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Ten Arguments against Hate-Speech Regulation: How Valid Symposium: Political Correctness in the 1990's and Beyond

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

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

TEN ARGUMENTS AGAINST HATE-SPEECH REGULATION: HOW VALID?

by Richard Delgado[1] and Jean Stefancic[2]

We'd like to thank the law school, the law review, and the sponsors of this event for bringing us here to this beautiful region and school. It's a pleasure to be here—even if Jean is the only woman on the program and the two of us are the only identifiable representatives of modern leftist thought. On a panel packed with voices from the other side of the spectrum, we will take our place in the lineup as a vote of extraordinary confidence.

Beginning about twelve years ago, many American universities began noticing an upsurge in incidents of racial violence and name calling. These ranged from out and out violence—beatings, gay bashing, arson against buildings housing black fraternities—to taunts, name-calling and anonymous leaflets demanding that blacks and others "go home." A national institute counts over 200 campuses where incidents severe enough to make the news have occurred, and estimates that the average black undergraduate is victimized by hate speech at least twice during four years on campus. The increase seems to be real and not the product of increased sensitivity or better reporting. It comes at a time when many Western nations are reporting an upsurge of anti-Semitism, hate propa-

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1. Charles Inglis Thomson Professor of Law, University of Colorado.

2. Research Associate in Law, University of Colorado.

This address develops and expands on themes we addressed in earlier work, including: Richard Delgado & Jean Stefancic, *Apologize and Move On?: Finding a Remedy for Pornography, Insult and Hate Speech*, 67 U. COLO. L. REV. 93 (1996); 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); Richard Delgado & David Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994); Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes so Slowly*, 82 CAL. L. REV. 851 (1994); Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994); Jean Stefancic & Richard Delgado, *A Shifting Balance; Freedom of Expression and Hate Speech Restriction*, 78 IOWA L. REV. 737 (1993); Jean Stefancic & Richard Delgado, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Sytemic Social Ills?* 77 CORNELL L. REV. 1258 (1992); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343 (1991).

The reader interested in an overview of our work in this area may wish to examine MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT (NYU Press, forthcoming 1996).

ganda, and attacks on immigrants. In the U.S., the upsurge corresponds with increased social unrest and competition over changing job markets, exactly as social science would predict.

Can campuses do anything about this—about the invective part, at any rate? Until fairly recently, the answer would have been no. But First Amendment legal realism, now belatedly appearing, suggests otherwise. First Amendment legal realism, which includes such well known legal scholars as Mark Tushnet, Jack Balkin, and a host of Critical Race theorists, is casting aside tired maxims and ancient shibboleths such as no content regulation, the best cure for bad speech is more speech, and so on, and looking instead to purpose, effect, context, and class and self interest, and turning to social science and communication theory to understand how speech really works. One realist observation, from Mark Tushnet, holds that private action, such as hate speech and hate crime, is today a more serious threat to liberty and well-being than the hobgoblin of former years, the censor. Activist courts that today reach out to strike down campus hate-speech rules enacted by communities who wish, for educational reasons, to govern themselves that way, are an example of a second realist insight—this one from Jack Balkin, namely ideological drift—the notion that a principle like the First Amendment over time can switch places so that it becomes a protector of privilege and a refuge for scoundrels. Many in the ACLU have resisted the implications of these two trends, although they cannot do so much longer. A number of breakaway chapters have chosen to endorse civil rights and hate-speech rules in defiance of the national organization's policy; and of course, every time they defend a prominent Nazi they lose a thousand members, a rate they cannot keep up for long.

A third realist observation provides the occasion for this talk, namely that now that various clichés and conversation-ending maxims such as no-content discrimination are passing into history, issues of speech regulation will be decided on the basis of policy, or as a great judge once said, experience, not logic.

Everyone—outside the conservative judiciary, at any rate—realizes this, so that today even defenders of the current regime are beginning to hedge their bets and argue that *even if* hate-speech rules are constitutional, they are a bad idea and campuses and other social institutions should abjure them. We will discuss ten such arguments and show why they are not valid. These arguments fall into three groups. Jean will discuss ones associated with our liberal friends; I will take up a group associated with

the neoconservative, sometimes called the "toughlove" school. At the end Jean will return to discuss a final series of objections dealing with administrability. It's worth repeating that our talk deals with arguments *against* regulation, with the aim of showing they are invalid. Today, we shall *not* be making an affirmative case *for* hate-speech rules. We've already made that argument; it's in print; and if you are interested you can read it. Today, we deal with objections to our position that there should be rules against hate speech.

Now consider three paternalistic justifications for opposing hate-speech rules:

(1) *Permitting racists to utter racist insults allows them to blow off steam harmlessly.* Minorities accordingly are safer than they would be under a regime of antiracism rules. We will refer to this as the "pressure valve" argument.

(2) *Free speech has been minorities' best friend.* Persons interested in achieving reform, such as minorities, should resist placing any fetters on freedom of expression. This we term the "best friend" objection.

(3) *More speech—talking back to the bigot—rather than regulation is the solution to racist speech.* Racism is a form of ignorance: dispelling it through reasoned argument is the only way to get at its root. Talking back to the aggressor also is empowering. It reduces victimization, strengthens one's own identity, and reinforces pride in one's heritage. This we call the "talk back" argument.

Each of these arguments is paternalistic, as we mentioned, invoking the interest of the group seeking protection. Each is seriously flawed; indeed, the situation is often the opposite of what its proponents understand it to be. Let us examine these arguments in detail.

1. The Pressure Valve Argument

The pressure valve argument holds that rules prohibiting hate speech are unwise because they increase minorities' jeopardy. Forcing racists to bottle up their emotions means that they will be more likely to say or do something hurtful later. Free speech serves as a pressure valve, allowing tension to dissipate before it reaches a dangerous level. If minorities understood this, the argument goes, they would reject antiracism rules. The argument is paternalistic; it says the rules, which you think will help

you, will only make matters worse. If minorities knew this, they would join in opposing them.

How valid is this argument? Hate speech may well make the speaker feel better, but it does not make the victim safer. On the contrary, psychological evidence shows that permitting one person to say or do hateful things to another *increases*, rather than decreases, the chance that he or she will do so again. Moreover, others may come to believe that they may follow suit. We are not mechanical objects. Our behavior is more complex than the laws of physics that describe pressure valves, tanks, and such other mechanical things. Unlike them, we use symbols to construct our social world, a world that contains categories and expectations for "black," "woman," "child," "teacher," "inner-city gang member," and so on. Once these categories are in place, they govern perception. They also govern the way we speak and act toward members of those groups in the future.

Even barnyard animals act on the basis of categories. Poultry farmers know a chicken with a speck of blood may be pecked to death by the others. With chickens, of course, the categories are neural, functioning at a level more basic than language. But social science experiments show that the way we categorize others radically affects our treatment of them. A school teacher's famous "blue eyes/brown eyes" experiment showed that even a one-day assignment of stigma can drastically alter behavior and performance. At Stanford University, Phillip Zimbardo assigned students to the roles of prisoner and prison guard, but was forced to discontinue the study when some of the participants began taking their assignment too seriously. And Diane Sculley's interviews with male sexual offenders in her 1990 book Understanding Sexual Violence showed that many did not see themselves as criminals at all since they considered women fair game. At Yale University, Stanley Milgram showed that many subjects could be induced to act in ways that violated social norms if an authority figure ordered them to do so and assured them it was safe.

Allowing persons to stigmatize or revile others thus makes them more aggressive, not less so. Once the speaker comes to think of another as a deserved-victim, his or her behavior may easily escalate to bullying and physical violence. Stereotypical treatment also tends to generalize—what we do teaches others that they may do so as well. Pressure valves may be safer after letting off steam, but human beings are not.

2. *Free Speech as Minorities' Best Friend*

Many liberals argue that the First Amendment historically has been a great friend and ally of social reformers. The national president of the ACLU, for example, argues that without free speech Martin Luther King, Jr. could not have changed America as he did. And so for the environmental movement, women's rights, gay liberation, and so on. This argument is paternalistic, based on the supposed best interest of minorities. If they understood this best interest, the argument goes, they would not ask to bridle speech.

The argument oversimplifies the history of the relationship between racial minorities and the First Amendment. In fact, minorities often have made greatest progress when they acted in *defiance* of that amendment. The original Constitution protected slavery in several provisions, while the First Amendment existed alongside that institution for nearly 100 years. Free speech for slaves, women, and other outsiders was simply not a significant concern for the drafters, who appear to have thought of the First Amendment primarily as a source of protection for the kind of refined political and artistic discourse they and their class enjoyed.

Even later, when abolitionism and civil rights activism broke out, examination of the role of speech in reform movements shows that the relationship of the First Amendment to social advance is not so straightforward as First Amendment absolutists maintain. In the 1960s, for example, Martin Luther King, Jr. and others did use speech to kindle America's conscience. But as often as not, the First Amendment (as then understood) did not protect them. They rallied, were arrested and convicted; sat in, were arrested and convicted; marched, were arrested and convicted. Their speech was deemed too forceful, too disruptive. Many years later their convictions might be reversed on appeal, at the cost of thousands of dollars and a great deal of gallant lawyering. But the First Amendment as then understood helped much less than we like to think.

Narrative theory shows how this happens: we interpret new stories in terms of the old ones we have internalized and that form our current reality. When new stories deviate too drastically from those that make up our present understanding, we reject them as false and dangerous. Free speech is useful mainly for solving small, clearly bounded disputes; it is much less useful for redressing systemic evils, such as racism, that are deeply inscribed in our current paradigm. Language requires a set of shared meanings that a group agrees to attach to words and terms. If

racism is deeply embedded in that paradigm—incorporated into a thousand scripts, stories, jokes, and roles—one cannot speak out against it without appearing incoherent or ridiculous.

The landscape of current First Amendment exceptions betrays these forces in operation. Our system has carved out or tolerated dozens of "exceptions" to free speech: official secrets; libel; conspiracy; plagiarism; copyright; misleading advertising; words of threat; disrespectful words uttered to a judge, teacher, or other authority figure; and many others. These exceptions, enacted at the insistence of a powerful group, seem familiar and acceptable, as indeed perhaps they are. But the idea of a new exception to protect some of the most defenseless members of society, young minority undergraduates at predominantly white campuses, produces consternation: the First Amendment must be a seamless web.

But it is we who are caught in a web—the web of the familiar. The First Amendment seems to us commonplace, useful, and valuable. It reflects our sense of the world, allows us to make distinctions, tolerates exceptions, and gets things done in a way we assume will be equally valuable for others. But the history of the First Amendment, as well as the landscape of current exceptions, shows that it is much more valuable to the majority than to the minority, more useful for confining change than propelling it.

3. The "More Speech" Argument

Some First Amendment purists argue that minorities should talk back to the aggressor. For example, Nat Hentoff writes that antiracism rules teach people of color to depend on whites for protection, while talking back emphasizes self-reliance and strengthens one's self-image as an active agent in charge of one's own destiny. The talk-back approach draws force from the First Amendment principle of "more speech," according to which additional discussion is always a preferred response to a message some listener finds troubling. Hentoff and others oppose hate-speech rules, then, not so much because they limit speech, but because they believe minorities should learn to speak out. A few offer another advantage: a minority who speaks out will be able to educate the utterer of a racially hurtful remark. Racism is the product of ignorance and fear. If a victim of racist hate speech explains matters, she may alter the speaker's perception so he or she no longer will utter racist remarks.

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

Unfortunately, things are not as asserted. Those who hurl racial epithets do so because they feel empowered to do so. One who talks back is seen as issuing a direct challenge to that power. Often racist remarks are delivered in several-on-one situations in which responding in kind would be foolhardy. Indeed, many cases of racial homicide began in just this way: a group badgered a black person; the black talked back; and paid with his life. Other racist remarks are uttered in a cowardly fashion, by means of graffiti scrawled on a campus wall under cover of darkness, or by a flyer placed outside a black student's door. In these situations, more speech is simply unfeasible.

Racist vitriol is rarely a mistake that could be corrected or countered by discussion. How could one respond to: "N_____, go back to Africa. You don't belong at the university"? Would one say: "Sir, you do not understand. According to prevailing ethics and constitutional interpretation I, an African American, am of equal dignity and entitled to attend this university in the same manner as others. Now that I have explained this, will you please modify your remarks in the future?"

The notion that talking back is safe for the victim or educative for the racist is deeply fallacious. It ignores the power dimension to racist remarks, requires minorities to run very considerable risks, and treats a hateful message as an invitation for discussion. Even when successful, talking back is a burden. Why should minority undergraduates, already burdened with their own educational responsibilities, be charged with educating others?

The three paternalistic arguments do not survive analysis. Neither current doctrine nor liberal policies pertaining to minorities' well-being dictate that there should not be antiracism rules. Could there be *other* reasons—perhaps associated with the conservative camp? A second group of arguments all concern the idea of victimization and tend to be associated with neoconservatives, including some of color.

4. The Waste-of-Time Argument

Many such writers argue that mobilizing against hate speech is a waste of precious time and resources. Donald Lively, for example, urges that civil rights leaders should have better things to do. Concentrating on hate-speech reform, he writes, is myopic and able, at best, to benefit only a small number of minority persons. Instead of "picking relatively small fights of their own convenience," reformers should be examining "the obstacles that truly impede" racial progress, namely inadequate legal doctrine and financial savvy. Dinesh D'Souza writes that campus radicals champion hate-speech regulation because it is easier than working hard and getting a first-rate education. Henry Louis Gates wonders why this minor issue attracts the attention of so many academics when so much more serious work remains to be done.

But is it so clear that working to control hate speech is a waste of time and resources? What neoconservative writers may neglect is that eliminating hate speech goes hand in hand with combating what they call "real racism." Certainly, being the victim of hate speech is a less serious misfortune than being denied a job, a mortgage, or an educational opportunity. But it is equally true that a society that speaks and thinks of minorities disparagingly is tolerating an environment in which these more active forms of discrimination will occur frequently. First, hate speech, acting in concert with a panoply of media imagery, constructs and reinforces a picture of minorities in the mind of the public. This picture or stereotype, which varies from era to era, is rarely positive: minorities are happy and carefree, oversexed, criminal, treacherous, untrustworthy, immoral, stupid, and so on.

These stereotypes account for much misery in the lives of persons of color, including motorists who fail to stop to aid a stranded black driver, police officers who roust African-American youths innocently walking or talking to each other on the streets, or landlords who act on unarticulated feelings in renting an apartment to a white over an equally qualified black or Mexican. Once persons of color are rendered one-down in the minds of hundreds of actors, their victimization by what even the toughlove crowd would recognize as real discrimination increases in frequency. It also acquires the capacity to sting. A white motorist who suffers an epithet ("goddam Sunday driver!") may be momentarily stunned. But the epithet does not call upon an entire historical legacy the way a racial epithet does, nor deny the victim status and personhood.

A related reason why neoconservatives ought not throw their weight against hate-speech rules has to do with latter-day racism. Most neoconservatives, like many whites, think that acts of out-and-out discrimination are rare. The racism that remains is subtle, "institutional," "latter-day," lying in the arena of unarticulated feelings, practices, and patterns of behavior on the part of institutions and individuals. A focus on speech and language may be one of the few ways to address and cure this kind of racism. Thought and language are closely connected. A speaker asked to reconsider his or her use of language may for the first time reflect on the way he or she thinks about a subject. Our choice of word, metaphor, or image betrays the attitude we have about a person or subject. No better tool than a focus on language exists to deal with this form of subtle or latter-day racism. Since neoconservatives are among the leading proponents of the idea that this form of racism is the only one that remains, they should think carefully before opposing measures that might curb it. Of course, speech codes would not reach *every* form of disparaging speech or depiction. But a tool's unsuitability to redress every aspect of a problem is surely no reason to refuse to deploy it where it is effective.

Neoconservatives similarly argue against hate-speech regulation on the basis that the effort is quixotic or disingenuous. Lively, for example, writes that the Supreme Court consistently has rejected laws regulating speech on grounds of vagueness and overbreadth. He also writes that the campaign lacks a sense of "marketability"—the American people simply will not buy it. Gates asks how hate-speech activists can believe that campus regulations will be effective. If campuses are the seething masses of racism activists believe, how will administrators provide fair hearings under the codes? Elsewhere he accuses the hate-speech activists of pressing claims for "symbolic" reasons, while ignoring that the free-speech side has a valid concern over symbolism, too.

But is the effort to curb hate speech quixotic or disingenuous? If the gains to be reaped were potentially only slight, maybe so. But, as we have argued, they are not: our entire structure of civil rights laws and rules depends for its efficacy on controlling the background of pernicious depiction against which the rules and practices operate. In a setting where minorities are thought and spoken of respectfully, few acts of out-and-out discrimination would occur. In one that constantly stigmatizes and demeans them, even a determined judiciary will be hard pressed to enforce equality and racial justice.

Furthermore, success is much more within reach than the toughlove crowd acknowledges. A host of Western democracies have instituted laws against hate speech and hate crime. Some, like Sweden, Great Britain, and Canada, have traditions of respect for free inquiry rivaling ours. In recent years, several hundred college campuses have instituted student conduct codes penalizing face-to-face racial insults, many in order to advance interests the campus saw as necessary to its function, including protecting diversity or providing an environment conducive to learning. Powerful actors like government agencies, the writers' lobby, industries, and so on have always been successful at coining free speech "exceptions" to suit their interest—copyright, false advertising, words of threat, defamation, libel, plagiarism, words of monopoly, and many others. But the strength of the interest behind these exceptions seems no less than that of a black undergraduate subjected to vicious abuse while walking late at night on campus. New regulation is of course examined skeptically in our laissez-faire age. But the history of free speech doctrine, and especially the careers of the many "exceptions," shows that need and policy have a way of being converted into law. The same may well happen with the hate-speech movement.

5. The Bellwether Argument

A further argument is that hate speech should not be driven underground but allowed to remain out in the open. The racist who one does not know, it is argued, is more dangerous than the one who one does. Moreover, on a college campus, incidents of racism or sexism can serve as useful spurs for discussion and self-examination. Steve Carter writes that regulating racist speech will leave minorities little better off than they are now, while screening out "hard truths about the way many white people look at . . . us." D'Souza echoes this argument when he points out that hate-speech crusaders miss a valuable opportunity. When racist graffiti or fraternity parties proliferate, minorities should reflect on the possibility this may indicate a basic problem with affirmative action itself. An editor of Southern California Law Review considers antiracism rules tantamount to "sweeping the problem under the rug," while "keeping the problem in the public spotlight . . . enables members [of the university community] to attack it when it surfaces."

How should we see this argument? In one respect, it does make a valid point: the racist who is known, in most cases, is less dangerous than the

one who is not. What the argument ignores is that there is a third alternative—the racist who is cured or at least deterred by official rules and policies from exhibiting the behavior he or she once did. Since most conservatives believe that laws and penalties do change conduct—indeed are among the strongest proponents of heavy penalties for crime—they ought to concede that campus guidelines against hate speech and assault would decrease those behaviors. Of course, regulation has costs of its own—something even we would concede—but this is a different argument from the bellwether one.

Other neoconservatives argue that silencing the racist might deprive the campus of the "town hall" opportunity to discuss and analyze issues of race when racist incidents come to light. But campuses could hold those discussions anyway. Even the best-drafted rules will not suppress hate speech entirely; there will continue to be some incidents of racist speech and behavior. The difference is that now there may be campus disciplinary hearings, which virtually guarantee the "town hall" discussions the argument assumes desirable. Because the bellwether argument ignores that rules will have at least some deterrent effect and that there are other means of assuring campuswide discussions short of allowing racial invective to flourish, the argument deserves little weight.

6. Victimization

Another objection many neoconservatives raise is that prohibitions against verbal abuse encourage minorities to see themselves as victims. Instead of rushing to campus authorities every time something wounds their feelings, minority group persons ought to learn either to speak back or ignore the offensive behavior. A system of rules and hearings reinforces that they are weak, that their lot in life is to be victimized rather than assertive. Carter writes that anti-hate-speech rules are the special favorite of those "whose backgrounds of oppression make them especially sensitive to the threatening nuances that lurk behind racist sentiment." Lively warns that these rules end up reinforcing a system of "supplication and self-abasement," D'Souza that they prevent interracial friendships and encourage a "crybaby" attitude; Gates that they reinforce a "therapeutic" mentality and an excessive preoccupation with feelings.

Would hate-speech rules have these dire effects? Not at all—in part because other alternatives will remain as before. No African American or

gay student is *required* to file a complaint when targeted by verbal abuse. He or she can always talk back or ignore it if he or she prefers. Hate-speech rules simply provide one more avenue of recourse for those who wish to take advantage of them. Filing a complaint might even be considered one way of taking charge of one's destiny: One is active, instead of passively "lumping it" when racial invective strikes. Notice that we do not raise the "victimization" issue with other offenses we suffer, such as having a car stolen or a house burglarized. Nor do we encourage those victimized by these crimes to "rise above it" or talk back to their victimizer. Might it be because we secretly believe that a black who is called "n_____" by a group of whites is in reality not a victim? If so, it would make sense to encourage him not to dwell on the event. But this is different from saying that filing a complaint increases victimization. Moreover, it is simply untrue: filing a civil rights complaint does not cause otherwise innocuous behavior to acquire the capacity to harm.

A related neoconservative argument is that hate-speech rules are injurious to other values that we hold, such as equal treatment of offenders. The rules will end up punishing only what ignorant or blue-collar students do and say. Refined, but much more devastating expressions of contempt of the more highly educated will go unpunished. Henry Louis Gates gives the following comparison:

> (A) LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well-intentioned, but given the fact that aptitude tests place African Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide.
>
> (B) Out of my face, jungle bunny.

Lively and D'Souza make versions of the same argument.

In one respect, the classist argument is plainly wrong. Both blue-collar and upper-class members of the campus community will be prohibited from uttering racial slurs and epithets. Most hate-speech codes penalize serious face-to-face insults based on race, ethnicity, and a few other factors. They thus penalize the same harmful speech—for example,

"N_____, go home; you don't belong at this university"—whether spoken by the billionaire's son or the coal miner's daughter. If the prep school product is less likely to speak words of this kind, or to utter only intellectualized versions like those in Gates' example, this may be because he is less racist in a raw sense. Many social scientists believe prejudice tends to be inversely correlated with educational level and social position; the wealthy and well educated may well violate hate-speech rules less often than others do. And, as for Gates' example, there *is* a difference between his two illustrations, although not in the direction he suggests. "Out of my face, jungle bunny" is a more serious case of hate speech because (1) it is not open to argument or a more-speech response; and (2) it bears overtones of a direct physical threat. The "LeVon" example, deplorable as it is, is answerable by more speech and contains no element of threat.

7. Two Wrongs Don't Make a Right

A final neoconservative argument holds that hate speech may be wrong but prohibition is not the way to deal with it. Gates, for example, warns that two wrongs do not make a right and laments that our legal system seems to have abandoned Henry Kalven's ideal of civil rights and civil liberties as perfectly compatible goods for all. Lively writes that campaigns to limit speech end up backfiring against minorities because free speech is a vital good and even more essential for minorities than others.

But we routinely deploy prohibitory rules in connection with dozens of other kinds of speech we have decided we don't like, ranging from disrespectful speech to an authority figure, to shouting fire in a crowded theatre and many others. Regulation always has costs. But it also has benefits—symbolic as well as real. The same should be true of hate-speech rules. It's worth noting that the most common alternative conservatives tout—more speech—has costs, too. The black undergraduate called a n_____ as he walks home from the library late at night by five toughs—and who then talks back to his offenders—may end up severely beaten. Talking back later, such as through a letter to the editor or a campus forum, does not correct the actual offenders. Besides, as we noted, why should minority or gay undergraduates or women, already saddled with the demands of their own education, be charged with constantly going around educating others?

Like the liberal arguments, none of the neoconservative ones stands as an obstacle in the way of enacting hate-speech rules. A final group of arguments concerns administrability and is not associated with any particular position. These objections all have to do with the effectuation of hate-speech rules. How would they work? Would they work too well—turn out to be boundless in their reach? Who would enforce the rules, and what would prevent that person or body from becoming a censor who seizes upon every caustic or off-color remark so that campus discourse becomes cautious and lifeless? Each of these objections reveals a degree of result-orientation, fear of the new, and distrust of those (mainly people of color) who might take advantage of the rules.

8. Where Would We Draw the Line?

Take the drawing-the-line argument first. It is no doubt true that a rule that penalizes on-campus hurling of face-to-face racial slurs would require some line drawing. What does on-campus mean? Is an epithet hurled at three African-American students from twenty feet away "face-to-face"? Is water buffalo, or honkey, or dumb baboon, a racial slur? These are indeed difficulties but they are no greater than those attending other, long-accepted doctrines that limit speech we do not like, such as libel, defamation, plagiarism, copyright, threat, and so on. Our system of law has opted for a regime of simply stated rules, trading the benefit of certainty in core cases in return for a degree of uncertainty at the periphery. Everyone knows what a clear-cut case of plagiarism looks like; at the margin we are less sure. Hate-speech rules should be no different.

9. Reverse Enforcement

The same is true with reverse enforcement. Some authorities may indeed begin charging black students with hate speech directed against whites. But the American experience with hate-speech rules shows that this is not a major concern, nor is it in most Western countries with a liberal tradition. If reverse enforcement occasionally happens, it is not necessarily a bad thing—if in fact the black or Mexican has harassed or terrorized a fellow student who is white or Asian. If the fear is that college deans and other administrative officers are so racist that they will invent or magnify charges against minority students in order to punish or

expel them from campus, this is entirely implausible. Figures from *U.S. News and World* report show that college administrators and faculty harbor less anti-black animus than the average American, even than the average college student. Indeed, it is the very concern of campus administrators over dwindling black numbers that underlies enactment of most hate-speech rules.

10. Chilling and Censoring

A final version of the administrability fear is that whoever is put in charge of enforcing hate-speech rules will overdo it in the *opposite* direction—will grab power and begin extending the crusade into areas such as classroom speech or editorials in the campus newspaper where speech ought to be free. With properly drafted hate-speech rules this expansion should not occur and appears not to be occurring. Like other Western societies that have enacted hate-speech rules, campuses do not report a lessening of respect for free speech and inquiry. Indeed, minorities and political dissidents feel *freer* to speak, attend school, and otherwise participate in public life. The level of dialogue goes up not down.

There seems to be little good reason, either in constitutional law or in social policy, not to enact rules against vicious face-to-face hate speech that disparages members of the campus community based on unalterable characteristics going to their deepest identity. Most campus administrators favor these rules, realizing that they are an important part of preserving a campus atmosphere of respect for all. The most common objections to these rules are easily answered. Every one of the twenty or thirty exceptions to free speech now on the books is capable of being wielded heavy-handedly. That has not prevented us from maintaining and refining rules such as libel, official secrets, assault, threat, plagiarism, copyright, and many more—rules that we have collectively decided advance important non-speech objectives such as privacy, dignity, property, or personal security. The basic values of human decency and equal respect that underlie our civil rights heritage are surely more than sufficient basis for a further limited exception. The right of the bigot to spew racial venom, like your right to punch your fist into my nose, must yield in the face of these other interests. Canada, Sweden, France, Italy, Germany, and many other societies have come to the same conclusions. Anti-hate-speech rules are desirable, necessary, and not at all inconsistent with a spirit of free inquiry. Indeed, for the reasons we mentioned they may be necessary for

its full effectuation and flowering. Thank you very much.