying approved messages about women verses speech containing disapproved messages about women).

¹⁵¹ Compare Jonah Mix, *Pornography Doesn’t Cause Sexual Violence. Pornography IS Sexual Violence*, MEDIUM (Nov. 17, 2016), <https://medium.com/@JonahMix/pornography-doesnt-cause-sexual-violence-it-is-sexual-violence-6ff8206407cb> (arguing that pornography itself is violence), with Martin Daubney, *Does Watching Porn Really Turn People into Violent Criminals?*, TEL. (Jan. 29, 2015, 11:57 AM), <https://www.telegraph.co.uk/men/thinking-man/11376283/Does-watching-porn-really-turn-people-into-violent-criminals.html> (discussing lack of scientific proof that pornography consumption leads to violent crime).

¹⁵² Melinda Wenner Moyer, *The Sunny Side of Smut*, SCI. AM. (July 1, 2011), <https://www.scientificamerican.com/article/the-sunny-side-of-smut/> (observing that, as access to online pornography has increased, rape rates have declined and discussing the self-medicating effect of pornography at quelling sexual aggression).

¹⁵³ Aviva Moster et al., *Cognitive Behavioral Therapy Interventions with Sex Offenders*, 14 J. CORR. HEALTH CARE 109, 109–10; Pamela M. Yates, *Treatment of Sexual Offenders: Research, Best Practices, and Emerging Models*, 8 INT’L J. BEHAV. CONSULTATION & THERAPY 89, 90 (2013).

¹⁵⁴ Moster et al., *supra* note 153, at 111.

¹⁵⁵ *Id.* at 112.

¹⁵⁶ *Id.* at 116.

(1982), this technique can significantly reduce deviant arousal after 12 sessions. Verbal satiation is similar to masturbatory satiation, except that after the initial ejaculation the offender has to verbalize deviant sexual fantasies for a set time period, until these fantasies become tedious. This verbalization has to continue for at least 30 minutes, at least 3 times per week. Reduction in deviant arousal is said to occur between 40 and 60 sessions (Laws & Osborn, 1982).¹⁵⁷

CBT also focuses on altering the distorted cognitive schema that lead to sexually inappropriate behavior.¹⁵⁸ Cognitive schema are akin to belief systems that represent an individual's underlying views and attitudes, and prevalent among sex offenders are schema that reinforce sexual entitlement and a belief that the world is hostile.¹⁵⁹ Group therapy is prevalent in working with sex offenders, who are not typically inclined to openly disclose the details of their behavior.¹⁶⁰ It is critical that sex offenders be provided a safe and trusting environment where they can discuss and transform their faulty cognitive schema.¹⁶¹

The success of these interventions—which rely upon verbal expressions of deviant fantasies and distorted world views—demonstrates that talking about harm to another person can prevent the speaker from actually engaging in damaging behaviors.¹⁶² In this way, then, sexually explicit expression may actually function as a therapeutic deterrent for sexually deviant tendencies.

B. *Child Pornography*

Possessors of child pornography often explain that their ability to live out pedophilic fantasies through the viewing of images enables them to withstand the urge to engage in sex with real children.¹⁶³ In some sense, consumers of pornographic material involving children rationalize their behavior by labelling

¹⁵⁷ *Id.* at 116–17.

¹⁵⁸ Yates, *supra* note 153, at 90–91.

¹⁵⁹ *Id.* at 91.

¹⁶⁰ Michael Hubbard, *Sex Offender Therapy: A Battle on Multiple Fronts*, COUNSELING TODAY (Mar. 31, 2014), <https://ct.counseling.org/2014/03/sex-offender-therapy-a-battle-on-multiple-fronts/#>.

¹⁶¹ *Id.*

¹⁶² See, e.g., John A. Hunter, Jr. & Dennis W. Goodwin, *The Clinical Utility of Satiation Therapy with Juvenile Sexual Offenders: Variations and Efficacy*, 5 ANNALS SEX RES. 71, 71, 73, 79–80 (1992).

¹⁶³ This observation derives from over fifteen years in the private practice of law, during which I routinely represented defendants accused of the creation and/or possession of child pornography in both state and federal courts. The names of specific defendants and notes of our conversations contained in their case files are withheld here in order to protect attorney–client privilege; see also Moyer, *supra* note 152 (discussing a psychiatrist's observation that sexual offenders describe pornography as a tool to help them control the urge to act on their deviant sexual desires).

the actual sexual abuse of children as somehow different and worse than viewing the actual sexual abuse of children.¹⁶⁴ But this seemingly false dichotomy is not purely a moral one. To the contrary, individuals who view child pornography express that the opportunity to see their deviant fantasies played out in images and film actually quells rather than whets their appetite for the real thing.¹⁶⁵ As a result, they contend that viewing child pornography actually prevents further child abuse.¹⁶⁶

Former newspaper editor David Goldberg discussed this phenomenon in his heartbreakingly candid essay, “I, Pedophile.”¹⁶⁷ A convicted pedophile, Goldberg set out to investigate why he was sexually attracted to children and how society could approach the problem of pedophilia from a rehabilitative rather than punitive perspective.¹⁶⁸ In his essay, Goldberg publicly confessed his nightly consumption of computerized child pornography, but emphasized that he “had never hurt a child.”¹⁶⁹ In fact, according to Goldberg, almost all pedophiles are this way; they “do not molest, but instead spend hours looking at child pornography.”¹⁷⁰

The Supreme Court implicitly endorsed this distinction—between viewing depictions of child sexual activity and engaging in unlawful sexual contact with minors—in striking down the Child Pornography Prevention Act, which was aimed at quelling the distribution of child pornography and material appearing to be child pornography online.¹⁷¹ At the outset, the Court rejected the connection between virtual child pornography—which appears to depict children engaged in sexual activity but does not involve the use of an actual child—and actual sexual abuse of children.¹⁷² The Court also discounted the idea

¹⁶⁴ See Author’s legal experiences, *supra* note 163.

¹⁶⁵ *Id.*; see also Moyer, *supra* note 152.

¹⁶⁶ See Hunter & Goodwin, *supra* note 162; see also Alice Park, *Study: Making Pornography More Accessible May Curb Child Abuse*, TIME (Dec. 2, 2010), <http://healthland.time.com/2010/12/02/study-making-pornography-more-accessible-may-curb-child-abuse/>.

¹⁶⁷ David Goldberg, *I, Pedophile*, ATLANTIC (Aug. 26, 2013), <https://www.theatlantic.com/health/archive/2013/08/i-pedophile/278921/>.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253–56 (2002). The Child Pornography Prevention Act prohibited “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture that is, or appears to be, of a minor engaging in sexually explicit conduct.” *Id.* at 241 (citing 18 U.S.C. § 2256(8)(B) (2018)).

¹⁷² The Court questioned the connection between virtual or fake child pornography and harm to real minors. *Id.* at 250 (“While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”).

that fake child pornography could be used to whet the appetite of pedophiles, causing them to victimize children in the real world, because there is no scientific proof that expression related to child sex abuse actually leads the consumer to take the same action.¹⁷³

If valid, the notion that individuals who are sexually attracted to children may be less likely to harm a real child if given the chance to view sexually explicit material involving children exposes a potentially inverse and fascinating relationship between speech and harm. The predominant thinking is that negative speech leads to harm across a variety of contexts.¹⁷⁴ But, as the child pornography case example shows, access to speech depicting child sex abuse may in fact reduce harm by providing an outlet for deviant, pedophilic instincts and behaviors.

This Author acknowledges that the notion that child pornography has value as a prophylactic for child abuse may be offensive and uncomfortable to discuss, and would not go so far as to argue that child pornography is entitled to constitutional protection merely because of its potentially medicinal or therapeutic effects. Indeed, real child pornography, depicting actual minors engaging in sexual activity, inflicts the exact type of physical harm the criminalization of child pornography seeks to avoid.¹⁷⁵ But the protection of virtual child pornography, created through technological means to mimic real children but not involving actual human beings, makes sense, both legally and psychologically. It makes legal sense because virtual child pornography does not generate the discrete harms and secondary revictimization concerns that justify the exclusion of actual child pornography from First Amendment protection.¹⁷⁶ And it makes psychological sense because viewing virtual child pornography may enable those who are sexually attracted to children to “let off steam” and to therefore conform their behavior to what is legally expected of them.¹⁷⁷ This is

¹⁷³ See *id.* at 253–54 (“The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.”).

¹⁷⁴ See *supra* Section I.A.

¹⁷⁵ *New York v. Ferber*, 458 U.S. 747, 758 (1982); MACKINNON, *supra* note 80.

¹⁷⁶ *Ferber*, 458 U.S. at 758. One could argue, as the government did in *Free Speech Coalition*, that the consumption of virtual child pornography might “whet the appetite” of pedophiles, causing them to engage in actual sex offenses with children. *Free Speech Coal.*, 535 U.S. at 263. But the Supreme Court soundly rejected this contention, noting that there is no scientific or empirical support for it. *Id.* at 253–54; see also Goldberg, *supra* note 167 (“Scientists don’t know for certain if there is a correlation between viewing child pornography and offending against children.”).

¹⁷⁷ This view embodies Emerson’s safety valve notion of the First Amendment, in which individuals who are in the minority are better able to accept the limitations placed upon them by the majority when they are given

particularly true given that, although sexual behaviors towards children can be managed and prevented, there is no proven cure for pedophilia¹⁷⁸ and that adult sex offenders, both pedophiles and non-pedophiles, have high recidivism rates.¹⁷⁹ A speech-related remedy may actually prevent greater danger to vulnerable children who might otherwise be victimized by those with deviant tendencies.

C. *Elonis and the “True Threats” Doctrine*

Nowhere is the speech/harm nexus more apparent than in the context of so-called true threats, where an individual verbally communicates a serious intent to engage in harmful physical violence to a specific individual or group.¹⁸⁰ Although the courts have struggled to precisely define and apply the “true threats” doctrine,¹⁸¹ it is clear that the concept encompasses words that are either a precursor to violent behavior or that cause the listener to believe that violence is imminent without regard to the speaker’s intent, or lack thereof, to act upon the threat.¹⁸² However they are defined, true threats lack constitutional protection because they place the listener in fear of active danger and that fear alone is understandably disruptive.¹⁸³

The Supreme Court most recently considered the true threats doctrine in *Elonis v. United States*.¹⁸⁴ For several months, *Elonis* posted a series of

access to expressive outlets. Emerson, *supra* note 21, at 885; *see also* Moyer, *supra* note 152 (explaining that “some experts believe the consumption of pornography may actually reduce the desire to rape by offering a safe, private outlet”); Section II.C.

¹⁷⁸ Alice Dreger, *What Can Be Done About Pedophilia?*, ATLANTIC (Aug. 26, 2013), <https://www.theatlantic.com/health/archive/2013/08/what-can-be-done-about-pedophilia/279024/> (“Therapists have been attempting to turn pedophiles into non-pedophiles for a very long time, but no one has presented any objective evidence of any enduring change in sexual interests. . . . [W]e do not appear to be able to change the pedophilia itself.”).

¹⁷⁹ Heather M. Moulden et al., *Recidivism in Pedophiles: An Investigation Using Different Diagnostic Methods*, 20 J. FORENSIC PSYCHIATRY & PSYCHOL. 680, 684 (2009) (documenting sex offense recidivism rate at 22.8%).

¹⁸⁰ *Virginia v. Black*, 538 U.S. 343, 359–60 (defining “[t]rue threats” as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”); *see also* *Watts v. United States*, 394 U.S. 705, 708 (1969) (noting that hyperbole is insufficient to prove that a true threat of violence exists).

¹⁸¹ *See, e.g.*, Marc Rohr, “Threatening” Speech: *The Thin Line Between Implicit Threats, Solicitation, and Advocacy of Crime*, 13 RUTGERS J.L. & PUB. POL’Y 150, 153–54 (2015) (discussing lower court split in applying objective and subjective versions of true threats test).

¹⁸² *See, e.g.*, *Black*, 538 U.S. at 359–60 (noting that the “speaker need not actually intend to carry out the threat”).

¹⁸³ *Id.* at 360.

¹⁸⁴ 135 S. Ct. 2001 (2015).

Facebook rants following his divorce and termination from employment.¹⁸⁵ While the posts at times threatened or depicted simulated violence, Elonis was clear that he was asserting his First Amendment rights and intended to be artistic, mimicking Eminem and other rappers.¹⁸⁶ His posts frequently contained disclaimers that his writings were fictitious and did not intentionally represent real people.¹⁸⁷ Elonis also explained that his Facebook musings were “therapeutic” and “help[ed him] . . . deal with the pain.”¹⁸⁸ While his speech targeted his ex-wife, co-workers at an amusement park, an unspecified kindergarten class, and the FBI, there is no indication that Elonis ever committed acts of violence against anyone.¹⁸⁹

The Supreme Court declined to answer the question of whether Elonis’s threats would be understood by the reasonable person to be intentional, instead resolving the issue of criminal liability on the basis of the district court’s faulty *mens rea* jury instruction.¹⁹⁰ But the facts in *Elonis* are prescient and illustrative. Was Elonis committing a crime by threatening violence he intended to impart? Or was he instead, as he himself observed, engaging in therapeutic expression?

The answers to these questions are no doubt elusive, particularly given that Elonis was arrested on the basis of his speech alone and never actually committed the violent acts he discussed on Facebook.¹⁹¹ But the fact that he engaged in his expressive Facebook outlet from May to October 2010 without incident lends credence to Elonis’s own description of his writing as therapeutic and artistic, rather than a precursor to serious violence.¹⁹²

Like Colorado theater shooter James Holmes, Elonis clearly envisioned violence on a massive scale. He threatened to kill his wife by launching a mortar at her house from a nearby corn field; he discussed his “sinister plans” to harm his co-workers at a Halloween Haunt event; he indicated he had enough explosives to “take care of” the police department; and he talked about engaging in a mass shooting at a kindergarten.¹⁹³ But unlike Holmes, Elonis never actually engaged in any of these behaviors and in fact repeatedly disclaimed that he

¹⁸⁵ *Id.* at 2004–05. For a full description of Elonis’s posts, see *id.* at 2004–07.

¹⁸⁶ *Id.* at 2006 (describing the disclaimer on one of Elonis’s posts: “Art is about pushing limits. I’m willing to go to jail for my Constitutional rights. Are you?”).

¹⁸⁷ *Id.* at 2005.

¹⁸⁸ More specifically, Elonis testified “I’m doing this for me. My writing is therapeutic.” *Id.* at 2005.

¹⁸⁹ *Id.* at 2004–07.

¹⁹⁰ *Id.* at 2012.

¹⁹¹ *Id.* at 2007.

¹⁹² *Id.* at 2004–07.

¹⁹³ *Id.* at 2005–06.

intended to act on his threats.¹⁹⁴ To be sure, Holmes and *Elonis* are different people, with different beliefs, struggles, traits, and persuasions, and their radically opposite actions—undertaking mass murder versus penning half-baked rap songs—defy comparison. But one thing is clear: unlike Holmes, *Elonis* had access to what he perceived to be a therapeutic speech outlet and that outlet just perhaps enabled him to avoid physical violence.

The *Elonis* decision frustrated many scholars for its failure to resolve lingering difficulties with defining and applying the “true threats” doctrine, particularly in the context of social media, where there may be gaps of space and time between the communication and its receipt.¹⁹⁵ But despite its shortcomings, *Elonis* elucidates the relationship between speech that inflicts harm, speech about harm, and speech that prevents harm. Where speech is uttered as a form of therapy and as, in the words of Thomas Emerson, a way to “let off steam,” its therapeutic qualities may forestall more harm than they engender.¹⁹⁶ The debate between speech safety advocates and free speech purists can find common ground in this conclusion.

CONCLUSION

There exists a well-documented and verifiable relationship between the words of the speaker and the harm they may cause to those who hear them.¹⁹⁷ Indeed, the power of speech to cause harm is and always has been a valid First Amendment concern and has, to some extent, governed the scope and extent of free speech protection. Those categories of expression that have been historically determined to fall outside the scope of the First Amendment do so precisely because of their power to inflict grave interpersonal or societal harm. Consistent with this tradition, the impact of speech on its listener is undoubtedly a factor in determining whether the speech is of sufficient value and character to merit constitutional protection.

Much has been said by others about how the relationship between speech and harm should be recognized, particularly in educational settings. The calls for safe spaces and trigger warnings on college campuses are loud and effective. Speech targeting racial minorities, women, and other societally marginalized

¹⁹⁴ *Id.* at 2005–07.

¹⁹⁵ See, e.g., Jessica L. Opila, Note, *How Elonis Failed to Clarify the Analysis of “True Threats” in Social Media Cases and the Subsequent Need for Congressional Response*, 24 MICH. TELECOMM. & TECH. L. REV. 95 (2017).

¹⁹⁶ Emerson, *supra* note 21, at 885.

¹⁹⁷ See *supra* notes 35–37.

groups does indeed, at times, inflict harm and secondary trauma on those who unjustly endure inequity on a daily basis, and the instinct to withdraw from such speech is real and valid. While it may seem that the creation of safe spaces is rooted in the impression that speech itself is dangerous, progressive legal theory also implicitly embodies the notion that speech can be healing when offered in a nurturing, accepting environment.

On the flip side, free speech, as an ideal and as a societal value, can at times seem under assault by those who wrongfully equate the ideas being expressed by extremists with the principle of free expression. Even in our increasingly polarized society, there remain good reasons for protecting expression that we find degrading, dehumanizing, or just plain wrong. For one, exposure to offensive expression at an early age helps young people develop the psychological fortitude and coping skills they need to withstand aggression and marginalization.¹⁹⁸ For another, allowing those with extremist views to express them freely decreases the likelihood that they will engage in underground revolt and physical uprising.¹⁹⁹

What is lost in the debate between free speech and speech safety, however, is the power of free speech to offer a therapeutic outlet for individuals in emotional or psychological distress. The prevailing treatment modalities for sex offenders and pedophiles offer tremendous insight into the power of speech to not only expose an individual's violent or deviant tendencies, but also to serve as a prophylactic remedy against future negative action. So too does the courts' jurisprudence in the context of "true threats" demonstrate that, at times, the expression of a desire to inflict physical harm may prevent the individual communicating the threat from acting on that impulse.

Scholars and advocates can debate whether the First Amendment protects speech that, by its content, inflicts pain on vulnerable people and populations, but the normative question remains as to whether the First Amendment *should* encompass this kind of expression. Given its propensity to deter far worse physical violence, the answer to that question is resoundingly yes. At its core, speech is primarily self-enhancing and affirming to the human dignity of the speaker. Even when it causes distress to the listener, that harm is far less severe than the infliction of sexual or physical pain that can sometimes result when troubled people lack access to expressive outlets. The therapeutic qualities of

¹⁹⁸ See *supra* notes 138–41.

¹⁹⁹ See *supra* notes 138–41.

speech should therefore be taken into account in determining the nature and scope of First Amendment protection.