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Richard Delgado

University of Alabama - School of Law, rdelgado@law.ua.edu

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ARE HATE-SPEECH RULES CONSTITUTIONAL HERESY?
A REPLY TO STEVEN GEY

RICHARD DELGADO[†]

In a recent article,¹ Steven Gey takes strenuous issue with proposals to regulate racist and misogynistic hate speech. Focusing on the work of Mari Matsuda, Charles Lawrence, and myself in the hate-speech area,² and Catharine MacKinnon and Andrea Dworkin in the area of pornography regulation,³ Gey mounts the most sustained attack yet on the view that interests of equality and dignity might sometimes justify limits on what may be said.

Gey writes impressively, with a complex argument and over 300 footnotes, yet in one respect his article is curiously incomplete. Much like an appellate brief, it is devoid of any serious consideration of countervailing interests. Most articles of this kind contain at least some token bow toward the interests of eighteen-year-old black and Latino undergraduates in not being reviled on account of who they are, or of a university in providing a welcoming environment in which everyone can learn without terror or abuse. One searches Gey's article in vain for the usual "we wish we could do something, but . . ."; or "let's try a different approach to controlling racism"; or even the slightly scolding "this is not the way" (which implies that another might be acceptable).⁴ One finds, instead, a rather cold, technical

[†] Jean Lindsley Professor of Law, University of Colorado-Boulder. J.D. 1974, University of California-Berkeley (Boalt Hall).

¹ Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996).

² See *id.* at 196 (selecting these three authors' work as examples of critical race theory).

³ See *id.* at 194 n.1, 282 n.262 (identifying Dworkin's antipornography work); *id.* at 196 (acknowledging MacKinnon's "branch of feminism"). MacKinnon and Dworkin have often worked and spoken together in the campaign against hard-core pornography; they also co-drafted a model antipornography ordinance that in various guises continues to receive attention across the country. On this ordinance and its history, see generally ANDREA DWORKIN & CATHARINE MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY* (1988). Gey also attacks Cass Sunstein for embracing a form of civic republicanism that would tolerate some controls on speech. See Gey, *supra* note 1, at 196.

⁴ See, e.g., Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 179 (1994)

exercise, coupled with sarcasm heaped on his adversaries for thinking the way they do.⁵ One can almost imagine the author witnessing a group of fraternity members hurling epithets at a lone black undergraduate walking home late at night from the campus library, and rushing to intervene—but on the side of the harassers. (“Leave them alone. They have a right to do what they are doing.”) All his instincts seem to lie on one side; the article trots in the other point of view only briefly, for purposes of refutation, and then ushers it out.

Gey’s central argument is that my colleagues and I are no different from Senator Joe McCarthy, the Salem witch tribunals, and other historic controllers of speech.⁶ And our reasons for wishing to exercise control, while perhaps less sinister, still emerge as unflattering elitism and fear of that which is politically radical.⁷ In Gey’s turned-around view, we are the ones guilty of intolerance—against Nazis, racists, Ku Klux Klan members, and purveyors of hard-core pornography, to be sure, but, in his view, still intolerance toward people who simply want to speak their minds.⁸ Milton, Mill, Holmes, Brandeis,

(recognizing the value of “regulations intended to protect individual members of victimized groups from being verbally abused,” but arguing that such regulations must be narrowly construed to be constitutional); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 490-92 (recognizing that “traditional civil libertarians should agree with [Charles] Lawrence that some examples of racially harassing speech should be subject to regulation consistent with first amendment principles,” but arguing that Lawrence’s proposals to limit racist speech and conduct are too broadly drawn); Robert M. O’Neil, *Colleges Should Seek Educational Alternatives to Rules That Override the Historic Guarantees of Free Speech*, CHRON. HIGHER EDUC., Oct. 18, 1989, at B1, B1, B3 (stating that “[t]he worthiest motives prompt efforts to restrict speech that may wound, or embarrass, or offend,” but “the exception we make today to combat anti-Semitism or racism or sexism may well return to haunt us tomorrow”).

⁵ See, e.g., Gey, *supra* note 1, at 193-99 (calling us “censors,” “new censors,” or advocates of “censorship” 19 times); *id.* at 296 (describing us as “faddish[.],” “heralding a new, more righteous era,” obsessed with a “shiny new toy,” and “Victorian”); *id.* at 297 (claiming we are governed by fear).

⁶ See *id.* at 195 (“[T]he underlying theories are the same ones that justified the prosecutions of antiwar protesters, socialists and anarchists in the early years of this century.”); see also *id.* at 278-79, 297.

⁷ See *id.* at 215, 232 (describing how one historical motivation for speech suppression was to eliminate “the possibility that a steady diet of radical ideas would construct . . . a legion of new revolutionaries by changing the thought patterns of previously pathetic and docile citizens,” and characterizing the anti-hate-speech perspective as “elitist to its core” (internal quotations omitted)).

⁸ See *id.* at 196.

and other classic liberal theorists were right, says Gey⁹—we should hesitate to give government too much control over speech, for if we do, we could soon find it regulating our very thoughts and bedroom behavior.¹⁰

In this reply, I first address Gey's central premise about governmental control of speech. Then, I address some subordinate issues about hate-speech regulation: his contention that minorities have no business writing about hate speech because we are blinded by self-interest, for example. Finally, I offer a perspective for understanding social resistance, including articles like Gey's, to reform in this area.

I. THE ROLE OF GOVERNMENT

Gey points out that anti-hate-speech activists have dishonorable predecessors in Supreme Court Justices who approved suppression of political speech.¹¹ But, of course, his heroes have their blind spots, too: Hobbes and Locke wrote approvingly of slavery,¹² and Holmes wrote *Buck v. Bell*¹³ and was a camp follower of the American eugenics movement that advocated restrictions on the immigration of persons of color and controls on breeding of groups deemed inferior.¹⁴ And,

⁹ See *id.* ("[T]he old arguments against censorship—tracing back to Milton, Mill, Holmes and Brandeis—remain responsive to the flaws of any theoretical system in which government is empowered to regulate speech and thought.").

¹⁰ See *id.* at 196-98, 233, 246-47, 273, 278, 289 (citing these and other horrors that could ensue).

¹¹ See *id.* at 215-17 (citing a case which held "that a Socialist Party faction's 'Left Wing Manifesto' 'involve[s] danger to the public peace and to the security of the State,'" thereby justifying suppression (alteration in original) (quoting *Gitlow v. New York*, 268 U.S. 652, 669 (1925))), and another case that argued that "the development of human personality can be debased and distorted by crass commercial exploitation of sex'" (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973))).

¹² See THOMAS HOBBS, *LEVIATHAN* 145-54 (Richard Tuck ed., 1991) (1651) (entitled "Of the Liberty of Subjects"); 2 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 302-03 (Peter Laslett ed., 2d ed. 1967) (1690) (providing argument in favor of slavery); see also SEYMOUR DRESCHER, *CAPITALISM AND ANTISLAVERY* 23-24 (1987) (noting Locke's ambivalence over slavery, at times supporting and at times decrying the institution).

¹³ 274 U.S. 200, 207 (1927) (approving involuntary sterilization of Carrie Lee Buck, who was supposedly mentally retarded, on the theory that "[t]hree generations of imbeciles are enough").

¹⁴ See Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1948-50 (1991) (identifying Holmes's opinion in *Buck v. Bell* as an example of "serious moral error"). On this chapter in history, and Justice Holmes's role in it, see generally STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 32, 51, 335-36 (1981); OLIVER WENDELL HOLMES, *Law and Social Reform*, in *THE MIND AND FAITH OF JUSTICE HOLMES* 399, 400-01 (Max Lerner ed., 1943).

as everyone knows, the First Amendment coexisted with slavery for nearly one hundred years.¹⁵ Is it a standoff, then—one side's favorite value and stock interpretation of history pitted against another's? I do not believe so, for Gey's characterization of the other side contains a glaring flaw: Controlling hate speech differs radically from controlling the speech of a political dissident.

Consider an analogy from a related area, social and political satire. The classic writers in this genre, such as Swift, Voltaire, and Mark Twain, reserved their barbs for the wealthy and powerful kings and other governmental figures who abused power, the idle rich, or the complacent bourgeoisie.¹⁶ They scrupulously avoided making fun at the expense of the poor or the crippled, but instead tweaked pomposity and self-importance among the ruling class.¹⁷ "A root meaning of 'humor' is humus—bringing low, down to earth . . ."¹⁸ Clearly, deflating a government bureaucrat or a puffed-up rich person stands on different footing from poking fun at someone who is poor or afflicted with a disease.

A similar intuition applies to censorship. Suppression of speech is odious when it is government that is censoring the speech of a weak, voiceless dissident.¹⁹ There, the dangers of silencing, governmental self-aggrandizement, and nest-feathering rise to their most acute level. A powerful actor like government should never be above criticism. But with hate-speech regulation, the opposite situation prevails—an arm of government, usually a university, is intervening to prevent *private* harm.²⁰ Far from trying to insulate itself from criticism, or intervening on the side of the powerful, the university is acting on behalf of persons who are disempowered vis-à-vis their tormentors. Because few, if any, of the dangers of censorship loom, it

¹⁵ The Bill of Rights was ratified in 1789, while the Thirteenth Amendment abolishing slavery was ratified in 1865.

¹⁶ See Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1064-71 (1994) (exploring the historical use of satire).

¹⁷ See *id.* at 1065-66 ("On the whole, . . . most of the classic writers reserved their arrows for society's favored few."); see also *id.* at 1069-71.

¹⁸ *Id.* at 1063.

¹⁹ See, e.g., ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 223-25 (1941) (discussing how the raids and deportations of Communists in January, 1920, were illogical, given that "all the spying, arresting, and herding [was done] to save the country from men who in ordinary peace-time conditions were advocating a revolution at some distant and indefinite day through legislative and other propaganda and occasional future unspecified and improbable general strikes").

²⁰ That is, the university acts, in part, to avert harm to minorities.

seems perverse to use the term in that way, just as it would sound strange to call a story ridiculing blind people satire.

Gey is particularly concerned with the social-construction justification for anti-hate-speech measures.²¹ I think it perfectly sensible—who would want to live in a society ten or twenty percent of whose members were regularly demeaned by face-to-face insults²² and in popular culture? But even if not, this is by no means the only interest proregulation writers have advanced. Racist speech damages the dignity, pecuniary prospects, and psyches of its victims²³ (particularly children),²⁴ while it impedes the ability of colleges to diversify their student bodies.²⁵ When severe or protracted, it can even cause physi-

²¹ See Gey, *supra* note 1, at 199-205, 218-33, 282-87, 295-97 (taking strenuous issue with the view, put forward by Matsuda, MacKinnon, and others, that speech, including the racist and misogynist variety, contributes to the way we understand ("construct") our social world, including the value placed on whiteness and nonwhiteness, the appropriate roles for women, children, and other actors, and similar matters).

²² The social-constructionist view holds that we construct the social world by means of speech, speech-acts, pictures, and the like. See *supra* note 21. Most proponents of hate-speech regulation limit their proposals to face-to-face, one-on-one insults that demean on the basis of race or sex. See, e.g., MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 58 (1993) ("[C]arefully drafted regulations can and should be sustained without significant departures from existing first amendment doctrine. The regulation of racist fighting words should not be treated differently from the regulation of garden-variety fighting words, and captive audiences deserve no less protection when they are held captive by racist speakers."); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2380 (1989) (proposing "criminalization of a narrow, explicitly defined class of racist hate speech"). This rather sensible limitation evidently makes Gey unhappy: it is so *moderate*. He is certain that if we had our way, we would be regulating broader and broader areas of speech, such as books and speeches to a crowd. See Gey, *supra* note 1, at 204 ("[C]ritical race theorists do not propose to eliminate the distortions they find in the marketplace; on the contrary, they propose to distort the market intentionally in a different way. One set of ideas will be favored over another . . .").

²³ 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, 135-38, 143-49 (1982) (identifying the harmful psychological effects of racial insults); Matsuda, *supra* note 22, at 2336-37 ("Professor Patricia Williams has called the blow of racist messages 'spirit murder' in recognition of the psychic destruction victims experience." (citing Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 139 (1987))).

²⁴ See Delgado, *supra* note 23, at 138, 146 (opining that "racial stigmatization . . . may affect parenting practices among minority group members, thereby perpetuating a tradition of failure," and that "[b]ecause they constantly hear racist messages, minority children . . . question their competence, intelligence, and worth").

²⁵ See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 387 n.354 (1991) (recognizing that hate speech is affect-

cal sickness, including high blood pressure, tremors, sleep disturbance, and early death.²⁶ In focusing only on the most abstract and novel of the justifications, Gey has overlooked that hate-speech rules are necessary to promote a number of social and educational objectives of a quite ordinary nature. Moreover, Gey himself often blithely invokes the informed social consensus or "common understanding"²⁷ as though these were not social constructs, and ignores that the status quo (in which minorities suffer frequent slights and insults) has a bias, too.²⁸ Social constructionism, it turns out, is impermissible only when wielded by minorities seeking to change the prevailing situation.

In addition, in his fixation on the supposed political dangers of hate-speech regulation, Gey overlooks the numerous other "exceptions" and special doctrines that riddle free-speech law—libel, defamation (even of vegetables and produce), words of threat and of monopoly, state secrets, copyright, plagiarism, disrespectful speech uttered to a judge or other authority figure, and many more.²⁹ With these, the state intervenes on behalf of actors who are quite empowered, such as the military, agribusiness, or the community of commercially successful authors, and where the risks of aggrandizement

ing African-Americans' choices of colleges and causing some students to drop out of schools).

²⁶ See Delgado, *supra* note 23, at 139 (listing numerous physical effects of hate speech on African-Americans, including stress symptoms, high blood pressure, and heightened "morbidity and mortality rates from hypertension, hypertensive disease, and stroke"); Matsuda, *supra* note 22, at 2336 ("Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide."); Barbra Rodriguez, *Racism, Rise in Blacks' Blood Pressure Linked*, DENV. POST, July 22, 1996, at 4A (reporting Duke University study showing hypertension, migraine headaches, and depression may result from racial tension).

²⁷ See Gey, *supra* note 1, at 198 ("[T]he postmodern censors are true radicals in the sense that they define the world in a way that is contrary to the common understanding of those outside their ideological fold.").

²⁸ Cf. *id.* at 281 (placing the onus on civil rights advocates to justify changing the current regime of free speech).

²⁹ See Delgado, *supra* note 25, at 377 (listing these and other such "exceptions" and special doctrines). To be fair, Gey does refer in passing to the existence of one or two exceptions which we tolerate as a matter of "pragmatic reality." Gey, *supra* note 1, at 218 ("The advocates of the conservative and postmodernist censorship proposals build on the almost universal acknowledgment that even a democratic government occasionally will have to suppress some speech to preserve public order, although the censorship proponents sometimes seek to portray this basic pragmatic reality as if it were a novel contribution to free speech theory."). But, then, why would hate-speech controls not be entitled to the same consideration?

and increase of power are very real. Government, authors, consumers, and other powerful groups are able to suppress speech that offends them, but when a university proposes a speech code to protect some of the most defenseless members of society—black, brown, gay, or lesbian undergraduates at dominantly white institutions—Professor Gey charges us with constitutional heresy and warns that we will all end up thought-controlled zombies.³⁰ But racism is a classic case of democratic failure; to insist that minorities be at the mercy of private remonstrance against their tormentors—and that the alternative is censorship—is to turn things on their head.

II. OTHER PIECES OF THE PICTURE

Gey levels other charges against the hate-speech camp. As minorities in most (but not all) cases,³¹ we are apt to be partial—too close to the problem to write about it objectively.³² But then why is Gey, a white male, not similarly disqualified from taking the contrary position? Readers are of course capable of evaluating for themselves an argument made by a minority, just as they are one by Gey, but his oversight of the way that his own argument cuts both ways is telling. An example of white transparency,³³ it shows how the white point of

³⁰ See, e.g., Gey, *supra* note 1, at 195 (thought control); *id.* at 203, 230 (thought reform); *id.* at 243 (reeducation); *id.* at 232 (indoctrination); *id.* at 234 (revision or erasure of ideas); *id.* at 230, 248 (control of minds).

³¹ Matsuda, for example, is an Asian-American; Lawrence is black; I am a Chicano. Frank Michelman is white.

³² See Gey, *supra* note 1, at 225 (stating that postmodernist “theorists are too close to the problems they describe”); *id.* at 226, 227 (same).

³³ See, e.g., RUTH FRANKENBURG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 1 (1993) (defining “whiteness” as “a location of structural advantage, . . . a place from which white people look at ourselves, at others, and at society. . . . ‘[W]hiteness’ refers to a set of cultural practices that are usually unmarked and unnamed.”); STEPHANIE WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PRIVILEGE UNDERMINES AMERICA* 87 (1996) (stating that “[w]hites do not look at the world through [the] filter of racial awareness”). See generally Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2015 (1995) (contending that transparently white decisionmaking in the workplace systematically disadvantages minorities and violates Title VII, and recommending the implementation of a more expansive disparate-impact doctrine as a remedy for such discrimination); Barbara J. Flagg, *“Was Blind But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 959 (1993) (defining white transparency as “the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific,” and arguing that “[t]he imposition of transparently white norms is a unique form of unconscious discrimination, one that cannot be assimilated to the notion of irrationalism that is central to the liberal ideology of racism”).

view masquerades as colorless, raceless, and systematically devoid of bias.³⁴ Gey's argument not only ignores much recent scholarship, but also would disqualify consumers from arguing for consumer protection laws, medical patients from urging changes in medical malpractice law, and anyone else with an interest in a controversy from writing about it—clearly not a position we take in general.

Gey also argues that everyone has the right to be obnoxious and wrong.³⁵ But this certainly is not true—we regulate many forms of obnoxiousness, and should.³⁶ Nor do anti-hate-speech advocates argue for regulation of hate speech because it is wrong in any factual sense. The campus tough who snarls, "N_____, go back to Africa. You don't belong on this campus," is not conveying information. The victim already knows that he is an African-American, that the speaker and many others do not like him or welcome his presence on campus, and that his ancestors came from Africa. Face-to-face hate speech conveys no information. It is more like a slap in the face or a performative (like "You're on," or, "I now pronounce you man and wife"); it reorders the speaker's and the listener's statuses in relation to each other.³⁷ Indeed, regulating these stunning transactions might well result in more speech on campus, not less. Feeling more welcome and less beleaguered, students of color would be more likely to speak out and participate more actively in classroom discussions.

Gey also reasons that hate-speech rules are unnecessary because the numerous civil rights acts passed since 1957 are very broad-reaching.³⁸ But useful as that landmark legislation may be, it certainly has not been fully successful. Recent studies by "testers," one black, one white, but otherwise as alike as possible, show the radically different receptions they receive when shopping, renting an apartment,

³⁴ See WILDMAN, *supra* note 33, at 87; Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 291, 292-93 (Richard Delgado & Jean Stefancic eds., 1997).

³⁵ See Gey, *supra* note 1, at 230 (stating that "everyone in society has the right to disagree—verbally, loudly and even obnoxiously").

³⁶ For example: noise ordinances, trespass laws, and laws against pollution, fumes, professorial browbeating of students, or obnoxious behavior by pets.

³⁷ In short, it reinscribes a certain type of social reality, making it more difficult for the group whose status is thus lowered to change position.

³⁸ See Gey, *supra* note 1, at 243-44 ("It is difficult for many of us [not including Delgado] to think of the various Civil Rights Acts enacted since 1957 as covering only 'episodic, blatant acts of prejudice.'" (quoting Delgado, *supra* note 25, at 385-86)).

buying a car, or applying for a loan or job.³⁹ Today, more African-American children attend segregated schools than did in *Brown's* day.⁴⁰ And even if these more tangible forms of discrimination were on the wane, hate-speech rules would still be necessary to counter a cultural legacy of racism and pernicious stereotypes. Gey warns that this would be tantamount to brainwashing and thought control,⁴¹ but he overlooks that society already employs a variety of means to discourage racism, including education, laws, and official statements.⁴² Hate-speech rules would be no more intrusive than many of these measures.

Finally, what are we to make of Gey's repeated deployment of the shopworn slippery-slope argument that if courts give government the power to regulate speech in one area, it will soon seize even more and use it in ways minorities might not like?⁴³ One notices immediately that Gey makes this argument almost entirely by means of hypothetical language: Once courts give the go-ahead to hate-speech rules, other branches of government "may,"⁴⁴ "could,"⁴⁵ "could easily,"⁴⁶ or

³⁹ See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 818-19 (1991) (stating that a series of tests revealed "that white males receive significantly better prices [on new cars] than blacks and women"); *Prime Time: True Colors* (ABC television broadcast, Sept. 26, 1991) (observing, in a series of tests conducted in St. Louis, that the white tester received lower prices at a car dealership, faster service from retailers, and more courteous treatment in a variety of situations, while the black tester was ignored or treated with suspicion or outright hostility).

⁴⁰ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42-57, 345-48 (1991) (noting a failure of the landmark *Brown v. Board of Education* case to effect much improvement in the lives of black schoolchildren).

⁴¹ See *supra* note 30 and accompanying text.

⁴² Schools teach civility and respect for pluralism; three Constitutional Amendments (the Thirteenth, Fourteenth, and Fifteenth) guarantee antidiscrimination; and various recent Presidents, including Harry Truman, Lyndon B. Johnson, and Bill Clinton, have issued official statements celebrating equality and condemning racism. See DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 202-03, 894-95 (3d ed. 1992); President William J. Clinton, *Race in America*, Address to Graduates of the University of California, San Diego, available in *Excerpts from Clinton's Speech on Race in America*, N.Y. TIMES, June 15, 1997, § 1, at 16 (asserting that "diversity will enrich our lives in non-material ways," and suggesting that "we must deal with the realities and the perceptions affecting all racial groups in America").

⁴³ See, e.g., Gey, *supra* note 1, at 228 ("[T]he censors could easily win the battle to eliminate constitutional protection of speech, only to lose the battle over exactly which forms of speech should be regulated."); see also *id.* at 227-31, 245, 293-94.

⁴⁴ *Id.* at 213, 228, 287.

⁴⁵ *Id.* at 288.

⁴⁶ *Id.* at 228, 245.

"undoubtedly would"⁴⁷ pass laws punishing speech we prize, including (possibly, maybe, likely) even anti-racist speech itself.⁴⁸

Anything is possible, of course, but it just has not happened. Colleges that have enacted anti-hate-speech rules have not proceeded ineluctably to enact even more sweeping rules or put everyone in jail.⁴⁹ Western democracies that have enacted hate-speech laws, such as Canada, Denmark, France, Germany, and the Netherlands, have scarcely suffered a diminution of respect for free speech.⁵⁰ The few examples Gey does give of speech suppression, mainly McCarthy-era witch hunts, took place long before hate-speech rules were in effect and were more the product of political excess than lack of First Amendment zeal.⁵¹ Indeed, during the McCarthy hearings, the nation's leading First Amendment organization, the ACLU, chose to lay low instead of forcefully confronting McCarthyism and blacklists.⁵² A second example of censorship Gey cites, from Canada, has been refuted by later investigation.⁵³

⁴⁷ *Id.* at 288; *see also id.* at 228 (noting that regulations created to curtail hate speech will "not necessarily" produce the gains that their designers intend).

⁴⁸ *See id.* at 205 ("After the well-meaning critical race theorists have eliminated most or all constitutional restrictions on government regulation of speech, the predominant forces in the government could easily choose to use their new powers . . . [to] reinforce [what] the critical race theorists now find so oppressive."); *see also id.* at 228-33, 245, 287.

⁴⁹ *See* RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 125-26 (1997) (noting that no erosion of free-speech protection has been found in other societies); Interview with Michael Olivas, Professor of Law and Director, Institute of Higher Education Law and Governance, University of Houston School of Law (Aug. 1997).

⁵⁰ Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Regulation*, 78 IOWA L. REV. 737, 742 (1997) (book review) ("[T]he experiences of Canada, Denmark, France, Germany, and the Netherlands . . . imply that limited regulation of hate speech does not invariably cause deterioration of the respect accorded free speech.").

⁵¹ *See supra* note 6 and accompanying text.

⁵² *See* SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 125, 129-30, 131, 176-78, 186, 197-214, 372 (1990) (detailing the infighting caused by the anti-Communist faction's struggle for the soul of the ACLU); Mary S. McAuliffe, *The Politics of Civil Liberties: The American Civil Liberties Union During the McCarthy Years*, in *THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGINS OF MCCARTHYISM* 152, 155-57 (Robert Griffith & Athan Theoharis eds., 1974) (observing that the ACLU adopted an anti-Communism resolution following World War II and expelled a member of the Communist Party from its board of directors, rather than confronting McCarthyism); *cf. also* MELVIN PATRICK ELY, *THE ADVENTURES OF AMOS 'N' ANDY* 236-37 (1991) (detailing how the ACLU jousted with the NAACP over demonstrations aimed at movies inimical to the black cause).

⁵³ Compare Gey, *supra* note 1, at 247 n.154 (discussing the aftermath of *Regina v. Butler* [1992] S.C.R. 452, and claiming that "[a]fter *Butler* broadened government

Not only does First Amendment absolutism offer little bulwark against governmental repression, it has provided less help than is commonly supposed for minorities in their struggle against racism. Despite the frequent admonition that minorities, if they knew their own best interest, would not limit the First Amendment, civil rights reformers have made the greatest progress when they acted *against* the First Amendment, at least as it was then understood.⁵⁴ Speech may have served as a useful vehicle for racial reform, but the system of free speech generally did not.⁵⁵

Note how Gey writes as though minorities were now *in charge* and running things. When conditions change, he warns, the new regime may use hate-speech rules and the new regulatory power against the very people who advocated them.⁵⁶ But to argue that minorities are running the show now—when the political right is ascendant, rolling back affirmative action, curtailing immigration and the language rights of non-English speakers (where is Gey when we really need him?), and dismantling campus programs that differ even slightly from the Western canon—is ludicrous.⁵⁷ In reality, it is our very powerlessness and vulnerability that cause a few universities to consider passing hate-speech rules. Note as well how Gey, like other First Amendment absolutists, ignores that slopes are arguably just as slippery in the other direction. I might just as easily argue that *failure* to regulate hate speech, thereby leaving an important aspect of equality

authority to regulate sexual expression," the Canadian government searched and/or seized book shipments from the states), with Catharine A. MacKinnon & Andrea Dworkin, Statement Regarding Canadian Customs and Legal Approaches to Pornography (Aug. 26, 1994) (on file with author) (pointing out that the Canadian seizure of which Gey speaks took place shortly after the landmark *Butler* decision, when the customs authorities were still following the old, moralistic standard for obscenity, rather than the new, harm-to-women standard).

⁵⁴ Cf. Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 881-82 & n.70 (1994) (noting that historically, the First Amendment protected only the speech of white, male property owners, and that minorities have made civil rights advances primarily by disrupting "business as usual").

⁵⁵ See *id.* at 882 (noting that many in the civil rights movement who "marched, sang, and spoke . . . were arrested and convicted" as a result, and that "[t]heir speech was seen as too forceful, too disruptive").

⁵⁶ See Gey, *supra* note 1, at 228 (noting that "[t]his possibility is the most obvious flaw in the postmodern censorship literature"); see also *id.* at 205, 245, 287.

⁵⁷ See JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 4 (1996) (detailing seven campaigns in which the political right was successful over the past 20 years: "official English; Proposition 187 and immigration reform; IQ, race, and eugenics; affirmative action; welfare; tort reform; and campus multiculturalism").

unprotected, could lead to further erosion.⁵⁸ Racists could become emboldened, and who knows what the next outrage might be?⁵⁹

Free-speech law and etiquette are so open-ended and manipulable that one can make of them practically whatever one will. Consider an example drawn from Gey's own article. In a section entitled, ironically, "Rhetorical Excess,"⁶⁰ Gey takes me to task for speculating about the willingness of some campus officials to tolerate low-grade racism and hassling.⁶¹ The statement, as I made it, contained an important qualification, which I reproduce below.⁶² In his article, Gey produces his own version with the qualification dropped (but marked with ellipses)⁶³ *and then takes me to task for failing to make that very same*

⁵⁸ See Delgado, *supra* note 25, at 345-46 ("If we do *not* intervene to protect equality here, what will the next outrage be?").

⁵⁹ See *id.*; Matsuda, *supra* note 22, at 2378 (noting that by providing "police protection and access to public streets" for groups such as the Ku Klux Klan, the government is "promoting" and strengthening such groups).

⁶⁰ Gey, *supra* note 1, at 248-54 ("The Flaw of Rhetorical Excess").

⁶¹ See *id.* at 249 (characterizing it as a "bad-faith claim").

⁶² My statement (from a speech at the State Historical Society, Madison, Wisconsin, April 24, 1989) read, in full, as follows:

I believe that racist speech benefits powerful white-dominated institutions. The highly educated, refined persons who operate the University of Wisconsin, other universities, and major corporations, would never, ever themselves utter a racial slur. That is the last thing they would do.

Yet, they benefit, and on a subconscious level they know they benefit, from a certain amount of low-grade racism in the environment. If an occasional bigot or redneck calls one of us a nigger or spick one night late as we're on our way home from the library, that is all to the good. *Please understand that I am not talking about the very heavy stuff—violence, beatings, bones in the nose. That brings out the TV cameras and the press and gives the university a black eye. I mean the daily, low-grade largely invisible stuff, the hassling, cruel remarks, and other things that would be covered by rules.* This kind of behavior keeps non-white people on edge, a little off balance. We get these occasional reminders that we are different, and not really wanted. It prevents us from digging in too strongly, starting to think we could really belong here. It makes us a little introspective, a little unsure of ourselves; at the right low-grade level it prevents us from organizing on behalf of more important things. It assures that those of us of real spirit, real pride, just plain leave—all of which is quite a substantial benefit for the institution.

Delgado, *supra* note 25, at 380 n.319 (emphasis added).

⁶³ Gey's version reads as follows:

I believe that racist speech benefits powerful white-dominated institutions. . . .

. . . [T]hey benefit, and . . . they know they benefit, from a certain amount of low-grade racism in the environment. . . . This kind of behavior keeps non-white people on edge, a little off balance. We get these occasional reminders that we are different, and not really wanted. It prevents us from digging in too strongly, starting to think we could really belong here. It makes us a little

qualification!⁶⁴ Suppose you said "Alaska is a very nice place, except for the winter," and I then excised the part about winter. If I then scolded you for making a sweeping generalization that overlooked the problem of weather, surely you would wonder about my sense of fairness. Might it be that Gey's zeal to find heresy in the words of his antagonists has affected his scholarly objectivity?

III. SOCIOLOGY OF KNOWLEDGE ISSUES: HOW COULD THINGS SEEM THAT WAY TO STEVEN G. GEY?

How could simple antiracist measures aimed at advancing the civil rights agenda seem like tyranny and thought control to someone like Gey?

In some respects, the hate-speech controversy is the *Plessy v. Ferguson*⁶⁵ of our age. In that case, a railroad passenger challenged a Louisiana statute that forced blacks to ride in one railroad car while whites rode in another.⁶⁶ The Supreme Court upheld this official system. Each group was legally disadvantaged. Neither could ride in the cars set aside for the other: separate but equal.⁶⁷

Almost sixty years later, *Brown v. Board of Education*⁶⁸ overruled *Plessy*, finding that separate schools harmed black children irrepara-

introspective, a little unsure of ourselves; at the right low-grade level it prevents us from organizing on behalf of more important things. It assures that those of us of real spirit, real pride, just plain leave—all of which is quite a substantial benefit for the institution.

Gey, *supra* note 1, at 249 (omissions and alteration in original).

⁶⁴ The scolding proceeded as follows:

University administrators are instinctively sensitive to their image among wealthy private benefactors, parents of potential students, and (in the case of public universities) state legislators. Thus, the avoidance of conflict and discord whenever possible is foremost on the mind of every university administrator, especially if that conflict and discord is likely to get press coverage. It would be logical for an administrator to conclude that the prominent public expression of racist or sexist remarks will almost certainly generate some degree of bad publicity. In this light, it is implausible that university administrators would view themselves, either consciously or subconsciously, as having similar interests to persons expressing overtly racist or sexist views. Long periods full of angry marches and demonstrations held under the harsh glare of television cameras are not the stuff of which successful careers in academic administration are built.

Id. at 250-51. This, of course, merely restates what I said in the passage Gey elided!

⁶⁵ 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁶⁶ *See id.* at 540-41.

⁶⁷ *See id.* at 550-51.

⁶⁸ 347 U.S. 483 (1954).

bly, in violation of the Fourteenth Amendment's guarantee of equal protection.⁶⁹ Shortly after the *Brown* decision was announced, a well-known constitutional scholar asked how the opinion could be justified on neutral grounds.⁷⁰ To the scholar, it seemed to sacrifice the right of whites not to associate with blacks to that of blacks to do the converse. Why is the one right more deserving of respect than the other?

In the hate-speech debate, we see much the same sort of perverse neutralism. The white, with Gey on his side, insists on the freedom to say whatever is on his mind. The black or brown insists on the right *not* to hear what is on the white's mind when that takes the form of a vicious racial slur. One interest balanced against another, one emanating from one part of the Constitution (the First Amendment), the other from a different part (the Fourteenth Amendment)—seemingly a perfect standoff. As with *Plessy*, I think history will have no trouble telling us which interest is more morally significant.

But in the meantime, the question arises as to how Gey could have written as he did. Since the issue reverberates beyond the hate-speech debate, I would like to set out what I have labeled elsewhere the Reconstructive Paradox.⁷¹ The paradox, which to one degree or another afflicts every incipient reform movement, can be summarized in six steps:

1. The greater a social evil (e.g., black subordination or the system of media stereotypes of women or people of color), the more apt it is to be entrenched in our national life.
2. The more entrenched the evil, the more massive the social effort necessary to reform it.
3. The harm of an entrenched evil will be virtually invisible to many, because it is embedded and ordinary.
4. Any massive social effort will invariably collide with other social values and matters we hold dear, such as settled expectations, religion, property values, neighborhood schools, or the First Amendment

⁶⁹ See *id.* at 495.

⁷⁰ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) ("Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?").

⁷¹ See Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 558-59 (1995).

right to say anything we please. It will dislocate and discomfit, and require shifts in thinking, acting, spending priorities, and the way we relate to each other.

5. These reform efforts, by contrast, will be highly visible, sparking resistance and accusations that the reformers are engaging in totalitarian tactics, siding with big government, penalizing innocent whites, engaging in a new form of discrimination, reviving old grudges, or creating new divisions.

6. Resisting these latter complaints will feel right and proper, for the other side will appear to be callously sacrificing real liberty, real security, and real resources for a nebulous goal.

Another way of stating this is that reform, lamentably, often fails to generalize. Most of us today—I assume Gey, as well—believe that *Brown*, not *Plessy*, was rightly decided. What we fail to notice is that the hate-speech debate has a very similar structure. As with the arguments that supported the separate-but-equal doctrine, today's debate features speakers urging that the black's or brown's injury is only in her head,⁷² that she is injured only if she chooses to put that construction on it. And, as with *Plessy* and the Southern resistance to *Brown*, the opposition sees itself as highly principled.⁷³ We are not for discrimination, they say. Oh, no. Rather, higher principles, they argue (there, neighborhood schools, here free speech), are at stake.

⁷² Compare *Plessy*, 163 U.S. at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."), with DINESH D'SOUZA, *ILLIBERAL EDUCATION* 132-36, 156 (1991) (suggesting that many "racial incidents" at universities are at most ambiguous examples of discrimination), and NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* 146-92 (1992) (arguing that minorities prone to complain over minor slights should simply shrug them off).

⁷³ See Gey, *supra* note 1, at 193 (citing intellectual freedom); *id.* at 196 (citing free thought); *id.* at 196, 218, 297 (citing courage in the face of fear of political radicalism); *id.* at 290 (citing liberty, privacy, and autonomy).

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