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### Of Cops and Bumper Stickers: Notes toward a Theory of Selective Prosecution

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# OF COPS AND BUMPER STICKERS: NOTES TOWARD A THEORY OF SELECTIVE PROSECUTION

Richard Delgado<sup>†</sup>

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## INTRODUCTION

If academic freedom is of vital concern to many readers of this review, it surely lies close to the heart of many in the university community. Teachers, researchers, and many university administrators have long recognized the need to police its boundaries and to train close attention on forces, including alumni pressure, commercialization, and political correctness, that can endanger it.

Yet relatively few discussions of academic freedom consider indirect forces that may intrude just as deeply. For example, an otherwise comprehensive recent symposium<sup>1</sup> devotes scant treatment to two such forces, one of which figured prominently in the recent University of Colorado action against Indian law scholar Ward Churchill.<sup>2</sup> Those forces

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1. *Symposium: Horowitz, Churchill, Columbia—What Next for Academic Freedom?*, 77 U. COLO. L. REV. 841 (2006).

2. On the University of Colorado's long-running effort to discipline Churchill, see, e.g., Kirk Johnson, *Colorado U. Chancellor Advises Firing Author of Sept. 11 Essay*, N.Y. TIMES, June 27, 2006, at A11; *Inquiry on Research*, N.Y. TIMES, Sept. 10, 2005, at A10; Kirk Johnson, *University Changes Its Focus in Investigation of Professor*, N.Y. TIMES,

are retaliation and selective prosecution.

As readers will recall, Churchill published an inflammatory essay, entitled "Some People Push Back,"<sup>3</sup> on an obscure website one day after the terrible events of 9/11. In it, he reasoned that Americans should not be surprised at the terrorists' horrific act, because the U.S. itself had been visiting terror on Iraq through economic sanctions that had killed thousands of Iraqi adults and children and tyrannized the citizens of other Muslim nations by backing anti-democratic governments willing to cooperate with U.S. objectives.<sup>4</sup>

Churchill further posited that many of the victims of the 9/11 conflagration were not entirely innocent. In particular, the CIA agents, investment bankers, and stockbrokers who worked in the World Trade Center and profited from U.S. imperialism in the Middle East bore indirect responsibility for the many deaths associated with it. Comparing their role to that of members of the Nazi high command whom the United States charged with war crimes at Nuremberg, Churchill maintained that these "little Eichmanns" got exactly what they deserved.<sup>5</sup>

When, years later, Churchill's 9/11 remarks came to light in connection with a scheduled speech at Hamilton College, they incensed many members of the American public who found them insensitive and unpatriotic.<sup>6</sup> Acting at the request of state authorities, including the governor, the legislature, and the board of regents, the Boulder chancellor appointed a three-person committee to read everything that Churchill had written in the course of a long career to see if any of it, including his 9/11 remarks, "crossed the line."<sup>7</sup>

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Mar. 26, 2005, at A9 [hereinafter Johnson, *University Changes*]; Report and Recommendations of the Standing Committee on Research Misconduct Concerning Allegations of Research Misconduct by Professor Ward Churchill, June 13, 2006, available at <http://www.colorado.edu/news/reports/churchill/StandingCmteReport.html> (on file with author) [hereinafter Report & Recommendations]. See also Richard Delgado, *Shooting the Messenger* (book review), 30 AM. INDIAN. L. REV. 477 (2006), reviewing WARD CHURCHILL, *ON THE JUSTICE OF ROOSTING CHICKENS* (2003) [hereinafter ROOSTING CHICKENS].

3. Ward Churchill, "Some People Push Back" *On the Justice of Roosting Chickens*, available at <http://www.darknightpress.org/index.php?i=news&c=recent&view=9> (on file with author) [hereinafter *Push Back*].

4. *Id.* See also ROOSTING CHICKENS, *supra* note 2, at 5-6, 10-14 (making a similar claim).

5. *Push Back*, *supra* note 3; ROOSTING CHICKENS, *supra* note 2, at 19-20 (explaining Churchill's meaning in somewhat less flamboyant terms). See also Delgado, *supra* note 2, at 485-87, comparing the two passages.

6. See Michelle York & Mindy Sink, *Professor is Assailed by Legislature and Vandals*, N.Y. TIMES, Feb. 3, 2005, at B6.

7. See Press Release, University of Colorado, CU-Boulder Chancellor Releases Report

When, weeks later, the committee concluded that Churchill's public comments, although odious, fell within the First Amendment, the Chancellor charged a second committee with considering whether any of his writing evidenced academic misconduct.<sup>8</sup> After Churchill's case had become prime-time news, the university had begun learning of allegations, some years old, that Churchill had committed plagiarism and other scholarly infractions and represented himself as an Indian when, in the view of his academic rivals, he was not one.<sup>9</sup>

Several of these charges, including fabrication of an Indian identity, fell by the wayside, but others are the subject of a university appeal and seem bound for court.<sup>10</sup> It is the relation between the first set of accusations, based on his 9/11 remarks, and the second, alleging academic misconduct, that this essay ponders.

When the university filed the second set of charges shortly after dismissing the first, it was hard to escape the inference that the two events were related and that the university had filed the academic charges only upon realizing it could not proceed based on Churchill's 9/11 statements. Two of the university committees investigating him expressed misgivings over precisely this issue but concluded that they had no choice but to proceed anyway.<sup>11</sup> One member used the analogy of a traffic stop to explain why.<sup>12</sup>

As she put it, a motorist who is pulled over by a traffic cop because his car sports a liberal bumper sticker (such as "Impeach Bush") has no

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on Churchill Review (Mar. 24, 2005), available at <http://www.colorado.edu/news/releases/2005/129.html> (last visited Mar. 3, 2007). The three-person committee consisted of the chancellor, the law dean, and the dean of arts and sciences. *Id.* See also WARD CHURCHILL, *ACADEMIC FREEDOM/ACADEMIC FRAUD* (forthcoming 2007) (containing this language).

8. See Johnson, *University Changes*, *supra* note 2. The university's standing committee on research misconduct appointed an Investigative Committee to consider whether Churchill committed academic misconduct, see Report & Recommendations, *supra* note 2, at 3. For the full May 9, 2006 report of the Investigative Committee, see <http://www.colorado.edu/news/reports/churchill/churchillreport051606.html> (hard copy on file with author) [hereinafter Investigative Report].

9. Report & Recommendations, *supra* note 2, at 6-7 (summarizing charges against Churchill).

10. *Id.* At the time of writing, a faculty Privilege and Tenure Committee was hearing testimony (including this author's) on the investigative reports and university's intent to dismiss Professor Churchill.

11. See Investigative Report, *supra* note 8, at 3-4; and Ty Gee, *Fourth Estate Goes AWOL*, BOULDER DAILY CAMERA, May 27, 2006, at A25 (quoting committee chair Marianne Wesson). See also Report & Recommendations, *supra* note 2, at 4-5, 15 (making similar argument without the motorist analogy).

12. See *supra* note 11 and accompanying text, explaining this argument.

defense to a ticket if the motorist was, in fact, speeding. The officer's decision may impinge on the motorist's First Amendment rights to some extent, but this still gives him no excuse for speeding.<sup>13</sup>

Similarly, this member reasoned that the university's motives in instituting disciplinary procedures against Churchill—indignation over his September 11 remarks—were irrelevant to the subsequent charges growing out of his Indian law scholarship.<sup>14</sup> This was so even if, as Churchill pointed out, most prolific scholars whose work came under such intense scrutiny would turn out to have committed relatively minor indiscretions like the ones the university charged him with.<sup>15</sup>

It is this aspect of the Churchill proceeding that I wish to examine in hopes of shedding light on the concept of selective prosecution and, to a lesser extent, retaliation, in general. Both doctrines accuse a disciplinary body with proceeding in bad faith, usually for a worker's exercise of some protected right. Whistleblower statutes now protect subordinates from retaliation for filing environmental or workplace complaints.<sup>16</sup>

With selective prosecution, the relationship between the precipitating grievance and the matter actually alleged can be subtler, so that legal doctrine in this area is relatively underdeveloped. Yet the Churchill case shows that society may soon need such a doctrine if it is to maintain an effective system of academic freedom. Without one, administrators overly attuned to political tides may suppress protected behavior by subjecting a controversial scholar's work to microscopic examination and filing charges based on some minor shortcoming that this examination brings to light.

### I. THREE MODELS OF SELECTIVE PROSECUTION

#### A. *The Cop and the Bumper Sticker*

Selective enforcement may take at least three forms. The first is the one Ward Churchill's disciplinary committee thought it had before it.

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13. *Id.*

14. Report & Recommendations, *supra* note 2, at 3, 15 (explaining that the committee considered the university's motivations in bringing charges against Churchill irrelevant to its investigation).

15. *See id.*, Appendix B, Summary of Fallacies in the University of Colorado Investigative Committee Report of May 9, 2006, by Ward Churchill, at 1, 5-6.

16. *See, e.g.*, Victoria L. Donati & William J. Tarnow, *Key Issues and Analysis Relating to Retaliation and Whistleblower Claims*, Practising Law Institute Litigation and Administrative Practice Course Handbook Series, 745 PMI/Lit 619 (2006) (reviewing a wide range of federal and state laws against retaliation against employees); Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005) (analyzing the relation of retaliation and antidiscrimination law).

Here, selective prosecution takes the form of charging an offense that, like speeding, occurs out in the open and is both incontrovertible and inherently dangerous. Speeding drivers can kill; society has an unquestioned interest in deterring motorists who drive too fast, even by a few miles per hour.

Besides, we reason, if a conservative cop tickets a driver whose car bears a liberal bumper sticker (“Impeach Bush”), the next time a liberal cop may be the one giving a ticket to the speeder whose car sports a conservative sticker (“Support Our Troops”). So, things even out in the long run. Even though more cops may be conservative than liberal, with the result that motorists with liberal bumper stickers end up bearing a disproportionate brunt of official displeasure, we do not see the connection between ticketing and suppression of speech as sufficiently close to warrant giving either type of driver a defense.

The problem in Ward Churchill’s case is that Type A selective enforcement was not actually what the Colorado committee confronted. Two much stronger analogies lay close at hand.

### *B. The Cop and the Black Motorist*

Selective enforcement may take on a second, more pernicious form. Imagine a police officer who follows a practice of pulling over every black male motorist he sees driving an expensive, late-model car.<sup>17</sup> Believing that a high percentage of such drivers are drug dealers or other small-time crooks, he stops each one and conducts a thorough search. Eventually he finds something that is arguably contraband—say, a sharpened screwdriver in the glove compartment—and proceeds to arrest the driver.

Much more problematic than the first type of selective enforcement, this variety is unlikely to even out over time, since no plausible profile would subject well-behaved white motorists to similar treatment in our society. Moreover, the link between being a black male and a drug dealer is unacceptably weak. Purely statistical, it would target many law-abiding black men merely because a small number of their group deal drugs.<sup>18</sup>

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17. For discussion of one variety of Type B selective enforcement—racial profiling—see generally DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002).

18. See JODY ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997); Jody Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994) (discussing statistical, or “reasonable” racism in which whites train scrutiny and enforcement on blacks in general because they believe them statistically more likely than other groups to commit crimes). *But see* Richard Delgado, *Black Crime, White Fears: On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (pointing out that black crime is less dangerous than the white variety).

Unlike speeding, which is dangerous every time, driving while black is not. It sends a message—racial suspicion—to other blacks that society has wisely decided to reject.<sup>19</sup>

Ward Churchill's case shares a disturbing number of features with Type B selective enforcement. In deciding to comb through "every word he has written," the university made plain that it was looking for grounds to bring charges against him personally, not, for example, against all plagiarists or all historians who accuse the U.S. Army of providing the Indians with smallpox-infested blankets.<sup>20</sup> Like racial profiling, singling out an individual for special attention is unlikely to even out over time. Unlike a cop who stops a motorist for speeding, it is not spontaneous and isolated, but concerted—the university focuses its full investigative resources on one individual. And the social risk of a careless footnote or failure to give credit to another's work is scarcely as serious as driving too fast on a crowded street. Moreover, it sends a message to the scholarly community that if they address controversial topics they had better be prepared for a searching examination of their entire body of work.

### C. *The Cop and the Gadfly*

A final form of selective prosecution targets someone not because of who she is, but because of what she has done—namely, annoyed local authorities. Perhaps she has criticized the city council or clashed with the university president. Perhaps he has opposed a local program, such as recycling or dog walking, that enjoys wide community support. In response, the authorities place him under covert investigation. They assign a police officer to tail his car and ask the sanitation department to check

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19. See David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) (arguing that case law and federal policies have decisively rejected this position).

20. Telephone interview with David Getches, Dean, University of Colorado Law School (February 2005) (explaining that the three-person committee, of which he was a member, set out to read everything that Churchill had written); see also University of Colorado at Boulder Review of Churchill Materials, Mar. 24, 2005, <http://www.colorado.edu/news/reports/churchill/materials.html> (listing the books, articles, essays, speeches, and interviews that the three-person committee examined); Mike Littwin, *When Going Gets Tough, Hoffman Gets Going*, ROCKY MT. NEWS, Mar. 8, 2005, at 7A (describing the three-person committee as combing Churchill's past speeches); Arthur Kane and Amy Herdy, *Churchill: Heritage Undisputed Meets with CU Committee*, DENVER POST, May 25, 2005, at B1 (committee reviewed his writings); Remarks by Interim Chancellor Phil DiStefano, <http://www.colorado.edu/insidecu/archives/2005/2-8/chancellor.html> ("The Office of the Chancellor will launch and oversee a thorough examination of Professor Churchill's writings, speeches, tape recordings, and other works") (last visited Mar. 6, 2007).

whether he is segregating his recyclable trash properly. They encourage his neighbors to file noise complaints and turn him in if he lets his grass grow long during a vacation. They ask the IRS to audit his most recent tax returns.

Though all of us can identify with authorities who lose patience with a chronically obstructionist citizen, we still would find their response to the gadfly excessive. Although technically within the legitimate power of the state—after all, each action is independently justifiable—their response deploys one part of the Constitution to defeat another.<sup>21</sup> Even though each component is permissible, the investigation's combined effect violates an implicit norm of governmental fairness.<sup>22</sup>

Churchill's treatment at the hands of the Colorado authorities has more in common with Types B and C selective enforcement (which are impermissible) than it does with Type A (which is permissible). As mentioned, the second group of charges against him did not grow spontaneously out of a readily observed public action. They were directed at a single individual; the university went looking for them; and they are not likely to "even out" over time. And because most of us can imagine ourselves in Churchill's shoes, they send the message that one should not say anything calculated to offend the authorities unless one is prepared to undergo searching examination.

## II. THE APPROPRIATE STANDARD OF REVIEW FOR UNCONVENTIONAL SCHOLARSHIP

A second issue in cases like Ward Churchill's is the appropriate standard of review. Scholarly transgressions can, of course, arise in conventional fields such as presidential history<sup>23</sup> or constitutional theory,<sup>24</sup> where they rarely lead to serious discipline. For example, Harvard Law

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21. *Viz.*, it deploys the Executive Branch, charged under the Constitution with enforcing the laws, against the Bill of Rights, which protects individual values including privacy and freedom of speech.

22. *See, e.g.,* *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (noting that to prevail on a First Amendment retaliation claim under 42 U.S.C. § 1983, a plaintiff must show that his or her constitutionally protected conduct was a substantial or motivating factor in defendant's adverse action).

23. *See* David D. Kirkpatrick, *Author Goodwin Resigns from Pulitzer Board*, N.Y. TIMES, June 1, 2002, at A9 (describing plagiarism charges brought against prominent presidential historian Doris Kearns Goodwin).

24. *See Law Professor is Reproached*, N.Y. TIMES, Apr. 15, 2005, at A14; Sara Rimer, *When Plagiarism's Shadow Falls on Admired Scholars*, N.Y. TIMES, Nov. 24, 2004, at B9 (describing charges of plagiarism against Harvard constitutional law scholar Laurence Tribe). *See also* RICHARD POSNER, *THE LITTLE BOOK OF PLAGIARISM* (2007) (arguing that plagiarism is generally not a serious offense).



School recently received allegations of plagiarism by two highly regarded scholars, Laurence Tribe and Charles Ogletree, neither of whom was writing about a controversial subject.<sup>25</sup> Each pleaded simple negligence, one in the failure to supervise the work of a research assistant,<sup>26</sup> and apologized. Neither had aroused the authorities' ire by making statements about 9/11; both were in good standing at their schools. Neither received any form of public discipline.

Other times an author like Ward Churchill will have given the establishment some recent cause for offense. In these cases, the authorities will often not target the offending speech directly, realizing that this would trigger the First Amendment, but will comb through his writings in search of some unrelated transgression.

If the scholar, like Ward Churchill, has spent a lifetime engaged in social criticism, these transgressions, like the underlying ground for official displeasure, are apt to stem from passages about governmental misconduct. In the Colorado case, two of the allegations charged factual errors in Churchill's account of a pair of historical incidents of deliberate smallpox transmission,<sup>27</sup> while others had to do with his interpretation of two federal statutes, one of which (the Indian Allotment Act)<sup>28</sup> Churchill labeled a "blood quantum" measure similar to Hitler's Nuremberg Laws.<sup>29</sup> Four of the six charges against him thus arose from his writings on governmental impropriety.

What standard of review should apply in such cases?

*A. When the Scholar is Investigating Governmental Misconduct*

Every scholar who investigates governmental misconduct should enjoy wide latitude. In the related area of First Amendment law, one finds the rule that the government may not sue for defamation.<sup>30</sup> Even if the charges of an investigative reporter, for example, turn out to be untrue, the

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25. See Rimer, *supra* note 24 (describing plagiarism charges brought against Harvard law professor Charles Ogletree).

26. See sources cited notes 22-23, *supra*.

27. See Report & Recommendations, *supra* note 2, at 6-7 (summarizing charges against Churchill).

28. General Allotment (Dawes) Act of 1887, 24 Stat. 388, codified at 25 U.S.C. 331 *et seq.*

29. *Id.*

30. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 264-65 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 153 (1967) (stating that "history dictated extreme caution in imposing liability"); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786-87, 862-66 (2d ed. 1988). On the background leading up to *Sullivan*, see Fred D. Gray, *The Sullivan Case: A Direct Product of the Civil Rights Movement*, 42 CASE. W. RES. L. REV. 1223 (1992).

government will go without recourse. We strike the balance in this fashion because speech by which citizens call government to account lies at the heart of the First Amendment.<sup>31</sup> Statements that would be actionable if leveled against an ordinary citizen are beyond redress if the target is the government.

The law of human experimentation exhibits a similar asymmetry. All campuses that conduct federally-sponsored research are required to maintain human subjects protection committees (sometimes called “institutional review boards” or “human research committees”) that evaluate proposals for university research that uses human beings as subjects of study.<sup>32</sup> The committees are charged with assuring that researchers minimize the risk of harm to such subjects, protect their confidentiality, and secure their informed consent.<sup>33</sup>

One of the relatively few exceptions to these requirements is research into the performance of a governmental agency or program. Here, a “fast track” procedure enables the investigator to secure permission more readily than when the proposal contemplates research using prisoners, children, or members of another vulnerable group.<sup>34</sup> Thus a researcher who sought to investigate misconduct in connection with a campus program such as affirmative action or intercollegiate sports would receive a near-free pass. Because the research looks to establish governmental accountability and is an example of “research up” rather than “research down,” it is a candidate for quick approval.

A third area that will be familiar to readers with backgrounds in

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31. TRIBE, *supra* note 30, at 786-87. See generally Michael Kent Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 WM. & MARY BILL RTS. J. 507 (1995) (criticism receives highest protection when aimed at the most powerful).

32. For the federal regulations that establish institutional review boards, see 45 C.F.R. § 46.101 (2005). For a discussion of their operation, see CARL COLEMAN ET AL., *THE ETHICS AND REGULATION OF RESEARCH WITH HUMAN SUBJECTS* ch. 3 (2005). For Colorado’s regulations, see University of Colorado at Denver, Policies and Procedures of the Human Subjects Research Committee, available at, <http://thunder1.cudenver.edu/osp/HSRCpol.pdf> (last visited Mar. 6, 2007).

33. See, e.g., University of Colorado, Human Research Committee, Standard Operating Procedures, available at [http://www.colorado.edu/VCRsearch/HRC/SOP\\_TOC.html](http://www.colorado.edu/VCRsearch/HRC/SOP_TOC.html); University of Colorado, Human Research Committee Guidance Documents, <http://www.colorado.edu/VCRsearch/HRC/guidance.html> (last visited Mar. 7, 2007).

34. See 45 C.F.R. § 46.101 (2005) (exempting research examining the performance of elected or public officials, and projects which evaluate public benefit programs). On the protection of vulnerable groups, see University of Colorado, Human Research Committee, Standard Operating Procedures, Protocol 21 – Vulnerable Subjects, available at: <http://www.colorado.edu/VCRsearch/HRC/downloads/HRC21.doc> (last visited Mar. 7, 2007).

literary theory is satire.<sup>35</sup> Here, the mechanism is self-selection, not official enforcement, but the compliance rate is nearly one hundred percent. The practice to which I refer is that of the classical satirists, such as Voltaire or Jonathan Swift, or, in our time, Russell Baker, of reserving their slings and arrows for the high and the mighty—kings, nobles, and others who abused power or puffed themselves up self-importantly. They rarely, if ever, used their wit to ridicule beggars, cripples, orphans, or others of lower status than themselves. A root word of humor is humus, bringing down, close to earth; one recalls how Roman emperors would employ members of their retinue to accompany them during victory parades, whispering in their ear, “[t]hou art but a man.”<sup>36</sup>

This practice captures the same asymmetry that we found in free speech law and human-subjects experimentation. Power exerted downward is simply more problematic than when exerted in the opposite direction. Consequently, a scholar, such as Ward Churchill,<sup>37</sup> Noam Chomsky,<sup>38</sup> or Howard Zinn,<sup>39</sup> who investigates governmental misconduct should enjoy freedom from prosecution for all but the most egregious errors.

#### B. *Unscholarly Sources: The Role of the Official Account*

A further reason for affording the scholar investigating governmental impropriety wide leeway is simply that his burden is heavier than most. History is always written by the victors, so that the official account of any period is apt to downplay governmental criminality or racism.<sup>40</sup> Thus, the historian whose instinct tells him that something is amiss with the official account will, of necessity, be forced to resort to unconventional sources, such as oral history, letters, diaries, or other “stories from below.”<sup>41</sup> To an unsympathetic investigator, these may bespeak an unscholarly attitude.

Churchill’s committee report, for example, took him to task for using

35. See, e.g., Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1067-71 (1994).

36. *Id.* at 1091. See also Leslie Kim Treiger, Note, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment’s Opinion Privilege*, 98 YALE L.J. 1215 (1989) (noting the need to extend constitutional protection of satirical speech because of its vital role in political and social criticism).

37. See e.g., A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS 1492 TO THE PRESENT (1997).

38. See e.g., HEGEMONY OR SURVIVAL: AMERICA’S QUEST FOR GLOBAL DOMINANCE (2003).

39. See e.g., A PEOPLE’S HISTORY OF THE UNITED STATES 1492-PRESENT (2003).

40. See e.g., ALFRED F. YOUNG, LIBERTY TREE: ORDINARY PEOPLE AND THE AMERICAN REVOLUTION 1-23 (2006).

41. *Id.*

such unconventional materials,<sup>42</sup> when, in fact, they might well have been the only ones at his disposal. To draw an analogy to the human-subjects review process, his committee gave him the precise opposite of a “free pass.” It treated his efforts to call government to task with the aid of unconventional sources as proof of scholarly ineptitude, when those sources might well have been the best ones available to anyone pursuing his line of inquiry.

#### CONCLUSION

If scholars never took risks, paradigms would change very slowly. If they refrained from criticizing government, books such as Peter Irons’ “Justice at War,”<sup>43</sup> Vincent Harding’s “There is a River”<sup>44</sup> or Rachel Carson’s “Silent Spring”<sup>45</sup> would not have been written. If society is to rely on academic researchers to investigate governmental misconduct, it must be prepared to afford them wide leeway.<sup>46</sup> It must be alert for censorship that takes the form of retaliation or selective prosecution. And it must exercise special vigilance when powerful constituencies are demanding retribution and other, more cautious scholars are waiting in the wings to see what happens.

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42. See Investigative Report, *supra* note 8, at 94 (accusing Churchill of using American Indian oral traditions “disingenuously”); see also *id.* at 6 (noting that “interdisciplinary work and . . . ethnic studies . . . may require an even stronger fealty to standards” of conventional scholarship); *Id.* at 45-46 n.98 (rejecting any suggestion that scholars challenging historical beliefs may take liberties with evidence and presentation).

43. PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT (1983) (re-examining official evidence for wartime internment of Japanese).

44. VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1993) (recounting history of abolitionism and the civil rights movement).

45. RACHEL CARSON, SILENT SPRING (1962) (advancing early case for environmentalism).

46. In *Keyishian v. Board of Regents of the State of New York*, the Supreme Court noted that academic freedom is a “special concern of the First Amendment” because the country’s future depends on “leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues [rather] than through any kind of authoritative selection,’” 385 U.S. 589, 603 (1967), quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

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