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Richard Delgado

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

Jean Stefancic

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

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FOUR OBSERVATIONS ABOUT HATE SPEECH

*Richard Delgado**

*Jean Stefancic***

INTRODUCTION

In August 2008, the Oregon Supreme Court reversed the conviction of a motorist who engaged in a shouting match with two women, one white, the other black, on a public highway.¹ The automobile in which the two women were riding sported a rainbow decal on the rear bumper, which prompted the defendant, who was named Johnson, to believe that the two were lesbians.² After Johnson found himself stuck in traffic behind the women's car when the roadway narrowed from two lanes to one, he began tailgating the other car, making obscene gestures, and shouting racial epithets through a makeshift sound amplification system.³

Johnson's conduct continued for about five minutes as the vehicles made their way through stop-and-go traffic. Although he did not threaten the women, they feared that he was trying to start an altercation that might easily become violent. One of the women testified that she saw a second person in the bed of the other vehicle⁴ swinging a skateboard menacingly.⁵

The prosecutor charged Johnson under a statute that criminalized "publicly insulting [another] person by abusive words or gestures in a manner intended and likely to provoke a violent response."⁶ The defendant demurred to the indictment on free-speech grounds.⁷ After the trial judge overruled the demurrer, the

* University Professor, Seattle University School of Law; J.D., 1974, University of California, Berkeley.

** Research Professor, Seattle University School of Law; M.A., 1989, University of San Francisco.

1. State v. Johnson, 191 P.3d 665, 666 (Or. 2008) (en banc).

2. *Id.* Such a decal expresses solidarity with gays and lesbians.

3. *Id.* The opinion does not explain how Mr. Johnson came to have a bullhorn or similar device in his vehicle.

4. Johnson's vehicle appears to have been a pickup truck, in whose bed at least one passenger was riding. *Id.*

5. *Id.*

6. *Id.* at 667 (citing OR. REV. STAT. § 166.065.1(a)(B) (2007) (criminalizing abusive speech)).

7. *Id.*

case proceeded to trial. At its conclusion, Johnson appealed his conviction on a number of grounds, including that his speech fell under Oregon's free-speech guarantee, which is similar to the First Amendment. The state supreme court agreed, finding that Oregon's statute unconstitutionally singled out a form of words⁸ irrespective of whether they resulted in a physical act or fear of imminent violence. The statute thus targeted a broad category of speech, some of which is entitled to constitutional protection.⁹

The court conceded that annoyance is a common reaction to words that a listener finds "unpleasant."¹⁰ But a state may not punish speakers of those words for that reason alone. Mild distress such as that which the two women experienced might well warrant a civil remedy, but not a criminal sanction.¹¹

State v. Johnson is typical of a number of cases that pit the interests of hate speakers against those of their targets or audiences.¹² Some such cases arise in criminal settings, such as *Johnson*, or ones in which an individual burns a cross in an intimidating fashion.¹³ Others arise when a college or university charges a student or visitor with violating a campus regulation forbidding the dissemination of some form of hatred.¹⁴ Unlike in the criminal arena, where the law enforcement side generally prevails,¹⁵ these cases usually result in victory for the free-speech side. Nevertheless, campuses have continued enacting new versions of hate-speech regulations, in search of one that will survive scrutiny.¹⁶

8. Namely, words of harassment.

9. *Johnson*, 191 P.3d at 668-69 (declaring Oregon's statute unconstitutionally broad).

10. *Id.*

11. *Id.* at 669 n.5.

12. For a sampling of the case law in this area, see, for example, RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND (2004) [hereinafter DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND] (discussing legal decisions and statutes in a variety of areas including torts, the Internet, pornography, and children's rights).

13. See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (upholding a Virginia statute that banned cross burning with the intent to intimidate a person or group); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down a St. Paul ordinance that punished cross burning with the aim of provoking violence on the basis of race, color, and a few other characteristics).

14. See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 355-58 (1991) [hereinafter Delgado, *Narratives in Collision*] (analyzing these and similar cases).

15. *Johnson*, for now at least, is an exception, although it may turn out to be a bellwether. Some free-speech advocates are working to narrow harassment law on the ground that expression should be as free as possible. See Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY BILL RTS. J. 1025, 1045-47 (2008).

16. See generally JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION (2005) (examining the history of university hate speech regulation and concluding that administrators appear determined to enact speech codes that will promote a healthy climate on campus).

Other cases featuring the same conflict between constitutional values¹⁷ arise when women complain of sexual harassment at work.¹⁸ In all these cases, judges and commentators are prone to frame the issue in free speech rather than equal protection terms.¹⁹ This may be because the speaker receives backing from an organization like the ACLU or FIRE (Foundation for Individual Rights in Education) dedicated to advancing the former value. Or it may be because courts value positive rights, such as the right to speak one's mind, more highly than they do negative ones, such as the right to be free from aggressive vituperation.²⁰ Finally, it may be, as some have noted, because free-speech rights tend to favor the interests of powerful groups such as magazine owners, newspaper editors, and purveyors of pornography, while those clamoring for greater restrictions are women, racial minorities, and university administrators with fewer resources and prestige than their counterparts on the First Amendment side.²¹

Regardless of the reason, these controversies pitting free speech against equality raise a number of questions, some of which we have addressed in previous writings and others that we would like to address now. We summarize our previous writing below to simplify discussion, avoid undue repetition, and facilitate cross-referencing.²²

17. We mean the conflict between free-speech values and equal protection or racial peace.

18. See generally CATHARINE A. MACKINNON, *ONLY WORDS* (1993) (discussing the controversy over regulating pornography, sexual harassment, and hate speech).

19. That is, they begin by asking "Is this speech protected?" rather than "Should this campus's interest in racial peace receive protection?"

20. Interview with Alexander Tsesis, Professor of Law, Loyola Univ.—Chi. Sch. of Law, in Seattle, Wash. (Sept. 25, 2008) (pointing out the disparity in the extent of protection courts afford the two types of rights); see also Peter Schmidt, *Group Tells Public-College Presidents They May Be Personally Liable for Speech Code*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 5, 2009, <http://chronicle.com/daily/2009/01/9630n.htm> (online edition) (explaining FIRE's position).

21. See *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (invalidating ordinance written by Catharine MacKinnon and Andrea Dworkin that drew the ire of the pornography industry); see also MACKINNON, *supra* note 18, at 53 (noting the alliance between the ACLU and the pornography industry); Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 789–91 (2000) (reviewing STEVEN H. SHRIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)) [hereinafter Delgado, *Legal Realist View*] (noting how hate speech may contribute to the creation of a class system).

22. RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997) [hereinafter DELGADO & STEFANCIC, *MUST WE DEFEND NAZIS?*] (reviewing case law and scholarship in this area and arguing that a new First Amendment jurisprudence is emerging); DELGADO & STEFANCIC, *UNDERSTANDING WORDS THAT WOUND*, *supra* note 12; MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993)

The new issues²³ are the following: (1) strategy and use of resources within the progressive camp,²⁴ (2) the costs of a free-speech regime versus one that puts antiracism first,²⁵ (3) interest balancing,²⁶ and (4) a tendency to frame the issue as one of procedure rather than substance.²⁷

Although these issues arise in each of the settings mentioned above,²⁸ we take campus hate-speech regulation as our principal

(compiling leading essays on hate-speech reform); THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY (Laura J. Lederer & Richard Delgado eds., 1995); Richard Delgado, *Narratives in Collision*, *supra* note 14; Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994) [hereinafter Delgado, *Formalism Is Giving Way*] (discussing changes in free speech legal methodology); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words That Wound*] (urging tort remedies for racial slurs and insults); Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851 (1994) (analyzing the difficulties that lie in the way of judges considering a change in a reigning paradigm); 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 of the Outsider*] (discussing social stereotypes of various minority groups and the role of hate speech in inscribing them); Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence?"*, 53 OHIO ST. L.J. 1037 (1992) [hereinafter Delgado & Stefancic, *Pornography and Harm to Women*] (discussing factual basis for regulating pornography industry); Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation*, 82 CAL. L. REV. 871 (1994) [hereinafter Delgado & Yun, *Pressure Valves*] (discussing liberal objections to hate-speech controls); Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994) [hereinafter Delgado & Yun, *Toughlove*] (analyzing a series of conservative objections to hate-speech regulation); Richard Delgado & David Yun, "The Speech We Hate": *First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics*, 27 ARIZ. ST. L.J. 1281 (1995) [hereinafter Delgado & Yun, *Speech We Hate*] (evaluating an absolutist objection to regulating hate speech); Delgado, *Legal Realist View*, *supra* note 21; Richard Delgado & Jean Stefancic, *Apologize and Move On?: Finding a Remedy for Pornography, Insult, and Hate Speech*, 67 U. COLO. L. REV. 93 (1996) (reviewing RICHARD ABEL, SPEECH AND RESPECT (1994), a book on apologies as remedies for racial harms, including hate speech); Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737 (1993) (book review) [hereinafter Stefancic & Delgado, *A Shifting Balance*] (reviewing a book on international hate-speech controls).

23. By "new" we mean in the sense that we have not previously addressed the matter, or else in the sense that we have not delved into it as deeply as we need to here.

24. See *infra* Part I.

25. See *infra* Part II.

26. See *infra* Part III.

27. See *infra* Part IV.

28. That is, campus codes, workplace harassment, and prosecution for hate

example because it presents in pristine form many of the questions that interest us. As will be seen, the first and fourth issues have to do with the structure of the debate; the second and third deal with neglected elements in the calculus of the two sides.

I. OBSERVATION NUMBER ONE: THE OPPORTUNITY COST OF AN IN-GROUP FEUD

Our first observation concerns not so much the merits of the two positions as the nature of the pitched battle that is taking place. Each of the controversies mentioned earlier²⁹ features a progressive organization trying to impose its view on another of the same or very similar stripe. With hate speech, for example, the ACLU, FIRE, and other progressive organizations clash with campus authorities and activists of color over the legitimacy of controlling that form of expression. In the simplest terms, First Amendment defenders maintain that campus speech should be free, while their adversaries insist that the campus should be free—but of racism.³⁰ Their dispute features contrasting views about how to frame the central issue, the governing narrative, controlling case law, and the lessons of history.³¹

As we have noted, free-speech defenders invoke case law such as *Brandenburg v. Ohio*³² and *New York Times Co. v. Sullivan*³³ that has decisively expanded the scope of free speech. These advocates invoke a particular kind of story, or narrative, as well. For them, defense of campus speech is part of a history that includes the struggle of Western society to rise above superstition and enforced orthodoxy.³⁴ They cite heroes, such as Socrates, Galileo, and Peter Zenger, who put their bodies on the line to expand free expression, and writers such as John Locke, David Hume, Thomas Hobbes, and Voltaire, who placed it on a firm theoretical foundation.³⁵

The equality faction approaches the problem from a different perspective. For them, defending racial and sexual minorities from hateful invective is an essential feature of safeguarding equal

crimes.

29. That is, campus hate speech, racial harassment in the workplace, and enforcement of criminal laws punishing harassment or ethnic intimidation. See *supra* notes 12–18 and accompanying text.

30. See, e.g., Delgado, *Narratives in Collision*, *supra* note 14, at 345–48 (explaining these two polar positions); Delgado, *Legal Realist View*, *supra* note 21, at 793–95, 800–01 (same).

31. E.g., Delgado, *Narratives in Collision*, *supra* note 14, at 345–48. We explain and illustrate these differences immediately *infra*.

32. 395 U.S. 444 (1969) (per curiam) (offering a ringing defense of unfettered free speech).

33. 376 U.S. 254 (1964) (applying a high standard for defamation of a public figure).

34. See DELGADO & STEFANCIC, *MUST WE DEFEND NAZIS?*, *supra* note 22, at 46–49 (discussing the opposing narratives).

35. *Id.* at 48.

protection and equal dignity or, in the case of university administrators, a healthy environment for learning.³⁶ This group, too, has its favorite cases, but they are ones like *Brown v. Board of Education*³⁷ that emphasize the role of equality in education and other areas of life.³⁸ Like their counterparts on the other side, they invoke stories that lie close to America's core, including those of civil rights heroes like Medgar Evers, Rosa Parks, and Cesar Chavez, who fought to expand the rights of all citizens.³⁹ They call upon different theorists, including Charles Lawrence⁴⁰ and Catharine MacKinnon,⁴¹ who propose frameworks for limiting hateful expression. They cite the example of many Western democracies that have done just that.⁴²

We mention the above not to highlight the indeterminacy of the debate or the way in which one can cite constitutional values on either side. We have done this elsewhere⁴³ and believe that the party of multiculturalism has the better argument.⁴⁴ Instead, we mention it to point out a feature that ought to have been obvious all along, but that we and most other commentators seem to have missed—namely, how the debate proceeds almost entirely between two groups of the progressive left: the ACLU and its followers, on the one hand, and minority groups, critical race theorists, and their allies on the other.⁴⁵

36. See *id.* at 47–49 (discussing the equality-first position); Delgado, *Formalism Is Giving Way*, *supra* note 22 (same).

37. 347 U.S. 483 (1954) (invalidating separate but equal school assignments for black and white children).

38. DELGADO & STEFANCIC, *MUST WE DEFEND NAZIS?*, *supra* note 22, at 48.

39. *Id.*

40. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (defending restrictions on hate speech as necessary to safeguard the right of equal education); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (demonstrating the influence of unconscious racism and urging that antidiscrimination law expand to take it into account).

41. See MACKINNON, *supra* note 18 (defending limitations on pornography and racial harassment).

42. See, e.g., Delgado, *Narratives in Collision*, *supra* note 14, at 362–71 (reviewing international responses to racial speech); Stefancic & Delgado, *A Shifting Balance*, *supra* note 22, at 739–41 (same).

43. E.g., Delgado, *Narratives in Collision*, *supra* note 14, at 345–48 (discussing competing frameworks for analyzing hate-speech regulation).

44. See MATSUDA ET AL., *supra* note 22 (offering an extended argument for regulating hate speech); Delgado, *Narratives in Collision*, *supra* note 14 (same); Delgado & Yun, *Pressure Valves*, *supra* note 22 (questioning a number of standard arguments against hate-speech regulation); Delgado & Yun, *Speech We Hate*, *supra* note 22 (same).

45. See *infra* notes 46–54 and accompanying text for examples. We are not saying that every member or chapter of the ACLU opposes hate-speech controls, or that every person or organization of color supports them. See Delgado & Yun, *Toughlove*, *supra* note 22, at 1812–13 (noting that some of the latter do not

The struggle, in short, proceeds between two sets of progressive activists⁴⁶ who, in most respects, see the world in very similar terms, consuming attention and energy at the very time when the political right—which holds little affection for either of them—has been registering large gains.⁴⁷ For example, while the ACLU has been laboring to convince minorities of the error of their ways, conservative power has been rolling back the right of privacy by opening citizens' library records to official prying and insisting on the right to snoop on e-mail and telephone exchanges.⁴⁸ At the same time, conservatives in government have carved out a broad sphere of governmental secrecy, greatly limiting the public's access to information.⁴⁹ These are, of course, areas close to a civil libertarian's heart.

By the same token, scholars like those writing for this symposium have been trying to convince the free-speech advocates of the error of *their* ways, while conservative judges and administrators have been steadily dismantling programs that lie close to the heart of civil rights advocates, including affirmative

support such controls).

46. Namely, the ACLU and similar organizations, who in other respects support progressive causes, and, on the other hand, schools such as critical race theory, which counts a number of prominent anti-hate-speech scholars, including Mari Matsuda, Charles Lawrence, and Richard Delgado, among its members.

47. We list some of these gains immediately infra. On the rise of conservative movements in such areas as immigration reform, English-Only, and welfare, see MANUEL GONZALES & RICHARD DELGADO, *THE POLITICS OF FEAR: HOW REPUBLICANS USE MONEY, RACE, AND THE MEDIA TO WIN* (2006); JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1996); Paul Krugman, Op-Ed., *It's a Different Country*, N.Y. TIMES, June 9, 2008, at A21.

48. E.g., Neil A. Lewis, *Ashcroft Permits F.B.I. to Monitor Internet and Public Activities*, N.Y. TIMES, May 31, 2002, at A20; Eric Lichtblau, *Ashcroft Mocks Librarians and Others Who Oppose Parts of Counterterrorism Law*, N.Y. TIMES, Sept. 16, 2003, at A23; Michael Moss & Ford Fessenden, *New Tools for Domestic Spying, and Qualms*, N.Y. TIMES, Dec. 10, 2002, at A1; see also Adam Liptak, *Little Help from Justices on Spy Program*, N.Y. TIMES, Dec. 23, 2005, at A21; Julia Preston, *Judge Strikes Down Section of Patriot Act Allowing Secret Subpoenas of Internet Data*, N.Y. TIMES, Sept. 30, 2004, at A26 (detailing areas in which a conservative administration has asserted the power to invade citizens' privacy); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; Kathleen Taylor, *It's Time to Begin Restoring Lost Liberties*, SEATTLE POST-INTELLIGENCER, Oct. 26, 2009, at B9.

49. On the Bush administration's penchant for official secrecy, see, for example, Felicity Barringer, *White House Refused to Open E-Mail on Pollutants*, N.Y. TIMES, June 25, 2008, at A15; Leonard Pitts, Op-Ed., *Mourning a Country Long Gone*, SEATTLE TIMES, Oct. 19, 2008, at B10; Scott Shane, *Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S.*, N.Y. TIMES, June 4, 2006, at A32; see also Geoffrey Stone, Op-Ed., *How to Put Civil Liberties in the White House*, N.Y. TIMES, June 30, 2008, at A19 (noting recent retrenchment in civil liberties and proposing a cabinet-level position for their protection).

action,⁵⁰ bilingual education,⁵¹ and the rights of immigrants.⁵² These same conservative judges and administrators have also been weakening courts' abilities to redress racial discrimination through judicially created intent requirements, strict chains of causation, and limitations on who may sue and when.⁵³

Two groups of moderate leftists have thus been energetically clashing while conservatives have been making steady inroads into programs both sets of leftists hold dear. This reality suggests that moderate leftists might wish to find some common ground and turn their attention to what their adversaries have been achieving at their expense. One could analogize the situation to one in which two dogs, one slightly larger than the other, are carrying on a ferocious snarl-fest in the middle of the street, feinting and lunging, making a tremendous racket, blissfully unaware that the dog catchers are coming to take them to the municipal shelter where they will be euthanized ten days later.⁵⁴

It is possible that with a new administration, the conservative assault on civil liberties and civil rights will ease somewhat. But historical forces such as the war on terror⁵⁵ and the new color-blind approach to race relations⁵⁶ are likely to generate continuing pressure on the progressive agenda regardless of who is in power in Washington. The hate-speech adversaries (and we do not exclude

50. See, e.g., Robert Pear, *In California, Voters Bar Preferences Based on Race*, N.Y. TIMES, Nov. 6, 1996, at B7 (noting the passage of an initiative banning use of race in public programs, including higher education).

51. See RICHARD DELGADO ET AL., *LATINOS AND THE LAW* 250–68 (2008) (discussing recent attacks on bilingual education).

52. *Id.* at 406–500.

53. *E.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–07 (1989) (requiring narrow tailoring and rejecting evidence of society-wide discrimination in such suits); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (requiring proof of intent in cases alleging racial discrimination).

54. To the dogs in this example, the dispute at the time may seem terribly important. It is only by expanding their frame of reference that the animals' common jeopardy comes into view.

55. The war on terror has increased suspicion and profiling of minorities, especially those who look Middle Eastern. See, e.g., HEIDI BEIRICH ET AL., S. POVERTY L. CTR., *THE NATIVISTS: PROFILES OF 20 ANTI-IMMIGRANT LEADERS* (2008), <http://www.splcenter.org/intel/intelreport/article.jsp?aid=885> (discussing an increase in scrutiny of foreign-looking people); Damien Cave, *Local Officials Adopt New, Harder Tactics on Illegal Immigrants*, N.Y. TIMES, June 9, 2008, at A1; Jeff Stein, *Collateral Damage: After 9/11, the Justice Department Rounded Up Thousands of Innocent People*, N.Y. TIMES, June 8, 2008, at 9 (reviewing ERIC LICHTBLAU, *BUSH'S LAW: THE REMAKING OF AMERICAN JUSTICE* (2008) and discussing abridgments of civil liberties in the wake of September 11, 2001).

56. For discussion of the view that the U.S. is a color-blind society, see, for example, MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003).

ourselves) need to ponder the expenditure of energy that they have been making and whether a détente of some sort is in order.⁵⁷

II. OBSERVATION NUMBER TWO: THE EVALUATION OF HARMS HAS BEEN INCOMPLETE

One way, of course, to end the current standoff is for one of the parties to defer to the other's point of view. Indeed, by pursuing an aggressive campaign of litigation, the free-speech camp has been implicitly urging that the other side do just that.⁵⁸ One could also argue that a host of campus administrators, by enacting successive versions of hate-speech codes, are attempting to do the same thing, namely, wear the other side down.⁵⁹ Ordinarily, though, it is the free-speech faction, with a string of lower-court victories to its credit, who urge the other side to "get over it" and toughen its collective hide.⁶⁰ Yet, a careful weighing of the costs and benefits of speech regulation suggests that the case for it is closer than the ACLU and some courts seem ready to acknowledge.

Before addressing the costs of hate-speech regulation versus the opposite, it is advisable to arrive at an understanding of what hate speech is.

A *Types of Hate Speech*

Hate speech, including the campus variety, can take a number of forms—direct (sometimes called "specific") or indirect; veiled or overt; single or repeated; backed by power, authority, or threat, or not.⁶¹ One can also distinguish it in terms of the characteristic—such as race, religion, sexual orientation, immigration status, or gender—of the person or group it targets.⁶² It can isolate a single

57. That is, the parties—the First Amendment defenders, who are generally liberal (or libertarian), and the advocates of hate-speech regulation, who are, as well—might agree to expend less energy combating each other and instead join forces to counter the conservative onslaught against programs that both prize.

58. Two of the better known cases are *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1164, 1181 (E.D. Wis. 1991) (striking down a campus anti-hate-speech code at the University of Wisconsin) and *Doe v. University of Michigan*, 721 F. Supp. 852, 853–54 (E.D. Mich. 1989) (doing the same at the University of Michigan).

59. See *supra* note 16 and accompanying text (noting that colleges and universities persist in enacting new hate-speech codes even though they realize they will attract legal challenges).

60. See, e.g., cases cited *supra* note 58.

61. See DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 12, at 11–12; Delgado, *Legal Realist View*, *supra* note 21, at 786.

62. DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 12, at 11–12.

individual (“Jones, you goddamned X.”) or group (“The goddamned Xs are destroying this country.”). It can be delivered orally, in writing, on the Internet, or in the form of a tangible thing, such as a Confederate flag, football mascot, or monument.⁶³ It can be anonymous, as with graffiti or a leaflet surreptitiously placed on a bulletin board or under a dormitory door, or its author can be plainly identified.⁶⁴ The object of the speech may be free to leave, or trapped, as in a classroom or workplace.⁶⁵

B. *The Harms of Hate Speech*

The various forms of hate speech present different kinds and degrees of harm.

The face-to-face kind is the most immediately problematic, especially if the target is not in a position to leave and the one delivering it possesses the power to harm.

1. *Direct or Face-to-Face Hate Speech*

Although some courts and commentators describe the injury of hate speech as mere offense,⁶⁶ the harm associated with the face-to-face kind, at least, is often far greater than that and includes flinching, tightening of muscles, adrenaline rushes, and inability to sleep.⁶⁷ Some victims may suffer psychosocial harms, including depression, repressed anger, diminished self-concept, and impairment of work or school performance.⁶⁸ Some may take refuge in drugs, alcohol, or other forms of addiction, compounding their misery.⁶⁹

63. *Id.* at 11–12, 123–51.

64. *Id.* at 11–12; Delgado, *Legal Realist View*, *supra* note 21, at 786.

65. See DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 12, at 11 (giving the example of a teacher addressing a student); Delgado, *Legal Realist View*, *supra* note 21, at 786; see also Delgado & Stefancic, *Images of the Outsider*, *supra* note 22, at 1281–82, 1285 (noting the role of power and authority in the creation of racial stereotypes); Delgado, *Legal Realist View*, *supra* note 21, at 789–90, 793–95 (same).

66. See, e.g., Taylor v. Metzger, 706 A.2d 685, 694 (N.J. 1998) (deeming racial insults not comparable to ordinary ones because they conjure up and reinforce the entire history of racial discrimination in this country); *supra* note 10 and accompanying text.

67. DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 12, at 13–14 (listing these and other physical consequences of a racial insult); Delgado, *Words That Wound*, *supra* note 22, at 137–39, 146 (noting similar consequences in support of a tort remedy for racist speech).

68. DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 12, at 14–16; see Delgado, *Words That Wound*, *supra* note 22, at 135–36, 139–41.

69. DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra*

2. Hate Speech and Children

With children, the harms of hate speech may be even more worrisome. A child victimized by racial taunts or browbeating may respond aggressively, with the result that he or she is labeled as assaultive.⁷⁰ Or, the child can respond by internalizing the harm and pretending to ignore it. Robbed of self-confidence and a sense of ease, such a child can easily become introspective and morose.⁷¹ If the child's parents suffer the same fate at work, they may bring these problems home so that the parents retain even less energy for their families than before.⁷² Recent scholarship points out how the pathologies associated with social subordination may be transgenerational, lasting for centuries, if not millennia, and include pain, fear, shame, anger, and despair.⁷³

3. General Hate Speech

With general hate speech, such as anonymously circulated flyers or speeches to a crowd, the harms, while diffuse, may be just as serious.⁷⁴

Recent scholarship shows how practically every instance of genocide came on the heels of a wave of hate speech depicting the victims in belittling terms.⁷⁵ For example, before launching their wave of deadly attacks on the Tutsis in Rwanda, Hutus in government and the media disseminated a drumbeat of messages casting their ethnic rivals as despicable.⁷⁶ The Third Reich did much the same with the Jews during the period leading up to the Holocaust.⁷⁷

note 12, at 14 (citing studies).

70. *See id.* at 15, 93–105.

71. *Id.*; *see also* Delgado, *Words that Wound*, *supra* note 22, at 142–43, 146.

72. DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 12, at 15.

73. *See* Jonathan R. Cohen, *Coping with Lasting Social Injustice*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 259, 268–81 (2007).

74. By diffuse, we mean harms that afflict a substantial group, not just a single individual. As we show, these harms are qualitatively different from the ones (such as elevated blood pressure, internalized anger, and depression) associated with face-to-face insults. For example, their onset is delayed and mediated by other factors, such as the extent to which the demonized group is able to flee.

75. *See, e.g.*, ALEXANDER TESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 9–79 (2002) (reviewing examples); *id.* at 82, 113, 137–39, 193 (tracing the causal connection between hate speech and deadly policies).

76. *See, e.g.*, W. Bradley Wendel, *The Banality of Evil and the First Amendment*, 102 MICH. L. REV. 1404, 1404–05 (2004) (reviewing TESIS, *supra* note 75).

77. *See* TESIS, *supra* note 75, at 9–79 (discussing the Holocaust, slavery, and Indian removal).

When the United States enslaved African Americans and killed or removed the Indians, it rationalized that these were simple folk who needed discipline and tutelage, or else bloodthirsty savages who resisted the blessings of civilization.⁷⁸ When, a little later, the nation marched westward in pursuit of manifest destiny, it justified taking over the rich lands of California and the Southwest on the ground that the indolent Mexicans living on them did not deserve their good fortune.⁷⁹ Before interning the Japanese during World War II, propagandists depicted the group as sneaky, suspicious, and despotic.⁸⁰

It is possible that the connection between general hate speech and instances of mass oppression may not be merely statistical and contingent, but conceptual and necessary.⁸¹ Concerted action requires an intelligible intention or rationale capable of being understood by others. One cannot mistreat another group without first articulating a reason why one is doing it—otherwise, no one but a sadist would join in.⁸²

Without a softening-up period, early steps toward genocide, such as removing Jews to a ghetto, would strike others as gratuitous and command little support. Discriminatory action of any kind presupposes a group that labors under a stigma of some kind.⁸³ The prime mechanism for the creation of such stigma is hate speech.⁸⁴ Without it, genocide, imperialism, Indian removal, and Jim Crow could gain little purchase.⁸⁵

C. *The Harms of Speech Regulation*

If the harms of hate speech are sobering, what lies on the other

78. See *id.* at 49–65 (discussing Indian removal); Delgado & Stefancic, *Images of the Outsider*, *supra* note 22, at 1260–75 (discussing stereotypes of four minority groups in the United States, including Native Americans, and the role of these stereotypes in justifying oppression).

79. See, e.g., JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 288–96 (2d ed. 2007) (discussing historian Reginald Horsman's thesis regarding the origin of the Anglo-Saxon).

80. See *id.* at 436–62; Delgado & Stefancic, *Images of the Outsider*, *supra* note 22, at 1272.

81. By conceptual and necessary, we mean implied in the very meaning of the term—for example, linked by the nature of mass extermination, not merely frequently found in conjunction with it.

82. Imagine that a secretary of agriculture proposes cutting down all the daisies in a field. One would immediately want to know why. Do daisies choke off other more desirable plants? Cause hay fever among the allergy-prone? Interfere with the breeding habits of migratory birds?

83. See TESIS, *supra* note 75, at 9 (suggesting a connection between hate speech and historic atrocities).

84. See generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963) (discussing how society constructs stigma of various kinds); TESIS, *supra* note 75 (same).

85. Without a widely announced campaign of demonization, no one would know whom to kill or why to do it.

side? What happens to the hate speaker forced to hold things in? Will he or she suffer psychological injury, depression, nightmares, drug addiction, and a blunted self image?⁸⁶ Diminished pecuniary and personal prospects?⁸⁷ Will hate-speech regulation set up the speaker's group for extermination, seizure of ancestral lands, or anything comparable?⁸⁸

The very possibility seems far-fetched. And, indeed, regimes, such as Europe's and Canada's, that criminalize hate speech exhibit none of these ills.⁸⁹ Speech and inquiry there seem as free and uninhibited as in the United States, and their press just as feisty as our own.⁹⁰

What about harm to the hate speaker? The individual who holds his or her tongue for fear of official sanction may be momentarily irritated. But "bottling it up" seems not to inflict serious psychological or emotional damage.⁹¹ Early in the debate about hate speech, some posited that a prejudiced individual forced to keep his impulses in check might become more dangerous as a result.⁹² By analogy to a pressure valve, he or she might explode in a more serious form of hate speech or even a physical attack on a member of the target group.⁹³ But studies examining this possibility discount it.⁹⁴ Indeed, the bigot who expresses his sentiment aloud is apt to be more dangerous, not less, as a result. The incident "revs him up" for the next one, while giving onlookers the impression that baiting minorities is socially acceptable, so that they may follow suit.⁹⁵ A recently developed social science instrument, the Implicit

86. These are among the harms of racist hate speech. See *supra* notes 67–73 and accompanying text.

87. See *supra* notes 68, 71–73 and accompanying text (noting that these are common results of hate speech).

88. See *supra* notes 75–82 and accompanying text (noting that hate speech often precedes waves of mass cruelty).

89. See Stefancic & Delgado, *A Shifting Balance*, *supra* note 22 (reviewing hate-speech controls in a number of foreign countries).

90. See Delgado, *Narratives in Collision*, *supra* note 14, at 361–71.

91. Might learning self-control be a step toward developing moral character? See DELGADO & STEFANCIC, *MUST WE DEFEND NAZIS?*, *supra* note 22, at 63 (suggesting that uttering hate speech impairs personal growth by "encouraging rigid, dichotomous thinking and impeding moral development"); see also Delgado, *Words That Wound*, *supra* note 22, at 140 (positing that learning to suppress impulses toward bigotry might be a step toward developing moral character). Aristotle believed that moral character required the development of good habits, or dispositions, to do good and refrain from evil. Upbraiding others needlessly would certainly qualify as a case of the latter.

92. See, e.g., Delgado & Yun, *Pressure Valves*, *supra* note 22 (casting doubt on the "pressure valve" argument for unbridled hate speech).

93. *Id.* at 877–78.

94. *Id.* at 878–80.

95. *Id.*; see also Editorial, *Politics of Attack*, N.Y. TIMES, Oct. 8, 2008, at A30 (discussing angry rhetoric at rally for vice presidential candidate Sarah Palin that included the cry "kill him!").

Association Test (“IAT”), shows that many Americans harbor measurable animus toward racial minorities.⁹⁶ Might it be that hearing hate speech, in person or on the radio, contributes to that result?⁹⁷

III. OBSERVATION NUMBER THREE: INTEREST BALANCING MUST TAKE ACCOUNT OF RELEVANT FEATURES OF HATE SPEECH

If all types of hate speech are apt to impose costs,⁹⁸ large or small, how should courts and policymakers weigh them?

Not every victim of hate speech will respond in one of the ways described above. Some will shrug it off or lash back at the aggressor, giving as good as they got.⁹⁹ The harm of hate speech is variable, changing from victim to victim and setting to setting.¹⁰⁰ By the same token, it is impossible to say with assurance that the cost of hate-speech regulation will always be negligible. Some speakers who might wish to address sensitive topics, such as affirmative action or racial differences in response to medical treatments, might shy away from them.¹⁰¹ The interplay of voices that society relies on to regulate itself may deteriorate. In balancing hate speech versus regulation, two benchmarks may be helpful: a review of current free-speech “exceptions” and attention to the role of incessancy.

A. *Current Free-Speech Exceptions*

Not all speech is free. The current legal landscape contains many exceptions and special doctrines corresponding to speech that society has decided it may legitimately punish. Some of these are: words of conspiracy; libel and defamation; copyright violation; words of threat; misleading advertising; disrespectful words uttered to a judge, police officer, or other authority figure; obscenity; and words

96. See, e.g., Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542–56 (2004), reprinted in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 33, 33–44 (Gregory S. Parks et al. eds., 2008) (discussing implications of the IAT for understanding and controlling racism in society).

97. See sources cited *supra* note 96; Siri Carpenter, *Buried Prejudice: The Bigot in Your Brain*, SCI. AM. MIND, May 1, 2008, available at <http://www.sciam.com/article.cfm?id=buried-prejudice-the-bigot-in-your-brain> (discussing the influential role of subconscious attitudes and predispositions toward people of other races).

98. See *supra* Part II (discussing the harms of hate speech and the faulty analysis of these harms by courts and some commentators).

99. See Delgado & Yun, *Toughlove*, *supra* note 22, at 1812–14 (noting that some opponents of regulation believe that shrugging off incidents of hate speech is preferable to attempting to control or punish them).

100. See *supra* Part II.B (noting that some victims of hate speech, such as children, may be especially vulnerable).

101. That is to say, they may fear that their speech will contravene anti-hate-speech rules and remain silent for that reason.

that create a risk of imminent violence.¹⁰²

If speech is not a seamless web, the issue is whether the case for prohibiting hate speech is as compelling as that underlying existing exceptions. First Amendment defenders often assert that coining a new exception raises the specter of additional ones, culminating, potentially, in official censorship and Big Brother.¹⁰³ But our tolerance for a wide array of special doctrines suggests that this fear may be exaggerated and that a case-by-case approach may be quite feasible. How important is it to protect a black undergraduate walking home late at night from the campus library?¹⁰⁴ As important as a truthful label on a can of dog food or safeguarding the dignity of a minor state official?¹⁰⁵ Neither free-speech advocates nor courts have addressed matters like these, but a rational approach to the issue of hate-speech regulation suggests that they should.¹⁰⁶

B. *Incessancy and Compounding*

Two final aspects of hate speech are incessancy—the tendency to recur repeatedly in the life of a victim—and compounding.¹⁰⁷ A victim of a racist or similar insult is likely to have heard it more than once. In this respect, a racial epithet differs from an insult such as “You damn idiot driver” or “Watch where you’re going, you klutz” that the listener is apt to hear only occasionally. Like water dripping on stone, racist speech impinges on one who has heard similar remarks many times before.¹⁰⁸ Each episode builds on the last, reopening a wound likely still to be raw.

The legal system, in a number of settings, recognizes the harm of an act known to inflict a cumulative harm. Ranging from eggshell plaintiffs to the physician who fails to secure fully informed consent,

102. See, e.g., DELGADO & STEFANCIC, *MUST WE DEFEND NAZIS?*, *supra* note 22, at 43–44, 88, 102–03 (listing categories of unprotected speech).

103. This is the view of ACLU activist and Village Voice writer Nat Hentoff, among others. See, e.g., NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* (1992). Big Brother is the name for an omniscient governmental figure who monitors every action and thought in GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949).

104. Imagine such a youth who is set upon by three toughs yelling racial epithets and suggesting that she go back to Africa because the university is not a place for her.

105. See *supra* note 102 and accompanying text (listing untruthful advertising and disrespectful words addressed to an authority figure as among First Amendment exceptions).

106. Reflection on the panoply of current exceptions suggests that society could coin another, either by analogy to an existing one, or by locating the new one in a region carved out by underlying policies, such as respect for the integrity of the human personality.

107. See DELGADO & STEFANCIC, *MUST WE DEFEND NAZIS?*, *supra* note 22, at 66–69 (discussing this recursive phenomenon).

108. *Id.* at 67; Delgado, *Legal Realist View*, *supra* note 21, at 788.

we commonly judge the blameworthiness of an action in light of the victim's vulnerability.¹⁰⁹

When free-speech absolutists trivialize the injury of hate speech as simple offense, they ignore how it targets the victim because of a condition he or she cannot change and that is part of the victim's very identity. Hate speakers "pile on," injuring in a way in which the victim has been injured several times before. The would-be hate speaker forced to keep his thoughts to himself suffers no comparable harm.

A comparison of the harms to the speaker and the victim of hate speech, then, suggests that a regime of unregulated hate speech is costly, both individually and socially. Yet, even if the harms on both sides were similar, one of the parties is more disadvantaged than the other, so that Rawls's difference principle suggests that, as a moral matter, we break the tie in the victim's favor.¹¹⁰ Moreover, the magnitude of error can easily be greater, even in First Amendment terms, on the side of nonregulation. Hate speech warps the dialogic community by depriving its victims of credibility. Who would listen to one who appears, in a thousand scripts, cartoons, stories, and narratives as a buffoon, lazy desperado, or wanton criminal? Because one consequence of hate speech is to diminish the status of one group vis-à-vis all the rest, it deprives the singled-out group of credibility and an audience, a result surely at odds with the underlying rationales of a system of free expression.¹¹¹

IV. SHIFTING THE DEBATE FROM SUBSTANCE TO PROCEDURE

If hate speech offers little of social value yet taxes society with very real costs, why should we not straightforwardly regulate it? The balance of costs and benefits would seem to favor regulation, while constitutional doctrine is indecisive—both sides cite plausible cases, social policies, and history favoring their interpretation.

One side in the debate is prone to avoid difficult issues like these by shifting ground and converting the debate into one about procedure. In this respect, their approach recalls certain religious fundamentalists who insist that the public schools teach creationism as well as evolution because both, after all, are mere theories, and

109. See PROSSER AND KEETON ON THE LAW OF TORTS § 43 (W. Page Keeton et al. eds., 5th ed. 1984) (discussing eggshell plaintiffs and ones with similar pre-existing vulnerabilities).

110. JOHN RAWLS, A THEORY OF JUSTICE 52–93 (rev. ed. 1999) (setting out a moral principle according to which social rules should promote utility but only insofar as this does not disadvantage those who are already severely disadvantaged).

111. See DELGADO & STEFANCIC, MUST WE DEFEND NAZIS?, *supra* note 22, at 67–68; Delgado, *Legal Realist View*, *supra* note 21, at 786–87. One well-known rationale of a system of free expression is the dialogic ideal—the notion that protecting free speech is vital to the exchange of ideas necessary in a democracy.

the state should remain neutral as between competing explanations of life's origin.¹¹² Many matters that once were accepted, these writers point out, are now known to be false, and vice versa, even in the supposedly objective arena of science.¹¹³ Banishing free thought about racial matters similarly risks freezing a discussion that ought to be robust and wide ranging.¹¹⁴

But of course no respectable scientist believes that God created the world in seven days 4,000 years ago or that life-forms like those evident in the fossil record do not evolve over eons. Teaching young students that creationism and evolution are equally plausible would be a serious mistake.

What of hate speech? Could it ever turn out to be "true?"¹¹⁵ Ponder how much hate speech, particularly the face-to-face variety,¹¹⁶ is not so much an invitation to a dialogue as a slap in the face—a performative expression, rather than a statement of fact.¹¹⁷ "You dirty N___, you don't belong on this campus; go back to Africa" conveys little that the addressee does not know. She certainly knows she is an African American and that some members of the local community wish she were not there. What, then, could she learn from the exchange?

General hate speech, such as speech to a crowd or the ranting of a bigot preaching the biological superiority of the white race, stands on a different footing. Unlike targeted epithets, it is not a slap in the face. Although antidemocratic and in contravention of our deepest values, it aims to operate through persuasion. Here alone the free-speech argument acquires a thin veneer of plausibility. As unlikely as it is that the supremacist's language will one day become the new orthodoxy, this is at least conceivable.¹¹⁸ Hence, campus

112. *E.g.*, Deborah Solomon, *The Convert: Questions for Bobby Jindal*, N.Y. TIMES, Aug. 31, 2008, (Magazine), at 11 ("I think these decisions need to be made by local school boards. In terms of teaching my own kids at home, I do believe there is a Creator. Catholicism doesn't teach authoritatively on evolution of the origins of life, but we do believe that God is our Creator.")

113. *See, e.g.*, *The Case Against Sarah Palin*, NEW REPUBLIC, Sept. 24, 2008, at 1 (quoting Sarah Palin during October 25, 2006, Alaskan gubernatorial debate: "[D]on't be afraid of information and let kids debate both sides.")

114. *See, e.g.*, THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (demonstrating how scientific theories and frameworks often change over time); Delgado & Stefancic, *Pornography and Harm to Women*, *supra* note 22, at 1052–54 (on the role of conventional frameworks in confining social change).

115. For discussion of a similar changing-the-subject argument, see Marcus, *supra* note 15, at 1026 (noting that certain litigators are beginning to invoke the First Amendment as a defense to lawsuits alleging sexual harassment or anti-Semitism).

116. *See supra* notes 61–65 and accompanying text (defining direct or specific hate speech).

117. Performative means an utterance that, like "I do" (spoken at a wedding) or "you're on" (culminating a process of contracting), effects a change in social or legal relations by virtue of its very utterance.

118. Conceivable, but quite unlikely—just as it is conceivable (but quite

authorities probably could not prohibit this form of hate speech, although they could, and should, regulate its time, place, and manner and make plain that the speech receives no official endorsement but stands on its own insecure footing.

CONCLUSION

We have reviewed some of the main features of the debate over the regulation of hate speech and added four observations that are relatively new and go beyond our existing corpus. Two of these concern the structure of the debate, while two others have to do with the calculus by which the two sides assess each other's positions. In particular, we have pointed out how the debate proceeds between two camps of the progressive left at a time when conservative forces have been making inroads into both civil rights and civil liberties. We urge both camps, the defenders of the minority position and the proponents of free-speech absolutism, to resolve their argument and direct their energies toward their common adversary, the political right. We also noted how the free-speech side often uses a particular rhetorical ploy that consists of shifting the argument for their position from substance to procedure.

With respect to the debate itself, we pointed out that the calculus of harms has been incomplete. In particular, many scholars have failed to differentiate the harms of the many varieties of hate speech, take note of the special case of children, ponder the importance of social power and setting, and recognize the connection between general, nontargeted hate speech and the rise of destructive social movements. We also noted that courts and commentators need to take note of compounding and incessancy—the way hate speech often targets an individual who, by reason of his or her race or physical appearance, has been the object of similar attacks many times before.

The debate about hate speech has been long and contentious in part because it requires us to examine two of our deepest values—equality and free speech—in a setting in which they are in tension with each other. We will probably never fully solve this problem. But we can at least appreciate its complexity and understand the role the controversy, like hate speech itself, plays in society.