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The Elasticity of Protected Speech: A Balance of Breadth

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THE ELASTICITY OF PROTECTED SPEECH: A BALANCE OF BREADTH

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I. INTRODUCTION

"The right to swing my fist ends where the other man's nose begins" is an axiom not always, but often attributed to Oliver Wendell Holmes.[1] Whichever learned individual penned it, the quotation

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exemplifies the omnipresent and judicially confounding tension between "freedom of" and "freedom from" speech and expression.

In reviewing *In re Welfare of A.J.B.*, the Minnesota Supreme Court invalidated Minnesota's stalking-by-mail statute and narrowed the mail-harassment statute.[2] Under the first statute, stalking-by-mail occurs when a person "repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, messages, packages"[3] and "the actor knows or has reason to know [this conduct] would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated."[4] Pursuant to the second statute, mail harassment occurs when an actor "with the intent to abuse, disturb, or cause distress, repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, or packages."[5]

The court determined both statutes were sufficiently overbroad and violated the First Amendment.[6] While the court invalidated the first statute in its entirety, it saved the second statute by severing the overbroad language.[7] In doing so, the court balanced the importance of maintaining the protections offered by the statute with the constitutional right to free speech.

This Paper examines the court's decision and whether it could have (and should have) gone further to protect Minnesotans' safety while maintaining their First Amendment protections. The Paper begins with a history of significant cases and government action involving the First Amendment that both broadened and narrowed protected speech and expressive conduct.[8] This Part also explores some of the limited exceptions to First Amendment protections.[9] The Paper then discusses the facts and procedural posture of *In re Welfare of A.J.B.*[10] Next, it explores the overbreadth doctrine in relation to *A.J.B.*, how speech can be considered conduct, and whether hate speech should maintain constitutional protection.[11] Then, the Paper looks at the First Amendment in a modern context, specifically how private actors intervene to fill the gaps left by the

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[1] Bob Hooper, *Freedom, Responsibility, and Accountability*, THE HAYS DAILY NEWS (July 14, 2016), https://www.hdnews.net/474620df-b1ff-5873-a1ef-54229ac61a4f.html [https://perma.cc/9XST-YKX6].
[2] *In re* Welfare of A.J.B., 929 N.W.2d 840, 864 (Minn. 2019).
[3] MINN. STAT. § 609.749, subdiv. 2(6) (2018).
[4] *Id.* § subdiv. 1.
[5] *Id.* § subdiv. 1(3).
[6] *A.J.B.*, 929 N.W.2d at 864.
[7] *Id.*
[8] *See infra* Part II.
[9] *See infra* Part II.
[10] *See infra* Part III.
[11] *See infra* Part IV.

government.[12] Finally, it concludes that, while the court was correct in its ruling on the legal merits of the challenge, it missed an opportunity to create additional societal protections by narrowing protected speech, ultimately weakening its reasoning.[13]

I. HISTORY OF FREE SPEECH

The United States Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech . . . ."[14] This guarantee is a bedrock principle of American democracy.[15] In the many years since the ratification of the First Amendment, the limits and reach of this freedom have been tested.[16] Protected speech was both restricted and expanded.[17]

The overbreadth doctrine is a common mechanism by which to challenge First Amendment protections.[18] The doctrine holds that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[19] Decisions in favor of free speech are predicated on this doctrine, which is based on the sensitive nature of protected expression.[20] The Supreme Court's opinion in *Gooding v. Wilson* refers to the "*transcendent* value to all society of constitutionally protected expression . . . ."[21] One has

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[12] *See infra* Part V.
[13] *See infra* Part VI.
[14] U.S. CONST. amend. I.
[15] Steven J. Wermiel, *The Ongoing Challenge to Define Free Speech*, 43 HUMAN RIGHTS, no. 4, 2018, at C2. ("Freedom of speech, Supreme Court Justice Benjamin Cardozo declared more than 80 years ago, 'is the matrix, the indispensable condition of nearly every other form of freedom.'").
[16] *See, e.g.*, *id.* ("227 years after the first 10 amendments to the U.S. Constitution were ratified in 1791 . . . debate continues about the meaning of freedom of speech . . . .").
[17] Marc O. DeGirolami, *The Sickness unto Death of the First Amendment*, 42 HARV. J.L. & PUB. POL'Y 751, 752 (2019).
[18] *See* Osborne v. Ohio, 495 U.S. 103, 119 (1990); *see also Overbreadth Doctrine*, LAW LIBRARY – AMERICAN LAW AND LEGAL INFORMATION, https://law.jrank.org/pages/8973/Overbreadth-Doctrine.html [https://perma.cc/JGL6-CQS5] ("One common argument in First Amendment challenges is that the statute is overbroad.").
[19] *See* United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008)).
[20] Gooding v. Wilson, 405 U.S. 518, 521 (1972) ("[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.").
[21] *Id.*

only to probe the authoritarian regimes of North Korea[22] or Libya[23] to observe governments significantly curbing free speech and expression to the detriment of their people.[24]

At the same time, courts have contrarily favored citizen protections over free speech.[25] Striking down a law that honors First Amendment protections as overbroad has been viewed as having limited potency.[26] For example, the effect of a federal overbreadth judgment is binding solely over the parties to the lawsuit.[27] Civil actions can still proceed, and the state may pursue criminal prosecutions against nonparties.[28] Even at the United States Supreme Court level, a law cannot be stricken from a state's statute books, nor can a state be barred from narrowing an "invalidated" statute to bring it into constitutional compliance.[29] More importantly, these overbreadth opinions reason that a state has the right to enact and enforce "valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct," including speech that results in conduct.[30] While such laws may have a chilling effect on speech if they are especially overbroad, the negative effects of harmful speech, the reasoning goes,

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[22] Morse H. Tan, *A State of Rightlessness: The Egregious Case of North Korea*, 80 MISS. L.J. 681, 681 (2010) (discussing North Korea's "astonishing absence of a free press, free speech, and free association rights . . . .").

[23] Mustafa Fetouri, *Freedom of Speech Yet Another Casualty of the Libyan Uprising*, THE NAT'L NEWS (June 28, 2017), https://www.thenationalnews.com/opinion/freedom-of-speech-yet-another-casualty-of-the-libyan-uprising-1.92357 [https://perma.cc/R7J7-FU5V]. Libya exemplifies the fragility of these freedoms. After the Arab Spring uprising in 2011, previously unavailable free expression flourished, but given the country's continued political instability, once again those rights have precipitously deteriorated. *Id.*

[24] *10 Most Censored Countries*, COMM. TO PROTECT JOURNALISTS (Sept. 10, 2019), https://cpj.org/reports/2019/09/10-most-censored-eritrea-north-korea-turkmenistan-journalist/ [https://perma.cc/RCM7-S4GL] (detailing the digital censorship, surveillance, and traditional methods used to silence media in the top ten most repressive countries).

[25] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 764 (1982) ("When [material involving child pornography] bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."); *accord* Gooding v. Wilson, 405 U.S. 518, 522 (1972).

[26] Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 853 (1991) ("Characterized by both the Supreme Court and scholarly commentators as 'strong medicine' that courts ought to administer cautiously, overbreadth doctrine is frequently a far weaker potion than either its champions or its critics have appreciated." (internal citation omitted)).

[27] *Id.*

[28] *Id.*

[29] *Id.* at 853–54.

[30] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

should allow a state to exercise its authority to enforce a constitutionally valid statute without court intervention.[31]

A. Free Speech Origins

In the early American Republic, the Founders believed "natural rights" (things citizens could do without a government) included speaking, writing, and publishing.[32] In 1789, James Madison referred to freedom of speech as a natural right when he proposed constitutional amendments.[33] Perhaps, as a result, the First Amendment cemented the natural right to freely express one's thoughts; however, that right was subject to restrictions for the common good.[34] Eighteenth-century Americans believed free speech was a right, but also believed the government had a right to "constrain [speech] in order to achieve or protect certain collective social goods . . . assum[ing] that the political community could and should make value judgments among different ideas."[35] This idea—that the protection of natural rights must be balanced with the enforcement of legal rules—is central to the Founders' belief that the freedoms enshrined in the Constitution are not always legally supreme.[36] The concept of a "public good" (also described as "general welfare" or "public interest") is the basis for this Paper's push-back on the minimal exceptions to the protection of speech.[37]

B. Fluctuating Freedom

It is little wonder why balancing is such an important tool of First Amendment jurisprudence. Even amongst themselves, legislators, courts, and advocacy groups utilize inconsistent approaches to First Amendment speech protections, both abruptly and systemically reversing course on policy and personal ideology over time.

1. Legislative and Executive Indecision

Those who made and enforced the laws during the eighteenth and nineteenth centuries happily dipped their toes in First Amendment waters, running back to shore when it was too cold. The 1798 Sedition Act

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[31] *Id.* ("[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").
[32] Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 265–66 (2017).
[33] *Id.* at 264.
[34] *Id.* at 304–07.
[35] DeGirolami, *supra* note 17, at 752.
[36] Campbell, *supra* note 32, at 252–54.
[37] *Id.* at 253 (defining a public good to be "generally understood as the welfare of the entire society.").

criminalized "false and malicious criticism of the Federalist Party—that is, the president or Congress."[38] By 1802, all Alien and Sedition Acts had expired or been repealed.[39] In 1836, the U.S. House of Representatives adopted gag rules preventing the discussion of anti-slavery proposals.[40] Due to opposition on free speech grounds, the House repealed the rules in 1844.[41] Sedition Acts in both the eighteenth and nineteenth centuries fared similarly. In 1798, John Adams, upset by his critics, pushed for and passed a Sedition Act, which restricted criticism against the President.[42] When Thomas Jefferson assumed the presidency just two years later, the law expired and was not renewed.[43] Similarly, Congress passed the Sedition Act of 1918 to prohibit citizens from speaking out against the government or the war, but Congress then repealed the Act in 1921.[44]

The next hundred years of American governance proved equally vulnerable to the legislative and judicial dance, wherein Congress passed politically driven legislation, and the judiciary subsequently imposed constitutional limits. The Alien Registration Act of 1940 (also known as the Smith Act, after Representative Howard Smith, the Act's sponsor) made it a crime to advocate for the violent overthrow of the government and required official government registration of all adult non-citizens.[45] While the Act was never officially repealed, in 1957, the Supreme Court overturned fourteen convictions under the Smith Act,[46] citing a violation of the First Amendment, which limited it to such a degree that, after *Yates*, no future Smith Act violations were prosecuted.[47]

In 1996, there was no clear consensus among the branches of government when Congress passed the Communications Decency Act (CDA),[48] which was immediately challenged on First Amendment grounds

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[38] Joseph Russomanno, *The Right and the Duty: Jefferson, Sedition and the Birth of the First Amendment's Central Meaning*, 23 COMM. L. & POL'Y 49, 51 (2017).

[39] Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798) (expired 1801); Alien Act of 1798, ch. 58, 1 Stat. 570, 570–71 (1798) (expired 1801).

[40] Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 930 (1999) ("The abolitionists' campaign of petitions to abolish slavery in the District of Columbia and to prohibit interstate slave trade also provoked efforts to suppress anti-slavery free speech.").

[41] *Id.* at 933.

[42] Russomanno, *supra* note 38, at 64–65, 75.

[43] *Id.* at 77.

[44] *U.S. Congress Passes Sedition Act*, HISTORY.COM, https://www.history.com/this-day-in-history/u-s-congress-passes-sedition-act [https://perma.cc/P34C-SZQE].

[45] Alien Registration Act, 18 U.S.C. § 2835 (1940).

[46] Yates v. United States, 354 U.S. 298, 301, 338 (1957).

[47] *Yates v. United States*, BRITANNICA.COM, https://www.britannica.com/topic/Yates-v-United-States [https://perma.cc/6WWG-4QPS].

[48] William A. Sodeman, *Communications Decency Act*, BRITANNICA.COM, https://www.britannica.com/topic/Communications-Decency-Act [https://perma.cc/NW5D-

and struck down by the Supreme Court a mere twelve months later.[49] The Court concluded that the CDA was too vague and trampled on protected speech.[50]

2. Judicial Vacillation

The Supreme Court, as a body, similarly does not have a unified historical posture on the extent to which speech should be protected.[51]

The Supreme Court of the eighteenth and nineteenth centuries sanctioned free speech with great latitude in the decisions of the few related cases it heard.[52] It is no surprise that early American courts aimed to test-drive the First Amendment to see how she handled on the open road. After decades of monarchical rule, a successful revolution, and the arduous construction of a new form of government and Constitution, it makes perfect sense that the nineteenth century opened a large umbrella of free speech protection.[53]

During the first half of the twentieth century, the Supreme Court began paying closer attention to free speech issues, causing judicial whiplash as it ruled and then overruled itself.[54] At a time marked by war and its aftermath, and filled with suspicion and paranoia, it is understandable that the Court preferred a narrow view of what speech can be protected.

In 1919, the Court weighed in with a trio of cases affirming the curtailment of free speech during wartime to protect the general welfare.[55]

P4EJ] ("The CDA created a criminal cause of action against those who knowingly transmit 'obscene' or 'indecent' messages, as determined by local community standards, to a recipient under the age of 18 years.").

[49] Reno v. ACLU, 521 U.S. 844, 885 (1997).

[50] *Id.* at 874.

[51] Luke Meier, *A Broad Attack on Overbreadth*, 40 VAL. U. L. REV. 113, 117 (2005) ("Unfortunately, it is impossible to identify a unified theory for how courts decide free speech cases.").

[52] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2179 (2015) (noting that the Court, in that period, ruled broadly in favor of free speech protections, concluding only once that a particular kind of expression did not fall under the umbrella of First Amendment protection. *See* State v. Blair, 60 N.W. 486, 487 (1894) (holding that a law prohibiting "itinerant vender[s]" from publicly advertising their ability to treat diseases did not violate the state constitutional guarantees of speech and press freedom).

[53] *See, e.g.*, Dailey v. Superior Ct. of S. F., 44 P. 458, 459 (1896) ("The production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author" and is therefore protected by the free speech and press provision of the California Constitution).

[54] *See infra* Part II.B.

[55] *See* Schenck v. United States, 249 U.S. 47, 53 (1919) (holding that the Espionage Act was not a violation of the First Amendment); *accord* Debs v. United States, 249 U.S. 211, 216–17 (1919) (holding that Mr. Debs's First Amendment rights were not violated when he was convicted under the Espionage Act); *accord* Abrams v. United States, 250 U.S. 616, 624 (1919) (holding that the Espionage Act is constitutional).

Enshrining into our lexicon the enduring (if simplistic) axiom about yelling fire in a crowded theater, Oliver Wendell Holmes created a conditional standard for protected speech: what can be said in times of peace may not be legal during times of war. This conditional standard has become known as the "clear and present danger" test.[56] A "clear and present danger" is one that "will bring about the substantive evils that Congress has a right to prevent."[57]

Further prioritizing the protection of the public interest from the harmful consequences of speech, in 1942, the Court found that the First Amendment did not protect "fighting words."[58] Similarly, in *West Virginia State Board of Education v. Barnette*, the West Virginia School Board's policy requiring the recitation of the Pledge of Allegiance was found unconstitutional.[59] The Court further narrowed free speech by adding another unprotected category: obscenity.[60] Hearkening back to the 1919 cases[61] and embodying the chill on free speech wrought by McCarthyism, the Supreme Court upheld the conviction of citizens who spoke about overthrowing the government.[62] Due to the political climate, the first fifty years of the twentieth century saw First Amendment rights take a back seat to protections of "the public good."[63]

Conversely, the latter half of the twentieth century saw the Supreme Court reverse course and put its weight behind the protection of free speech and expression, reflecting decades of progressive social and political upheaval. Fifty years after Justice Holmes penned the "clear and present danger" test in *Schenck*, *Brandenburg v. Ohio* completed the test's evolution for First Amendment speech protections.[64] The *Brandenburg* test

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[56] *Schenck*, 249 U.S. at 52.

[57] *Id.*

[58] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "fighting words" as those which "by their very utterance, inflict injury or tend to incite an immediate breach of the peace" and "such utterances [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[59] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the First Amendment cannot enforce consensus of opinion on an issue or idea).

[60] *See generally* Roth v. United States, 354 U.S. 476, 485 (1957); *see also* Miller v. California, 413 U.S. 15, 24 (1973) (creating a three-pronged test to determine whether and which speech is obscene); FCC v. Pacifica Found., 438 U.S. 726, 748–51 (1978) (clarifying the difference between "indecent" and "obscene" and granting the FCC the power to fine networks for broadcasting indecent content).

[61] *See Schenck*, 249 U.S. at 53; Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[62] *See* Dennis v. United States, 341 U.S. 494, 590–91 (1951) (Douglass, J., dissenting).

[63] *See* Campbell, *supra* note 32, at 253 (defining "public good").

[64] Brandenburg v. Ohio, 395 U.S. 444, 449 (1969); *Remarks of William Van Alstyne on the Brandenburg Panel*, 44 TEX. TECH. L. REV. 85, 86 (2011) ("The Brandenburg test thus

dictates that speech can be punished only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[65] Holmes's *Schenck* opinion was so emphatically overruled that Justice Black filed a brief concurrence in *Brandenburg*, stating that "the 'clear and present danger' doctrine should have no place in the interpretation of the First Amendment."[66] Affirming that even hate speech is protected under the Constitution as long as it does not incite violence, *Brandenburg* was a landmark decision in the expansion of the First Amendment shield.[67]

Cases that reflected the shift in the Court's increasingly protectionist attitude toward First Amendment speech continued to mount. In a major win for student activists in 1969, the Court held it unconstitutional for school officials to censor student expression (in this case, black armbands to protest U.S. involvement in Vietnam).[68] The Court theorized that prohibiting only specific political symbols (anti-Vietnam armbands) effectively prohibits the expression of one particular opinion and is unconstitutional.[69] In *Cohen v. California*, the Supreme Court reversed the conviction of a man charged with disturbing the peace by wearing a jacket containing a visible expletive.[70] The Court wrote, "[O]ne can[not] forbid particular words without also running a substantial risk of suppressing ideas in the process."[71] Another school-related case, *Board of Education v. Pico*, held that books could not be banned from school libraries based on the books' content or message.[72] Flag burning was also decriminalized in *Texas v. Johnson* when the Court ruled the activity constituted political protest and was, therefore, a form of symbolic speech that is protected by the First Amendment.[73]

Analysis of the Court's shift in attitude toward the First Amendment over the twentieth century cannot be done without recognizing the historical context in which it occurred. Similar to the Framers' reactionary interest in opening a wide umbrella of free speech protections after years of monarchical rule, the post-1950s Court decisions reflected the

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became the central First Amendment test in respect to political advocacy and criminal law, federal and state, more than a half-century ago.").

[65] *Brandenburg*, 395 U.S. at 447.

[66] *Id.* at 449–50 (Black, J., concurring).

[67] *Id.* at 447.

[68] Tinker v. Des Moines, 393 U.S. 503, 514 (1969).

[69] *Id.* at 510–11.

[70] Cohen v. California, 403 U.S. 15, 16, 26 (1971) (indicating both the expression of emotion and ideas are protected under the First Amendment).

[71] *Id.* at 26.

[72] Bd. of Educ. v. Pico, 457 U.S. 853, 871–72 (1982) (finding that school board authority does not supersede that of the First Amendment regarding ideas).

[73] Texas v. Johnson, 491 U.S. 397, 399, 418 (1989).

atmosphere of social unrest occurring across the country; a possible acknowledgment that (largely) unfettered speech is a necessary conduit for change.

3. Extra-Governmental Equivocation

Looking outside the realm of government, the American Civil Liberties Union (ACLU), perhaps the staunchest (and oldest, at 97 years) advocacy group for First Amendment protections, recently engaged in a reversal of course. In 2017, the ACLU of Virginia successfully litigated on behalf of an "alt-right" activist, claiming his First Amendment rights were being denied by the city's refusal to allow his group to engage in a public "Unite the Right" march.[74] Amid criticism for supporting a hate group, Anthony Romero, the Executive Director of the ACLU, justified the group's position, responding that "[p]reventing the government from controlling speech is absolutely necessary to the promotion of equality."[75] After a bystander, Heather Heyer, was intentionally run down (and killed) at that rally, some ACLU chapters declared they no longer believed free-speech protections apply to events like the one in Charlottesville.[76] Mr. Romero promised that the entire ACLU would "screen clients more closely for the potential of violence" and would no longer defend hate groups if they protest while carrying guns.[77] While the ACLU is not expressing a capricious ideological shift, this indecisiveness exemplifies the vacillating boundaries of the First Amendment.

Another example of First Amendment hedging is social media platform Twitter's recent prohibition of posts that wish a person, including the President, death, disease, or serious bodily harm.[78] This is a major policy reversal as, since its inception in 2006, Twitter has been infamous for

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[74] Kessler v. City of Charlottesville, 441 F. Supp. 3d 277 (W.D. Va. 2020); *see also Kessler v. Charlottsville*, ACLU VIRGINIA, https://acluva.org/en/cases/kessler-v-charlottesville [https://perma.cc/D773-MVXH].

[75] Anthony D. Romero, *Equality, Justice and the First Amendment*, ACLU BLOG (Aug. 15, 2017), https://www.aclu.org/blog/free-speech/equality-justice-and-first-amendment?redirect=blog/speak-freely/equality-justice-and-first-amendment [https://perma.cc/KN2T-963B].

[76] Dara Lind, *Why the ACLU is Adjusting its Approach to "Free Speech" After Charlottesville*, VOX (Aug. 21, 2017), https://www.vox.com/2017/8/20/16167870/aclu-hate-speech-nazis-charlottesville [https://perma.cc/RDJ8-3ET4].

[77] Joe Palazzolo, *ACLU Will No Longer Defend Hate Groups Protesting with Firearms*, WALL ST. J. (Aug. 17, 2017), https://www.wsj.com/articles/aclu-changes-policy-on-defending-hate-groups-protesting-with-firearms-1503010167 [https://perma.cc/NWA9-L5KG].

[78] Bobby Allyn, *Facebook, Twitter and TikTok Say Wishing Trump's Death From COVID-19 Is Not Allowed*, NPR (Oct. 2, 2020), https://www.npr.org/sections/latest-updates-trump-covid-19-results/2020/10/02/919778961/facebook-twitter-and-tiktok-say-wishing-trumps-death-from-covid-is-not-allowed [https://perma.cc/M38U-DT4N].

allowing hurtful speech to reach its users in the name of the First Amendment.[79]

C. Some Exceptions to First Amendment Protections

Amid the back and forth discussed in the Section above,[80] the Supreme Court illustrated its reluctance to expand the list of precedented exceptions to protected speech. In addition to false statements, two more categories of unprotected speech are "fighting words" and obscenity.[81] The Supreme Court explained in detail:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[82]

The Minnesota Supreme Court was of a similar mind in *In re Welfare of A.J.B.*[83] The court stated that "the legitimate purpose of the [mail-harassment] statute [is to] prevent harm,"[84] concurring that exceptions may be warranted when they would prevent injury to another.

1. Fighting Words

There is good reason and precedent for exempting fighting words from protected speech. As the Supreme Court emphasized in *Chaplinsky*, "'Resort[ing] to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.'"[85] When compared with freedom of expression, the Court

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[79] *Tweets Wishing for Trump's Death Violate Twitter Policy, Company Says*, GUARDIAN (Oct. 2, 2020), https://www.theguardian.com/technology/2020/oct/02/twitter-trump-death-threats-covid-19-policy [https://perma.cc/38GN-M56P].

[80] *Supra*, Part II (B)(2).

[81] KATHLEEN ANN RUANE, CONGRESSIONAL RESEARCH SERVICE, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (2014).

[82] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[83] *In re* Welfare of A.J.B., 929 N.W.2d 840 (Minn. 2019).

[84] *Id.* at 861.

[85] *Chaplinsky*, 315 U.S. at 572 (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

reasoned that fighting words may, indeed, have expressive intent, but that the expression is not worthy of protection given the harm it causes.[86]

In addition to words that "by their very utterance inflict injury," *Chaplinsky*'s unprotected fighting words include those that breach the peace,[87] and in "practically all [such cases], the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer."[88]

2. Obscenity

Obscenity is an oft-scrutinized category of speech exempted from protection.[89] Similar to outlining the boundaries of "fighting words," defining "obscene" is challenging.[90] The present-day obscenity standard was set in *Miller v. California* when the Court affirmed that obscene materials are not protected expression under the First Amendment and created a standard for the exception.[91] The three-prong test includes:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[92]

The *Miller* test exemplifies the concept of protected speech exceptions, but the Court remains hesitant to expand the definition (and, thus, the amount of unprotected speech) any further.[93]

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[86] *Id.* ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[87] *Id.*

[88] *Cantwell*, 310 U.S. at 309.

[89] *See, e.g.*, Ashcroft v. Am. C.L. Union, 542 U.S. 656, 679–80 (2004); Redrup v. New York, 386 U.S. 767, 770–72 (1967); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 417–19 (1966); Roth v. United States, 354 U.S. 476, 484–85 (1957).

[90] *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), (Stewart, J., concurring) (conceding he cannot precisely define obscenity, "[b]ut I know it when I see it.").

[91] Miller v. California, 413 U.S. 15, 24 (1973) (The third prong is adopted by legislatures as a means for excepting protected speech in non-obscenity contexts as well, such as the regulation of violent video games). *See, e.g.*, Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 808 (2011).

[92] *Miller*, 413 U.S. at 24. *See, e.g.*, *Brown*, 564 U.S. at 808.

[93] The Supreme Court denied certiorari in *Mukasey v. Am. C.L. Union*, 555 U.S. 1137 (2009), which could have broadened obscenity law beyond the parameters of the *Miller* test. The lower court ruled in favor of the ACLU and protected speech. Am. C.L. Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008).

3. The Argument for Purposeful Expansions

The intransigence to expand exceptions is a boon for First Amendment advocates eager to maintain broad protection of speech, but the hypocrisy and narrow concept of freedom are easy to spot. Courts have cited child protection as a primary reason for limiting obscene expression.[94] For example, *Ginsberg v. New York* empowers the state to regulate the well-being of its children.[95] The Court said that "even where there is an invasion of protected freedoms 'the power of the state to control children's conduct reaches beyond the scope of its authority over adults . . . .'"[96] The priorities of our society are laid bare, then, when protecting minors from (one might embellish the notion as "*freedom* from") such tangible evils as bullying, harassment, and inducement to suicide do not triumph over free speech in the way sharing pornographic content might have.

Even if a new category of exception for bullying and hate speech is not warranted, *Chaplinsky* reminds us that such categories of speech are much closer to the allowable exception of "fighting words" than the communication of an idea. Because these words can easily be construed as "abusive," they pass *Cantwell*'s "breach the peace" test and should have qualified as fighting words.[97]

Overall hesitance to reduce certain instances of First Amendment protection appears to be based on fear of a societal slippery slope.[98] The thinking is that if an exception to First Amendment speech protection is created, any and all free speech (and democracy itself) is put at risk: "If we start punishing speech, advocates argue, then we will slide down the slippery slope to tyranny."[99] However, over time the Supreme Court increased exceptions to protected speech to include obscenity, fighting words, and defamatory statements,[100] and Americans continue to enjoy broad protection of ideas and expression. At the same time, we remain vulnerable to bullying

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[94] *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968) ("We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms.").

[95] *Id.*

[96] *Id.* (quoting Prince v. Mass., 321 U.S. 158, 170 (1944)).

[97] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (referencing Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

[98] Alan M. Dershowitz, *A Dangerous Slippery Slope*, N.Y. TIMES (Feb. 10, 2014), https://www.nytimes.com/roomfordebate/2010/09/19/can-speech-be-limited-for-public-workers/a-dangerous-slippery-slope [https://perma.cc/S33M-DAAJ].

[99] Kent Greenfield, *The Limits of Free Speech*, THE ATLANTIC (Mar. 13, 2015), https://www.theatlantic.com/politics/archive/2015/03/the-limits-of-free-speech/387718/ [https://perma.cc/QG9H-KW42].

[100] *See, e.g.*, Miller v. California, 413 U.S. 15, 15 (1973) (discussing obscenity); *Chaplinsky*, 315 U.S. at 573 (discussing fighting words); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (discussing defamation).

and stalking.[101] It is no surprise that the issue of whether an expansion of exceptions to protected speech is more or less a public good is a question that continues to vex our courts.

D. Free Speech in Minnesota

In re Welfare of A.J.B.[102] is a Minnesota case dealing with state police powers (those that establish and enforce laws protecting the welfare, safety, and health of the public).[103] Because these powers are reserved to the states,[104] it is germane to this analysis to examine Minnesota's own inconsistent history of free speech jurisprudence.

In 1981, a Minnesota free speech case, *Near v. Minnesota*, found its way to the Supreme Court and was so impactful that it was contemporaneously recognized as a game-changer.[105] "Contemporaries saw *Near* as a landmark, with one legal commentator on freedom of the press characterizing the case as 'the most important decision rendered since the adoption of the [F]irst [A]mendment.'"[106] In 1925, Minnesota passed a statute known as the Minnesota Gag Law, which permitted a judge, acting without a jury, to stop publication of any periodical the judge found "obscene, lewd, and lascivious" or "malicious, scandalous, and defamatory."[107] The statute permitted periodicals' permanent enjoinment from future publication.[108]

The Minnesota Supreme Court opinion, from which *Near* (reviewed *sub nom*)[109] was granted certiorari, embraced the supremacy of state police power and rejected the idea that First Amendment freedoms outweighed issues of public welfare.[110] The court held:

> Under modern authorities there can be no doubt that the police power includes all regulations designed to promote public convenience, happiness, general welfare, and prosperity, an orderly state of society, the comfort of the

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[101] *See, e.g.*, *infra* Part III.A.
[102] 929 N.W.2d 840 (Minn. 2019).
[103] *Police Power*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[104] U.S. CONST. amend. X.
[105] Paul L. Murphy, Near v. Minnesota *in the Context of Historical Developments*, 66 MINN. L. REV. 95, 97 (1981).
[106] *Id.* (quoting Eberhard P. Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 749 (1938)).
[107] Near v. Minnesota, 283 U.S. 697, 702 (1931) (quoting Mason's Minnesota Statutes, 1927, §§ 10123-1–1203-3).
[108] *Id.* at 703.
[109] *Sub Nomine*, BLACK'S LAW DICTIONARY (11th ed., 2019) ("[I]ndicate[s] that there has been a name change from one stage of the case to another.").
[110] State *ex rel.* Olson v. Guilford, 174 Minn. 457, 459 (1928) (citing Lawton v. Steele, 152 U.S. 133, 140 (1894)).

> people, and peace, and that it extends to all great public needs as well as to regulations designed to promote public health, morals, or safety.[111]

The court also believed the legislature had the authority and right to decide both what is in the public's best interest and how to protect those interests.[112]

The *Near* Court reversed, however, prioritizing the press's First Amendment protections over public welfare.[113] This principle was successively applied to free speech in general.[114] Tugs-of-war between these oft-competing freedoms continue to dominate in Minnesota.[115]

Minnesota's Constitution is silent on any guarantee of freedom of speech and expression.[116] However, the First Amendment applies to the states through the Fourteenth Amendment,[117] which is codified in Minnesota's Constitution.[118]

Free speech protection rulings by the Minnesota Supreme Court mirror the inconsistent holdings of the Supreme Court. In *Knudtson v. City of Coates*, Minnesota favored police powers over First Amendment rights.[119] The court held that a city ordinance barring nude dancing in licensed liquor establishments was a reasonable exercise of police power[120] and did not violate the free speech provision of the Minnesota Constitution[121] (and, thus, the First Amendment).[122] *Similar modern Minnesota cases abound.*[123] *State*

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[111] *Id.*
[112] *Id.*
[113] *Near*, 283 U.S. at 737–38.
[114] *Id.* at 707 ("[The Minnesota gag rule] raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press *and of speech* is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion of state action.") (emphasis added).
[115] *Compare* Knudtson v. City of Coates, 519 N.W.2d 166, 169 (Minn. 1994) (detailing a narrow free speech ruling), *with* State v. Hensel, 901 N.W.2d 166 (Minn. 2017).
[116] *See* MINN. CONST. art. I.
[117] *See* U.S. CONST. amend. XIV, § 1 (applying the first ten amendments of the United States Constitution to the states); *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("[W]e may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").
[118] MINN. CONST. art. I, § 2.
[119] *See Knudtson*, 519 N.W.2d at 169 ("The [municipality's] police power may be used to protect . . . 'the public health, safety, and general welfare' of the community.").
[120] *Id.* at 169.
[121] *Id.*
[122] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").
[123] For cases that detail a lack of statutory overbreadth see, State v. Muccio, 890 N.W.2d 914 (Minn. 2017); DI MA Corp. v. St. Cloud, 562 N.W.2d 312 (Minn. Ct. App. 1997); State v. Kakosso, No. A12–0401, 2012 WL 6652598 (Minn. Ct. App. Dec. 24, 2012).

v. Hensel, however, illustrates Minnesota's converse stance, invalidating the disorderly conduct statute as overbroad and, thus, violative of the First Amendment.[124] *Similar modern Minnesota cases abound.*[125]

Recent Minnesota rulings also embody the inconsistency in the state courts' definition and application of "fighting words." Calling a police officer a "white racist mother***ker" and wishing his mother would die were considered fighting words and, thus, unprotected by the First Amendment.[126] However, yelling "fuck you all" to a police officer and security personnel at a nightclub did *not* qualify as the use of fighting words and *was,* therefore, protected speech.[127]

Serving as a bookend to this Section, the Supreme Court recently heard another First Amendment Minnesota case, further demonstrating the delicate balance between freedom of speech and freedom from speech.[128] A Minnesota statute prohibits individuals from wearing a "political badge, political button, or other political insignia" inside a polling location.[129] Writing for the majority, Chief Justice Roberts explained that some forms of advocacy should be excluded from the polling place due to the sensitive and private nature of voting.[130] In this holding, the Supreme Court expressed the importance of being flexible, rather than absolute, when it comes to protecting speech, and particularly when the recipient is vulnerable.[131] This is a lesson the *A.J.B.* court should have heeded. Would that the *A.J.B.* court took notice.

III. *IN RE WELFARE OF A.J.B.*

A. Facts and Procedural Posture

In 2016, A.J.B., a juvenile, sent approximately forty vicious, personal messages on Twitter, directed at M.B., a juvenile diagnosed with autism and Attention Deficit Hyperactivity Disorder.[132] The messages contained homophobic language, insults, and slurs, mocked M.B.'s

[124] State v. Hensel, 901 N.W.2d 166 (Minn. 2017).
[125] For cases that affirm statutory overbreadth see, State v. Jorgenson, 946 N.W.2d 596 (Minn. 2020); State v. Peterson, 936 N.W.2d 912 (Minn. Ct. App. 2019); Polinsky v. Bolton, No. 3:11CR190, 2017 WL 2224391 (Minn. Ct. App. May 22, 2017).
[126] State v. Clay, No. CX-99-343, 1999 WL 711038, at *4 (Minn. Ct. App. Sept. 14, 1999).
[127] Cornelious v. Brubaker, No. 01CV1254, 2003 WL 21511125, at *14 (D. Minn. June 25, 2003).
[128] Minnesota Voters All. v. Mansky, 138 S. Ct. 1876 (2018).
[129] *Id.* at 1879.
[130] *Id.* at 1887.
[131] *Id.* at 1885.
[132] *In re* Welfare of A.J.B., 929 N.W.2d 840, 844 (Minn. 2019).

disabilities, and encouraged M.B. to kill himself.[133] The tweets were sent within a two- to three-hour period, and were designed to "teach [M.B.] a lesson."[134] After viewing these tweets, M.B. felt suicidal.[135] A.J.B. was charged under the Minnesota stalking-by-mail and mail-harassment statutes.[136] Subsequently, the juvenile court found A.J.B. "delinquent" on all counts.[137] In its opinion, the juvenile court said the tweets were "cruel and [went] beyond any measure of human decency."[138] A.J.B. appealed, and the Minnesota Court of Appeals affirmed the district court's decision.[139]

B. Minnesota Supreme Court

Under a theory of constitutional overbreadth, A.J.B. appealed the Minnesota Court of Appeals' decision to the Minnesota Supreme Court.[140] Of concern to the court was the balance between the chilling effect resulting from the proscription of constitutionally-protected speech and the protections afforded by the stalking-by-mail and mail-harassment statutes.[141] Following the Supreme Court's example, the court laid out a three-factor test to determine whether a statute is overbroad in the context of the spirit in which it was drafted.[142]

First, the court must understand the scope and sweep of the statute.[143] Second, the court determines whether the statute prohibits protected speech or expressive conduct.[144] If so, the third and final factor is whether the amount of speech prohibited is "substantial" relative to the amount of prohibited, unprotected speech.[145] If the court finds the statute to be overbroad and unconstitutional, it must ascertain whether the statute can be saved by severing the overbroad language.[146]

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[133] *Id.* at 845.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 846.
[141] *Id.* at 847 ("[W]e tread carefully as we balance the constitutional demands of the First Amendment against society's interest in protecting Minnesotans' safety, health, and welfare.").
[142] *Id.* at 847–48; *see also* United States v. Williams, 553 U.S. 285, 293 (2008) (discussing how to determine if a statute is overbroad).
[143] *A.J.B.*, 929 N.W.2d at 847.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 848.

In the case at hand, the Minnesota Supreme Court analyzed both the stalking-by-mail and the mail-harassment statutes.[147] Concerning the stalking-by-mail statute,[148] the court found the language—particularly with regard to the negligence standard and wide-ranging potential victim reactions—to be overbroad.[149] The court determined the scope and sweep of the statute was "substantial" and "tethered closely to speech or expressive conduct."[150] As to the second interpretive factor, the court recalled its prior finding that it is not enough for the offending speech itself to be illegal, but that the conduct related to the speech must be illegal.[151] In this case, the statute did not criminalize speech because it was connected to a criminal act; rather, "the statute criminalizes the communication itself . . . ."[152] Therefore, this finding indicated to the court that the statute prohibited protected speech. To the final element of substantiality, the court found that, while the statute covered both protected and unprotected speech, the proportion of protected speech was high enough to be considered "substantial."[153] The court stated that because of the "substantial ways in which subdivision 2(6) can prohibit and chill protected expression, we conclude that the statute facially violates the First Amendment overbreadth doctrine."[154]

The court also interpreted the mail-harassment statute[155] using dictionary definitions, but it said the terms must be used in context.[156] They also found that this statute required an intention "to cause a specific type of

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[147] *Id.* at 848–51, 857–59.

[148] MINN. STAT. § 609.749, subdiv. 2(b)(6) (2020).

[149] *A.J.B.*, 929 N.W.2d at 851 ("[The statute] criminalizes the mailing or delivery of any form of communication that an actor directs more than once at a specific person who the actor 'knows or has reason to know' would cause (after considering the victim's specific life circumstances) [and does cause] that person to feel 'frightened, threatened, oppressed, persecuted, or intimidated . . . .'") (quoting MINN. STAT. § 609.749, subdiv. 1).

[150] *Id.*

[151] *Id.* at 852 (citing State v. Melchert-Dinkel, 844 N.W.2d 13, 20 (Minn. 2014)); *see also id.* (citing Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1011 (2016)) ("It is not enough that the speech itself *be labeled* illegal conduct . . . Rather, it must help cause or threaten *other* illegal conduct . . . which may make restricting the speech a justifiable means of preventing that other conduct.").

[152] *Id.*

[153] *Id.* at 853.

[154] *Id.* at 856 (emphasis added).

[155] MINN. STAT. § 609.795, subdiv. 1(3) (2018) ("Whoever does any of the following is guilty of a misdemeanor . . . (3) with the intent to harass or intimidate another person, repeatedly mails or delivers or causes the delivery by any means, including electronically, of letters, telegrams, or packages . . . .").

[156] *A.J.B.*, 929 N.W.2d at 858 ("[The court must] keep[] in mind the context of the statute which is focused on the intent of the person sending and the reactions of the person receiving letters, telegrams, or packages.").

harm," but the victim need not suffer any actual harm.[157] For the second factor, the court decided statutorily that the proscribed speech was not independently related to criminal conduct.[158] Unlike the stalking-by-mail statute, this provision did not require the victim to suffer a tangible harm or experience actual abuse. The only requirement is that the actor intended the victim to suffer.[159] Third, the court similarly determined the amount of protected speech prohibited in the statute was substantial when compared with "the statute's plainly legitimate sweep."[160] It concluded the only legitimate purpose in prohibiting the mailing of an item with the intent to cause harm is to prevent said harm from happening.[161] Therefore, with no requirement for harm to actually occur, "the Legislature criminalized behavior, including substantial speech and expressive conduct, that will have no impact on the statute's legitimate purpose of preventing harm."[162]

After determining both statutes to be constitutionally overbroad, the Minnesota Supreme Court examined the potential to remedy the statutes by severing the problematic language.[163] The court determined the stalking-by-mail statute could not be saved, as severing the necessary language would disconnect the statute from its legislative intent[164] and render it "incapable of being executed."[165] On the contrary, the court found that the mail-harassment statute could be sufficiently narrowed by severing the overbroad language ("disturb, or cause distress"),[166] thereby saving the statute.[167]

Given the invalidation of the statute, the court reversed the lower court's decision regarding the stalking-by-mail verdict.[168] On the mail-harassment verdict, the court remanded the case to the juvenile court to be adjudicated under the redrawn statute.[169] Three justices dissented in part,

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[157] *Id.* at 858–59.
[158] *Id.* at 859.
[159] *Id.* at 858–59.
[160] *Id.* at 860.
[161] *Id.* at 861.
[162] *Id.*
[163] *Id.* at 856.
[164] *Id.* at 847 ("The Legislature's interest in protecting all Minnesotans, and particularly our more vulnerable neighbors, from such conduct is proper and serious.").
[165] *Id.* at 856 (citing State v. Hensel, 901 N.W.2d 166, 179 (2017) ("We cannot rewrite the statute to narrow it . . . . It would be 'inconsistent with the statute's text' . . . . We conclude that there are legitimate reasons to doubt that the Legislature would have enacted Minn. Stat. § 609.749, subd. 1, without the negligence standard.") (internal citations omitted).
[166] *Id.* at 857 (citing MINN. STAT. § 609.795, subdiv. 1(3), as original); *see also id.* at 863 (citing MINN. STAT. § 609.795, subdiv. 1(3), as amended).
[167] *Id.* at 863.
[168] *Id.* at 864.
[169] *Id.*

arguing the court had enough factual evidence from the juvenile court to affirm the decision, even under the newly narrowed statute.[170]

IV. ANALYSIS

A. The Overbreadth of A.J.B.

Under the free speech overbreadth doctrine, a litigant argues that a statute should be struck down because it could be applied unconstitutionally in certain hypothetical fact patterns and those situations substantially outweigh the number of potential constitutional applications.[171] Laws that encompass any (or too much) protected speech foster an environment ripe for complicated legal overbreadth challenges.[172] In *United States v. Williams*, the Court simplified this issue: "The [overbreadth] doctrine seeks to strike a balance between competing social costs."[173]

The Supreme Court's overbreadth doctrine is mirrored on the state level by the Minnesota Supreme Court's ruling in *A.J.B.*,[174] which exemplifies the doctrine's complexity. To determine the sweep of the Minnesota statutes, the court painstakingly defined the words central to the statutes: "stalking," "deliver," "repeatedly," "disturb," "distress," and "abuse."[175] These words can be viewed as legitimately protected speech, such as "delivering" letters to "disturb" an elected official.[176] At the same time, the court recognized there is no legitimate rationale for the word "abuse" to be swept into protected speech, commenting, "unlike the terms 'disturb' and 'distress,' the term 'abuse' is more narrowly cast and the injury intended

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[170] *Id.* at 865 (Chutich, J., concurring).

[171] Meier, *supra* note 51 at 131–32.

[172] Christopher A. Pierce, "*The Strong Medicine" of the Overbreadth Doctrine: When Statutory Exceptions are No More than a Placebo*, 64 FED. COM. L.J. 177, 182 (2011) (explaining the two purposes of the overbreadth doctrine: (1) to prevent the chilling of protected speech; and (2) to incentivize legislatures to tailor their statutes narrowly, so as not to face constitutional challenges).

[173] United States v. Williams, 553 U.S. 285, 292 (2008) (comparing the chill on free speech with the invalidation of constitutionally sound laws that protect individuals from "antisocial" conduct).

[174] *A.J.B.*, 929 N.W.2d at 847 ("[W]e tread carefully as we balance the constitutional demands of the First Amendment against society's interest in protecting Minnesotans' safety, health, and welfare.").

[175] *Id.* at 849, 858–59. It is important to read these definitions to understand the impact these words have, beyond the broad scope of the terms. *See, e.g.*, BLACK'S LAW DICTIONARY (11th ed. 2019) which defines "abuse" as "physical or mental maltreatment, often resulting in mental, emotional, sexual, or physical injury." This specificity exhibits the magnitude of harm as well as the reach of the conduct.

[176] *A.J.B.*, 929 N.W.2d at 853.

much more substantial."[177] Therein lies the precarious balancing act thrust upon the court.

In *Williams*, the Court provided specificity to the overbreadth doctrine and when a statute can be invalidated.[178] The Court stated, "[i]n order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[179] The Court reasoned that the competing social costs of the "free exchange of ideas" and conduct that is "so antisocial that it has been made criminal" must be weighed.[180]

The *A.J.B.* court seemed to employ a similar "substantiality" test when it asked, "Does the statute prohibit a 'substantial amount of constitutionally protected speech[?]'"[181] The court found that the Minnesota statute at issue contained both protected and unprotected expression, but the court had to determine which expression *substantially* tipped the scale.[182] The court reasoned that the terms used in the statute were broad enough that delivering a complaint letter meant to "cause distress" to a politician or businessperson would be criminalized, and this expression is protected.[183]

B. "Strong Medicine"

Courts recognize how drastic a measure it is to nullify or modify a statute, noting that "invalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'"[184] Therefore, consideration is often given to legislative intent when weighing free speech against statutory protections.[185] The Minnesota Legislature's clear intent in devising the

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[177] *Id.* at 863.
[178] *Williams*, 553 U.S. at 292.
[179] *Id.*
[180] *Id.*
[181] *A.J.B.*, 929 N.W.2d at 847 (quoting State v. Hensel, 901 N.W.2d 166, 171–72 (Minn. 2017)); *see also supra* Part IV.A (discussing the overbreadth doctrine).
[182] *A.J.B.*, 929 N.W.2d at 847.
[183] *Id.* at 862.
[184] *See* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) ("Application of the overbreadth doctrine . . . has been employed by the Court sparingly and only as a last resort."); *accord* State v. Turner, 864 N.W.2d 204, 207 (Minn. Ct. App. 2015) (quoting N.Y. Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 14 (1988)) ("Applying the overbreadth doctrine to invalidate a statute . . . is a 'strong medicine' that should be 'used sparingly and only as a last resort.'"). *See also Williams*, 553 U.S. at 293 (quoting Los Angeles Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 39 (1999)).
[185] *See* Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L. J. 427, 435 (2005) ("[L]aws are written in language and language can only be understood in context."); *see also* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) ("As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional

stalking-by-mail and mail harassment statutes was to protect the most vulnerable citizens from "bullying, stalking, and other forms of harassment."[186]

The *A.J.B.* court, however, preferred to guard against the chilling effect on speech that could result instead of upholding the spirit of and protections provided by the statutes.[187] It reasoned that to avoid a chilling effect, it must not expand exceptions to protected speech, despite what the Minnesota Legislature intended.[188] The court cited the Supreme Court's holding in *United States v. Stevens*: "'Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.'"[189] Notably, however, the *A.J.B.* court neglected to recognize the portion of the *Stevens* opinion—in the same paragraph—that (1) opened the door for future expansion of protected speech exceptions and (2) admonished the government's flawed process for doing so.[190] The *Stevens* Court stated: "We need not foreclose the future recognition of such additional categories [of speech outside the scope of the First Amendment] to reject the Government's highly manipulable balancing test as a means of identifying them."[191] The *A.J.B.* court could have used that rationale to widen the scope of protected exceptions.

The Minnesota Supreme Court examined the federal stalking statute for comparison to see if it could allow the Minnesota statute to stand.[192] The federal law penalizes whoever:

> with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that (A) places that person in reasonable fear of the death of or serious bodily injury to [the] person or a [family member]; or (B) causes, attempts to cause, or would be reasonably

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information rather than ignoring it. . . Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.") (citation omitted).

[186] *A.J.B.*, 929 N.W.2d at 847 (Minn. 2019).

[187] *Id.* at 855, 863.

[188] *Id.* at 851 ("[T]he Legislature cannot save a statute that is otherwise unconstitutionally overbroad by including language stating that the statute does not reach speech or expression protected by the First Amendment.").

[189] *Id.* at 846 (quoting United States v. Stevens, 559 U.S. 460, 472 (2010)).

[190] *Stevens*, 559 U.S. at 472.

[191] *Id.*

[192] *A.J.B.*, 929 N.W.2d at 855.

> expected to cause substantial emotional distress to [the] person [or a family member].[193]

When challenged, courts have ruled that the federal statute is not overbroad.[194] The Minnesota Supreme Court found that, unlike the federal statute, the state stalking statute did not require intent.[195] Therefore, the potential for the act occurring negligently could facilitate a chilling effect on speech.[196] The federal statute also required a higher burden regarding the victim's reaction to stalking than the state statute.[197]

The court did not work hard enough to maintain the protections provided by the stalking-by-mail statute using the federal statute as a guide.[198] The federal stalking statute only applies when a person acts with an "intent to kill, injure, harass, intimidate, or place under surveillance *with intent* to kill, injure, harass, or intimidate another person."[199] Given that the court understood the intent of the Minnesota Legislature to lean toward the protection and well-being of its citizens,[200] using the federal statute's "malicious intent" standard, it could have applied that standard to the Minnesota statute. This application would provide a narrower sweep of speech and create a higher burden while maintaining protections for children like M.B.

While the *A.J.B.* court said it was limited by the overbreadth doctrine and the substantial amount of non-protected speech in the statutes, it missed an opportunity to further criminalize A.J.B.'s actions and speech. In addition to A.J.B.'s speech qualifying as fighting words,[201] the court discounted *Williams*, which stated that obscene speech is not protected by the First Amendment when it "violates fundamental notions of decency[.]"[202]

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[193] *Id.* at 854 (citing 18 U.S.C. § 2261A(2) (2018)).

[194] *Id.*; *see, e.g.*, United States v. Ackell, 907 F.3d 67, 77 (1st Cir. 2018), *cert. denied*; United States v. Petrovic, 701 F.3d 849, 856 (8th Cir. 2012).

[195] *A.J.B.*, 929 N.W.2d at 855.

[196] *Compare* MINN. STAT. § 609.749, subdiv. 5(a) (2020) ("knows *or has reason to know*" the victim would be upset; no intent or knowledge that behavior will harm another person) *with* 18 U.S.C. § 2261A(1) (2018) (must have "intent to kill, injure, harass, intimidate, or place under surveillance . . . .") (emphasis added).

[197] *A.J.B.*, 929 N.W.2d at 855 (quoting 18 U.S.C. § 2261A(2)) ("The federal statute requires proof that a person's conduct placed the victim or the victim's family member in 'reasonable fear of [] death [] or serious bodily injury' or 'causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress' to the victim or a family member of the victim.").

[198] *See* United States v. Williams, 553 U.S. 285, 307 (2008) (Stevens, J. concurring) (quoting Hooper v. California, 155 U.S. 648, 657 (1895) "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."); *see also* 18 U.S.C. § 2261A(2) (federal stalking statute).

[199] 18 U.S.C. § 2261A(1) (emphasis added).

[200] *A.J.B.*, 929 N.W.2d at 861.

[201] *Supra* Part II.C.3.

[202] *Williams*, 553 U.S. at 288.

So, too, should speech such as A.J.B.'s be unprotected as it was indisputably and fundamentally indecent.[203]

Early in its *A.J.B.* analysis, the Minnesota Supreme Court acknowledged that, while the legislature must craft legislation in step with the First Amendment, protecting Minnesota's most vulnerable citizens from harassment is simultaneously "proper and serious."[204] In fact, the dissenting opinion felt so certain about A.J.B.'s motivation to "abuse" M.B. that it did not see the need to remand the case back to the juvenile court and was prepared to affirm the delinquency disposition.[205] Justice Chutich felt that there was no doubt that A.J.B. "specifically intended to *abuse* M.B." and that there was "overwhelming evidence of A.J.B.'s abusive tweets, threatening violence, encouraging suicide, and otherwise demeaning and harassing a vulnerable M.B."[206] Given the undisputed facts, the court did not need to remand the case back to juvenile court. The court could also have noted that A.J.B.'s expression was not, by its nature and intention, protected. Instead, the court chose to dispense its "medicine" sparingly.

C. Speech as Conduct

Speech we simply do not like or agree with, or even speech that offends, should undoubtedly be protected.[207] However, when a person is left vulnerable to dangerous, harmful conduct hiding behind the shield of First Amendment speech security, we must examine which protection should receive priority.

There is federal precedent for treating expression as conduct and weighing that freedom with emotional injury: the Supreme Court overturned *Plessy v. Ferguson* in part because of the psychological harm inflicted on children of color due to the conduct manifesting as an expression of segregationist ideas.[208] In *Plessy*, the Court considered the harm "separate but equal" legislation caused the plaintiffs to be a "fallacy,"

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[203] *See* Elizabeth H. Steele, *Examining the FCC's Indecency Regulations in Light of Today's Technology*, 63 FED. COMM. L.J. 289, 295 (2010) (The FCC deemed indecent language "that which is 'patently offensive by contemporary community standards; and . . . utterly without redeeming social value.'"). It would be difficult to argue that A.J.B.'s words did not fit this definition of "indecent."

[204] *A.J.B.*, 929 N.W.2d at 847.

[205] *Id.* at 867 (Chutich, J., concurring).

[206] *Id.*

[207] *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (stating that the best remedy for speech with which we disagree or find offensive is not censorship of that speech but more speech).

[208] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

existing only because the plaintiffs chose to feel inferior.[209] The *Brown* Court disagreed,[210] articulating that segregation expresses the denigration of African-American children.[211] *Brown* saw that, under the cover of First Amendment protection, public welfare was being harmed precisely because the "expression" of segregation had "the sanction of the law[.]"[212] "Separate but equal" as an idea "has no place," said the *Brown* Court, despite being an expression of an idea.[213]

A justiciable argument persists over whether speech is barred from First Amendment protection when it is, in effect, conduct.[214] Noted cases about the right to burn the U.S. flag or protest government involvement in a war show the Court's interest in protecting conduct-related expression.[215] But what about statements that, by their nature, are effectively illegal conduct—which conduct is covered by applicable and prohibitive laws? For example, publishing a book that intentionally explains how to commit a crime may constitute aiding and abetting the described crime.[216] The *Rice* court explains: "[W]hile even speech advocating lawlessness has long enjoyed protections under the First Amendment, it is equally well established that speech which, in its effect, is tantamount to legitimately proscribable non-expressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes."[217] Plainly, a law prohibiting certain conduct may be applicable to speech that produces the effect of such illegal conduct.[218]

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[209] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

[210] *Brown*, 347 U.S. at 494–95 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [of the harm from segregation] is amply supported by modern authority. Any language . . . contrary to this finding is rejected.").

[211] *Id.* at 494 ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children.").

[212] *Id.*

[213] *Id.* at 495.

[214] *See* Texas v. Johnson, 491 U.S. 397, 399, 418 (1989); *see also* Tinker v. Des Moines, 393 U.S. 503, 514 (1969).

[215] *Johnson*, 491 U.S. at 399, 418; *see also Tinker*, 393 U.S. at 514.

[216] *See* Rice v. Paladin Enters., 128 F.3d 233, 267 (4th Cir. 1997); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 837 (2d ed. 1988) ("[T]he law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.").

[217] *Rice*, 128 F.3d at 243.

[218] *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (analogizing that if the press conducts the illegal act of publishing copyrighted material, it is not immune from prosecution simply because the press has general First Amendment protection); *accord* Associated Press v. Nat'l Lab. Rels. Bd., 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws.").

Further illustrating the point that speech may qualify as illegal conduct, the Supreme Court in *R.A.V. v. St. Paul* provided that there is no First Amendment conflict when speech is imperiled because of generally relevant laws.[219] The Court applied this reasoning only to speech that already falls within existing First Amendment exceptions, like fighting words,[220] and the *A.J.B.* court seemed to agree.[221] However, included among the *R.A.V.* Court's listed exceptions is "'speech integral to criminal conduct.'"[222] This would seem to bolster the *Rice* court's holding that speech producing the effect of illegal conduct *is* a permissible exception to First Amendment protection.[223] Nonetheless, the *A.J.B.* court prioritized "balance" in its analysis and chose to "tread carefully," ultimately finding that only historically sanctioned exceptions may apply.[224] Despite the existence of a criminal federal stalking and harassment statute[225] and consideration of the detrimental effects such conduct has on citizens, the Minnesota Supreme Court did not consider either to be "speech integral to criminal conduct," at least not enough to reverse the lower court's decision.[226]

The *A.J.B.* court used *Broadrick v. Oklahoma* broadly to determine whether the Minnesota statutes prohibited a substantial amount of speech,[227] but ignored *Broadrick*'s reasoning that the potential for chilling future speech is not the priority when public safety is threatened by conduct masquerading as speech.[228] Arguably, in *A.J.B.*, the defendant's cruel words were "true threats," which, acting as conduct, are not protected by the First Amendment.[229] M.B. is an individual diagnosed with autism—a fact known

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[219] R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992) (The government may sweep up speech "incidentally within the reach of a statute directed at conduct rather than speech.").

[220] *Id.*; *see also id.* at 382 (explaining that the Court has "narrowed the scope of the traditional categorical exceptions" from First Amendment protections since the 1960s).

[221] *In re* Welfare of A.J.B., 929 N.W.2d 840, 846 (Minn. 2019). The court, citing *United States v. Stevens*, reasons that while "[t]here is a point where First Amendment protections end and government regulation of speech or expressive conduct becomes permissible[,]" there are limited, generally recognized exceptions, further noting that new exceptions should not be considered lightly. (quotation at 559 U.S. 460, 472 (2010)).

[222] *Id.*

[223] *See* Rice v. Paladin Enters., 128 F.3d 233, 267 (4th Cir. 1997).

[224] *A.J.B.*, 929 N.W.2d at 847.

[225] 18 U.S.C. § 2261A(2) (2018).

[226] *A.J.B.*, 929 N.W.2d at 864.

[227] *Id.* at 852.

[228] Broadrick v. Oklahoma, 413 U.S. 601, 618 (1973).

[229] *See* Virginia v. Black, 538 U.S. 343, 344 (2003) ("[T]he First Amendment . . . permits a State to ban 'true threats,' which encompass those 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.") (internal citation omitted); *see also* R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992) (Threats of violence are First Amendment exceptions to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.").

and exploited by A.J.B.[230] Given A.J.B.'s threats and hateful words, M.B. feared being attacked if he returned to school.[231]

The *A.J.B.* court further elucidated the concept of speech as conduct when it noted that it is not enough to label speech alone as illegal, but the conduct related to that speech must also be illegal.[232] A.J.B.'s speech included repeatedly encouraging M.B. to commit suicide.[233] In its opinion, the court references *State v. Melchert-Dinkel*, which held that expressive language or action encouraging a person to commit suicide is protected because the act of suicide itself is *not* illegal.[234] Given, however, that Minnesota law *does* criminalize such behavior,[235] the *A.J.B.* court's reliance on *Melchert-Dinkel*[236] is perplexing.

D. The Value of Chilling Speech

A law that allegedly targets or deters free speech and expression is said to have a "chilling effect."[237] Given the limited exceptions discussed above and the judiciary's hesitance to expand them, statutes that chill speech are frequently challenged and struck down as overbroad.[238] Because such latitude protects hate speech and, debatably, resultant conduct, one might question whether this bedrock protection does more harm than good.

Brandenburg v. Ohio demonstrated that hate speech is protected under the First Amendment.[239] According to the Court, even speech that advocates violence is protected, so long as it is not likely to produce "imminent lawless action."[240] The Ku Klux Klan is "the oldest and most infamous of American hate groups,"[241] yet *Brandenburg* prioritized those individuals' hateful words and their incitement of others to commit violent

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[230] *A.J.B.*, 929 N.W.2d at 845 ("One tweet contained a checkerboard of images with M.B.'s face and a caption reading, 'Click the Autistic Child.'").
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.* (quoting Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception,* 101 CORNELL L. REV. 981, 1011 (2016) ("It is not enough that the speech itself *be labeled* illegal conduct . . . . Rather, it must help cause or threaten *other* illegal conduct . . . which may make restricting the speech a justifiable means of preventing that other conduct.").
[235] MINN. STAT. § 609.215, subdiv. 1 (2020) (stating that "Whoever intentionally advises, encourages, or assists another in taking the other's own life may be sentenced to imprisonment for not more than 15 years or to payment of a fine of not more than $30,000, or both" including aiding attempted suicide).
[236] *A.J.B.*, 929 N.W.2d at 852.
[237] *See* Jennifer M. Kinsley, *Chill*, 48 LOY. U. CHI. L.J. 253, 255 (2016).
[238] *See supra* Part II (C).
[239] 395 U.S. 444, 449 (1969).
[240] *Id.* at 447.
[241] *Ku Klux Klan*, SOUTHERN POVERTY LAW CENTER, https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan [https://perma.cc/F4Y6-DMT3].

acts[242] over the negative effects their words no doubt cast on others.[243] However, John Powell, who represented the Ku Klux Klan when he was the national legal director of the ACLU, now questions how much weight is given to free speech over equality: "[w]hat if we weighed the two as conflicting values, instead of this false formalism where the right to speech is recognized but the harm caused by that speech is not?"[244] This is the challenge of the Minnesota Supreme Court's decision in *A.J.B.* Powell exemplifies the thesis of this Paper when he ponders, "'We need to protect the rights of speakers . . . but what about protecting everyone else?'"[245] M.B.'s right to live free from harassment and bullying was not prioritized.

The balance between freedom of speech and freedom from speech is historically complex and contestable, even for seasoned justices.[246] In a more modern context, this balance is no easier to achieve. In 2019, the conviction of three members of the white supremacist "Rise Above Movement" was overturned by a federal judge, citing the overbreadth doctrine, despite the speech in question causing riots and physical attacks.[247] Yet, across the country, another federal judge reached the opposite conclusion in a similar case involving different members of the same hate group.[248] This issue may soon be in front of the Supreme Court to reconcile the contradictory verdicts.[249]

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[242] *Brandenburg*, 395 U.S. at 448.

[243] *See, e.g.*, Brian Mullen & Joshua M. Smyth, *Immigrant Suicide Rates as a Function of Ethnophaulisms: Hate Speech Predicts Death*, 66 PSYCHOSOMATIC MED. 343, 343 (2004) (correlating increased suicide rates among victims of hate speech).

[244] Andrew Marantz, *How Social-Media Trolls Turned U.C. Berkeley Into A Free Speech Circus*, NEW YORKER (June 25, 2018), https://www.newyorker.com/magazine/2018/07/02/how-social-media-trolls-turned-uc-berkeley-into-a-free-speech-circus [https://perma.cc/GJJ2-D94J].

[245] Andrew Marantz, *Free Speech is Killing Us*, N.Y. TIMES (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html [https://perma.cc/3XEU-83YC].

[246] *Brandenburg*, 395 U.S. at 452 (citing Gitlow v. New York, 268 U.S. 652, 673 (1925)) (quoting Holmes, J., dissenting) ("'If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way' . . . . We have never been faithful to the philosophy of that dissent.").

[247] Brian Melley, *Judge: White Supremacist Group's Actions Protected by Free Speech*, CHRISTIAN SCI. MONITOR (June 5, 2019), https://www.csmonitor.com/USA/Justice/2019/0605/Judge-White-supremacist-group-s-actions-protected-by-free-speech [https://perma.cc/V93W-XYPM].

[248] *Id.*

[249] *Id.*

While the intention of the Framers regarding the First Amendment is unclear,[250] surely it was closer to the protection of a citizen's expression of a particular fact or idea, not to aid and abet harassment and bullying.[251] This position is epitomized in *Morse v. Frederick*, which held that schools are entitled to take steps to safeguard their students from speech encouraging illegal drug use.[252] The Court compared its earlier and contrary ruling in *Tinker* (upholding free expression in a school environment) with that in *Morse*, arguing that the interest in deterring drug use by schoolchildren greatly outweighs that of free speech protections: "The First Amendment does not require schools to tolerate[,] at school events[,] student expression that contributes to [the] dangers [of illegal drug use]."[253] The *A.J.B.* decision should have been no different with regard to the well-being and safety of a child outweighing another's freedom of speech.

V. CURRENT TRENDS

A. The Wild, Wild Internet

In *Reno v. American Civil Liberties Union*, the Supreme Court held that government regulation of speech communicated via the internet was unconstitutional.[254] The Court even applied this reasoning to one traditionally allowable exception: "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults."[255] The Court affirmed the lower court's ruling that First Amendment protections should not be qualified because "the content on the Internet is as diverse as human thought."[256] Of all outlets for speech, *Reno* provided the First Amendment its broadest sanctuary in the realm of the internet.

It is possible, however, that the Court's prior understanding of the internet may no longer be reasonable.[257] The *Reno* decision occurred in 1997 when the internet was just starting to boom. Google, Facebook, and

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[250] Jud Campbell, *What did the First Amendment Originally Mean?*, RICH. L. (July 9, 2018), https://lawmagazine.richmond.edu/features/article/-/15500/what-did-the-first-amendment-originally-mean.html [https://perma.cc/B67F-A69W].

[251] *See* discussion *supra* Part II.A.

[252] Morse v. Frederick, 551 U.S. 393, 410 (2007).

[253] *Id.*

[254] Reno v. ACLU, 521 U.S. 844, 885 (1997) ("[G]overnmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.").

[255] *Id.* at 875 (internal citations omitted).

[256] *Id.* at 870 (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

[257] *See* Marantz, *supra* note 244 (statement of University of California Berkeley Chancellor, Carol Christ) ("Speech is fundamentally different in the digital context . . . . I don't think the law, or the country, has even started to catch up with that yet.").

Twitter did not yet exist.[258] Since then, we have seen the consequences of free speech metastasizing into hateful, violent conduct. A prime example is Heather Heyer's death at the "Unite the Right" rally.[259] Her horrific death is an oft-shared directive on social media.[260] The internet is full of posts encouraging individuals to vehicularly run down civilians with different ideas than their own.[261] "Run them over" is a popular catchphrase on social media.[262] This kind of speech, rampant on the internet, is tantamount to placing a weapon in someone's hands and encouraging them to commit a crime.[263]

The Southern Poverty Law Center ("SPLC") studied the dangerous trajectory from idea to action, finding hate sites to be a common denominator for an increase in white nationalist attacks.[264] In a speech about hate speech on the internet before the United Nations High Commission on Human Rights, Mark Potok, editor of the SPLC magazine *Intelligence Report*, explains:

> The Net gives racists unprecedented access to . . . teens[] who live in their parents' homes and have computers in their bedrooms . . . [and] wouldn't be caught dead at a Klan rally . . . . The Net, with its promise of privacy, lowers any social inhibitions they might have had about consorting openly with racists and other haters. Where these teens would likely have met social disapproval if they expressed anti-Semitic or racist ideas at home or in school, they are

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[258] William Craig, *The History of the Internet in a Nutshell*, WEBFX (Nov. 15, 2009), https://www.webfx.com/blog/web-design/the-history-of-the-internet-in-a-nutshell/ [https://perma.cc/X5M4-CNPK].

[259] Maev Kennedy, *Heather Heyer, Victim of Charlottesville Car Attack, was Civil Rights Activist*, THE GUARDIAN (Aug. 13, 2017), https://www.theguardian.com/us-news/2017/aug/13/woman-killed-at-white-supremacist-rally-in-charlottesville-named [https://perma.cc/758D-HQ2V].

[260] *See* Henry Grabar, "*Run Them Down": Driving into Crowds of Protesters was a Right-Wing Fantasy Long Before the Violence in Charlottesville*, SLATE (Aug. 14, 2017), https://slate.com/business/2017/08/driving-into-crowds-of-protesters-was-a-right-wing-fantasy-long-before-charlottesville.html [https://perma.cc/44XN-X9L5].

[261] *Id.*

[262] *Id.*

[263] *See* Lind, *supra* note 76. The ACLU took a position on physical weapons at rallies but continues to support speech that is a *de facto* weapon. Was the hate speech and incitement to violence on alt-right and white supremacist websites the same as an actual gun? *Id.*

[264] Heidi Beirich, *White Homicide Worldwide*, S. POVERTY L. CTR. (Apr. 1, 2014), https://www.splcenter.org/20140331/white-homicide-worldwide [https://perma.cc/V6DY-53XF]. Since the white supremacist website "Stormfront" went live in 1995, its registered users have been disproportionately responsible for deadly hate crimes. *Id.*

> able to propound such ideas over the Internet in a welcoming environment.[265]

Since that speech, internet-related hate speech-turned-violent dominates headlines.[266] In 2012, a white supremacist posted in online hate groups right before he murdered six people at a Sikh temple in Wisconsin.[267] A man murdered nine people at a Black church in South Carolina in 2015 after being radicalized online.[268] In 2018, after being active on a white supremacist social media site, a man murdered eleven people at a Pennsylvania synagogue.[269]

Perhaps courts are hesitant to regulate the internet, generally, because it serves as a virtual town square, allowing a free exchange of (often competing) ideas.[270] It has also been suggested that social media sites are platforms, not publishers, open to both producers and consumers.[271] Also, comparisons to authoritarian governments that heavily regulate the internet are undesirable.[272]

The *A.J.B.* court, nonetheless, agreed with *Reno* that First Amendment protections are not relinquished just because speech or expressive conduct occurs on the internet.[273] It quotes the Court, saying: "There is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to online speech."[274] Assuming this reasoning is sound, it should work both ways: if publishing a physical manual on how to commit a specific crime is *unprotected*, criminally actionable speech,[275] so, too, should that parity extend to analogous expression on the internet. While a two-tiered system of First Amendment protections would, indeed, be inadvisable, the totality of First Amendment freedoms *and* consequences must be applied equally.

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[265] *Internet Hate and the Law*, INTELLIGENCE REPORT (Mar. 15, 2000), https://www.splcenter.org/fighting-hate/intelligence-report/2000/internet-hate-and-law [https://perma.cc/VGE3-BXRB] (highlights from spoken remarks).

[266] Rachel Hatzipanagos, *How Online Hate Turns into Real-Life Violence*, WASH. POST (Nov. 30, 2018), https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/ [https://perma.cc/U4PC-4RJZ].

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] Elijah Hack, *The Marketplace of Twitter: Social Media and the Public Forum Doctrine*, 88 U. CIN. L. REV. 313, 315 (2019).

[271] Jeff Jarvis, *Platforms Are Not Publishers*, THE ATLANTIC (Aug. 10, 2018), https://www.theatlantic.com/ideas/archive/2018/08/the-messy-democratizing-beauty-of-the-internet/567194/ [https://perma.cc/W7DP-P6VE].

[272] Jyh-An Lee, Ching-Yi Liu & Weiping Li, *Searching for Internet Freedom in China: A Case Study on Google's China Experience*, 31 CARDOZO ARTS & ENT. L.J. 405, 406 (2013).

[273] *In re* Welfare of A.J.B., 929 N.W.2d 840, 846 (Minn. 2019).

[274] *Id.* (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)).

[275] TRIBE, *supra* note 216, at 837.

B. Constitutionality vs. Compassion

Free speech is considered a core value in the United States, but it is not the only core value. University of California professor Judith Butler explained the cost of prioritizing ideas over humanity:

> I suppose we are being asked to understand that we will, in the name of freedom of speech, willingly allow our environment to be suffused with hatred, threats, and violence, that we will see the values we teach and to which we adhere destroyed by our commitment to free speech . . . .[276]

Two prominent and unfortunate cases exemplify this concept. First, in *Virginia v. Black*, the Court held that the First Amendment did not permit the government to impose special prohibitions on speakers who express views on disfavored subjects.[277] Cross-burning on the lawn of an African American family, it stated, was intimidating but protected speech.[278] With a surprise dissent, however, Justice Thomas (stalwart defender of First Amendment protections for most of his tenure on the Supreme Court) expressed not only his displeasure with the opinion, but suggested that cross burning was so damaging that the Court should expand its limited exceptions to include the practice,[279] saying, "those who hate cannot terrorize and intimidate to make their point."[280]

Then, in *Snyder v. Phelps*, the Court held that picketing a military funeral is constitutional; no matter how offensive, outrageous, or upsetting, free speech trumps emotional distress.[281] Similar to the Thomas dissent in *Black*, Justice Alito was the surprise dissenter in *Snyder*, falling on the side of compassion over freedom: "[o]ur profound national commitment to free

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[276] Conor Friedersdorf, *Judith Butler Overestimates the Power of Hateful Speech*, THE ATLANTIC (Dec. 12, 2017), https://www.theatlantic.com/politics/archive/2017/12/judith-butler-on-the-power-of-hateful-speech/548138/ [https://perma.cc/7RH2-NLWY]; *see also* Marantz, *supra* note 244 (quoting Butler) ("We should perhaps frankly admit that we have agreed in advance to have our community sundered, racial and sexual minorities demeaned, the dignity of trans people denied, that we are, in effect, willing to be wrecked by this principle of free speech.").

[277] Virginia v. Black, 538 U.S. 343, 347–48 (2003).

[278] *Id.* at 363 (O'Connor, J. writing for the majority: "[a State may prohibit] only those forms of intimidation that are most likely to inspire fear of bodily harm.").

[279] *Id.* at 388 (Thomas, J. dissenting) (arguing that certain First Amendment exceptions should be allowable).

[280] *Id.* at 394.

[281] Snyder v. Phelps, 562 U.S. 443, 458 (2011) ("[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.") (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

and open debate is not a license for the vicious verbal assault that occurred in this case."[282]

In 2019, ACLU's John Powell highlighted the need to protect speech, but not to the exclusion of morality: "Racists should have rights . . . . I also know, being black and having black relatives, what it means to have a cross burned on your lawn. It makes no sense for the law to be concerned about one and ignore the other."[283]

C. In the Absence of Government

In the gaps left by legislators and the courts, private actors have stepped in, protecting human rights while their leaders are silent. After *Snyder,* counterprotests shielded military funerals from the hate-filled sights and sounds of the Westboro Baptist Church ("WBC"). In 2012, hundreds of Texas A&M students gathered to create a human wall around the funeral service for a soldier, blocking the WBC members from view.[284] Student organizer Elyssa DeCaprio said, "[WBC's] message is just one of pure hate, and it's not something we want people to listen to."[285] Even the ACLU, which has defended the WBC,[286] in 2018 changed its guidelines governing case selection to take the content and effect of speech into consideration, and not just the fact that it *is* speech, generally.[287]

Recently, social media companies stepped in to regulate harmful speech on the internet, countering *Reno*'s assertion that anything goes. Facebook and Instagram banned the far-right collective called "the Proud

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[282] *Id.* at 463.

[283] Marantz, *supra* note 245.

[284] Katie Notopolous, *Texas A&M Students Block Westboro Baptist Protesters with Human Wall*, BUZZFEED (Aug. 23, 2020), https://www.buzzfeed.com/katienotopoulos/texas-am-students-block-westboro-baptist-prot [https://perma.cc/3A7V-F8UA].

[285] Dan Solomon, *Texas A&M Students Shouted Down a Westboro Baptist Church Demonstration With Yell Practice*, TEX. MONTHLY (Nov. 12, 2014), https://www.texasmonthly.com/the-daily-post/texas-am-students-shouted-down-a-westboro-baptist-church-demonstration-with-yell-practice/ [https://perma.cc/AHK6-U2BJ].

[286] *See* Chris Hampton, *Why Fred Phelps's Free Speech Rights Should Matter to Us All*, ACLU BLOG (Oct. 7, 2010), https://www.aclu.org/blog/free-speech/rights-protesters/why-fred-phelpss-free-speech-rights-should-matter-us-all [https://perma.cc/D7KS-53P9].

[287] Wendy Kaminer, *The ACLU Retreats from Free Expression*, WALL ST. J. (June 20, 2018), https://www.wsj.com/articles/the-aclu-retreats-from-free-expression-1529533065 [https://perma.cc/SCF3-G4E8] ("Speech that denigrates [marginalized] groups can inflict serious harms and is intended to and often will impede progress toward equality.").

Boys,"[288] which was designated as a hate group by the SPLC.[289] Similar to the in-person WBC counterprotests, social media users attempted to drown out the online visibility of the hate group by posting images of LGBTQ love with the hashtag "#ProudBoys,"[290] essentially enacting a virtual "heckler's veto."[291] In 2020, YouTube announced it was updating its hate-speech and harassment policies to prohibit "content that targets an individual or group with conspiracy theories that have been used to justify real-world violence."[292] It is heartening to know that private actors will fill the gaps left by the government when it comes to protecting their neighbors.

D. Overcorrection

It is arguable that private actions referenced above overstepped when it comes to protecting the emotional lives of our neighbors. "Cancel culture" refers to the recent phenomenon of fervent public criticism of a person, business, movement, or idea.[293] There is often an element of shaming or boycotting a business.[294] Adding irony to insult, there is now a vicious cycle of canceling speech that cancels speech.[295] One wonders if society is chasing its tail when it comes to freedom of speech.

Boycotting a product or company based on its ideas is a perfectly legal means of persuasion (one might even say coercion). The same goes for speaking out against celebrities who espouse unpopular or hurtful views. When J.K. Rowling gave her opinion of transgendered women, there was

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[288] Dade Hayes, *Proud Boys Banned from Facebook in Effort to Rein in Hate Groups*, DEADLINE (Oct. 31, 2018), https://deadline.com/2018/10/proud-boys-gavin-mcinnes-banned-facebook-effort-to-rein-in-hate-groups-1202492920/ [https://perma.cc/6YCG-N466].

[289] *Proud Boys*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys [https://perma.cc/5KYB-HSTA].

[290] April Siese, *Twitter Users Take Over Proud Boys Hashtag with Photos of LGBTQ Love*, CBS NEWS (Oct. 5, 2020), https://www.cbsnews.com/news/proud-boys-twitter-hashtag-photos-lgbtq-love/ [https://perma.cc/8FFS-F6TC].

[291] The term "heckler's veto" is used when a heckler shouts down or boos a speaker, preventing the speaker from being heard. The heckler's speech is constitutionally unprotected. *See generally* Brown v. Louisiana, 383 U.S. 131 (1966).

[292] The YouTube Team, *Managing Harmful Conspiracy Theories on YouTube*, YOUTUBE OFF. BLOG (Oct. 15, 2020), https://blog.youtube/news-and-events/harmful-conspiracy-theories-youtube [https://perma.cc/89CY-N7LD].

[293] Katie Camero, *What is 'Cancel Culture'? J.K. Rowling Controversy Leaves Writers, Scholars Debating*, MIAMI HERALD (July 8, 2020), https://www.miamiherald.com/news/nation-world/national/article244082037.html [https://perma.cc/4FPA-PDPR].

[294] *Id.*

[295] Abby Gardner, *A Complete Breakdown of the J.K. Rowling Transgender-Comments Controversy*, GLAMOUR (Oct. 12, 2020), https://www.glamour.com/story/a-complete-breakdown-of-the-jk-rowling-transgender-comments-controversy [https://perma.cc/2GWW-NKPM].

an instant backlash.[296] Fans and co-workers felt that Rowling's comments were hurtful and, given her platform, she should refrain from any similar statements.[297] Instead, Rowling and more than one-hundred-fifty other well-known signatories published an open letter in *Harper's Magazine* arguing that the recent stifling of free speech is creating an "intolerant climate" within society.[298] In other words, it was a backlash about the backlash. Put another way, people told Rowling she should curtail her speech, to which Rowling, et al., responded that their detractors should curtail their speech about curtailing speech.[299] The circularity continued: three days later, a group of more than 150 well-known signatories published an open letter against that open letter.[300] They wrote that the *Harper's* letter was written primarily by representatives of non-marginalized groups who already have highly-visible platforms, out of a fear of "being silenced, that so-called cancel culture is out of control, [] fear for their jobs and free exchange of ideas, even as they speak from one of the most prestigious magazines in the country."[301] So, Group D censors Group C for censoring Group B for censoring Group A. Perhaps this is an illustration of the dreaded slippery slope.[302] Perhaps the *A.J.B.* court prescribed the right dosage of "medicine," avoiding an overdose.

E. In the Shadow of A.J.B.

In 2020, another challenge to an overbroad statute involving threatening behavior reached the Minnesota Supreme Court.[303] The court did not change its opinion, nor its priorities: "'The right of free expression is as important to many people in their personal and institutional relationships as it is in the narrower "civil liberties" related to politics . . . .'"[304] In *State v. Peterson*, the Minnesota Court of Appeals again ruled against the Minnesota Legislature, finding a stalking-by-telephone statute overbroad.[305] The court cited *A.J.B.* to justify its reasoning that, as in the stalking-by-mail statute, this provision "'can prohibit and chill protected

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[296] *Id.*
[297] *Id.*
[298] *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), https://harpers.org/a-letter-on-justice-and-open-debate/ [https://perma.cc/SL4Y-PCJB].
[299] *See id.*
[300] *A More Specific Letter on Justice and Open Debate*, THE OBJECTIVE (July 10, 2020), https://theobjective.substack.com/p/a-more-specific-letter-on-justice [https://perma.cc/6M6M-WZ2C].
[301] *Id.*
[302] *See* Dershowitz, *supra* note 98 and accompanying text.
[303] State v. Jorgenson, 946 N.W.2d 596 (Minn. 2020).
[304] *Id.* at 605 (citing State v. Robertson, 649 P.2d 569, 589 (Or. 1982)).
[305] State v. Peterson, 936 N.W.2d 912, 923 (Minn. Ct. App. 2019).

expression'" and was thus overbroad, despite the Appellant's repeated, harassing behavior.[306]

In direct juxtaposition to the *A.J.B.* court's jurisprudence regarding free speech versus suicide encouragement[307] is *Commonwealth v. Carter*, wherein the Massachusetts Supreme Court upheld the involuntary manslaughter conviction of a minor for the death of her friend after verbally encouraging him to commit suicide.[308] The *Carter* decision can be viewed as a curtailment of a constitutionally guaranteed freedom. However, it is possible that, in doing so, it prevented future loss of innocent life. Both *Melchert-Dinkel* and *A.J.B.*, while differing on their interpretations of the legality of coerced suicide, protected speech-as-conduct more absolutely than *Carter*.

VI. CONCLUSION

Mr. Powell has an answer—or, at least, an analogy—for the challenging balance of breadth: he compared harmful speech to carbon pollution.[309] It is, indeed, legal to drive a car, but doing so, unfettered, will hasten climate catastrophe. However, the government can regulate greenhouse emissions, private actors can commit to renewable energy sources, and civic groups can promote public transportation alternatives.[310] If not, Powell warns, "[e]veryone should be allowed to drive a car and that's that. But doing so wouldn't stop the waters from rising around us."[311]

As for *A.J.B.*, the Minnesota Supreme Court understood that to claim a statute is overbroad, a balance must be achieved between upholding the constitutional right to free expression and the negative societal result if no limits are in place. However, the court turned a blind eye to the Supreme Court's *Chaplinsky* ruling that highlighted the importance of limiting speech "which by [its] very utterance inflict[s] injury."[312] By ignoring cases like *Chaplinsky*, the expulsion of the stalking-by-mail statute and the drastic narrowing of the mail harassment statute were missed opportunities to add an exception to First Amendment protections by rendering the hateful, dangerous speech demonstrated in *A.J.B.* legally intolerable. While professing to prioritize constitutional equilibrium, the scales tipped appreciably away from personal security in favor of free speech.

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[306] *Id.* at 921.
[307] *In re* Welfare of A.J.B., 929 N.W.2d 840, 845 (Minn. 2019).
[308] Commonwealth v. Carter, 115 N.E.3d 559, 559 (Mass. 2019).
[309] Marantz, *supra* note 245.
[310] *Id.*
[311] *Id.*
[312] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

We end as we began, with Justice Holmes. In 1919, the venerable jurist stated: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[313] Nearly one-hundred years later, we are no closer to an invariable answer to that question.[314] Clearly, the past remains prologue, as the free speech argument continues to vacillate, upholding the tension necessary to maintain its tenuous balance.

[313] Schenck v. United States, 249 U.S. 47, 52 (1919).
[314] Lind, *supra* note 76 ("[W]hether the best way to protect the powerless is to stand against the principles that could be used to crush them.").

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