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Hateful Speech, Loving Communities: Why Our Notion of 'A Just Balance' Changes So Slowly

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*851 ESSAY I. HATEFUL SPEECH, LOVING COMMUNITIES: WHY OUR NOTION OF "A JUST BALANCE" CHANGES SO SLOWLY

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INTRODUCTION

The debate about hate speech features two camps, each of which sees the world quite differently. [FN1] One group, on learning that some campus administrators are considering enacting hate speech rules, immediately declares the proposal a free speech question. If one places speech at the center, a number of things immediately follow. The hate speech rule advocates*852 are placed on the offensive, seen as aggressors attempting to curtail a precious liberty. The burden shifts to them to show that the speech restriction is not content-based, is supported by a compelling interest, is the least restrictive means of promoting that interest, and so on. [FN2]

Concerns about slippery slopes and dangerous administrators also arise when the hate speech controversy is viewed through a free-speech lens: if we allow face-to-face racial invective to be bridled, will we not soon find ourselves tolerating restrictions on classroom speech or political satire in the school newspaper? [FN3] If we permit our fragile web of speech protection to suffer one rent, might not others soon follow? Moreover, someone will have to adjudicate complaints brought under the new rules. Is there not a danger that the judge or administrator will turn into a narrow-minded censor, imposing his or her notion of political orthodoxy on a campus climate that ought to be as free as possible? [FN4]

Hate speech rule advocates, however, will see the controversy in different terms. For them, the relevant issue is whether campuses are free to impose reasonable rules to protect the dignity and self-regard of vulnerable young African American undergraduates and other targets of hate speech. [FN5] These advocates place equality at the center of the controversy and portray the defenders of racist invective as seeking to attack values emanating from the equality-protecting Constitutional amendments. [FN6] Since these values are vital to our system of justice, rule advocates maintain that it is incumbent on free speech advocates to show that the hate-speaker's interest in hurling racial invective rises to the requisite level of compellingness. They will *853 insist that this interest be advanced in the way least damaging to equality, and they, too, will raise line-drawing and slippery slope concerns, but from the opposite direction. If society does not intervene to protect equality from this intrusion, where will it all stop? [FN7] Rule advocates will raise concerns about the administrator who will make decisions under the code, but again from the opposite direction: they will want to make sure that the hearing officer is sensitive to the delicate nuances of racial supremacy in the incidents likely to come before him or her. [FN8]

Differences between the two camps run deeper than matters of doctrine and administrability, however. The two sides invoke different narratives to rally support and make their view of the matter seem the only reasonable one. [FN9] The free speech defenders depict the current struggle as just the latest in a long succession of battles to keep speech free. They

evoke a long, deeply stirring account including early struggles against censorship by king and church. [FN10] They see a history of book-burning, inquisitions, official blacklists, and imposed orthodoxy. [FN11] They cite heroes -- Galileo, Voltaire, Locke -- who in word or deed resisted imposed orthodoxy or ignorance. [FN12] The story the speech defenders tell is deeply rooted in the myths, history, and traditions of our people.

The minority defenders have their own narrative, however, one which taps cultural myths no less rooted, no less stirring than those invoked by the ***854** free speech defenders. For hate speech rule advocates, the struggle over hate speech is a continuation of our nation's centuries-long battle over equality and brotherhood. [FN13] They read a history that includes early abolitionists who worked to subvert an evil institution -- Quakers and others who operated the underground railroad -- and 1960s-era civil rights protesters who put their bodies on the line for racial justice. They, too, have their heroes: Frederick Douglass, Rosa Parks, Martin Luther King, Jr., and Justice Harlan, author of the dissent in Plessy v. Ferguson. [FN14]

Each side of the controversy thus wants not merely to have the balance struck in its favor, but also to place its interpretation of what is at stake at the center of the characterization. Yet, on closer inspection it turns out that the two stories are closely connected: although on the surface contradictory and in tension, the paradigms stand in an intricate relation. Like lovers locked in a death embrace, each depends on, yet threatens, the other. Part I of this Essay describes this interconnection and its source using the notion of an interpretive community.

When confronted with competing values, a common response in our system of politics is to entrust the decision to a wise judge who will balance the concerns at stake. [FN15] The peculiar relation of speech and equality, however, casts doubt on the feasibility of a balancing solution. Part II illustrates the shortcomings of balancing through historical examples. Part III employs narrative theory to explain the source of the difficulty and describes some mechanisms society deploys to assure that canonical ideas and social structures do not change too rapidly. The Essay concludes by discussing means by which reformers hoping to change the current system may make some modest inroads.

I HOW SPEECH AND EQUALITY BOTH PRESUPPOSE AND THREATEN EACH OTHER

Free speech and equality presuppose and threaten each other. Insult and invective, brought to bear by a powerful majority on a helpless minority,***855** can oppress. [FN16] It can harm directly, either through injury to the psyches of its victims or by encouraging others to take immediate hostile action. [FN17] It can also harm indirectly, constructing an image or stigma-picture according to which the victim is less than human. [FN18] For these reasons, many minorities ask for protection from hate speech in the form of speech codes.

But the call for respectful treatment itself can stifle and oppress. [FN19] Imagine, for example, a community that enacted a rule prohibiting all expression that any individual in the group might find unsettling. This call for civility could conceivably lead to a bland form of group-think in which little change could occur. [FN20] Speech and equality are thus in tension.

Yet, speech and communitarian values also depend on each other. As the ACLU's Nadine Strossen points out, speech has served as a powerful instrument for social reform, [FN21] something minorities (if they knew their own history) ought to know as well as anyone. But her counterparts point out with equal logic that speech, at least in the grand dialogic sense, presupposes rough equality among the speakers. [FN22] Speech among persons who are markedly unequal in power and standing is not democratic dialogue at all, but something else -- a sermon, a rant, an order, a summons -- like speech to a child. [FN23]

Speech and community are thus simultaneously interdependent and in tension; the current debate itself is evidence of this complexity. Despite the difficulty in dealing with conflict between values central to our society, however, practical challenges force us to act. Minorities clamor for greater protection from campus insults, hate crimes, and symbolic acts such as cross-burning. [FN24] The ACLU and other liberal organizations demand that campuses refrain from enacting broad hate speech regulations, on the ***856** ground that speech must remain as free as possible. [FN25] To make matters worse, the situation is often binary. If minorities demand a speech code, we can either oblige them or not. If the ACLU challenges a speech code, we can strike it down, or not.

The usual approach in our system of politics whenever principles clash is to try to balance the competing values in some fashion. [FN26] We hope that an ingenious decisionmaker can find a way to protect minorities from invective and insult while allowing speakers some liberty to say what is on their minds.

But the difficulty is not just the practical one of finding the right compromise. Speech and equality are not separate values, but rather opposite sides of the same coin. Their interdependence arises because they are integral aspects of a more basic phenomenon, namely the interpretive community. [FN27] Recent scholarship points out that communication requires a group of persons who agree to see the world roughly in the same way. It presupposes a community of speakers and listeners who abide by certain conventions, who assign particular meanings and interpretations to words and messages. [FN28] Without such an interpretive community, communication is impossible.

This notion of an interpretive community explains the precarious interdependence of speech and equal-protection values. Speech requires community [FN29] -- without it communication is virually impossible. At the same time, community requires speech because it is our only way of doing what communities must do. [FN30] Yet, concerted speech can isolate or exclude a weak minority, [FN31] and majoritarian limitations on what can be said can freeze social change. [FN32] It is this precarious interdependence that makes the hope of balancing the interests of the two sides in the hate speech controversy problematic. In effect, a judge weighing any non-trivial proposal for ***857** regulating hate speech is deciding whether to throw the state's weight behind a new interpretive community. [FN33] That new speech-community will have different bounds from the old. In it, African Americans, or gays, or women will be included, treated with greater respect, or less. Their image, their self-regard, will be treated with greater solicitude, or less. Their speech will be given greater credibility, or less. Terms and customs dear to them will be included in the lexicon, or not. [FN34]

When judges make decisions with respect to speech codes, they are not simply balancing two discrete things, like Smith's desire to have a twelve-foot fence against Jones' desire to have more sunlight in his living room. They are deciding between competing conceptions of speech-equality, and therefore between different worlds we might live in. This is a more portentous and difficult task than deciding whether the interest of a young black undergraduate in not being called a "N . . ." late at night on his or her way home from the library "outweighs" the interest of the would-be speaker in shouting it.

Can judges properly carry out this task? Not easily. As we explain in greater detail in Part III, deciding between one speech-community and another requires a dialogue. [FN35] Judges will have discussions with other judges or carry on internal monologues with themselves, all conducted through a set of conventions using words with established meanings. [FN36] These dialogues-about- dialogue will be heavily weighted in favor of the current regime. [FN37] Thus, most radical reformers and members of movements which aim to transform the speech-community do not believe that judges can fairly balance the two competing values -- one established and entrenched, the other foreign and "new." For judges to weigh proposed speech regulations fairly and dispassionately requires them, in effect, to ***858** stand outside their own interpretive community. They must be unsituated, have no experience, attach no particular meanings to words and arguments. This is no easy task. [FN38] History shows that when reformers have asked the dominant society to restructure itself radically, the response has often been incomprehension, if not ridicule. The would-be reformer is heard as urging that black be redefined as white, night as day, a thing as its opposite. After a brief review of such responses, we return to the question of why this happens.

II WHAT HAPPENS WHEN REFORMERS ASK US TO CHANGE THE EXISTING SPEECH-PARADIGM

At many points in human history, activists and innovators have asked society to transform radically the way it thought and spoke about a subject or group. Often the request was tantamount to a change in consciousness, requiring the adoption of a new definition of the human community or community of concern, of the "we" in the "we are this." In most cases, this request was greeted initially with skepticism and disbelief. This was so in large part, we believe, because reformers were heard as asking for something that could not be said, or heard,

within the current speech paradigm and was therefore unthinkable. This limitation bodes ill for the cause of persons advocating limitations on hate speech.

Consider, for example, society's responses to the early abolitionist movement. For decades, the principal response was consternation and disbelief. [FN39] Many whites, including some mainline church leaders, believed blacks were inferior to whites, childlike, and ill prepared to assume the responsibilities of citizenship. [FN40] Even President Pierce reacted to the prospect of abolition with shock and dismay. In a message to Congress, he charged that granting blacks full rights was beyond lawful authority and could only be accomplished by the "forcible disruption of a country" he considered the best and most free in human history. [FN41] He charged the abolitionists with appealing to passion, prejudice, and hatred. [FN42] To be sure, part of the resistance to abolition was economic, especially in the South. But at least as much was conceptual and stemmed from a failure of imagination or empathy.

***859** Many citizens reacted to the abolitionist message with surprise or scorn: What, free them? Early feminists [FN43] and children's rights advocates [FN44] met similar resistance. More recently, environmentalists, [FN45] gay and lesbian activists, [FN46] and animal rights advocates [FN47] have encountered the same reactions. In response to the first three movements mentioned, society eventually changed its paradigm or way of thinking about the group in the direction of greater inclusion. In the cases of animal rights and of gay and lesbian rights, society will probably do so in the future. We think this contrast is general: proposals that entail a reconstitution of the human community or community of concern always spark much greater resistance than ones that do not, such as a change in the way we finance schools. The request that we change our speech and our thoughts with respect to minorities and women, we believe, taps much of the same resistance that accompanied previous broad social reforms. In the remainder of this Essay, we explain in greater detail how this resistance arises, and suggest means by which reformers may sometimes overcome or silence it.

III MECHANISMS OF CULTURAL RESISTANCE, AND HOW TO DOUBLE-CROSS THEM

We construct the social world, in large part, through speech. [FN48] How we speak to and of others determines whether and on what terms we accept them into our world as groups and as individuals. [FN49] The leaders of the reform movements just mentioned were asking for more than better treatment in material respects for certain people or things. They were also asking ***860** that these people or things be thought of, spoken of, constructed, differently. [FN50] They were asking that terms like human, creature, decent, good, nice, precious, and worthy of respect apply to them. In short, they were asking for membership in the community. Respectful speech, even more than willingness to rent a house or offer a job to someone, indicates the degree to which we accept a person's humanity. [FN51]

Yet speech, including the reformer's, is paradigm-dependent; [FN52] unfortunately, both exclusion and inclusion are built into the very narratives and thought structures by which we communicate. [FN53] Recent focus on our common language reveals that the "image of the outsider" in American law and culture has always included a host of stories, pictures, and stock characters that are demeaning, yet seldom seen as such at the time. [FN54] During each era, a few reformers complained of the unfairness of a Sambo, a Charlie Chan, or a Tom image, but the usual response was incomprehension: isn't that the way they actually are? [FN55] Our system of ethnic depiction constructs reality so that the images seem true, or at most, are perceived as humorous exaggerations well within the bounds of artistic license. [FN56]

We coined the term empathic fallacy to describe the belief that we may somehow escape the confines of our own internalized narratives, that we may easily and endlessly reform ourselves and each other through argument, exhortation, exposure to great literature, and other verbal means. [FN57] If even modest alterations in our system of imagery, such as abandoning a stereotype a group finds demeaning, provoke strong resistance, how much more will we resist requests that appear to require radical restructuring of our self-concept as a people? In proposing rules that change the way we speak about women or persons of color, the reformer is heard as saying something verging on incoherent. Later, when we realize what they are saying, we are outraged. The reformer, we learn, is asking that us be defined to include them, that justice means consideration of those others, that "nice" refers to those we have learned are "not

nice," those who were excluded from the paradigm by which we first learned how to use that term.

***861** Judges are no quicker than others to surmount their own limitations of culture and experience. [FN58] In cases containing a radical reform component, even eminent justices often fail to appreciate the moral force of the new vision being urged on them. Years later, such cases are labeled "anomalies," failures that mar the reputation of an otherwise great jurist. [FN59]

A judge is always free, within the limits of precedent, to modify the current understanding of terms like justice, fairness, discrimination, and equal protection. But given the limitations of the courtroom situation, that modification could occur only through a process of dialogue among the judge, the lawyers, and the relevant community. Such a dialogue is necessarily heavily weighted in favor of the status quo. Long ago, empowered actors and speakers enshrined their meanings, preferences, and views of the world into the common culture and language. [FN60] Now, deliberation within that language, purporting always to be neutral and fair, inexorably produces results that reflect their interests. [FN61]

Only a judge with no experience, history, or community -- virtually with no language -- could render an unbiased decision in a case calling for reformulation of the terms by which we define that community, change our history, alter our language. There is no such judge. Tools of thought primarily facilitate "normal science" -- minor, incremental refinements in the current structures by which we see and rule ourselves. Law is no exception. [FN62] After its passage, even the Fourteenth Amendment was often used to protect corporations and then later to rationalize a regime of segregation in which blacks were "separate but equal." [FN63] Given these limitations, the result of free speech, including speech in the courtroom, is most often to ensure stasis, not to facilitate change.

***862** Blacks, women, gays and lesbians, and others were not part of the speech community that framed the Constitution and Bill of Rights. [FN64] They fell outside the original definition of "we the people"; they were not allowed to speak. Later, when they did speak, their speech was deemed incoherent, self-interested, worthy of scorn. [FN65] Who would credit a member of a group whose members are -- according to thousands of images, plots, narratives, stories, and songs -- stupid, bestial, happy-go-lucky, and sexually licentious? [FN66] Words apportion credibility and define the community. [FN67] Because those assigned a stigma are thereby separated from mainstream society, [FN68] it is likely that few judges will know them. How many judges are good friends with an African American, send their children to schools with more than a token black presence, or attend social clubs where blacks or Mexicans appear in roles other than those of gardener or waiter? Excluded groups fall outside most judges' experience. [FN69] Lacking experience, what can they fall back upon other than what they hear and read?

Much of what they hear and read comes, of course, from the law, an interpretive community of its own. At a recent annual meeting of the Association of American Law Schools, participants explored the question, "Does the law have a canon?" [FN70] Some answered no, the law has only cases, statutes, administrative regulations, and the like, which are the same for everyone, black or white, conservative or liberal. [FN71]

But the law does have a canon. It consists of terms like "just," "fair," "equal," "equal opportunity," "unfair to innocent whites," "nice," "deserving," and "meritorious," all with canonical meanings that reflect our sense of how things ought to be, namely much as they are. [FN72] The terms reassure ***863** us that all is well, that our own situations in life are deserved (because fairly won), and that change generally ought to be resisted because the demand for change is incoherent or unprincipled. [FN73] Many years ago, the majority of us learned what "principled" means, and it certainly doesn't mean the strange thing that reformer is saying! Words, once they enter the canon, freeze community, enabling us to resist transformation without even noticing how we do so. The suggestion that they are like us is heard as an impossibility. [FN74]

Thus, when a reformer demands that we look at things in a different way, our first response is outrage or incredulity: what they are asking for simply does not fit our paradigm. But if the reformer persists, we are apt to deploy a series of mechanisms to discredit them and what they are saying. These mechanisms are outlined below.

A. General Mechanisms We Deploy to Derail Our Own Reformist Impulses

Any serious proposal to transform society radically is apt to provoke a number of predictable responses, particularly when the proposal threatens self-interest. [FN75] We can fail to hear what the reformer is saying, or translate the message into something else. We can declare that the reformer is obviously aiming to avert a particular evil, and then pretend not to find any evidence that the evil is in fact occurring. We can deprecate the reformer as extreme, politically motivated, self-interested, or bizarre. [FN76]

Running through most of these mechanisms of resistance is the idea that the reformer is imposing on the status quo. [FN77] Since some whites find it normal and acceptable to depict African Americans and other people of ***864** color as inferior, the suggestion that this be changed strikes them as aggressive, as an encroachment. Civil rights are fine, up to a point. But with each successive demand, the reformers are decried as having exceeded all reasonable bounds. "We have already admitted some of them into the workplace, made places for them at our schools. Now they want to control how we speak, how we think. They are going too far." No longer victims, minorities become the aggressors and the majority the innocent victim. Resistance by the majority is not only morally permissible, it is appropriate. [FN78]

The point of canonical ideas is to resist attack. [FN79] If one places at the center of one's belief system the notion that all language should be free and that equality must accommodate itself to that regime, then all equality arguments but the most moderate will appear extreme and unjust, constrained as they are by our canonical language. The canon defines the starting point, the baseline from which we decide what other messages, ideas, concepts, and proposals are acceptable. Only moderate messages that effect minor incremental refinements within the current regime pass the test. [FN80] All preconceptions -- that women's place is with home and children, that minorities are here at our sufferance, that we have given blacks too much already, that speech ought to be free regardless of its cost -- resist change. Reason and argument are apt to prove unavailing; the point of the canon is to define what is a reasoned, just, principled demand. Because hate speech rules fall outside this boundary, if one begins (as we do) with a free speech paradigm, reason fails and the status quo prevails.

B. Strategies for the Outsider

Even though reform proposals predictably evoke stubborn resistance, history shows that there are a number of means by which reformers can nevertheless bring about change. These include rearranging interest convergence, tricking the trope, and the narrative strategy of the double cross. Each of these tools is potentially available to reformers who wish to institute hate speech rules.

1. Rearranging Interest Convergence

Societies rarely restructure themselves in response to a reasoned plea, but they do readily change in response to changes in material conditions. [FN81] For example, the American workplace quickly accepted women once the ***865** slipping economic position of the United States plus the advent of information technology made women's entry both necessary and feasible. [FN82] Reformers on behalf of women's rights had been advocating the virtues of equality in the workplace for centuries, while making little headway. [FN83] Once the nation became persuaded that its economic well-being required women in the workplace, change quickly followed. Derrick Bell interprets the tortuous course of civil rights progress in similar fashion: black people have made progress only when, and to the extent that, the progress also benefited members of the majority group. [FN84] The same is probably true for other disadvantaged groups, such as inmates of mental facilities, children, and the aged. [FN85]

How will interest convergence bear on the fortunes of hate speech reformers? Municipal and collegiate hate speech regulations do little to advance the tangible self-interest of powerful whites. At one time, the United States was engaged in competition with the Soviet Union for the loyalties of the uncommitted Third World, most of which is black, Asian, or brown. During this period, it behooved us to be on our best behavior toward our own minority populations. We

could scarcely portray ourselves as superior to godless Communism all the while visibly mistreating our own populations of color. [FN86] Moderate reforms were enacted; the Supreme Court even upheld a group libel law in a single case. [FN87] With the collapse of the Soviet Union, the need for such exemplary behavior has today largely disappeared. Blacks are a relatively weak group, while the forces arrayed against them in the hate speech controversy are well financed, certain they are right, and able to command the legal expertise to bring and win test suits. [FN88] Today, interest convergence is not a particularly promising avenue for blacks and others interested in promoting the cause of hate speech regulation. We believe a certain amount of unanswered, low-grade racism and ***866** hassling on the nation's campuses may even confer a benefit on the status quo. [FN89]

2. "Tricking the Trope": Employing Verbal Ju-jitsu

In the absence of interest convergence, reformers may employ other avenues for achieving redress. The first we call tricking the trope. One can identify and enumerate the rhetorical strategies the dominant culture deploys to deny one moral legitimacy, and to portray one as extreme, as an aggressor, as interested in trammelling others' rights, and so on. Then one can proceed to turn these rhetorical strategies against the dominators.

Martin Luther King, Jr. was an expert at this strategy. Innumerable times he brought the lofty language of the Declaration of Independence, the Bible, and other basic cultural documents to bear in the cause of racial justice for blacks. [FN90] This sometimes stopped Southern racists in their tracks -- their own rhetoric and beliefs were being used against them. King's most effective speeches and letters thus were replete with references to Moses leading the people out of bondage and to the political rights of all men, and reminded us of this nation's commitment to brotherhood and equality for all. [FN91]

In the hate speech controversy, reformers might remind their opponents that our founding as a nation grew out of complaints over disrespectful treatment and petty annoyances at the hands of the British aristocracy, that the Pledge of Allegiance ends with the words, "With liberty and justice for all", and that, more recently, the Third Reich prepared the way for atrocities visited on Jews, Gypsies, and homosexuals by first stigmatizing them and portraying them as less than human. [FN92] The powerful rhetoric of the ACLU and other organizations committed to expanding free speech can be turned around. Why do black undergraduates not have an equal right to go where they please without harassment and personal assault? Perhaps it is the defenders of First Amendment orthodoxy who are the aggressors, after all.

***867** 3. Double-Crossing the Narrative: The Role of the Counterstory

A third strategy that can be deployed is the double-cross or "trickster" tale. In black history, oral storytellers and then black novelists and poets have used the double-cross to register their disagreement with a regime that oppressed and demeaned them at every turn. [FN93] The Spanish picaro was a similar figure. The trickster was one who employed slyness and clever strategy to win justice from a more powerful master; the double-cross was, similarly, a means to avenge unfair treatment. [FN94]

Currently, a new generation of civil rights scholars, known as critical race theorists, is developing a form of legal scholarship which uses narratives or storytelling. Writers who adopt this approach employ anecdotes, chronicles, dialogues, and similar tales to analyze, criticize, and expose mindset. [FN95] Some such accounts take the form of stories from personal experience, illustrating a point about racial justice. [FN96] Others take a different approach. Instead of aiming at bringing to life the minority perspective or experience, these accounts focus on some majoritarian narrative, for example the notion of the innocent white male, or that racial discrimination does not exist unless it is intentional, or that role modeling is a good idea. [FN97] These "counterstories" are aimed at displacing one or more of these comforting majoritarian myths and tales in order to call into question the accuracy, impartiality, and correctness of the current story or account of progress toward racial equality. Derrick Bell's "Geneva Chronicles" are prime examples, [FN98] but there are many more. [FN99]

Could storytellers of color or their sympathizers employ these tools to shake the complacency of the forces resisting hate speech rules? Perhaps so. Irony, the demonstration of how self-interest operates in the current regime, and the "flip," the change of frame or perspective, are powerful ***868** means of introducing doubt or "suspicion" where they did not exist before. Minority storytellers have already begun the task of deploying such tools.

4. Cultural Nationalism and Renewal

Each of the preceding approaches -- interest convergence and the two narrative strategies -- presupposes that the insurrectionist group wishes to merge with the dominant society, but merely on more favorable terms. A fourth strategy consists of withdrawal, either permanent or strategic. The trend toward cultural nationalism among Chicano and African American groups is a recent example. [FN100]

In the controversy about hate speech, we see the beginnings of such an approach. Parents of minority children, concerned about their well-being and safety at white-dominated institutions, are beginning to send their college-age offspring to predominantly black schools, such as Howard and Morehouse, where the atmosphere will be more supportive. This strategy has the advantages of avoiding the need for hate speech rules altogether, building black institutions and culture, and allowing the next generation of African American leaders to develop in relative safety.

It is ironic that the threat of black flight may prove the spur that college and university administrators need to begin the serious process of assessing their own institutional cultures and environments. The University of Wisconsin, for example, enacted a speech code precisely at a point when concern over a diminishing black presence on the state's campuses had reached real alarm. [FN101] The very act of pointing out the onset of defensive nationalism and the consequences it may have for campuses committed to educating tomorrow's leaders may supply a vital (because self-interest based) argument for reform.

CONCLUSION

We have argued that speech and equality, freedom of expression and the call for community, both presuppose and threaten each other. Speech, at least in the grand dialogic sense, presupposes rough equality among the speakers, while equality depends on activism and mass action, both of which are unthinkable without speech. Insult and invective by a powerful majority, however, can oppress a minority. Likewise, imposition of a dominant community's values and beliefs can stifle speech and thought.

Efforts to balance these competing values fail because they ignore the way the two are inextricably interdependent aspects of a more basic structure***869** -- the interpretive community. Judges asked to strike a balance between free speech and minority protection are in effect deciding the contours of a new interpretive community. They must decide whose views count, whose speech is to be taken seriously, whose humanity afforded full respect. Can they do so fairly and open-mindedly given that most of them come from the dominant speech community? We have our doubts.

In Part II, we called attention to reform movements whose members asked society to transform radically the way it thought or spoke about a subject or group. Their proposals were greeted initially with skepticism and disbelief because the messages were heard as asking the unthinkable according to the communicative paradigm of the time. In Part III, we showed why this is so. Social decisionmakers asked to make decisions in favor of one interpretive community over another are situated in a speech paradigm. Their deliberations are carried out through words already carrying established meanings, almost always heavily weighted in favor of the status quo. Thus, reformers provoke predictable responses in society at large. We either fail to hear their message, or mistranslate it when we do. We misdirect the point of their critique, then fail to find evidence of social ill. We deprecate their intent or declare that we are the ones suffering imposition.

Hate speech reform invokes a plausible constitutional paradigm, with its own history, case law, and genuine heroes. Yet prospects for change are not particularly good. Because of the way

we are situated and because there is little in the self-interest of elite groups to cause them to want change, reform of laws against hate speech is certain to continue to evoke sharp resistance. At some future time, the United States will probably join the majority of Western nations that impose limitations on racial incitement and invective. We will then look back on our current stance and wonder how we could have thought it "principled."

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[FN1]. On the role of perspective in addressing racial harms, see, e.g., Richard Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. Pa. L. Rev. 561, 568 - 69 (1984); Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 Cornell L. Rev. 1258, 1282- 84 (1992) hereinafter Delgado & Stefancic, Images (recognizing that one may choose not to "see" racism when one is not subjected to it); Richard Delgado & Jean Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error?, 69 Tex. L. Rev. 1929, 1930 (1991) hereinafter Delgado & Stefancic, Norms and Narratives (criticizing judges' inability to understand the experiences of others); Charles Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 434 -35 (explaining operation of perspective and experience in the hate speech debate); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2335 (1989) (advocating narrow hate speech exception to First Amendment). For other articles on perspectives that generally support the desirability of hate speech regulation, see Richard Delgado, Mindset and Metaphor, 103 Harv. L. Rev. 1872 (1990); Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) hereinafter Delgado, Words That Wound.

On the two paradigms, or ways of characterizing the campus hate speech controversy, see Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 Nw. U. L. Rev. 343, 345 - 48 (1991) hereinafter Delgado, Narratives; John Powell, Worlds Apart: Reconciling Freedom of Speech and Equality, in The Price We Pay: The Case Against Pornography and Hate Speech (L. Lederer & Richard Delgado, eds., forthcoming 1995) (on file with authors) hereinafter Powell, Reconciling.

[FN2]. On judicial review of state actions encroaching on the right of free speech, see Lewis v. City of New Orleans, 415 U.S. 130, 131-32 (1974) (striking down state prohibition of "opprobrious language" as overbroad); New York Times v. Sullivan, 376 U.S. 254, 283 (1964) (requiring libelled public officials to prove "actual malice"); NAACP v. Button, 371 U.S. 415, 433 -37 (1963) (holding a legal malpractice statute which interfered with NAACP's organizing activities fatally vague and overbroad).

Examples of the sort of categorical thinking we describe are legion. Compare R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) and Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (characterizing cases before them almost exclusively as first amendment problems) with Loving v. Virginia, 388 U.S. 1 (1967) and Brown v. Board of Educ., 347 U.S. 483 (1954) (characterizing cases almost solely in protection-of-equality terms, even though they also contained regulatory and liberty components weighing in the other direction). All four of these cases contained both liberty and equality elements, and could have been characterized either way. By choosing the paradigm, the Court chose the outcome.

[FN3]. See, e.g., Robert M. O'Neil, Colleges Should Seek Educational Alternatives to Rules that

Override the Historic Guarantees of Free Speech, Chron. Higher Educ. , Oct. 18, 1989, at B1, B3; Garry Wills, In Praise of Censure, Time , July 31, 1989, at 71-72.

[FN4]. For commentators who fear inroads into First Amendment doctrine will lead to censorship, see, e.g., Zechariah Chafee Jr., Free Speech in the United States 223 -25 (1942) hereinafter Chafee, Free Speech ; George Will, Academic Liberals' Brand of Censorship, S.F. Chron. , Nov. 7, 1989, at A22.

[FN5]. On the harms of hate speech, see Delgado, Words that Wound, supra note 1, at 140 - 41.

[FN6]. U.S. Const. amend. XIII (forbidding slavery); U.S. Const. amend. XIV (providing for equal protection of the laws); U.S. Const. amend. XV (protecting right to vote). For an earlier discussion of this "equality paradigm," see Delgado, Narratives, supra note 1, at 381- 83.

[FN7]. See Delgado, Narratives, supra note 1, at 349 -58 (describing recent campus incidents, including slave auctions, racist graffiti, and one campus fraternity's erection of a 15 -foot high caricature of a black man with a bone through his nose).

[FN8]. The First Amendment paradigm includes suspicion of self-aggrandizing and illegitimate arrogation of power by a regulator of some sort. See Chafee, Free Speech , supra note 4, at 218 -32, 314, 497-501. The defenders of minority rights fear the opposite -- a deficiency of zeal or expertise in the arbiters of social equality.

[FN9]. Recent writing emphasizes the way in which internalized stories or "narratives" help us construct and order reality, including law's version of it. See, e.g., Peter L. Berger & Thomas Luckmann, The Social Construction of Reality (1966); James B. White, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 174 -75 (1985); Paul Ricoeur, Narrative Time, in On Narrative 165 - 86 (W.J.T. Mitchell ed., 1980) (on the use of narratives in discourse and construction of reality); Symposium: Legal Storytelling, 87 Mich. L. Rev. 2073 (1989) (a collection of articles on the way storytelling functions in legal discourse to guide thought and determine judicial outcomes).

For a recent effort to reconcile the tension between the two paradigms present in the hate speech controversy, see Powell, Reconciling, supra note 1, at 46 - 52. Powell believes this tension is undesirable and should be treated by finding a third value (namely participation) and then persuading both sides to accept that as primary. Unfortunately, this effort is doomed to fail because both sides will say, "It is precisely because participation is so important that society must ... (reject; put in place) hate speech rules." The pre-existing narrative or mindset retains its efficacy and will be used to situate and limit the proposed new approach. See infra notes 48 - 80.

[FN10]. See generally Chafee, Free Speech , supra note 4.

[FN11]. See, e.g., id. at 497-501; Liberty of the Press from Zenger to Jefferson (L. Levy ed., 1966).

[FN12]. See Chafee, Free Speech , supra note 4, at 497-501; Richard Delgado & David R. Millen, God, Galileo and Government: Toward Constitutional Protection for Scientific Inquiry, 53 Wash. L. Rev. 349, 354 -56 (1978); see also Dennis v. United States, 341 U.S. 494, 583 (1951) (Douglas, J., dissenting) (praising the Framers for redefining common-law treason to require an overt act).

[FN13]. See generally Derrick Bell, Race, Racism and American Law (2d ed. 1980) hereinafter Bell, Race, Racism ; Vincent Harding, There Is a River: The Black Struggle for Freedom in America (1981).

[FN14]. For histories of these movements and heroes, see, e.g., Plessy v. Ferguson, 163 U.S. 537, 552- 64 (1896) (Harlan, J., dissenting); Harding , supra note 13; Juan Williams, Eyes on the Prize: America's Civil Rights Years, 1954 -1965 (1987).

A few commentators have attempted to identify the fundamental values underlying our system of free expression, on the one hand, and the equality-protecting amendments on the other. For a discussion of the bearing of First Amendment theory and Fourteenth Amendment rationales on the controversy over hate speech, see Delgado, Narratives, supra note 1, at 375 - 83.

[FN15]. On the ubiquitous balancing approach deployed in various areas of constitutional law, see Laurence H. Tribe, American Constitutional Law 457, 789 - 94, 944 - 45, 977- 87, 1037-39, 1251-55 (2d ed. 1988).

[FN16]. On the ability of concerted speech to harm, see Delgado, Narratives, supra note 1, at 383 - 85; see also Delgado, Words that Wound, supra note 1, at 143 - 49. On the role of derogatory or stereotyped ethnic imagery in maintaining current power relations, see Delgado & Stefancic, Images, supra note 1, at 1279.

[FN17]. Delgado, Words that Wound, supra note 1, at 143 - 49.

[FN18]. See, e.g, Delgado & Stefancic, Images, supra note 1, at 1276.

[FN19]. Stephen G. Gey, The Unfortunate Revival of Civic Republicanism, 141 U. Pa. L. Rev. 801, 888 - 89 (1993) (criticizing search for community values as inherently favoring status quo); Martin H. Redish & Gary Lippman, Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications, 79 Calif. L. Rev. 267, 294 - 97 (1991) (warning that deference to community values leads to censorship).

[FN20]. See, e.g., Gey, supra note 19, at 858 - 64 (pointing out that community values are normally determined by the majority).

[FN21]. Nadine Strossen, Regulating Hate Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484, 567- 68 hereinafter Strossen, Regulating.

[FN22]. Lawrence, supra note 1, at 437.

[FN23]. See id. at 452-54 (explaining that historical association of racial epithets with violence against minorities often renders listener powerless to respond). One also recalls those parents who pretend to be "democratic" with their children: "Johnny, it's time we discussed your room."

[FN24]. Delgado, Narratives, supra note 1, at 349 -58 (detailing incidents at various campuses and the institutional responses).

[FN25]. See, e.g., Strossen, Regulating, supra note 21 (urging that racism on campus be countered by measures consistent with a broad interpretation of the First Amendment).

[FN26]. See supra note 15 and accompanying text. On the difficulty of communication and dialogue when the subject of discussion concerns strongly held values rooted in radically different world views, see Alasdair MacIntyre, After Virtue 6 -10 (2d ed. 1984).

[FN27]. For a lucid exposition of this concept, see generally Stanley Fish, Is There a Text In This Class? 14 (1980); see also infra notes 48 - 69 and accompanying text (explaining the concept's relation to the hate speech controversy).

[FN28]. On the way in which the current communicative paradigm contains and facilitates racism, see Delgado & Stefancic, Images, supra note 1, at 1275 - 84.

[FN29]. "Community" in this context is an interpretive community, a community of meaning, within which intelligible expression is possible.

[FN30]. Speech is the only way we can relate to others in any complex fashion. We also need it to make the basic arrangements that enable social life to occur, such as choosing a leader, selecting a form of government, and deciding whose choices count.

[FN31]. A portion of a community with the power to do so can construct a disparaging image of a smaller, weaker group, effectively excluding them from the community. See supra note 16 - 18.

[FN32]. A group that enacted rules against self-criticism would resist evolution and orderly change. On this dialectic function of speech, see generally Thomas I. Emerson, The System of Freedom of Expression (1970).

[FN33]. That is, he or she is calibrating the two parts of the speech-community dyad so as to produce, in effect, a new dyad or interpretive community.

[FN34]. But cf. Delgado & Stefancic, Images, supra note 1, at 1275 - 88 (implying that these changes come only very slowly).

[FN35]. For example, "Should I approve this hate speech rule which the administration of University X has enacted and the ACLU has challenged? My brother Judge Y thinks -- , but the case law seems to hold -- ; moreover, there seem to be strong policy reasons in favor of -- . Maybe I'll ask counsel what he or she thinks."

[FN36]. Thus, for example, the judge's understanding of such terms as "insult" (mild or serious?), "dignity," "fair," and "free," will affect, and almost predetermine, the outcome of a case implicating the boundaries of the interpretive community. The judge's experiences with insult and invective, with black people, with historical episodes such as the Hollywood blacklist, and so on, will all play a role in that understanding.

[FN37]. See Richard Delgado, Shadowboxing: An Essay on Power, 77 Cornell L. Rev. 813, 817-19 (1992) hereinafter Delgado, Essay on Power (describing the ways in which cultural power encodes itself in the very meanings and pictures we use to communicate and understand social reality). In the analogous context of the role of patriarchy in modern society, see generally Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law (1987) hereinafter MacKinnon, Feminism Unmodified ; Catharine A. MacKinnon, Toward a Feminist Theory of the State (1989) hereinafter MacKinnon, Feminist Theory (both detailing the way in which male power, or patriarchy, affects everything we do and see).

[FN38]. See Delgado & Stefancic, Norms and Narratives, supra note 1, at 1956 -57; see also Powell, Reconciling, supra note 1, at 24 -28 (noting that the temptation is almost always to favor, or "privilege" the view with which one is familiar); infra note 58 - 69 and accompanying text.

[FN39]. E.g., Leon F. Litwack, North of Slavery 12-14, 33, 106 - 09, 223 - 26 (1961) (detailing rise of and responses to the early abolition movement).

[FN40]. Id. at 223 -26.

[FN41]. President's Message to Congress, Cong. Globe , 34th Cong., 3d Sess., app. 1, 1 (1857).

[FN42]. Id.

[FN43]. For examples of early advocacy, see, e.g., The Norton Anthology of Literature By Women 253, 344 (Sandra M. Gilbert & Susan Gubar eds., 1985) (address by Elizabeth Cady Stanton; article by Stanton and Susan B. Anthony); Beverly A. Fish, Sojourner Truth: Crusader for Women's Rights, in 2 Black Women in United States History 386, 390 (Darlene C. Hine ed., 1990).

[FN44]. On the early history of child labor and children's rights reform, see Mary Jones, Autobiography of Mother Jones 71- 83 (1925); Howard Zinn, A People's History of the United States 260 - 61 (1980).

[FN45]. Stewart L. Udall, The Quiet Crisis and the Next Generation 195 - 203, 209 -10, 255 - 60 (1988).

[FN46]. Randy Shilts, And the Band Played On (1987) (history of gay and lesbian activism and society's responses in the context of the AIDS epidemic); Lynne Duke, Drawing Parallels -- Gays and Blacks: Linking Military Ban to Integration Fight Stirs Outrage, Sympathy, Wash. Post , Feb. 13, 1993, at A1.

[FN47]. Peter Singer, Animal Liberation (1975); William Ecenbarger, The Rights of Animals, Phila. Inquirer , May 13, 1984, (Magazine), at 20, 22 (attributing increased acceptance and respectability of the animal rights movement to publication in 1983 of philosopher Tom Regan's The Case for Animal Rights); Jon Margolis, Radical Protectors of Animals are Wrong about Rights, Chi. Trib. , Mar. 19, 1991, at C19.

[FN48]. See sources cited supra notes 9, 27.

[FN49]. See Erving Goffman, Stigma: Notes on the Management of Spoiled Identity , 2- 8 (Touchstone 1986) (discussing generally the socially-constructed stigmatization of the ugly, deformed, and racially different, and detailing individual responses and adaptations to that construction); Delgado, Words that Wound, supra note 1.

[FN50]. See, e.g., sources cited supra note 37; Delgado & Stefancic, Images, supra note 1, at 1281- 82 (on the usual fate that befalls reformers).

[FN51]. Delgado, Words that Wound, supra note 1, at 136 - 43 (discussing the harms of racism to make a case for reform of tort law to permit redress for racially hurtful remarks and slurs).

[FN52]. That is, communication presupposes a common store of meanings, intentions, understandings, etc. See sources cited supra notes 9, 27-28.

[FN53]. See Delgado & Stefancic, Images, supra note 1, at 1275 - 84.

[FN54]. See id. at 1259 - 61, 1280.

[FN55]. See id. at 1278 - 82. In the analogous context of images of women, see Richard Delgado & Jean Stefancic, Pornography and Harm to Women: "No Empirical Evidence?", 53 Ohio St. L.J. 1037, 1039 - 42 (1992) (surveying history of stereotypical images of women in the United States) hereinafter Delgado & Stefancic, No Empirical Evidence.

[FN56]. See Delgado & Stefancic, Images, supra note 1, at 1260 - 61, 1275 -79.

[FN57]. Id. at 1261, 1280 - 82.

[FN58]. Delgado & Stefancic, Norms and Narratives, supra note 1, at 1930, 1955 (arguing judges are little better able than average people to escape current understandings of social reality).

[FN59]. Id. at 1934 -52 (citing examples of judicial opinions written by eminent justices who misread how history would later judge these opinions).

[FN60]. See Delgado, Essay on Power, supra note 37, at 818 -19; see generally Michel Foucault, Power/Knowledge (1980) (describing the way social discourse inscribes and reinscribes power relations through what we decide to call "knowledge"); MacKinnon, Feminism Unmodified , supra note 37; MacKinnon, Feminist Theory , supra note 37.

[FN61]. See, e.g., President's Message to Congress, supra note 41 (announcing that the State of the Union address is the product of impartial assessment of the country's interests, and denouncing abolitionism as an appeal to passion, prejudice, and hatred); Richard Delgado, Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law, 45 Stan. L. Rev. 1133, 1139 - 47 (1993) (explaining how neutral principles of constitutional law disadvantage minority groups). We suspect that this observation is true beyond law -- medical knowledge benefits doctors, military doctrine benefits generals, and so on. Generally, knowledge benefits those who control it.

[FN62]. Delgado & Stefancic, Images, supra note 1, at 1278 - 84.

[FN63]. See Bell, Race, Racism , supra note 13, at 2-51 (providing historical illustrations of the themes of American racism).

[FN64]. Id. at 20 -25; see also Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 26 -50 (1989) hereinafter Bell, Not Saved (discussing Constitutional Convention in light of fictional conversation with "Geneva").

[FN65]. Delgado & Stefancic, Images, supra note 1, at 1270, 1282, 1287.

[FN66]. See id. at 1261-75 (chronicling stereotypical depictions of African Americans, Mexicans, Native Americans, and Asians in popular culture).

[FN67]. Id. at 1286 - 87. On the way legal categories, headnotes, index numbers, and other research tools limit and confine legal thought and imagination, see generally Richard Delgado & Jean Stefancic, Why Do We Tell the Same Stories? Law Reform, Critical Librarianship, and the Triple Helix Dilemma, 42 Stan. L. Rev. 207 (1989) hereinafter Delgado & Stefancic, Triple Helix Dilemma.

[FN68]. See Delgado & Stefancic, Images, supra note 1, at 1270, 1286 - 87 (illustrating how ethnic images alienate and diminish credibility and regard for members of minority groups).

[FN69]. For statistics on the demographic characteristics of recent Clinton appointees to the American judiciary, see Naftali Bendavid, Diversity Marks Clinton Judiciary, Recorder , Dec. 30, 1993, at 1 (giving net worths and law school alma maters of 27 recent Clinton federal judiciary nominees, seven of whom are worth more than one million dollars and only two of whom are worth less than $200,000); see generally 1 & 2 Almanac of the Federal Judiciary (1992).

[FN70]. Ass'n of Amer. Law Schools, Friday, January 8, 1993, AALS Plenary Session, 1993 A.A.L.S. Proc. 70.

[FN71]. Conversation with a colleague, at AALS Annual Meeting, in San Francisco, California (Jan. 5, 1993) (commenting that there is no real legal canon, except cases, statutes, and other documents, and that these are equally accessible to all).

[FN72]. On the homeostatic, status quo-maintaining function of legal terms, see Delgado & Stefancic, Triple Helix Dilemma, supra note 67, at 213, 215 -22 (discussing the way legal

categories, contained in terms, meanings, and conventional research tools, confine what may be said or imagined). See also Delgado, Essay on Power, supra note 37, at 822-24. On our society's system of racial imagery and its contribution to maintaining power relations, see Delgado & Stefancic, Images, supra note 1, at 1259 - 60. For an example of the pervasiveness of racial thinking, see Patricia Williams, Alchemy of Race and Rights: Diary of a Law Professor 44 -51 (1991).

[FN73]. On this legitimation function, see Alan D. Freeman, Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1054 -55 (1978).

[FN74]. Delgado & Stefancic, Images, supra note 1, at 1282- 84 (discussing the resistance that greets most reform efforts); see also Delgado & Stefancic, No Empirical Evidence, supra note 55, at 1046 -54 (discussing resistance to reform in connection with pornography).

[FN75]. See Delgado & Stefancic, No Empirical Evidence, supra note 55, at 1046 -54. For evidence that change is unlikely when the reformer's goals are contrary to those of the majority, see Derrick Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 524 (1980) hereinafter Bell, Interest-Convergence Dilemma (arguing that desegregation occurred only when it had become advantageous for elite whites).

[FN76]. For an earlier discussion of each of these mechanisms in the context of proposals to regulate pornography, see Delgado & Stefancic, No Empirical Evidence, supra note 55, at 1046 - 52.

[FN77]. Designating the reformist group as encroaching on our rights denies them legitimacy and gives us the moral standing to be indignant and to reject their program. We call this the notion of imposition. See Richard Delgado & Jean Stefancic, Failed Revolutions ch. 9 (forthcoming 1994).

[FN78]. Id.

[FN79]. Stanley Fish, Professor of Law and English, Duke University, Address to the AALS Plenary Panel, San Francisco, California (Jan. 5, 1993). For a broader perspective on the general cultural canon in the United States, see generally Henry Louis Gates, Jr., Loose Canons: Notes on the Culture Wars (1992) (examining the impact of multiculturalism, nationalism, and the politics of identity on American society, education, and culture).

[FN80]. See supra notes 59 - 63 and accompanying text.

[FN81]. See Bell, Interest-Convergence Dilemma, supra note 75, at 523 -24.

[FN82]. Cf. Richard Delgado & Helen Leskovac, The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue, 40 Rutgers L. Rev. 1031, 1034 -35 (1988) (discussing the pragmatist view which is concerned less with equality and more with the fact that women with children are needed in the workforce).

[FN83]. For a history of women in the workplace, see generally America's Working Women (Rosalyn Baxandall et al. eds., 1976).

[FN84]. Bell, Interest-Convergence Dilemma, supra note 75, at 523; see generally Bell, Race, Racism , supra note 13 (economic determinist view of racial progress).

[FN85]. For example, it seems plausible that society began to take the rights of the mentally ill seriously when cures became possible and hospitalization costly, and that children's rights acquired urgency only when society began to need a reliable supply of healthy, well-educated

workers for an industrial-technological economy.

[FN86]. For exposition of this hypothesis in connection with the "breakthrough" case of Brown v. Board of Education, see Bell, Interest-Convergence Dilemma, supra note 75, at 524. For a more recent treatment confirming this hypothesis, see Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61, 62- 63 (1988).

[FN87]. Beauharnais v. Illinois, 343 U.S. 250 (1952).

[FN88]. The most effective opponent of hate speech regulation is the ACLU. See, e.g., Marjorie Heins, Banning Words: A Comment on "Words that Wound," 18 Harv. C.R.-C.L. L. Rev. 585 (1983) (authored by an ACLU Staff Attorney); Strossen, Regulating, supra note 21, at 489, 552-54.

[FN89]. See Delgado, Narratives, supra note 1, at 380 n.319 (arguing that low-grade hassling benefits white-dominated institutions by keeping minorities on the defensive, preventing them from mobilizing around more costly reform measures, and assuring that students of color with spirit leave the institution).

[FN90]. For a comprehensive treatment of King's transformative rhetoric, see generally Anthony Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 Harv. L. Rev. 985 (1990).

[FN91]. Id. at 1013, 1023 - 41 (analyzing King's theology and rhetoric); see also Martin Luther King, Jr., I Have a Dream: Writings and Speeches that Changed the World (James Washington ed., 1992).

[FN92]. On the "functional" role that racial and other forms of stereotypes play in allowing the exploitation of those who are stereotyped, see Delgado and Stefancic, Images, supra note 1, at 1275 -76. On the way this process operated in pre-war Germany, see William L. Shirer, The Rise and Fall of the Third Reich 231-76 (1960).

[FN93]. On the present-day use of the counterstory and its roots in trickster tales and picaresque humor, see generally Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2411-15 (1989) hereinafter Delgado, Oppositionists.

[FN94]. Id. at 2414. For a recent example, see Kendall Thomas, A House Divided Against Itself: A Comment on "Mastery, Slavery, and Emancipation," 10 Cardozo L. Rev. 1481 (1989) (attempting to double-cross Hegel's construct of the Master/Slave relationship, inspired by African American trickster tales).

[FN95]. See generally Delgado, Oppositionists, supra note 93 (discussing the emerging narrative approach to legal scholarship); Kathryn Abrams, Hearing the Call of Stories, 79 Calif. L. Rev. 971 (1991). For criticism of this approach, see Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807 (1993).

[FN96]. See, e.g., Williams , supra note 72, at 44 - 45 (Patricia Williams' famous "Benetton" story).

[FN97]. See, e.g., Delgado, Oppositionists, supra note 93, at 2418 -35 (offering five versions of the same incident in which a black applicant interviews for a teaching position at a major law school and is rejected); see also Bell, Not Saved , supra note 64 (containing ten "Chronicles," each aimed at exposing some myth or comforting story about racial progress).

[FN98]. See Bell, Not Saved , supra note 64; Derrick Bell, Faces at the Bottom of the Well (1992); Derrick Bell, Foreword: The Civil Rights Chronicles, 99 Harv. L. Rev. 4 (1985).

[FN99]. See Richard Delgado & Jean Stefancic, Critical Race Theory: An Annotated Bibliography, 79 Va. L. Rev. 461 (1993) (describing Critical Race thought in general, and annotating over 200 articles, many of which are counterstories).

[FN100]. On the cultural-nationalist strain in recent race scholarship, see id. at 463; Gary Peller, Race Consciousness, 1990 Duke L.J. 758.

[FN101]. Author Richard Delgado was one of three University of Wisconsin-Madison professors who participated in drafting the University of Wisconsin speech code. On that campus, declining minority enrollment was a motivating factor for the adoption of a speech code. On the rise of campus codes in response to felt needs, see Delgado, Narratives, supra note 1, at 349 -58.

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