1994

Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation Symposium: Critical Race Theory: Essays on Hate Speech

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ESSAY II

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INTRODUCTION

The dominant free speech paradigm's resistance to change is not the only obstacle that hate speech rule advocates confront: what we call *paternalistic* objections are deployed as well to discourage reform, ostensibly in minorities' best interest.[1] These paternalistic arguments all urge that hate speech rules would harm their intended beneficiaries, and thus, if blacks and other minorities knew their own self-interest, they would oppose such rules. Often the objections take the form of arguing that there is no conflict between equality and liberty, since by protecting speech one is also protecting minorities.[2] This Essay details and answers these arguments before suggesting potential avenues for reform in the near future.

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1. By paternalism, we mean a justification for curtailing someone's liberty that invokes the well-being of the person concerned, that is, that requires him or her to do or refrain from doing something for his or her own good.

Could it be argued that the opposite position, namely advocacy of hate speech regulation, is also paternalistic, in that it implies that minorities need or want protection, when many may not? No. The impetus for such regulation comes mainly from minority attorneys and scholars. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). An argument emanating from the protected group cannot be paternalistic (although it could be misguided on other grounds). A gay who found gay-bashing inoffensive, or a Mexican who enjoyed being called "spic" or "wetback" has an easy recourse—not to file a complaint under the statute or code.

2. *See, e.g.*, NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER, 18-41 (1992) [hereinafter HENTOFF, SPEECH]; Marjorie Heins, *Banning Words: A Comment on "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 592 n.39 (1983) [hereinafter Heins, *Banning*] ("Tolerating ugly, vicious speech is a small but necessary price to pay for the freedom to advocate social change and justice."); Nadine Strossen, *Regulating Hate Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 562-69 [hereinafter

Our decision to focus on paternalistic objections is sparked by more than mere theoretical interest. Respected commentators, including the national president of the ACLU, make such arguments.[3] Audiences listen and nod agreement. Unless they are challenged, these arguments may have more effect than they deserve. In Part I of this Essay, we review the development and current state of the hate speech controversy. In Part II, we critique four paternalistic objections that free speech purists have put forward.

Part III addresses how to draft regulations that will protect members of the campus community from insult and invective while remaining within constitutional bounds. It offers a number of affirmative reasons why we should do so, and responds to the argument that, even if the First Amendment does not forbid antiracism rules, our general preference for free speech cautions against them. The Essay closes with a discussion of *hubris,* a concept rooted in early Greek thought, which we believe explains many of the blind spots and resistances one sees in the debate over campus antiracism rules.

I
THE CAMPUS ANTIRACISM DEBATE

In order to understand the interplay of arguments raging in the hate speech debate, it is necessary to review the development of antiracism rules in greater detail. That history has both social and legal aspects. Beginning around 1979, many campuses began noticing a sharp rise in the number of incidents of hate-ridden speech directed at minorities, gays, lesbians, and others. According to the *Chronicle of Higher Education,* at least 175 institutions of higher learning have experienced racial unrest serious enough to be reported in the news since the 1986-87 academic year.[4] The National Institute Against Prejudice and Violence estimates that twenty to twenty-five percent of minority students are victimized at least once during their college years.[5]

Strossen, *Regulating*] (arguing free speech protects minority groups and promotes social change towards racial equality). In the context of gender, see Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography,* 79 VA. L. REV. 1099, 1167-71 (1993) [hereinafter Strossen, *Critique*] (opposing anti-pornography rules in the interests of women). These are not the only arguments that are made against regulating hate speech, of course. *See infra* notes 45-49 and accompanying text. They are, however, an important set of arguments, because: (i) they are prominently and frequently repeated; (ii) they are insidious—those who make them can pretend to be serving minorities' best interest while opposing hate speech rules that many minorities advocate.

3. *See, e.g.,* Strossen, *Regulating, supra* note 2.

4. Denise K. Magner, *Blacks and Whites on the Campuses: Behind Ugly Racist Incidents, Student Isolation and Insensitivity,* CHRON. HIGHER ED., Apr. 26, 1989, A1, A28 (citing a National Institute Against Prejudice and Violence study documenting racial incidents at 175 institutions since 1986, counting only cases which received publicity).

5. Deb Riechmann, *Colleges Tackle Increase in Racism on Campuses,* L.A. TIMES, Apr. 30, 1989, pt. I, at 36.

At The Citadel, for example, white-sheeted intruders awakened a black cadet with chants, burst into his room, and left behind a charred paper cross.[6] At the University of California at Berkeley, a fraternity member shouted obscenities and racial slurs at a group of black students as they passed by his house.[7] In a later incident, a campus disc jockey told black students to "[g]o back to Oakland" when they asked the station to play rap music.[8] At Stanford, some white students scribbled stereotypically black facial features on a poster of Ludwig von Beethoven and left it outside the dorm rooms of black students.[9] At the University of Massachusetts, tensions resulting from television viewing of a World Series game exploded in a racial brawl that left a number of students injured.[10]

Experts are divided on the causes of the apparent upsurge in campus racism. A few argue that the increase is the result of better reporting or heightened sensitivity on the part of the minority community.[11] Most, however, believe that the changes are real, noting that they are consistent with a sharp rise in attacks on foreigners, immigrants, and ethnic minorities occurring in many Western industrialized nations.[12] This general rise in racist incidents may be prompted by deteriorating economies and increased competition for jobs. It may reflect an increase in populations of color, due to immigration patterns and high birthrates. It may be related to the ending of the Cold War and competition between the two superpowers.[13]

Whatever its cause, campus racism is a major concern for many educators and university officials. At the University of Wisconsin, for example, the number of black students dropped sharply in the wake of highly publicized incidents of racism.[14] Faced with negative publicity and declining minority enrollments, some institutions established campus programs aimed at racial awareness. Others broadened their curriculum to include more multicultural offerings and events. Still others have enacted hate speech codes that prohibit slurs and disparaging remarks directed against persons on account of their ethnicity, religion, or sexual orientation. Sometimes these codes are patterned after existing torts or the fighting words exception to the First Amendment. One at the University of Texas, for example, bars

6. *Rights Group Files Suit in Citadel Hazing Case,* N.Y. TIMES, Dec. 19, 1986, at A22.

7. Diane Curtis, *College Campuses Reinforce Rules Barring Racism,* SAN FRANCISCO CHRON., Sept. 18, 1989, at A1, A8.

8. *Id.*

9. Felicity Barringer, *Campus Battle Pits Freedom of Speech Against Racial Slurs,* N.Y. TIMES, Apr. 25, 1989, at A2.

10. *State Starting an Investigation of Clash at Massachusetts U.,* N.Y. TIMES, Nov. 18, 1986, at B24.

11. Michael Greve, Executive Director, Center for Individual Rights, Washington D.C., Address at Michigan State University (Oct. 22, 1992).

12. For a recent discussion of the international dimensions of hate speech and hate crimes, see generally STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992) [hereinafter STRIKING A BALANCE].

13. *See* Essay I, *supra,* text accompanying notes 86-87.

14. For the university's response, see Essay I, *supra,* note 101 and accompanying text.

personalized insults that amount to intentional infliction of emotional distress.[15] Another, at the University of California at Berkeley, prohibits "those personally abusive epithets which, when directly addressed to any ordinary person, are . . . likely to provoke a violent reaction whether or not they actually do so."[16]

It was not long before campus speech codes were challenged in court. In *Doe v. University of Michigan,*[17] the university unsuccessfully defended a student conduct code that prohibited verbal or physical behavior that "stigmatizes or victimizes" any individual on the basis of various immutable and cultural characteristics, and that "[c]reates an intimidating, hostile or demeaning environment."[18] Citing Supreme Court precedent that required speech regulations to be clear and precise,[19] the district court found Michigan's code fatally vague[20] and overbroad.[21] Two years later, in *UWM Post, Inc. v. Board of Regents,*[22] a different federal district court considered a University of Wisconsin rule that prohibited disruptive epithets directed against an individual because of his or her race, religion, or sexual orientation.[23] The district court invalidated the rule, finding the measure overbroad and ambiguous. The court refused to apply a balancing test that would weigh the social value of the speech with its harmful effect,[24] and found the rule's similarity to Title VII doctrine insufficient to satisfy constitutional requirements.[25]

Finally, the Supreme Court in *R.A.V. v. City of St. Paul*[26] struck down a city ordinance that selectively prohibited certain forms of racist expression.[27] In *R.A.V.,* a white youth had burned a cross on the lawn of a black family.[28] The local prosecutor charged him with disorderly conduct under an ordinance that forbade expression aimed at "arous[ing] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[29] Even after adopting the Minnesota Supreme Court's construction of the

15. UNIVERSITY OF TEXAS, GENERAL INFORMATION: INSTITUTIONAL RULES OF STUDENT SERVICES AND ACTIVITIES 174 app. C (1990-91).

16. Diane Curtis, *Racial, Ethnic, Sexual Slurs Banned on U.C. Campuses,* S.F. CHRON., Sept. 27, 1989, at A1.

17. 721 F. Supp. 852 (E.D. Mich. 1989).

18. *Id.* at 856.

19. *Id.* at 864, 866 (citing Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding state statute prohibiting state employee's receipt of political contributions and membership in political organizations because the act was "clear and precise")).

20. *Id.* at 867.

21. *Id.* at 866.

22. 774 F. Supp. 1163 (E.D. Wis. 1991).

23. *Id.* at 1165-66.

24. *Id.* at 1173-74.

25. *Id.* at 1177.

26. 112 S. Ct. 2538 (1992).

27. *Id.* at 2547.

28. *Id.* at 2541.

29. *Id.*

ordinance to apply only to fighting words, the Supreme Court found it unconstitutional.[30] Fighting words, although regulable in some circumstances, are not entirely devoid of First Amendment protection. In particular, they may not be prohibited based on the content of the message.[31] Not only did the ordinance discriminate based on content, but it further discriminated based on viewpoint by choosing to punish only those fighting words which expressed an opinion with which the city disagreed.[32]

More recent decisions have been more supportive of the efforts of some authorities to take action against racism. In *Wisconsin v. Mitchell,*[33] a black man was convicted of aggravated battery for severely beating a white youth.[34] Because the defendant selected the victim for his race, the defendant's sentence was increased by an additional two years under a Wisconsin penalty-enhancement statute.[35] The United States Supreme Court affirmed the statute's constitutionality, holding that motive, and more specifically racial hatred, can be considered in determining the sentence of a convicted defendant.[36] The Court explained that while "abstract beliefs, however obnoxious" are protected under the First Amendment, they are not protected once those beliefs express themselves in commission of a crime.[37]

In Canada, two recent decisions also upheld the power of the state to prohibit certain types of offensive expression when they cause societal harm. In *Regina v. Keegstra,*[38] a teacher had described Jews in disparaging terms to his pupils and declared that the holocaust did not take place.[39] The

30. *Id.* at 2542.

31. *Id.* at 2543-47. In this context, content regulation means regulation of a subset of fighting words, such as invective aimed at ethnicity, gender, or religion, that is distinguished from unregulated fighting words based on content.

32. *Id.* at 2547-48. Justice Scalia, writing for the Court, pointed out that in an argument between a Catholic and a critic of Catholicism, the St. Paul ordinance would permit the former to say "all 'anti-Catholic bigots' are misbegotten," but would not allow the latter to say that all "papists" are misbegotten because the second example of invective would insult and provoke violence on the basis of the victim's religion. *Id.* at 2548.

33. 113 S. Ct. 2194 (1993).

34. *Id.* at 2197. The defendant in this case, after a discussion with his friends about a scene from the movie "Mississippi Burning" in which a young black boy was beaten by a white man, asked his friends: " 'Do you all feel hyped up to move on some white people?' " Later, he egged the group on, saying: " 'There goes a white boy; go get him.' " The group beat the white youth severely. *Id.* at 2196-97.

35. *Id.* at 2197. Although aggravated battery ordinarily carries a maximum sentence of two years in Wisconsin, the maximum penalty for an aggravated battery where the defendant intentionally selects the victim for his race is increased to seven years. Under this penalty enhancement provision, the defendant was sentenced to four years. *Id.* at 2197.

36. *Id.* at 2199-200.

37. *Id.* at 2200. *See also* Barclay v. Florida, 463 U.S. 939, 947, 949 (1983) (holding the Constitution does not prohibit sentencing judge from considering racial hatred where it bears a rational nonarbitrary relationship to statutory aggravating factors). *But see* Dawson v. Delaware, 112 S. Ct. 1093, 1096-99 (1992) (holding that admission of defendant's membership in a white supremacist prison gang into evidence at sentencing hearing where this evidence was not relevant to any of the issues in the proceeding violated First Amendment rights).

38. 3 S.C.R. 697 (Can. 1990).

39. *Id.* at 714.

Supreme Court of Canada upheld the national criminal code provision under which the defendant was charged. The court emphasized that this type of hate speech harms its victims and society as a whole, sufficiently so to justify criminalizing it.[40] In *Regina v. Butler*,[41] the Supreme Court of Canada reversed a trial court dismissal of criminal pornography charges, based on the social harm caused by the speech and the minimal impairment of legitimate speech that the prohibition presented.[42] Both decisions are notable because Canada's legal and free speech traditions are similar to those of the United States, and because the Canadian Charter protects speech in terms similar to those of its United States counterpart.

The recent scholarly interest in torts-based approaches provides a final development suggesting the feasibility of regulating hate speech. Several scholars advocate regulating hate speech through the torts of intentional infliction of emotional distress or group defamation.[43] These scholars propose that the law of tort might be tapped to supply models for harm-based codes that would pass constitutional muster. They emphasize that tort law's historic role in redressing personal wrongs, its neutrality, and its relative freedom from constitutional restraints are powerful advantages for rules aimed at curbing hate speech.[44]

At present, then, case law and commentary suggest that hate speech restrictions may be drafted in compliance with the First Amendment. Given the legal feasibility of enacting hate speech codes, coupled with the continued rise of racism on college campuses, the future seems to lie squarely in the hands of policy makers.

II

PATERNALISTIC JUSTIFICATIONS FOR OPPOSING HATE SPEECH REGULATION: PRESSURE VALVES, BLOODIED CHICKENS, AND THE THEY-DON'T-KNOW-THEIR-OWN-SELF-INTEREST ARGUMENT

Because of the feasibility of drafting constitutional hate speech regulations, the debate over such rules has shifted to the policy arena.[45] Four arguments made by opponents of antiracism rules are central to this debate:

40. *Id.* at 745-49, 758.

41. 89 D.L.R. 4th 449 (Can. 1992).

42. *Id.* at 488-89 (describing the minimal impairment test—if the challenged rule imposes only minimal limtations on speech, it is upheld).

43. *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 (1982); Rhonda G. Hartman, *Revitalizing Group Defamation As a Remedy For Hate Speech on Campus*, 71 OR. L. REV. 855 (1992); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 23 (1990); Shawna H. Yen, *Redressing the Victim of Racist Speech After* R.A.V. v. St. Paul: *A Proposal to Permit Recovery in Tort*, 26 COLUM. J.L. & SOC. PROBS. 589 (1993).

44. *See infra* notes 109-10 and accompanying text.

45. This section focuses on four principal policy arguments that are paternalistic, as we define the term. *See supra* note 1. Additional arguments have been made. For example, the "martyrdom"

(i) Permitting racists to utter racist remarks and insults allows them to blow off steam harmlessly.[46] As a result, minorities are safer than they would be under a regime of antiracism rules. We will refer to this as the "pressure valve" argument.

(ii) Antiracism rules will end up hurting minorities, because authorities will invariably apply the rules against them, rather than against members of the majority group.[47] This we will call the "reverse-enforcement" argument.

(iii) Free speech has been minorities' best friend. Because free speech is a principal instrument of social reform, persons interested in achieving reform, such as minorities, would resist placing any fetters on freedom of expression if they knew their self-interest.[48] This we term the "best friend" objection.

(iv) More speech—talking back to the aggressor—rather than regulation is the solution to racist speech. Because racism is a form of ignorance, dispelling it through reasoned argument is the only way to get at its root. Moreover, talking back to the aggressor is empowering. It strengthens one's own identity, reduces victimization, and instills pride in one's heritage.[49] This we call the "talk back" argument.

Each of these arguments is paternalistic, invoking the interest of the group seeking protection. Each is also seriously flawed; indeed, the situation is often the opposite of what its proponents understand it to be. Racist speech, far from serving as a pressure valve, deepens minorities' predicament. Moreover, except in authoritarian countries like South Africa, authorities generally do not apply antiracism rules against minorities. Free speech has not always proven a trusty friend of racial reformers. Finally, talking back is rarely a realistic possibility for the victim of hate speech.

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argument (penalizing hate speakers makes heroes out of them and gives them a further platform for their message), *see* HENTOFF, SPEECH, *supra* note 2, at 265-70, and the "bellwether" argument (racist speech raises and alerts public consciousness), *see* Strossen, *Regulating, supra* note 2, at 560, have both paternalistic and nonpaternalistic dimensions. We exclude from our consideration these and other arguments falling in the "gray zone" of paternalism; their treatment awaits another day.

46. *See, e.g.*, HENTOFF, SPEECH, *supra* note 2, at 134 (quoting Yale University President Benno Schmidt); Heins, *Banning, supra* note 2, at 590; Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936) ("[I]t would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam.").

47. *See, e.g.*, HENTOFF, SPEECH, *supra* note 2, at 169 (quoting Eleanor Holmes Norton); Strossen, *Regulating, supra* note 2, at 512, 556.

48. *See, e.g.*, HENTOFF, SPEECH, *supra* note 2, at 167; Strossen, *Regulating, supra* note 2, at 567-68.

49. *See, e.g.*, HENTOFF, SPEECH, *supra* note 2 at 101-02 (quoting Roy Innis), 159 (quoting Gerald Gunther), 167.

A. *The Pressure Valve Argument*

The pressure valve argument holds that rules prohibiting hate speech are unwise because they increase the danger racism poses to minorities.[50] Forcing racists to bottle up their dislike of minority group members means that they will be more likely to say or do something hurtful later. Free speech thus functions as a pressure valve, allowing tension to dissipate before it reaches a dangerous level.[51] Pressure valve proponents argue that if minorities understood this, they would oppose antiracism rules.

The argument is paternalistic; it says we are denying you what you say you want, and we are doing it for your own good. The rules, which you think will help you, will really make matters worse. If you knew this, you would join us in opposing them.

Hate speech may make the speaker feel better, at least temporarily, but it does not make the victim safer. Quite the contrary, the psychological evidence suggests that permitting one person to say or do hateful things to another *increases,* rather than decreases, the chance that he or she will do so again in the future.[52] Moreover, others may believe it is permissible to follow suit.[53] Human beings are not mechanical objects. Our behavior is more complex than the laws of physics that describe pressure valves, tanks, and the behavior of a gas or liquid in a tube. In particular, we use symbols to construct our social world, a world that contains categories and expectations for "black," "woman," "child," "criminal," "wartime enemy," and so on.[54] Once the roles we create for these categories are in place, they govern

50. *See, e.g.,* HENTOFF, SPEECH, *supra* note 2, at 134 (quoting Yale University President Benno Schmidt); *cf.* Strossen, *Critique, supra* note 2, at 1140-41 (making a similar argument in the context of rules against pornography and their effect on women).

51. *See, e.g.,* HENTOFF, SPEECH, *supra* note 2 at 134 ("If fear, ignorance, and bigotry exist on our campuses, it is far better that they be exposed and answered, than that they be bottled up.") (quoting Yale University President Benno Schmidt).

52. *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 467-73 (1954) (rejecting view that racist conduct serves as catharsis and arguing that laws and norms against discrimination change behavior for the better); *infra* notes 56-57 and accompanying text (social science laboratory and field evidence). The mechanism by which racist speech and acts encourage further racist speech and acts probably consists of a combination of *habituation* (our tendency to repeat an action that is enjoyable and brings no penalty); *cognitive dissonance* ("he must deserve it—look how badly I treated him before"); and *social construction of reality* (the images we disseminate of and toward minorities create a world in which they are always one-down). *See also* Richard Delgado, *Rodrigo's Chronicle,* 101 YALE L.J. 1357, 1374 (1992) (on a fourth mechanism, *perseveration,* as a response to frustration and stress).

53. *See infra* notes 56-57 and accompanying text; *see also* LEONARD BERKOVITZ, AGGRESSION—ITS CAUSES, CONSEQUENCES AND CONTROL (1993); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 57 Mich. L. Rev. 2320, 2329-31 (1989) (noting that racial violence is often preceded by racist propaganda or slurs); Leonard Berkowitz, *The Case for Bottling Up Rage,* PSYCHOL. TODAY, July 1973, at 24.

54. On this symbolic dimension and the part it plays in constructing racial reality, see 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 (1992) [hereinafter Delgado & Stefancic, *Images*]; *see also* Essay I, *supra,* notes 27-38 and accompanying text (on way systems and communities of meaning limit what we can imagine and hamper social reform).

the way we speak of and act toward members of those categories in the future.[55]

Even simple barnyard animals act on the basis of categories. Poultry farmers know that a chicken with a single speck of blood will be pecked to death by the others.[56] With chickens, of course, the categories are neural and innate, functioning at a level more basic than language. But social science experiments demonstrate that the way we categorize others affects our treatment of them. An Iowa teacher's famous "blue eyes/brown eyes" experiment showed that even a one-day assignment of stigma can change behavior and school performance.[57] At Stanford University, Phillip Zimbardo assigned students to play the roles of prisoner and prison guard, but was forced to discontinue the experiment when some of the participants began taking their roles too seriously.[58] And Diane Sculley's interviews with male sexual offenders showed that many did not see themselves as offenders at all. In fact, research suggests that exposure to sexually violent pornography increases men's antagonism toward women and intensifies rapists' belief that their victims really welcomed their attentions.[59] At Yale University, Stanley Milgram showed that many members of a university

55. *See* Delgado & Stefancic, *Images, supra* note 54, at 1260-62, 1280-84; Delgado & Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?,* 69 TEX. L. REV. 1929, 1929-34 (1991).

56. RICK & GAIL LUTTMAN, CHICKENS IN YOUR BACKYARD: A BEGINNER'S GUIDE 121 (1976):

> Bored chicks often start by picking each other's toes (or even their own). Older birds may start picking at the base of the tail or near the vent. Should a bird get caught in a fence or otherwise trapped, the other chickens may mercilessly pick it until it is plucked bare and eaten alive. An injury of any sort provides an occasion for picking to start. The chickens may finish off one unfortunate bird and nonchalantly go on to eat others.

57. The experiment was first done by a third-grade school teacher from Riceville, Iowa, on April 5, 1968, in response to the death of Martin Luther King, Jr. *See* WILLIAM PETERS, A CLASS DIVIDED: THEN AND NOW (1971). The teacher, Jane Elliott, set out to teach her students what it would feel like to be discriminated against and made to feel inferior. On the day of the exercise, "Discrimination Day," she divided the class into two groups, one consisting of blue-eyed children, the other of brown-eyed ones. For that day, the brown-eyed group would be treated as superior to the blue-eyed ones: better, cleaner, more civilized, and smarter. They were also given extra privileges, including additional recess time and use of the playground equipment, and granted an opportunity to go to lunch first. Moreover, they could drink directly and at will from the fountain. The behavioral effects of this staged demonstration were striking: the young brown-eyed children immediately sat up straighter in their chairs than their blue-eyed classmates, who behaved listlessly and raised their hands less often. Within a short time the brown-eyed students seemed actually to believe they were superior. The next day, the teacher repeated the experiment but reversed the roles; this time the previously inferior blue-eyed children displayed greater alertness and self-confidence. Even more significantly, the students' performance on tests of spelling, math, and reading changed on the day of the exercise, exactly in accord with the behavioral changes. The exercise was subsequently repeated in several settings, including correctional facilities, with the same results. *Id.; see also PBS Frontline: A Class Divided* (PBS television broadcast, May 11, 1970; rebroadcast 1985).

58. Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison,* 1 INT'L J. CRIMINOL. & PENOLOGY 69, 80-81 (1973) (reporting the guards began to haze, browbeat, and even physically mistreat the prisoners).

59. DIANE SCULLEY, UNDERSTANDING SEXUAL VIOLENCE 100-17 (1990).

community could be made to violate their conscience if an authority figure invited them to do so and assured them this was permissible and safe.[60]

The evidence, then, suggests that allowing persons to stigmatize or revile others makes them more aggressive, not less so. Once the speaker forms the category of deserved-victim, his or her behavior may well continue and escalate to bullying and physical violence. Further, the studies appear to demonstrate that stereotypical treatment tends to generalize—what we do teaches others that they may do likewise. Pressure valves may be safer after letting off steam; human beings are not.

B. The "Reverse Enforcement" Argument

A second paternalistic argument is that enactment of hate speech rules is sure to hurt minorities because the new rules will be applied against minorities themselves.[61] A vicious insult hurled by a white person to a black will go unpunished, but even a mild expression of exasperation by a black motorist to a police officer or by a black student to a professor, for example, will bring harsh sanctions. The argument is plausibile because certain authorities are racist and dislike blacks who speak out of turn, and because a few incidents of blacks charged with hate speech for innocuous behavior have occurred. Nadine Strossen, for example, asserts that in Canada, shortly after the Supreme Court upheld a federal hate speech code, prosecutors began charging blacks with hate offenses.[62]

But the empirical evidence does not suggest that this is the pattern, much less the rule. Police and FBI reports show that hate crimes are committed much more frequently by whites against blacks than the reverse.[63] Statistics compiled by the National Institute Against Violence and Prejudice confirm what the police reports show, that a large number of blacks and other minorities are victimized by racist acts on campus each year.[64] Moreover, the distribution of enforcement seems to be consistent with commission of the offense. Although an occasional minority group member

60. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974) (reporting results of experiment in which one subject administered an electric shock to another when the latter missed a question asked by an authority figure).

61. *See, e.g.*, HENTOFF, SPEECH, *supra* note 2, at 169 (quoting Eleanor Holmes Norton); Strossen, *Critique, supra* note 2, at 1143-46; Strossen, *Regulating, supra* note 2, at 512.

62. Nadine Strossen, ACLU National President, Address to the Judicial Conference, Tenth Circuit Court of Appeals, Durango, Colo. (July 1992); *see also* Henry Louis Gates, *Let Them Talk*, NEW REPUB., Sept. 20 & 27, 1993, at 37, 44 (attributing same view to Strossen in the context of enforcement of University of Michigan speech code).

63. *See, e.g., Race Bias Prompted Most Hate Crimes: FBI's First National Statistics Show Blacks As Main Target*, S.F. CHRON., Jan. 5, 1993, at A2 [hereinafter *Race Bias*](reporting national statistics); Thom Shanker, *Hate-Crime Numbers Rise*, DENVER POST, June 29, 1994, at 2-A. *But see* Eugene H. Czajkoski, *Criminalizing Hate: An Empirical Assessment*, FED. PROBATION, Sept. 1992, at 36, 38 (reporting Florida statistics, inconsistent with national figures, which showed 43 percent of hate crimes were committed by blacks against whites, while 39 percent were committed by whites against blacks).

64. *See* Riechmann, *supra* note 5.

may be charged with a hate crime or with violating a campus hate speech code, these prosecutions seem rare.[65]

Racism, of course, is not a one-way street; some minorities have harassed and badgered whites. Still, the reverse-enforcement objection seems to have little validity in the United States. A recent study of the international aspects of hate speech regulation showed that in repressive societies, such as South Africa and the former Soviet Union, laws against hate speech have indeed been deployed to stifle dissenters and members of minority groups.[66] Yet, this has not happened in more progressive countries.[67] The likelihood that officials in the United States would turn hate speech laws into weapons against minorities seems remote.

C. *Free Speech as Minorities' Best Friend: The Need to Maintain the First Amendment Inviolate*

Many absolutists and defenders of the First Amendment urge that the First Amendment historically has been a great friend and ally of social reformers. Nadine Strossen, for example, argues that without free speech, Martin Luther King, Jr. could not have moved the American public as he did.[68] Other reform movements also are said to have relied heavily on free speech.[69] This argument, like the two earlier ones, is paternalistic—it is based on the supposed best interest of minorities. If they understood their own best interest, the argument goes, they would not demand to bridle speech.

The argument ignores the history of the relationship between racial minorities and the First Amendment. In fact, minorities have made the greatest progress when they acted in *defiance* of the First Amendment.[70] The original Constitution protected slavery in several of its provisions,[71] and the First Amendment existed contemporaneously with slavery for

65. *See, e.g., Race Bias, supra* note 63; Riechmann, *supra* note 5. For an example of a hate crime case against a minority group member, see *Wisconsin v. Mitchell, supra* notes 33-36 and accompanying text.

66. *See* STRIKING A BALANCE, *supra* note 12, at 109, 221, 223, 240, 259, 307 (describing efforts of various countries to control hate speech).

67. Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction,* 78 IOWA L. REV. 737, 742 (1993) (for example Canada).

68. Strossen, *Regulating, supra* note 2, at 567; *see also* Essay I, *supra,* at note 27 (discussing same argument).

69. *See, e.g.,* Strossen, *Critique, supra* note 2, at 1166-71 (noting that curtailing speech might have some costs for feminists); Anthony Lewis, Address at the University of California Extension, Sacramento, Cal. (Feb. 1992) (replying in part to Delgado & Stefancic, *Images, supra* note 54).

70. *See, e.g.,* Charles Lawrence, *If He Hollers Let Him Go,* 1990 DUKE L.J. 431, 466-67 ("[O]ur petitions often go unanswered until they disrupt business as usual and require the self-interested attention of those persons in power. Paradoxically, the disruption that renders this speech effective usually causes it to be considered undeserving of first amendment protection."). We are not arguing that speech and remonstrance are ineffective tools for the reformer; rather, we believe that our legal system and its definition of free speech often stand in the way of effective protest and communication.

71. U.S. CONST. art. I, §§ 2, 9, art. IV, § 2, cl. 1, 3.

nearly 100 years. Free speech for slaves, women, and the propertyless was simply not a major concern for the drafters, who appear to have conceived the First Amendment mainly as protection for the kind of refined political, scientific, and artistic discourse they and their class enjoyed.

Later, of course, abolitionism and civil rights activism broke out.[72] But an examination of the role of speech in reform movements shows that the relationship of the First Amendment to social advance is not so simple as free speech absolutists maintain. In the civil rights movement of the 1960s, for example, Martin Luther King, Jr. and others did use speeches and other symbolic acts to kindle America's conscience.[73] But as often as not, they found the First Amendment (as then understood) did not protect them.[74] They rallied and were arrested and convicted; sat in, were arrested and convicted; marched, sang, and spoke and were arrested and convicted.[75] Their speech was seen as too forceful, too disruptive. Many years later, to be sure, their convictions would sometimes be reversed on appeal, at the cost of thousands of dollars and much gallant lawyering. But the First Amendment, as then understood, served more as an obstacle than a friend.[76]

Why does this happen? Narrative theory shows that we interpret new stories in terms of the old ones we have internalized and now use to judge reality.[77] When new stories deviate too drastically from those that form our current understanding, we denounce them as false and dangerous. The free market of ideas is useful mainly for solving small, clearly bounded disputes.[78] History shows it has proven much less useful for redressing systemic evils, such as racism.[79] Language requires an interpretive paradigm, a set of shared meanings that a group agrees to attach to words and terms.[80] If racism is deeply inscribed in that paradigm—woven into a thousand scripts, stories, and roles—one cannot speak out against it without appearing incoherent.[81]

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72. For enlightening histories, see generally LEON HIGOENBOTHAM, JR., IN THE MATTER OF COLOR (1978); RICHARD KLUGER, SIMPLE JUSTICE (1976).

73. *See, e.g.*, MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT (1963).

74. Lawrence, *supra* note 70, at 466-67. On the reasons why remonstrance and other speech-acts are less effective than we like to think at changing hearts and kindling conscience, see Delgado & Stefancic, *Images, supra* note 54, at 1260-61, 1277-82 (coining term "empathic fallacy" to describe misplaced faith in expression as a cure for deeply inscribed social ills and pointing out the way in which our "paradigm," or system of agreed meanings, may itself contain racism and other systemic ills and distortions that cause a person who speaks out against these ills to be heard as extreme).

75. *See* Lawrence, *supra* note 70, at 467 n.130 (detailing First Amendment cases in which protesters were arrested); DERRICK BELL, RACE, RACISM AND AMERICAN LAW 279-361 (2d ed. 1980) [hereinafter BELL, RACE, RACISM] (recounting fate of blacks in the era of demonstrations).

76. Delgado & Stefancic, *Images, supra* note 54, at 1285.

77. Delgado & Stefancic, *Images, supra* note 54, at 1276-82.

78. *See Images, supra* note 54, at 1259, 1275-88.

79. *Id.* at 1259-76.

80. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980) (arguing that members of different "interpretive communities" will perceive the same message very differently).

81. Delgado & Stefancic, *Images, supra* note 54, at 1276-82.

An examination of the current landscape of First Amendment exceptions reveals a similar pattern. Our system has carved out or tolerated dozens of "exceptions" to the free speech principle: conspiracy; libel; copyright; plagiarism; official secrets; misleading advertising; words of threat; disrespectful words uttered to a judge, teacher, or other authority figure; and many more.[82] These exceptions (each responding to some interest of a powerful group)[83] seem familiar and acceptable, as indeed perhaps they are. But a proposal for a new exception to protect some of the most defenseless members of society, 18-year old black undergraduates at predominantly white campuses, immediately produces consternation: the First Amendment must be a seamless web.

It is we, however, who are caught in a web, the web of the familiar. The First Amendment seems to us useful and valuable. It reflects our interests and sense of the world. It allows us to make certain distinctions, tolerates certain exceptions, and functions in a particular way we assume will be equally valuable for others. But the history of the First Amendment, as well as the current landscape of doctrinal exceptions, shows that it is far more valuable to the majority than to the minority, far more useful for confining change than for propelling it.[84]

D. "More Speech"—Talking Back to the Aggressor as a Preferable Solution to the Problem of Hate Speech

Defenders of the First Amendment sometimes argue that minorities should talk back to the aggressor.[85] Nat Hentoff, for example, writes that antiracism rules teach black people to depend on whites for protection, while talking back clears the air, emphasizes self-reliance, and strengthens one's self-image as an active agent in charge of one's own destiny.[86] The "talking back" solution to campus racism draws force from the First Amendment principle of "more speech," according to which additional dialogue is always a preferred response to speech that some find troubling.[87]

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82. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision,* 85 NW. U. L. REV. 343, 377 (1991) [hereinafter Delgado, *Narratives in Collision*] (reviewing these and other exceptions).

83. The law of defamation, for example, has largely been shaped by self-interested elite whites beeause they are generally the only ones who can afford to litigate their claims, especially against large journalistic defendants. NORMAN L. ROSENBERG, PROTECTING ALL THE BEST MEN 11 (1986).

84. *See* Delgado, *Narratives in Collision, supra* note 82, at 385 (discussing this insight in the context of defamation).

85. *See, e.g.,* HENTOFF, SPEECH, *supra* note 2, at 100-02, 111, 159, 167; Strossen, *Regulating, supra* note 2, at 562 (urging government officials, private individuals and groups, and civil libertarians to speak out against racism); Jon Wiener, *Racial Hatred on Campus,* THE NATION, Feb. 27, 1989, at 260, 262 (advocating that university leaders also speak out).

86. *See* HENTOFF, SPEECH, *supra* note 2, at 167.

87. *See* Linmark Associates v. Township of Willingboro, 431 U.S. 85, 97 (1977) (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)); *see also* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 837 (2d ed. 1988) (noting that First Amendment protection should apply to speech when dialogue is possible, that is when "talk leaves room for reply").

Proponents of this approach oppose hate speech rules, then, not so much because they limit speech, but because they believe that it is good for minorities to learn to speak out. A few go on to offer another reason: that a minority who speaks out will be able to educate the speaker who has uttered a racially hurtful remark.[88] Racism, they hold, is the product of ignorance and fear. If a victim of racist hate speech takes the time to explain matters, he or she may succeed in altering the speaker's perception so that the speaker will no longer utter racist remarks.[89]

How valid is this argument? Like many paternalistic arguments, it is offered blandly, virtually as an article of faith. In the nature of paternalism, those who make the argument are in a position of power, and therefore believe themselves able to make things so merely by asserting them as true.[90] They rarely offer empirical proof of their claims, because none is needed. The social world is as they say because it is *their* world: they created it that way.[91]

In reality, those who hurl racial epithets do so because they feel empowered to do so.[92] Indeed, their principal objective is to reassert and reinscribe that power. One who talks back is perceived as issuing a direct challenge to that power. The action is seen as outrageous, as calling for a forceful response. Often racist remarks are delivered in several-on-one situations, in which responding in kind is foolhardy.[93] Many highly publicized cases of racial homicide began in just this fashion. A group began badgering a black person. The black person talked back, and paid with his life.[94] Other racist remarks are delivered in a cowardly fashion, by means of graffiti scrawled on a campus wall late at night or on a poster placed outside of a black student's dormitory door.[95] In these situations, more speech is, of course, impossible.

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88. Benno Schmidt, President, Yale University, Remarks at *Campus Speech,* panel discussion at Yale Law School (Oct. 1, 1991).

89. *Id.*

90. On the way in which the perspectives and interests of empowered groups express themselves invisibly but effectively in cultural norms and meanings, see, e.g., CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Richard Delgado, *Shadowboxing: An Essay on Power,* 77 CORNELL L. REV. 813, 814-21 (1992) [hereinafter Delgado, *Essay on Power*] (analyzing the distinction between objective and subjective standards in law); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative,* 87 MICH. L. REV. 2411, 2412 (1989) (discussing the use of stories to construct shared social reality).

91. On the role of language and categories in constructing a world that will reflect the empowered's sense of how things are, see Delgado, *Essay on Power, supra* note 90; Richard Delgado, *Mindset and Metaphor,* 103 HARV. L. REV. 1872 (1990).

92. *See generally* BELL, RACE, RACISM, *supra* note 75 (describing American racism as the systemic subordination of people of color); Matsuda, *supra* note 53, at 2332-35.

93. *See, e.g.,* Sally McGrath, *Student Denies Insulting Black During Scuffle,* BOULDER (CO) DAILY CAMERA, Aug. 28, 1993, at B-1; Manning Marable, *No Longer As Simple As Black and White,* BOULDER (CO) DAILY CAMERA, Aug. 12, 1993, at B-3 (describing Florida prosecution of assailants who murdered a black person who talked back following a racial slur).

94. *See* Marable, *supra* note 93.

95. *See* Delgado, *Narratives in Collision, supra* note 82, at 352-54.

Racist speech is rarely a mistake, rarely something that could be corrected or countered by discussion. What would be the answer to "Nigger, go back to Africa. You don't belong at the University"? "Sir, you misconceive the situation. Prevailing ethics and constitutional interpretation hold that I, an African American, am an individual of equal dignity and entitled to attend this university in the same manner as others. Now that I have informed you of this, I am sure you will modify your remarks in the future"?[96]

The idea that talking back is safe for the victim or potentially educative for the racist simply does not correspond with reality. It ignores the power dimension to racist remarks, forces minorities to run very real risks, and treats a hateful attempt to force the victim outside the human community as an invitation for discussion. Even when successful, talking back is a burden. Why should minority undergraduates, already charged with their own education, be responsible constantly for educating others?

* * *

In summary, the four paternalistic arguments do not survive close analysis. The powerful and well-connected whites who resist hate speech rules must realize that the reasons for that resistance lie on *their* side of the ledger. To put it simply, on some level they *prefer* a regime in which minorities are subject to threat. In another setting, Susan Brownmiller has argued that many men resist reform of rape laws not because they themselves wish to be free to rape women. Rather, they benefit from the climate of terror that the possibility of attack by other men induces in women, with the resulting dependence on men for safety and the increased sexual access this brings.[97] In similar fashion, we must seriously entertain the possibility that low-grade racism benefits powerful whites, including the very ones who most sincerely deplore it and would themselves never utter a racist slur.[98]

Neither current doctrine nor policies pertaining to minorities' well-being dictate that there should not be antiracism rules. Could there be *impersonal* reasons, unrelated to white self-interest, militating against such rules? One source of such policies might be the First Amendment itself.

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96. Some might suggest that the student should "talk back" by publishing these remarks rather than saying them directly to the hate-speaker, but that approach is unlikely to be any more successful. First, it provides little comfort or protection for the student at the very moment when his psyche, and perhaps his body, are in danger. Second, remarks on a printed page are no more likely to affect the bigoted speaker than they would if spoken directly to him.

97. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL (1975) (explaining how lenient sentences for sex offenders, coupled with the harsh treatment of women who charge rape, contributes to a regime of sex-based subordination).

98. *See* Delgado, *Narratives in Collision, supra* note 82, at 380 n.319 (arguing that low-grade racism—not serious enough to call in the cameras and press—may benefit the status quo on university campuses by keeping non-white students off balance; by inducing distraction and demoralization which prevents minorities from mobilizing around costly demands; and by assuring that students of color with real spirit leave the university).

Even if that amendment does not forbid properly drafted rules aimed at reducing racist speech, perhaps our generalized preference for free speech does. We believe this is not the case. The next Part sets out our reasons why.

III
How (and Why) to Draft Campus Antiracism Rules—And Why They Are Invariably Resisted

To this point, we have shown that four frequently repeated paternalistic arguments against instituting campus antiracism rules are flawed. We also believe that, in the wake of recent court decisions, the task of drafting such rules is technically feasible. If a few commonsense procedures are followed, such rules should be held constitutional.[99] It now remains for us to sketch a few ways such rules could be written and then to defend them against the claim that they violate the principle and spirit, if not the letter, of First Amendment law.

A. Two Ways Hate Speech Rules Could be Drafted

Campus rules could be drafted either to prohibit expressions of racial hatred and contempt directly through a two-step approach, or to regulate behavior currently actionable in tort. In either case, the rules must be neutral and apply across the board, that is, must not single out particular forms of hateful speech for punishment while leaving others untouched.[100] Moreover, any campus considering enacting such rules should be certain to compile adequate legislative evidence of their necessity.[101]

The direct prohibition approach would couple two provisions. The first would prohibit severe, face-to-face invective calculated seriously to disrupt the victim's ability to function in a campus setting. This provision, which must be race-neutral, could be tailored to capture the content of any recognized First Amendment exception, such as fighting words[102] or work-

99. *See supra* notes 33-44 and accompanying text. On the difficulty that mindset and perspective pose, see Essay I, *supra* notes 39-63 and accompanying text; *infra* notes 123-27 and accompanying text.

100. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543-49 (1992).

101. Need for a rule can be documented through hearings on the extent of the problem of campus racism and by showing that other approaches such as counseling, lectures, and special seminars have failed to control it.

102. On fighting words, see Chaplinsky v. New Hampshire, 315 U.S. 568, 569, 572 (1942) (upholding conviction of Jehovah's witness who called city marshall a "God damned racketeer" and a "damned Fascist" on the ground that words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the First Amendment). The fighting words doctrine was later recharacterized by the Court to encompass "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20 (1971). *See also* Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 Wash. & Lee L. Rev. 171, 198 (1990) ("Nearly everyone seems to concede that a verbal attack directed at a particular individual in the sort of face-to-face confrontation that presents a clear and present danger of a violent physical reaction may be penalized.").

place harassment.[103] Because of the university's special role and responsibility for the safety and morale of students, even the precaution of working within a recognized exception might not be necessary.[104] A second provision would provide enhanced punishment for *any* campus offense (including the one just described) which was proven to have been committed with a racial motivation.[105] Such a two-step approach would satisfy all current constitutional requirements. It would promote a compelling and legitimate institutional interest.[106] It would not single out particular types of expression, but rather particular types of motivation at the punishment stage.[107] And it would not abridge rules against content or viewpoint neutrality, since it focuses not on the speaker's message but on its intended effect on the hearer, namely to impair his or her ability to function on campus.

Alternatively, a hate speech rule could be patterned after an existing tort, such as intentional infliction of emotional distress or group libel,[108] with the race of the victim a "special factor" calling for increased protection, as current rules and the Restatement of Torts already provide.[109] Tort law's neutrality and presumptive constitutionality strongly suggest that such an approach would be valid.[110] This suggestion is strengthened by the two Canadian cases, *Keegstra* and *Butler*.[111] Harm-based rationales for punishing hate speech should be valid if the social injury from the speech outweighs its benefits.

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103. *See* Title VII, 42 U.S.C.A. § 2000e-2(a) (1988); Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986). For a campus hate speech rule drafted in language that parallels workplace harassment regulation, see *infra* note 107.

104. *See, e.g.*, MICHAEL OLIVAS, THE LAW AND HIGHER EDUCATION 599-601 (1989); *see also* Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1040 (1993) (arguing that the university has compelling interest in providing atmosphere that is conducive to learning).

105. *See* Wisconsin v. Mitchell, 113 S. Ct. 2194 (1992); *see also* Barclay v. Florida, 463 U.S. 939 (1983) (allowing sentencing judge in capital trial to consider racist motivation of criminal when deciding whether to impose the death penalty). This second provision would apply to all campus offenses, such as stealing books and tampering with student records—not just hate speech.

106. The institution's interests are noninterference with the ability of a member of the community to carry out his or her work and studies, and maintenance of the peace. *See* Becker, *supra* note 104, at 1040.

107. The first provision would be race-neutral, prohibiting only "serious, face-to-face insults calculated to interfere with a student's or worker's ability to carry out recognized campus functions, such as studying, working, and attending class" (or words to that effect). For a different approach based on the fighting-words exception, see *supra* note 15.

108. *See, e.g.*, Hartman, *supra* note 43, at 876-79; Love, *supra* note 43, at 123-25, 145-47; Yen, *supra* note 43, at 605-16.

109. *See* RESTATEMENT (SECOND) OF TORTS § 46, cmt. f (1965) (exploiting a known susceptibility); Delgado, *supra* note 43, at 151-57 (commenting on this provision).

110. For arguments that hate speech restrictions based on tort law could be constitutional, see Delgado, *supra* note 43, at 172-79; Kent Grecnawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 306 (1990).

111. These cases are discussed at *supra* notes 38-42 and accompanying text. Canada, of course, is a different speech-community from the United States.

B. *Why Hate Speech Rules Should be Valid—Affirmative Considerations*

The strongest reason for enacting hate speech rules on campuses with a history of disruption is that they are necessary to promote equality.[112] But even if one puts aside this consideration and views the controversy purely through the free speech lens, the policy concerns underlying our system of free expression are at best weakly promoted by protecting hate speech. Targeted racist vitriol scarcely advances self-government[113] or the search for consensus.[114] It does not promote the search for truth,[115] nor help the

112. Delgado, *Narratives in Collision, supra* note 82, at 381-86 (arguing racial insults are always an affront to the ideal of equality); *see also* Essay I, *supra,* notes 16-38 and accompanying text. Racial remarks are one of the most pervasive means by which discriminatory attitudes are imparted. They ritually inscribe and reinscribe racial hierarchy, reminding both the speaker and the victim where each stands in a society in which color matters. *See, e.g.,* ALLPORT, *supra* note 52, at 77-78; Delgado & Stefancic, *Images, supra* note 54, at 1259-60, 1262-77. The racial epithet communicates the message that racial distinctions demarcate those with worth, merit, status, and personhood from those without. *Id.* at 1287-88. Kenneth Clark, black psychologist and past president of the American Psychological Association, writes: "Human beings . . . whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth." KENNETH CLARK, DARK GHETTO 63-64 (1965).

The psychological responses to racial tags and stigmatization include feelings of humiliation, anger, stress, self-hatred, and demoralization. ALLPORT, *supra* note 52, at 142-61; MARY ELLEN GOODMAN, RACE AWARENESS IN YOUNG CHILDREN 55-58, 60 (rev. ed. 1964); GEORGE E. SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 157-58 (4th ed. 1972); Ruben Martinez & Richard Dukes, *Ethnic and Gender Differences in Self-Esteem,* 22 YOUTH & SOC'Y 318, 332 (1991). The insult spoken is eventually overheard; its message is transmitted to succeeding generations. GOODMAN, *supra.* Race-hatred becomes internalized, affecting the victim's self-regard and even relations with his or her own group. *See generally id.;* KENNETH CLARK, PREJUDICE AND YOUR CHILD 51 (1963).

Although the emotional damage of a particular affront is variable, depending on the setting, the victim's age, and other factors, the racial insult is always a dignitary harm, a violation of the victim's right to be treated respectfully. *See* ALLPORT, *supra* note 52, at 49-51. It violates principles of equality of all as moral agents enshrined in the Declaration of Independence and the equality-protecting provisions of the U.S. Constitution, U.S. CONST. amends. XIII-XV, as well as various federal legislative acts, such as the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), *codified as amended at* 28 U.S.C. 1447, 42 U.S.C. 1971, 1975a-1975d, 2000a to 2000h-6 (1980).

113. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-25 (1948) (asserting that the goal of self-government is central to First Amendment jurisprudence). One-on-one racial vilification cannot advance political discussion because (a) it is not about a public subject; (b) by its nature, it is only issued to one person at a time; (c) it is not an invitation to a discussion of any sort, but is more akin to a slap in the face.

114. *See* Thomas Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 883 (1963) (stating that freedom of expression is necessary to form common values in society). Targeted vilification does not promote the search for consensus because society already condemns racism through the Emancipation Proclamation, Reconstruction amendments, and civil rights laws. Moreover, even if we should be open to a new consensus in which these amendments and values were rejected and something different (perhaps like South African apartheid) put in their place, a face-to-face insult is not the means to broach such a change. Other channels, such as writing, preaching, teaching, and speeches to a crowd would remain open, and would be a more natural and effective means of advocating such a change.

115. *Id.* at 881-82 (explaining that freedom of expression is the best process for discovering truth). The verbal attack does not promote the search for truth because it offers no evidence, no documentation,

speaker reach self-actualization,[116] at least in any ideal sense. Racist speech thus does little to advance any of the theoretical rationales scholars and judges have advanced as reasons for protecting speech.

Looking at the hate speech problem from the perspective of enforcement yields no stronger support for the free-speech position. Our system distrusts any form of official speech regulation because we fear that the government will use the power to control the content of speech to insulate itself from criticism.[117] This danger is absent, however, when the government sets out to regulate speech between private speakers, especially about subjects falling outside the realm of politics.[118] When the government intervenes to tell one class of speakers to avoid saying hurtful things to another, governmental aggrandizement is at best a remote concern. This is the reason why regulation of private speech—libel, copyright, plagiarism, deceptive advertising, and so on—rarely presents serious constitutional problems.[119] The same should be true of hate speech regulation.

Another political process concern is also absent. Our legal system resists speech regulation in part because of concern over selective regulation or enforcement.[120] If the state were given the power to declare particular speakers disfavored, it could effectively exclude them from public discourse. We would forfeit the benefit of their ideas, while they would lose access to an important means for advancing their own interest. But none of these dangers is present with hate speech. Allowing the government to create a special offense for a class of persons (even racists) is indeed troublesome, as the Supreme Court recognized in *R.A.V. v. St. Paul.*[121] But the direct prohibition approach we have outlined introduces the racial element only at the sentencing stage, where the dangers and political-process concerns of selective treatment are greatly reduced.[122]

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does not invite the other to engage in dialogue, but rather the opposite: it tells the listener that he or she is less than human in the eyes of the speaker and is unworthy of dialog.

116. *See id.* at 879. Racist speech and behavior injure the speaker by reinforcing simplistic us-them thinking and dichotomous, rigid moral categories. *See* Delgado, *supra* note 43, at 175-76.

117. On the role that aversion to censorship, especially prior restraint, plays in First Amendment jurisprudence, see, e.g., Abrams v. United States, 250 U.S. 616, 626-30 (1919) (Holmes, J., dissenting); ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 223-25, 314, 497-501 (1941).

118. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759-60 (1985) (in a private-speech case, "there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government . . . .") (quoting Harley-Davidson v. Markley, 279 Ore. 361, 366 (1977)).

119. *See id.* at 758-60; *see also* TRIBE, *supra* note 87, at 861 (discussing libel as assault and therefore justifying government interference). Most of the fighting words cases concerned police officers and other governmental figures. *See, e.g.*, Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

120. *See generally* Kenneth Karst, *Equality As a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

121. 112 S. Ct. 2538, 2548-49 (1992). *See supra* notes 26-32 and accompanying text.

122. *See supra* notes 100-10 and accompanying text (discussing two forms of campus hate speech rules). For the proposition that sentence enhancements based on race are acceptable, *see* Wisconsin v.

The same would be true if the tort approach were adopted. In tort law, it is the intent and injury that matter, not the content of the speech. Enforcement comes from private initiative, not state action. Prevention of harm is the goal, with no speech disfavored as such.

C. *But Will It Happen? Hate Speech and* Hubris

In the wake of recent cases, there is today little reason in First Amendment jurisprudence for leaving campus hate speech unregulated. Censorship and governmental nest-feathering are not implicated by rules against private speech. Nor does targeted racial vilification promote any of the theoretical rationales for protecting free speech, such as facilitation of political discussion or self-fulfillment of the speaker. Much less does permissiveness toward racist name-calling benefit the victim, as the ACLU and others have argued. Far from acting as a pressure valve which enables rage to dissipate harmlessly, epithets increase their victims' vulnerability. Pernicious images create a world in which some come to see others as proper victims. Like farmyard chickens with a speck of blood, they may be reviled, mistreated, denied jobs, slighted, spoken of derisively, even beaten at will.

The Greeks used the term *hubris* to describe the sin of believing that one may "treat[ ] other people just as one pleases, with the arrogant confidence that one will escape any penalty for violating their rights."[123] Those who tell ethnic jokes and hurl epithets are guilty of this kind of arrogance. But some who defend these practices, including First Amendment purists, are guilty as well: insisting on free speech over all, as though *no* countervailing interests are at stake, and putting forward transparently paternalistic justifications for a regime in which hate speech flows freely is also hubris.[124] Unilateral power can beget arrogance, including the arrogance of insisting that one's worldview, one's interests, and one's way of framing an issue, are the only ones. Unfettered speech, a freemarket in which only some can prevail, is an exercise of power.[125] Some words, we have argued, have no purpose other than to subordinate, injure, and wound.[126] Free speech defenders insist that the current regime is necessary and virtuous, that minorities must acquiesce to this injurious and demeaning definition of virtue, and that their refusal to subordinate their interests to those of the

Mitchell, 113 S.Ct. 2194, 2199-200 (1993); Dawson v. Delaware, 112 S. Ct. 1093, 1098 (1992) (dictum).

123. KENNETH J. DOVER, GREEK HOMOSEXUALITY 34 (1978).

124. *See* Essay I, *supra,* notes 16-38, on the way equal-protection and free speech values are delicately poised in the current controversy.

125. *See* Delgado, *Essay on Power, supra* note 90, at 814-22 (on power dimension of speech); Delgado, *Narratives in Collision, supra* note 82 at 383-86 (explaining how concerted speech can harden stereotypes and deepen racial schisms).

126. *See supra* note 92 and accompanying text; Delgado, *supra* note 43, at 135-49 (identifying the psychological, sociological, and political effects of racial insults).

First Amendment is evidence of their childlike simplicity and lack of insight into their own condition. These impositions may well be the greatest hubris of all.[127]

CONCLUSION

In a hundred years, the hate speech controversy may well be the *Plessy v. Ferguson*[128] of our age. In *Plessy,* the Supreme Court professed to be unable to see a moral difference between two claims—that of blacks to sit in a railroad car with whites, and that of whites to sit in a car without blacks.[129]

The hate speech controversy features the same sort of perverse neutralism. The speaker claims a right to utter face-to-face racial invective. The victim insists he or she has the right not to have it spoken to him or her. A perfect standoff, just like the railroad car case, one right balanced against its perfect reciprocal.

Perhaps because scholars and policymakers realize the hollowness of the neutral principles approach and remember how poorly its predecessor fared in history's judgment, the weight of legal opinion has been slowly swinging in the direction of narrowly drawn hate speech rules. Free speech traditionalists, focusing solely on one value and ignoring what else is at stake, have been fighting a holding action, using four paternalistic arguments for maintaining the status quo. These arguments each assert that even if hate speech controls are constitutional, they are unwise because they would injure the very persons sought to be protected. Each of these arguments is invalid, a thin veneer aimed at rationalizing the current regime. We have shown that these arguments are unsupported by empirical evidence, indeed that the situation is more nearly the opposite of what their proponents maintain. We employed narrative theory and interest analysis to reveal possible sources of these errors, and showed how hate speech rules could be drafted without violating either the letter or spirit of the First Amendment. We closed by exposing the role of *hubris* in the debate over hate speech rules and cautioning against replicating the mistake of earlier times, one that today appears both willful and indefensible.

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127. Just as some out-and-out racists seem to believe that they may do or say anything toward members of minority groups with impunity, so some majoritarian commentators in the hate speech debate appear to believe that they may employ the most caustic language toward those on the other side, secure in the belief that those who defend the minority position will not respond. *See, e.g.,* Jonathan Yardley, *The Code Word: Alarming,* WASH. POST, Aug. 16, 1993, at B-2 (labelling the campus hate speech rules "a peculiar blend of totalitarianism and phrenology"; dismissing allegations of harm as "pop psychology"; characterizing the position of hate speech rule advocates as a case of evasion, euphemism, zealotry, newspeak, thought police tactics, fascism, doublethink, ludicrous reasoning, and an "Orwellian nightmare.").

128. 163 U.S. 537 (1896).

129. *Id.* at 551-52; *see also* David Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 19, 31-35 (1959) (arguing for a standard of review based on generality and neutrality which "transcend[s] any immediate result that is involved").

CONCLUSION: ESSAYS ON HATE SPEECH

These two essays, then, ultimately coincide. Society evaluates minorities' demand for hate speech regulation in terms of the current paradigm, namely free speech. Within that framework, minorities are portrayed as asking for an incremental adjustment, a new "exception" to the grand sweep of First Amendment protection. To staunch defenders of the First Amendment, that demand necessarily appears short-sighted: it would reduce the amount of liberty we all enjoy, a reduction that would fall (in their view) disproportionately heavily on the very persons clamoring for protection.

But, of course, these arguments can be answered. Minorities may persist in their demands even in the face of paternalistic arguments to the contrary. Now, we must evaluate their claim on the merits, which, in turn requires balancing. But how shall we balance their demand for respectful treatment—for full inclusion in the human community—against our interest in speaking freely (even derogatorily) of and toward them? We argued in the first essay that this feat is practically impossible, because speech and community, liberty of expression and full equality of citizenship, are both linked and in indissoluble tension. There are ways to resolve this tension in the reformers' favor, just as there are arguments to address the casual paternalism of the free speech advocate. Although other western societies have made the adjustment, we are skeptical about the prospects of the United States joining them anytime soon. Free speech, like all marketplace activities, benefits those who are currently life's winners, reinforcing their advantage while enabling them to say to themselves that they won fair and square. Perhaps only the threat of serious social disruption will shake the current complacency, so that in twenty or fifty years we will look upon hate speech rules with the same equanimity with which we now view defamation, forgery, obscenity, copyright, and dozens of other exceptions to the free speech principle, and wonder why in the late twentieth century we resisted them so strongly.