California Western Law Review

Volume 48
Number 2 *LatCrit XVI Symposium - Global Justice: Theories, Histories, Futures*

Article 9

2012

(Re)complexioning a Simple Tale: Race, Speech, and Colored Leadership

Angela Mae Kupenda
Mississippi College

(RE)COMPLEXIONING A SIMPLE TALE: RACE, SPEECH, AND COLORED LEADERSHIP

ANGELA MAE KUPENDA*

INTRODUCTION

In the initial plenary session of LatCrit XVI, several speakers discussed the borderlands and the desolation in these areas. The borderlands have expanded as negative reactions to the increasing number of people of color seeking access to both the geographical spaces of what is America and the power spaces of who is America. Increases of colored people include voting citizens of color with their assertions of political voice and power, pose a threat to the past dominant whiter, ruling complexion of America.

As America's complexion naturally darkens and the potential impact of this darkening is noted, the borderlands become locations for some White, tenuously privileged citizens, to push back against this natural coloring of what it means to be an American. This struggle ensues to prevent the darkening or the natural coloring of America's complexion. Even the law has played a role in this pushback, as a bleaching agent of sorts to whiten the law, especially after the law shifts to follow the natural darkening of America's color.

This Essay argues for a different role for the law. Rather than acting as a whitening agent, the law should reflect the natural (re)complexioning of society and adapt to the melting pot that is America. The term "(re)complexioning" is used because the idea that the complexion of America was white at the beginning is false. Prior

* Professor of Law, Mississippi College School of Law. I want to thank my home institution for the scholarship grants, pre and post publication, that support faculty work. I also want to thank LatCrit and the participants at the conference who gave very helpful feedback on my presentation. LatCrit provides a community where we can explore ideas, plan activism, and be encouraged in our advocacy in a safe and collegial environment. An earlier draft of this article was also included for presentation at the Association for African American Historical Research and Preservation 2011 Black History Conference in Seattle, Washington.

to the "discovery" of America, native citizens were indeed more deeply complexioned than Whites. Any (re)complexioning of the law since, to reflect the colors of America, then, is just to resort to the recognition of factual premises unjustly rejected when America was usurped from those of color and denied to others of color after they themselves were usurped from their homelands.

To explain the necessary (re)complexioning of the law urged here, this Essay will be divided into three parts. Part I summarizes the law as a bleaching agent. Part II briefly summarizes the role of the law for (re)complexioning. Finally, Part III examines the unique application of this (re)complexioning in First Amendment jurisprudence as is urged in this Essay.

I. THE LAW AS A BLEACHING AGENT

Following the initial LatCrit plenary, one attendee during the question and comment session emphasized that borderlands of pushback exist in many places, even as conflicts in many minds, including in legal minds. Unfortunately, these borderlands exist even in the law, and they lead to movements that bleach legal principles so they will continue to uphold the dominant, Whiter culture as described many years ago in the *Plessy v. Ferguson* dissent.[1]

Justice Harlan, though dissenting from the Court's insistence on the constitutionality of separate and equal racial spaces, acknowledged the white complexion of America for its posterity. He stated:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be *for all time*, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.[2]

Justin Harlan contemplated the White race would remain the dominant race, in a predominantly White America. So far, Justice Harlan has unfortunately been correct. This dominance, though, is now in question as Whites are projected to be a numerical racial minority in

1. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
2. *Id.* at 559 (Harlan, J., dissenting) (emphasis added).

the coming years.[3] The numerical population shift could be momentous, especially given the legal principle of "one person one vote."[4] This principle, in the 2008 presidential election, led the face of America to darken in complexion.[5] Thus, White dominance was and will continue to be threatened, and Justice Harlan's predictions "for all time," as he asserted, seem less likely to prevail.

Though threatened, White dominance as a structural institution does not retreat without a struggle. The struggle occurs in the form of a pushback in the borderlands. The borderlands are not just geographical locations; similar effects can be seen in the laws in America. This pushback can lead to an artificial form of bleaching to whiten the law. Artificial whitening of the law is a bleaching of the law to maintain White supremacy. Whitening with an artificial bleaching agent is counterproductive to the progress of our nation, especially a nation built on principles of being a melting pot and promoting the value of the individual. This bleaching is a pushback against natural societal coloring or progressions, and leads to desolation and violence in the forced borderlands.

Whiteness as structural dominance has been maintained artificially through the bleaching of the law. In *Johnson v. McIntosh*,[6] the law expressly favored whiteness over the native complexions of the land. Then in *Dred Scott v. Sandford*,[7] the law declined to recognize even free Blacks as citizens. In *Korematsu v. U.S.*,[8] the law

---

3. "Some commentators anticipate a new melting pot, often labeled as 'the browning of America'. . . . [The] Census Bureau [projects that] . . . non-Hispanic Whites will no longer be the majority of the population in 2042." Anthony Daniel Perez & Charles Hirschman, *The Changing Racial and Ethnic Composition of the US.Population: Emerging American Identities*, 35 POPULATION & DEV. REV. 1, 1 (2009).

4. Reynolds v. Sims, 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

5. "[T]he president is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911, 952 (2011) (quoting John Marshall's address before the House of Representatives, delivered in 1800). Hence, the face of America, at least in the area of foreign relations, became more deeply complexioned in 2008.

6. 21 U.S. 543 (1823).

7. 60 U.S. 393 (1856).

8. 323 U.S. 214 (1944).

favored the appearance of security for Whites over the constitutional interests of darker complexions. Even the sole dissent, arguing in *Plessy v. Ferguson*, against the legitimization of separate and unequal as a legal principle, stressed the dominance of whiteness in the complexion of the power of America.[9]

Just as the law has a dominant complexion of whiteness, at other times the march toward equality in America leads to a grassroots or societal induced (re)complexioning of the law. It is unfortunate that it is then that the law itself pushes back even more stringently, in this legal borderland, to maintain a whiter, bleached complexion of the law and its structure.

An example is seen in race and the public school system where the law foraged further given the momentum of the civil rights movement with the marches and protests. In *Brown I*,[10] *Brown II*,[11] and *Cooper v. Aaron*,[12] the legal complexion browned as the schools and other areas desegregated. After the law supported progress and acknowledgment of the racial marches toward progress in America, the law again whitened to persuade us that what existed did not really exist. For example, *San Antonio v. Rodriquez*,[13] sanctioned unequal distribution of educational funds, and *Parents Involved in Community Schools v. Seattle School District No. 1*,[14] thwarted a district's own initiative to provide more culturally diverse education for its children.

After struggles for racial hiring, justice bore fruit[15] and sanctioned affirmative action. Affirmative action brought some relief to those generationally denied jobs based on their color. However, the complexion of the law artificially whitened again in response to this societal coloring and push. The law whitened again with *City of Richmond v. J.A. Croson Co.*,[16] and *Hopwood v. Texas*,[17] which defied

9. 163 U.S. at 537, 559 (1896) (Harlan, J., dissenting).

10. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

11. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

12. 358 U.S. 1 (1958).

13. 411 U.S. 1 (1973).

14. 551 U.S. 701 (2007).

15. *See, e.g.*, EMILYE CROSBY, A LITTLE TASTE OF FREEDOM: THE BLACK FREEDOM STRUGGLE IN CLAIBORNE COUNTY, MISSISSIPPI 118-27 (Waldo E. Martin, Jr., & Patricia Sullivan eds., 2005) (describing the grassroots battle waged in Port Gibson, Mississippi).

16. 488 U.S. 469 (1989).

the more complexioned earlier holding of *Regents of the University of California v. Bakke*.[18] *Grutter v. Bollinger* was another move toward equity and a browner complexion of the law. There, military advisers and corporations argued that as a matter of fact a legal (re)complexioning was necessary for the good of the country and for national defense.[19] But the law bleached white again with the pushback in *Gratz v. Bollinger*.[20]

So, we in America remain in the legal borderlands, as if in fear that the complexion of our society and of the law may not be as white as has been insisted is the purest form for generations. It is as if the legal system has served as a bleaching cream: casting out nonwhiteness by seeking to curtail birthright citizenship as to some groups, limiting the teaching in schools of civil rights stories as to other groups, and removing other colors from active participation in the political structures through disenfranchisement.

This form of artificial whitening, like a bleaching cream,[21] is an artificial attempt to resist the simple coloring of, or simple acknowledgement of the color in, and of, America. But, people of color who have tried bleaching cream on their own faces to become whiter and, maybe more acceptable if they bore lighter complexions, can tell us that the use of bleaching creams to maintain whiteness is futile.

As a Black teenager attending a very White school[22] in a society where dark skin on an innocent Black girl made her less attractive to some, I used bleaching creams on my beautiful, dark brown skin trying to make it more acceptable. After nightly applications of the bleaching cream, my flawless, dark brown skin first became splotchy with odd patches of paleness, and then became lighter brown skin. I unashamedly celebrated my lighter complexion in my tenth grade school pictures.[23] But bleaching agents are temporary, the sun's

17. 78 F.3d 932, 962 (5th Cir. 1996).

18. 438 U.S. 265 (1978).

19. 539 U.S. 306 (2003).

20. 539 U.S. 244 (2003).

21. 42 AM. JUR. PROOF OF FACTS 2D 97 *Cosmetic Injuries* § 8 (2010) (discussing bleaching creams).

22. *See generally* Angela Mae Kupenda, *Loss of Innocence*, *in* LAW TOUCHED OUR HEARTS 36 (Mildred Wigfall Robinson & Richard J. Bonnie eds., 2009).

23. I am ashamed to admit that I used these chemical creams to try to lighten

effects are quite dramatic on such fragile, bleached skin, and the true complexion reemerged. In my eleventh grade pictures, my skin was darker than ever. Ultimately, by my senior year, after more attempts to whiten or bleach myself, my skin was damaged[24] and became even darker than when I started this process.[25] So, bleaching delays the inevitable and results in a more flawed version than if the natural darkened complexion was allowed to just exist.[26]

This same damage to complexion occurs in America's borderlands. In America, as a nation of color, it takes great legal resources and tension, to prevent the visibility of the actual color that it has. These acts ultimately lead to desolation and damage of our society just as the use of bleaching creams bring desolation and damage to the skin. And, like a face that uses bleaching cream, once the daily application of the cream ceases, the color will return to its naturally darker state, and become damaged from the failed attempt to bleach it into whiteness. The constant struggle to maintain the artificial whiteness creates a damaged and desolate place of push and pushback, and never growth, productivity, or beauty. Thus, the constant struggle to maintain an artificially white America is futile and leads to much damage to the structure, health, and face of America.

II. A SIMPLER ROLE FOR THE LAW: (RE)COMPLEXIONING

We should resist the artificial bleaching agents. We should allow, and actually encourage, the natural (re)complexioning or coloring of America and of the law to reflect the beautiful coloring present in the

---

my complexion. As a young person growing up in Mississippi, I regarded myself as culturally aware and justice oriented. Still, I succumbed in the early seventies to the prevalent message that lightness of complexion was a major path to be recognized by Blacks and by Whites for having Black female beauty.

24. *See* Roseann B. Termini & Leah Tressler, *American Beauty: An Analytical View of the Past and Current Effectiveness of Cosmetics Safety Regulations and Future Direction*, 63 FOOD & DRUG L.J. 257, 267 (2008) (bleaching creams change the structure of one's skin).

25. Unfortunately, these creams are still promoted today, even in some of the Black magazines. Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1737 & n.144 (2000).

26. Imani Perry, *Buying White Beauty*, 12 CARDOZO J.L. & GENDER 579, 579-81 (2006) (discussing other harmful effects to the skin). Bleaching creams contribute to caste systems based on color. *Id.* at 588-90.

land. This (re)complexioning is a natural progression and it is essential to allow this necessary (re)complexioning of the law to reflect the natural (re)complexioning of our society. This is critical, especially given the election of the first Black president, and with other nonwhite-male presidents likely to follow.

Currently, the country is preparing for the upcoming presidential elections in 2012. While I hope for the re-election of President Barack Obama for a second term, the relevance of this Essay does not turn on his re-election. The fact that a nonwhite person was elected in 2008, signals a darker face of America; after all, the president is the face of America on the international stage. His election signals the possibility that other minorities including White women, women of color, and more nonwhite men can also become the face for a complexioned America. Perhaps it is this possibility that leads some to apply the artificial bleaching creams to our legal system with even more vigor.

The thesis of this Essay is that many of our outdated, bleached white legal norms do not contemplate the necessary and natural (re)complexioning of the law. This Essay urges for one such (re)complexioning from our now simple tale of race, hate speech, and colored leadership. The type of (re)complexioning that I urge, though, is opposite to the bleaching cream induced, artificial whitening noted above. The law must logically and naturally allow the (re)complexioning itself, even where White dominance is pushing for an opposite outcome. The law's (re)complexioning here is critical for our country's security and survival.

This Essay focuses on one aspect of the law where this is critical—in the area of hate speech. Some of the Court's bleached rulings on hate speech do not anticipate that our country could ever have a Black president. Its rulings seem to contemplate that, as stated by the *Plessy* dissent, the White race will dominate America "for all time." Given that America actually did elect a Black president in 2008, it is critical for the law to (re)complexion itself to reflect the factual reality of our times and to protect the country's security.

III. (RE)COMPLEXIONING THE LAW OF HATE SPEECH

President Obama has been subjected to many threats and blatantly racist hate speech. Even his beautiful family has been subjected to the ignorance of others who, rather than engage in political debates about

policies, choose race based attacks against the president and his family. These verbal assaults cause many to fear for the safety and well being of the president.

Rampant racist hate speech in America not only poses a threat to our president, it also poses a threat to the sacred Office of the President, and to the country itself. Instead of remaining in a borderland of artificially induced, bleached, pushback against the browning of the Office of the President and of the face of America itself, the Court should allow its complexion to naturally color by acknowledging, rather than fighting this browning. This acknowledgement must occur in the Court's dealings with the principles of race and hate speech. This (re)complexioning is a simple tale and a simple process, unlike the complicated and futile process of artificial bleaching.

A. Racist Fighting Words Would Have Been "More" Unprotected, but for the Court's Past Artificial Use of Bleaching Cream

Some who use racist speech to disrespect the president, the Office of the President, and hence the country, mistakenly believe their attempts to denigrate the coloring of American leadership through insult is protected by the First Amendment. Yes, the First Amendment protects the freedom of expression. However, few Justices of the United States Supreme Court have insisted the First Amendment accords absolute protection for speech.[27] Most Justices, past and present, insist speech rights must be balanced against other interests, and at times other interests prevail over speech.

In spite of these other interests, generally pure speech is protected from content regulation by the government. The Court has stated that if the First Amendment means anything, it means the government cannot tell citizens what is the proper way to think or speak.[28] Ordinarily, pure speech is protected from content regulation, meaning the government must satisfy strict scrutiny in order to regulate the content of pure speech.[29] Under strict scrutiny, the government must

---

27. *But see* Dennis v. United States, 341 U.S. 494, 579-81 (1951) (Black, J., dissenting) (arguing for fuller protections of speech).

28. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (protecting rights of public school students who refused to salute the American flag).

29. Some scholars have argued racial hate speech should not be protected

have a compelling interest and its restrictions must be narrowly tailored to that interest in order to disfavor one individual's message or to punish an individual for a given speech or message.[30]

However, the Supreme Court has deemed some speech unworthy of this great protection. Some speech has only slight value and could bring great harm if the government is not allowed to regulate it. The Court has ruled that other interests of society outweigh the importance of fully protecting or allowing that speech. For example, the Court has held that because of interests in protecting the moral fiber of society, obscenity is unprotected speech which the government may regulate as long as it has some rational basis, that is, that the government regulation is rationally related to a legitimate government interest.[31] This legitimate government interest could be connected to health, safety, or even morals. The Court has also balanced reputational interests against speech, holding that defamation is unprotected speech.[32]

Hate speech has been examined as defamatory speech against minorities.[33] However, hate speech fits more closely with the unprotected categories of speech advocating illegal action or fighting words. The Supreme Court regards speech advocating illegal action[34] and fighting words[35] as unprotected categories of speech. In other words, both categories have been regarded as unprotected speech,

---

under strict scrutiny, but under a lower intermediate level of review. *See, e.g.*, David O. Brink, *Millian Principles, Freedom of Expression and Hate Speech*, 7 LEGAL THEORY 119, 143 (2001).

30. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

31. Miller v. California, 413 U.S. 15 (1973). The Court defined how to determine if speech is unprotected obscenity in *Miller*. *Id.* The Court went further in a subsequent case and held that certain non-obscene, but pornographic depictions of children are also unprotected, thus may be regulated more freely by the government to protect children. New York v. Ferber, 458 U.S. 747 (1982).

32. The Court allows for less regulation, though, of potentially defamatory speech about public officials, or even public figures, to allow for robust debate. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

33. *See* Beuharnais v. Illinois, 343 U.S. 250 (1952).

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

35. *See* Edwards v. South Carolina, 372 U.S. 229 (1963); Feiner v. New York, 340 U.S. 315 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

which the government can regulate freely as long as it has some rational basis.[36]

One would think hate-filled speech, especially hate-filled speech directed against groups that do not make up the formerly White political majority in this country, would be regarded as speech advocating illegal action against certain groups and against racial equality. One would also think such hate-filled speech would be regarded as fighting words: words that would make an ordinary man want to fight.[37] It seems, though, that the Court has complexioned the ordinary man as White, while insisting that those of darker complexions should develop thicker skins.[38]

The Court has hesitated in allowing the government to rationally regulate such speech to further interests of safety for colored groups, and to further notions of an America based on racial equality for all of us. This has been the case with the Court seemingly making it harder to show speech unlawfully advocated illegal action in a case where the Ku Klux Klan (KKK) uttered hateful words.[39] Also, the Court, bleaching white its premises, has ignored the harmful effects of racially hateful speech directed to minorities,[40] even when trying to obtain equal education on college campuses.[41]

A case that illustrates the Court's bleaching of the law is *Virginia v. Black*,[42] where two KKK-like crosses were burned. One was burned on private property with the White property owner's consent, but in view of a public highway.[43] The other was burned on private property

36. Bose Corp. v. Consumers Union, 466 U.S. 485, 504-05 (1984).

37. *Cf.* Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77 (2003) (discussing effects of hate speech and racism on victims of color).

38. For documented examples, see Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990).

39. *See Brandenburg*, 395 U.S. 444.

40. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C. R.-C.L. L. REV. 133, 157 (1982).

41. *See generally* STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT 168-70 & n.i (2008) (citing authorities discussing the harmful effect of hate speech).

42. 538 U.S. 343 (2003).

43. *Id.* at 349.

without the Black property owner's consent.[44] The cross burners were convicted under a state statute where burning a cross created a rebuttable presumption of the intent to intimidate.[45] The Court held that statute unconstitutional.[46]

The Court suggested cross burning is protected speech unless burned with the intent to intimidate. The statute provided that cross burning created a presumption of intent to intimidate, a presumption that was rebuttable by criminal defendants.[47] The Court, however, thought a statute with such a presumption unconstitutional, with the White Justices thinking that such a KKK-like cross could be burned without the intent to intimidate. This was indeed a heavy application of bleaching cream to basic theories of First Amendment law.

The only Black Justice on the Court, Justice Clarence Thomas, did not submit to this whitened approach this time, though. Justice Thomas wrote a spirited and passionate dissent, which none of the White Justices joined.[48] Even prior to writing his dissent, Justice Thomas, who does not usually speak up during oral arguments, spoke with great passion during oral argument about the harm the Klan wrought on Blacks and the venomous effect of such cross burnings.[49]

Paraphrasing his written dissent that he read from the bench, Justice Thomas called out the other Justices on how they were artificially whitening the circumstances to bleach out the troubling issues of race in our society. Justice Thomas argued that the other Justices, the White ones, did not understand the terror caused in a nonwhite family by having a KKK cross burned, and burned in their yard.[50] Justice Thomas does not consistently vote in a similar vein to the racially aware voting patterns of the first Black Supreme Court Justice, the late Justice Thurgood Marshall.[51] Yet, in *Virginia v. Black*,

---

44. *Id.* at 350.

45. *Id.* at 348.

46. *Id.* at 364, 367.

47. *Id.* at 395-400.

48. *Id.* at 388.

49. Thomas B. Metzloff, *The Constitution and the Klan: Understanding the Burning Cross in* Virginia v. Barry Black, *in* CIVIL RIGHTS STORIES 347, 362-63 (Myriam E. Giles & Risa L. Goluboff, eds., 2008).

50. *Black*, 538 U.S. at 388 (Thomas, J., dissenting).

51. For example, Justice Thomas opposed the affirmative action or diversity initiatives in *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting).

Justice Thomas was adamant that the Court did not understand terror in the way that one with a complexion similar to the Black family would, someone who in our society may be subjected to racial assaults.[52] It seems Justice Thomas was arguing the Court could perform this bleaching in its opinion, but it does not change the reality in a complexioned America.

To paraphrase Justice Thomas, realizing how terrible the effects of cross burnings are, must be beyond the understanding of the White Justices, and such an understanding must be a Black thing. Justice Thomas stated, "[i]n every culture things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred and the profane. I believe that cross burning is the paradigmatic example of the latter."[53]

So the question is: Why is racial hate speech not considered unprotected speech like some other forms of injurious speech that has slight if any value? Why does the Court prevent the government from acting in the interests of the people, when it wants to protect nonwhites from vicious White attacks that, as Justice Thomas said, cause terror in those to whom the speech is directed against?

The only answer this author has is that here, Justice Thomas is correct. And, as other legal scholars agree, the predominantly White Court has not seen racial hate speech as speech that is a major problem for the average American, the average White American.[54] Not only does the majority of the Court not feel the terror of racist speech and symbols, the majority of the Court also minimizes the extent of racist propaganda and disassociates itself and the legal system from having any responsibility to address it, as they are not members of the nonwhite groups targeted by such terror.[55] The predominantly White Court, thus, bleaches America and its racial realities to promote a view that color doesn't impact the average American. That the color of America is white, and when the laws suggest that other complexions are to be incorporated, the Court

52. 538 U.S. at 388 (Thomas, J., dissenting).

53. *Id.*

54. *See, e.g.*, Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2326-27 (1989).

55. *See, e.g., id.*

dismisses the issue, forcing America back into a borderland of push and pushback.

Racial hate speech not only causes terror, it also suggests continued inequality based on color. Interestingly, efforts to achieve equality and to enact hate speech regulations to ensure equality and freedom from domestic terror in the form of racist speech may be read by "many millions of Americans . . . [as] yet another law exhibiting special favoritism for people of color."[56]

If, however, racial hate speech implicates the average White American too, then the Court's prior determinations, hopefully, become outdated, and the effects of the bleaching cream will fade, as we forge a more just society, free of racism and the accompanying terror. Maybe then the law, rather than being bleached white, will (re)complexion and will naturally reflect the colored complexions of America.

At the LatCrit conference, many of us were in shock and in a place of deep sadness after the passing of Professor Derrick Bell—a great legal scholar, teacher, activist, and friend to us all. We grieved the passing of Professor Bell as we simultaneously celebrated the tremendous impact of his work. One of the important theories he forged was the convergence interest theory. Professor Bell argued that Whites will support racial equality when their interests converge with those of racial minorities.[57] He also argued that once this convergence ends, Whites cease to support racial equality.[58] In other words, when White dominance is threatened, Whites as a group no longer seek racial equality.[59]

So, this author must discover how the bleached white legal structures in America can be persuaded that naturally (re)complexioned legal rules related to hate speech are in the best interests of all Americans. The election of a Black president forces this convergence of interest of certain legal precepts as will be discussed below.

---

56. Steven Shriffin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 96-103 (1994).

57. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

58. Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1056 (2005).

59. *Id.* at 1059.

B. A More Reality Complexioned Revisiting of R.A.V. v. St. Paul Coupled with the Election of a Black President Suggest a Convergence of Interests of the Complexioned with Those of Whiter America.

The convergence of interests of the complexioned with those of whiter America is made more visible through the study of the case of *R.A.V. v. St. Paul*,[60] where several Whites burned a cross during the predawn hours in the fenced-in yard of a Black family. The White defendants were arrested and charged under an ordinance designed by the city to punish offenses motivated by impermissible bias.[61] Ultimately the Court held the ordinance unconstitutional, setting the cross burners free.[62] Essentially the Court held that, although fighting words are unprotected speech, the city could not discriminate among the types of content it would regulate in this way.

Several Justices complained that the majority was creating a new principle. This author thinks the Court's holding urges a bleached principle. In past cases, the Court held that unprotected speech could be regulated as long as the government had a rational basis. And, here there was certainly a rational basis to regulate such abhorrent bias offenses. This opinion is indeed confusing. A cynical view of the opinion is that the Court did not take this apprehensible crime seriously. In the beginning of the Court's opinion it referred to the defendants as "teenagers,"[63] suggesting White teenagers carrying out a prank, as opposed to considering the terror imposed on this Black family. A bleached view of race based attacks is that they cause no special harm to others.

In spite of these concerns about the opinion, two statements of the Court are most important to this Essay. First, although the Court strikes down the bias punishing statute as unconstitutional, the Court announces a number of exceptions to its holding. One of the exceptions the Court notes is "the Federal Government can

60. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

61. *Id.* at 379-81.

62. *Id.* at 395-96.

63. *Id.* at 379 (the Court described the scene as, "petitioner and several other teenagers allegedly assembled a crudely made cross").

criminalize only those *threats of violence that are directed against the President* . . . since the reason why threats of violence are outside the First Amendment (*protecting individuals from the fear of violence*, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) *have special force when applied to the person of the President*."[64]

The Court acknowledged additional steps could be taken to protect the president from threats that instill fear, cause disruption from fear, or create possibilities of actual violence directed against the president. When the Court issued this opinion, America had never had a Black president. The Court's next point becomes even more perplexing, given that President Obama, compared to other presidents, has had an incessant number of threats against him.[65]

The Court said, "[b]ut the Federal Government may not criminalize only those threats against the president that mention his policy on aid to inner cities."[66] The Court does not say the Federal Government may not criminalize threats against the president that only implicate his race.

Many of the hate messages against the president do implicate race, so the next logical step in the Court's reasoning is that the Federal Government may criminalize racist speech in its attempts to protect the president, who is Black. An environment of hate messages against Blacks necessarily includes the president. And an environment of hate directed against the president focusing on the president's race necessarily includes all Americans of color.

Moreover, threats and hate directed against the president because of his race, disrespect the honored Office of the President, and disrespect America. Those Americans launching such racist attacks embarrass America abroad.

African Americans and other people of color have been the targets of and subjected to much of the hate speech in America's history. Yet,

---

64. *Id.* at 388 (emphasis added) (citation omitted).

65. *See* Regina F. Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L.J. 585, 588 n.10 (2011); Joel Wm. Friedman, *The Impact of the Obama Presidency on Civil Rights Enforcement in the United States*, 87 IND. L.J. 349, 351 (2012); Gregory S. Parks & Danielle C. Heard, *"Assassinate the Nigger Ape[]": Obama, Implicit Imagery, and the Dire Consequences of Racist Jokes*, 11 RUTGERS RACE & L. REV. 259, 260-62 (2010).

66. *R.A.V.*, 505 U.S. at 388.

the impact of such injurious words and depictions has been bleached—underestimated and deemphasized—even by the United States Supreme Court.[67] The Court has bleached the impact on nonwhites from its rulings. The Court has actually gone so far as to suggest the government cannot, without meeting a high showing, single out nonwhites for protections from hate speech.[68] Such rulings seem contrary to earlier rulings of the Court, which allow the government to protect people from certain categories of speech, such as fighting words and obscenity, as long as those governmental protections are rational.

The Court's ignoring of the harm of hate speech to African Americans and other nonwhite groups is problematic. The election of an African American president, however, makes these rulings even more problematic. This election, the resulting hateful speech about Blacks as some individuals lament having a Black president, coupled with the Court's apparent tolerance for racist hate speech, all together create a challenging predicament for the entire country.

The Court's past rulings ignore the harm racist speech causes to Black Americans. It follows then, that the Court's rulings also ignore the harm racist speech causes to a Black president. Hence, the Court's rulings now ignore the denigration to the country, the Office of President, and all those similarly colored by allowing, essentially unchecked, continued hate and racist speech.

If the law finds it acceptable for the Office of the President to be demeaned racially, the insult is not just an insult directed at the president or his family; the insult is also an insult directed at those of the same color. Moreover, the racial insult is also an insult directed at the once predominantly White country he commands as commander in chief.

IV. CONCLUSION

Hate speech unchecked against Blacks, with a Black president in office, magnifies the effect of hate speech on the country. These rulings must be (re)complexioned, as unchecked hate speech places

67. *See generally* JABARI ASIM, THE N WORD (2007).

68. *See, e.g.*, *R.A.V.*, 505 U.S. at 377 (striking down as unconstitutional a hate speech ordinance that would have punished defendants for burning cross inside fenced yard of a Black family).

the Office of the President, and the condition of those similarly colored, in even greater peril. Thus, without change, the country experiences a magnified impact of hate speech that could reign to the great detriment of the entire country. Hence, interests converge.

Every racial onslaught against the president who is Black, and the news and internet attests to many such onslaughts, are racial onslaughts against Black Americans and other Americans of color. The impact is not only magnified for those who are not of the majority race. The negative impact of racial onslaughts against the president is magnified and affects all Americans, and the image of America domestically and abroad.

In the past, the primarily-White Court seemed detached from racist hate speech, viewing it as a problem for racial minorities that are too sensitive, and not a problem for the White majority of Americans. Now, though, with this hate speech being directed at the top executive officer, the Court must revisit its nonchalant, bleached holdings about the injuries of cross burnings and other forms of hate speech.

In other words, if the Court's bleached rulings sanction the acceptability for the president to be labeled by citizens as [a racial slur], then does it follow that all of America is [a racial slur] or is the country following the lead of [a racial slur]? Today, hate speech does not just injure people of color; hate speech injures all of America and its image abroad, which the Court may ultimately more fully understand.

Denigration of the president as being lesser by his complexion compromises national integrity, national security, and the ability of the country to operate in the foreign arena. If the president's face is compromised, not by legitimate disagreement, but by racial demoralization, then so is the country. The Court in *Grutter* was correct when it said cultural understanding was critical to the country's defense.[69] Greater cultural understanding could lift people out of borderlands by helping the resistance to this natural browning of America see that their resistance and hate speech is the real threat to America, rather than the (re)complexioning itself.

This necessity for the law's (re)complexioning continues even if the Office of the President is not held by a person of color. It is

69. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

necessary because a person of color, a White female, or any person who challenges what is regarded as the norm or dominance of America could hold the Office of the President. Such (re)complexioning of the high office remains an even more viable option now that America elected a Black president.