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The Speech We Hate: First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics

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PREAMBLE

The two of us were pleased to read Professor Charles Calleros' article, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, which the *Arizona State Law Journal* editors were kind enough to advance. Responding to two articles of ours, one in California's and the other in Vanderbilt's law review, both arguing for limitations on hate speech against racial and sexual minorities and women, Professor Calleros charges that we have given inadequate attention to counterspeech as a possible remedy. Citing examples from Stanford and his own university, Calleros shows how talking back in an effort to raise consciousness empowered the minority victims of hate speech and educated the campus community—all this without resorting to constitutionally troublesome and heavy-handed disciplinary procedures.

Nothing that we said in either of the two articles causes us to disagree with Professor Calleros. Talking back sometimes works. We would just note two reservations. The first is that the talking back solution puts the onus on young minority undergraduates to redress the harm of hate speech. This is a burden to them, one they must shoulder in addition to getting their own educations. In other words, in addition to educating themselves, they must educate the entire campus community, and do so every time a racial incident takes place.

Second, it would be a serious mistake for Professor Calleros' readers to generalize from his sunny and optimistic experience. Not every setting is as progressive, supportive, and loving as A.S.U. and Stanford University. Some campuses do not enjoy a strong norm of civility or respect for people

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of color. And this is certainly true of hundreds of noneducational institutions, such as the military, fraternities, and certain sport teams. And it is even more true of the many ugly street encounters minorities suffer daily. In many of these settings, talking back is not an option. In others, it would be foolhardy, because of the imbalance of power. Ivory tower academics must be careful of generalizing from one or two experiences in which speech—their favorite mechanism—seemingly has worked. The social history of pornography and hate speech in the United States argues for caution, and for a multitude of approaches, not just one.

In general, we believe that traditional defenders of free speech must beware of the tendency to light upon a single solution to a complex problem. The purpose of this essay is to explore a type of unitary or essentialist thinking that we find prevalent in First Amendment absolutist circles. Although we welcome Calleros' article, we think that it has overtones of this simplistic one-size-fits-all approach. It is in the hope that the future discussion of hate speech will someday exhibit the kind of nuance that we see in other areas of constitutional law, for example equal protection, that we write this essay.

INTRODUCTION

In *The Brothers Karamazov*, Aloysha, an impressionable young man, visits his mother's grave, where he has an intense religious experience.[1] Transformed, he declares, "I want to live for immortality, and I will accept no compromise."[2] Having discovered God—the most important thing in life—nothing else matters to Aloysha. He enters a monastery, devotes himself single-mindedly to his spiritual mentor, Father Zossima,[3] prays fervently, counsels the young, rescues animals, and effects a reconciliation between feuding schoolboys before the death of one of them.[4]

In many respects, the American Civil Liberties Union (the "ACLU") and other free speech absolutists remind us of Aloysha. Until recently, they have held the line in every case of a proposed free speech exception, invoking such doctrines and shibboleths as: no content regulation; no viewpoint regulation; speech is different from action; more speech is the cure for bad

1. FYODOR DOSTOYEVSKI, THE BROTHERS KARAMAZOV 22 (Constance Garnett trans., Modern Lib. ed. 1950) (1880).
2. *Id.* at 26.
3. *Id.* at 29-30.
4. *Id.* at 189, 208-13, 653, 937-40.

speech; and governmental censorship and self-aggrandizement are evils always to be feared and avoided.[5]

But as legal realism[6] has arrived finally in First Amendment jurisprudence,[7] more than fifty years after its appearance in other areas of law, sweeping aside the various mechanical doctrines and "tests" that prevailed until recently, the ACLU and other First Amendment absolutists, who much preferred matters the old way, have been shifting ground somewhat. Nowhere is this shift more evident than with regulation of hate speech and pornography. With the publication of a number of influential law

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5. On free speech absolutism in general, or the ACLU position on hate speech and pornography in particular, see Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245; Whitney v. California, 274 U.S. 357, 374-77 (1927) (Brandeis, J., concurring) (more speech, not suppression, is the solution for bad speech); Nadine Strossen, *In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future*, 29 HARV. C.R.-C.L. L. REV. 143 (1994); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484 [hereinafter Strossen, *Modest Proposal*]; SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY (1994); HENRY LOUIS GATES ET AL., SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES (1994); ARYEH NEIER, DEFENDING MY ENEMY (1979).

6. On legal realism in general, see Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). Legal realism swept the law in the early years of this century, condemning to history the formalist view attributed to Christopher Langdell and others, that law is a static, timeless science with one right answer for every question. *E.g.*, ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 92-94 (1975) (on formalism and the view of law as a science). Realism holds that "the life of the law is experience," and that policy, wisdom, commonsense, and personal and class loyalties affect judicial outcomes as much as syllogistic logic. *E.g.*, Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13, 21-24 (D. Kairys ed., 2d ed. 1990).

7. *See* 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, *Giving Way*]; J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV 255 (1992); Fredrick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853 (1992); Stanley Fish, *Fraught with Death: Skepticism, Progressivism and the First Amendment*, 64 U. COLO. L. REV. 1061 (1993). First Amendment legal realism recognizes that speech acts take place against a variety of backgrounds and settings; that some acts are more valuable than others; that speaker, listener, forum, and the message conveyed all count; and that all speech comes embedded in a complex of social practices, meanings, and arrangements. *See, e.g.*, Katherine Abrams, *Creeping Absolutism and Moral Impoverishment: The Case for Limits on Free Expression*, *in* THE LIMITS OF EXPRESSION IN AMERICAN INTELLECTUAL LIFE 1 (ACLS Occasional Paper, No. 22, 1993); CATHARINE A. MACKINNON, ONLY WORDS (1993); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); 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*].

review articles and books[8] and the handing down of a trio of decisions by the United States and Canadian Supreme Courts,[9] properly drafted hate-speech codes may well be found constitutional. But are they wise?[10] Assured formerly that formalistic categories and doctrines such as the prohibition against content or viewpoint discrimination would hold, the ACLU and others who oppose hate-speech rules have ignored these questions until recently. Now, like an Aloysha beginning to doubt his faith, they are starting to hedge their bets and to argue that even if hate speech rules are constitutional, they are a poor idea and that colleges, universities, and other institutions should not adopt them, even if they could.[11]

In our previous work, we examined two sets of policy arguments that opponents of hate speech rules have advanced.[12] On the left, the ACLU and others have put forward policy arguments based on paternalism.[13] These include what we call the "pressure valve,"[14] "reverse enforcement,"[15] "best friend,"[16] and "talk back"[17] arguments, all of which commonly insist that hate speech rules would injure minorities, whether they know it or not, and should be avoided. A second set of arguments characterizes the moderate or

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8. *E.g.*, Delgado, *Giving Way*, *supra* note 7; Balkin, *supra* note 7; Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Narratives in Collision*]; Delgado, *Words That Wound*, *supra* note 7.

9. Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993) (upholding penalty enhancement for racially-motivated crimes); Regina v. Keegstra, 3 S.C.R. 697 (Can. 1990) (upholding hate speech legislation); Regina v. Butler, 89 D.L.R.4th 449 (Can. 1992) (upholding antipornography measures). The Canadian free speech charter provisions are patterned after the United States' First Amendment.

10. *See* Richard Delgado, *Foreword: Essay on Hate Speech*, 82 CAL. L. REV. 847, 848 (1994) (raising this question).

11. *See id.*

12. Delgado, *Words That Wound*, *supra* note 7, at 172-79; Delgado, *Narratives in Collision*, *supra* note 8, at 345-47; Delgado, *Giving Way*, *supra* note 7, at 169, 172; Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence?"* 53 OHIO ST. L.J. 1037, 1037-38 (1992); Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851, 851-53 (1994); Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 741-44 (1993) (Book Review) [hereinafter Stefancic & Delgado, *Shifting Balance*]; 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, 1812-21 (1994) [hereinafter Delgado & Yun, *Toughlove Crowd*]; Richard Delgado & David Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation*, 82 CAL. L. REV 871, 878-85 (1994) [hereinafter Delgado & Yun, *Pressure Valves*].

13. Delgado & Yun, *Pressure Valves*, *supra* note 12, at 877.

14. *Id.* at 878.

15. *Id.* at 880.

16. *Id.* at 881.

17. *Id.* at 883.

neoconservative right.[18] These include the following arguments: that mobilizing against hate speech is a waste of time—minorities ought to have better things to do;[19] that hate speech is a useful bellwether that ought not be driven underground;[20] that running to the authorities every time one suffers a minor indignity merely deepens victimization; [21] and that minorities ought to toughen up or learn to talk back.[22] Each of these arguments makes up what we call the "toughlove" position, and each, like the ones the liberals offer, has answers. Some are empirically groundless, others assume a social world unlike the one we live in, and others are inconsistent with the values that we hold.[23]

Our purpose in this essay is to examine an argument that is neither paternalistic, nor of the toughlove variety, but structural. This argument, which is associated with the ACLU and those who take a relatively purist position with respect to the First Amendment, holds that hate speech, pornography, and similar forms of expression ought to be protected precisely because they are unpopular. The speech we hate, it is said, must be protected in order to safeguard that which we hold dear.[24] The only way to assure protection of values that lie at the core of the First Amendment is to protect speech lying at its periphery.[25] And this inevitably means protecting unpopular speakers: Nazis, anti-Semites, the Ku Klux Klan, utterers of campus hate speech, and promulgators of hard-core pornography.[26]

What can be said about this argument? As we will show in Part I, it is fairly often put forward by lawyers, legal commentators, special interest groups, and even an occasional judge as a reason for protecting odious speech. The argument takes two or three forms, each of which boils down to the insistence that to protect speech of one sort, it is necessary to protect another. The argument in all its guises, however, is paradoxical and

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18. Delgado & Yun, *Toughlove Crowd*, *supra* note 12, at 1812.

19. *Id.* at 1812.

20. *Id.* at 1816.

21. *Id.* at 1818.

22. *Id.* at 1819; *see also id.* at 1815 ("Quixotic" argument: the campaign for hate-speech reform is doomed because society will never accept any form of regulation).

23. Delgado & Yun, *Pressure Valves*, *supra* note 12, 878-85 (answering liberals' arguments); Delgado & Yun, *Toughlove Crowd*, *supra* note 12, 1812-21 (answering neoconservatives' arguments).

24. *See infra* part I (setting out this argument in greater detail).

25. For this reason, we will at times refer to the argument as the "periphery-center" one. At other times we will refer to it as the "single-valued jurisprudence" or "totalistic" argument because it assumes only one supreme value, speech. *See infra* part I (analyzing and assessing several varieties of the argument).

26. *E.g.*, NEIER, *supra* note 5; GATES ET AL., *supra* note 5 (collection of essays on the need to defend Klansmen, cross-burners, Nazi marchers, and similar clients).

groundless, for reasons we present in Part II. In Part III, we address how an argument with so little foundation can be put forward with seeming sincerity by otherwise intelligent people. We show that the argument's contradictions disappear once one understands that hate speech today lies not at the periphery, but at the center, and that political speech lies at the periphery of First Amendment ideology. The center and the periphery have traded places in a second sense as well: In a striking reversal of Harry Kalven's thesis, injuries to whites are now placed at the fore of constitutional jurisprudence, with redress to blacks' historical injustices allowed only when it coincides with benefits to whites.[27]

I. SINGLE-VALUED JURISPRUDENCE: EXAMPLES IN COMMENTARY AND JUDICIAL OPINIONS

As we indicated, the "speech we hate" (core-periphery) argument has been put forward by commentators, including ones associated with special interest groups like the ACLU, as well as by a few courts. In no case has anyone attempted to argue for its truth or validity; instead, it has been repeated as though a kind of mantra: We must protect X in order to protect Y.[28]

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27. *See infra* part III at notes 106-08 and accompanying text.

28. Most commentators who advance the argument simply assert some version of it (such as the slippery slope), without much support (for example, by showing why this particular slope is slippery). *E.g.*, NEIER, *supra* note 5, at 5 (asserting that Jews need a strong First Amendment and thus that hate speech should flow freely). LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986) comes closest to providing support. In a study of extremist (but not hate) speech, Bollinger identifies a number of mechanisms that might be supposed to connect the protection of extremist speech with protection of a central core of political speech (e.g., *id.* at 12-42, examining the idea that a *per se* rule protects against inadvertent encroachment on core speech functions; *id.* at 43-75, evaluating the claim that distrust of government argues against any form of regulation; *id.* at 76-103, examining the "fortress" model of First Amendment protection). JOHN STUART MILL, ON LIBERTY 19 (1882) puts forward the idea that speech must be broadly protected because what is thought error today may become tomorrow's truth. *See infra* notes 90-108 and accompanying text (proposing that something similar may be taking place today regarding hate speech).

Other possibilities occur to us—that defending low-value, peripheral hate speech, a difficult exercise, keeps one fit and on one's toes (the overload principle); that defending peripheral speech will inculcate a general attitude of toleration among the citizenry so that all speech will flourish (the toleration argument, *see* BOLLINGER, *supra* at 104-44); that, as in horticulture, attention to the periphery will cause the central core to be healthier (the pruning principle); that seeing others speak vigorously about "other" subjects will teach and encourage minorities to "talk back" to the hate speaker (the trickle-down theory) and thus the periphery will in time be no different from the core; and that speech is everywhere the same, and that therefore there is no core or periphery (the Platonic view of speech as essential, timeless, and devoid of contextual nuance or conditioning). Most of these hypothetical arguments for the principle of protecting the periphery have easy

A. The Commentators' and Special Interest Groups' Argument

The argument that we must protect the speech we hate in order to protect that which we hold dear is a special favorite of certain commentators, especially those connected with the ACLU and other groups that advocate an unfettered First Amendment. Samuel Walker, for example, the author of a recent history of the ACLU[29] and another of the hate speech controversy, writes that the ACLU believes that "every view, no matter how ignorant or harmful we may regard it, has a legal and moral right to be heard."[30] He explains that banning ignorant and hateful propaganda against Jews, for instance, "could easily lead to the suppression of other ideas now regarded as moderate and legitimate."[31] The free speech victories that have been won in defending Nazi and other unpopular speech, Walker points out, also have been used to protect pro-civil rights messages.[32]

In two recent books and a series of law review articles, Nadine Strossen, the president of the ACLU, echoes Walker's views. "If the freedom of speech is weakened for one person, group, or message," according to Strossen, we soon will have no free speech rights at all.[33] Thus, for example, "the effort to defend freedom for those who choose to create, pose for, or view 'pornography' is not only freedom for this particular type of expression, but also freedom of expression in general."[34]

In the recently published *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*, Anthony Griffin and Henry Louis Gates advance positions similar to Strossen's. Gates writes that when the ACLU defends the right of neo-Nazis to march in Skokie, a predominantly Jewish suburb of Chicago where a number of Holocaust survivors live, it does so to protect and fortify the constitutional right of free speech.[35] If free

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answers, and in any event except for the ones mentioned in the first paragraph of this note, are not put forward—to our knowledge, at any rate—by the argument's proponents.

29. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990).

30. SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 20; *see also id.* at 165-67 (1994).

31. *Id.* at 20.

32. *Id.* at 160. For example, the ACLU defended the right of Father Terminiello, a suspended Catholic priest, to give a racist speech in Chicago. The United States Supreme Court agreed with the ACLU in a landmark decision. Terminiello v. Chicago, 337 U.S. 1 (1949). Walker writes that the ACLU and other civil rights groups in the 1960s and 1970s were able to defend free speech rights of civil rights demonstrators by relying on *Terminiello*. WALKER, *supra* note 30, at 105-108.

33. GATES ET AL., *supra* note 5, at 212.

34. Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1171 (1993).

35. GATES ET AL., *supra* note 5, at 6.

speech can be tested and upheld to protect even Nazi speech, "then the precedent will make it that much stronger in all the less obnoxious cases."[36] Griffin, who forfeited his position with the Texas NAACP in order to defend a Klan organization, reiterates the ACLU position through a series of three fables, all of which reinforce the notion that the only way to have a strong, vibrant First Amendment is to protect Nazi speech, racist speech, and so on.[37] Otherwise, the periphery will collapse and the government increasingly will regulate speech that we regard as central to our system of politics and government.[38]

This type of argument is not just the favorite of the ACLU and civil libertarians. Respected constitutional commentators have employed the same periphery-to-center reasoning as well. Lee Bollinger, for instance, posits that Nazi speech should be protected not because people should value their message or believe that it should be seriously entertained, but because protection of such speech reinforces our society's commitment to tolerance.[39] Laurence Tribe explains that there is no principled basis for regulating speech based on content or viewpoint. For "[i]f the Constitution forces government to allow people to march, speak, and write in favor of peace, brotherhood, and justice, then it must also require government to allow them to advocate hatred, racism, and even genocide."[40] As stated by these and other commentators, then, the "speech we hate" argument takes on a small number of variants. Some argue that there must be a wall around the periphery to protect the speech that we hold dear. Others reason that speech that lies at the periphery must be protected if we are to strengthen impulses or principles, such as tolerance, that are important to society.

B. The Courts' Argument

Many years ago, Justice Oliver Wendell Holmes laid the groundwork for the periphery-to-center reasoning by declaring that, "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who

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36. *Id.*

37. *Id.* at 257-79.

38. *Id.*

39. Lee C. Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617, 629-31 (1982); BOLLINGER, *supra* note 28, at 125-33; *see* NEIER, *supra* note 5, at 5 (making same general argument in case of Jews, who are in special need of an unfettered First Amendment).

40. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 838 n.17 (2d ed. 1988).

agree with us but freedom for the thought that we hate."[41] He urged that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death" if we are to preserve the free competition of ideas.[42]

Later, in *Brandenburg v. Ohio*, the Supreme Court issued a ringing defense of an unfettered right of free speech. In vindicating the Ku Klux Klan's right to express hatred and violence toward Jews and blacks, the Court held that unless the Klan's speech is likely to incite imminent lawless action, our Constitution has made such speech immune from governmental control.[43] And in the famous "Nazis in Skokie" case, the Seventh Circuit's opinion reverberated with Justice Holmes' reasoning.[44] In upholding the neo-Nazi's right to march in that city, the Seventh Circuit wrote that its result was dictated by the fundamental proposition that if free speech is to remain vital for all, courts must protect not only speech that our society deems acceptable, but also that which it justifiably rejects and despises.[45]

Courts, then, make some of the same versions of the core-periphery argument that commentators do. A few hold that without protection for speech we hate, there will be no free marketplace of ideas. One or two further urge that in order to protect speech that our society finds acceptable we must also protect speech that we find repugnant. The argument in each of its guises is essentially the same: To protect the most central, important forms of speech—political and artistic speech, and so on—we must protect the most repugnant, valueless forms including hate speech directed against minorities and degrading pornographic stereotypes of women.

II. SEVEN PROBLEMS WITH THE EXTREME-CASE, OR "SPEECH WE HATE" ARGUMENT

As we have seen, the extreme-case argument is rarely if ever defended or justified. Rather, its supporters put it forward as an article of faith, without

41. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929).

42. Abrams v. United States, 250 U.S. 616, 630 (1919); *see* Schenk v. United States, 249 U.S. 47, 52 (1919) (holding that speech is only subject to prohibition when it is "used in such circumstances and [is] of such a nature as to create clear and present danger that will bring about substantive evils that Congress has a right to prevent").

43. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969); *see also* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting) ("freedoms of speech . . . must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish"); Cohen v. California, 403 U.S. 15, 22 (1971) (even "scurrilous speech" must receive protection).

44. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

45. *Id.* at 1210.

reason or support, as though it were self-evidently true. But not only is it not self-evidently true, it stands on a very weak footing.

A. Lack of Empirical Support

If protecting hate speech and pornography were essential to safeguarding freedom of inquiry and a flourishing democratic politics, we would expect to find that nations that have adopted hate speech rules and curbs against pornography would suffer quickly a sharp erosion of the spirit of free inquiry. But this has not happened.[46] A host of industrialized nations, including Sweden, Italy, Canada, and Great Britain, have instituted laws against hate speech and hate propaganda,[47] in many cases to comply with international treaties and conventions requiring such action.[48] Many of these countries traditionally respect free speech at least as much as the United States does.[49] No such nation has reported any erosion of the atmosphere of free speech or debate.[50]

At the same time, the United States, which until recently has refused to put such rules into effect, has a less than perfect record of protecting even political speech. United States agencies have persecuted communists,[51] hounded Hollywood writers out of the country,[52] and harassed and badgered such civil rights leaders as Josephine Baker,[53] Paul Robeson,[54] and W. E. B. DuBois[55] in a campaign of personal and professional smears that ruined their reputations and destroyed their ability to earn a living. In recent times, conservatives inside and outside the Administration have disparaged progressives to the point where many are now afraid to describe themselves

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46. *See* Stefancic & Delgado, *Shifting Balance*, *supra* note 12, at 742; Delgado, *Narratives in Collision*, *supra* note 8, at 371-72.

47. Stefancic & Delgado, *Shifting Balance*, *supra* note 12, at 741-44 (countries that have adopted reforms); Delgado, *Narratives in Collision*, *supra* note 8, at 364-71.

48. Stefancic & Delgado, *Shifting Balance*, *supra* note 12, at 739; Delgado, *Narratives in Collision*, *supra* note 8 at 362-64.

49. Stefancic & Delgado, *Shifting Balance*, *supra* note 12, at 742-43.

50. *Id.* at 742; Delgado, *Narratives in Collision*, *supra* note 8 at 371.

51. *See* Dennis v. United States, 341 U.S. 494 (1951).

52. On the infamous "Hollywood blacklist" and resulting exodus to Mexico and other countries by U.S. writers unable to obtain work, see JOHN COYLEY, REPORT ON BLACKLISTING (1956).

53. Mary L. Dudziak, *Josephine Baker, Racial Protest and the Cold War*, 81 J. AM. HIST. 543 (1994).

54. MARTIN B. DUBERMAN, PAUL ROBESON (1988); SHIRLEY GRAHAM, PAUL ROBESON: CITIZEN OF THE WORLD (1971).

55. GERALD HORNE, BLACK AND RED: W.E.B. DUBOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR, 1944-1963 (1986).

as "liberals."[56] Controversial artists are denied federal funding.[57] Museum exhibits that depict the atomic bombing of Hiroshima have been ordered modified.[58] If political speech lies at the center of the First Amendment, its protection seems to be largely independent of what is taking place at the periphery. There may, indeed, be an inverse correlation. Those institutions most concerned with social fairness have proved to be the ones most likely to promulgate anti-hate speech rules.[59] Part of the reason seems to be the recognition that hate speech can easily silence and demoralize its victims, discouraging them from participating in the life of the institution.[60] If so, enacting hate speech rules may be evidence of a commitment to democratic dialogue, rather than the opposite, as some of its opponents maintain.

B. A Paradoxical—and Highly Questionable—Metaphor

A second reason why we ought to distrust the core-periphery argument is that it rests on a paradoxical metaphor that its proponents rarely if ever explain or justify.[61] Suppose, for example, that one were in the business of supplying electricity to a region. One has competitors—private utility companies, suppliers of gas heaters, and so on. Ninety-nine percent of one's business consists of supplying electricity to homes and businesses, but the business also supplies a small amount of electricity to teenagers to recharge the batteries of their Walkmans. It would surely be a strange business decision to focus all or much of one's advertising campaign on the much smaller account. Or, take a more legal example. Protecting human security is surely a core value for the police. Yet, it would be a peculiar distribution of police services if a police chief were to reason: human life is the core value which we aim to protect; therefore, we will devote the largest proportion of our resources toward apprehending shoplifters and loiterers.

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56. On the recent right-wing barrage that has put liberals on the defensive, see Richard Delgado, *Stark Karst*, 93 MICH. L. REV. 1460 (1995) (Book Review).

57. On the controversy over the National Endowment for the Arts, which has funded controversial artists like Mapplethorpe, see, e.g., Robert Pear, *Alexander Makes Case for Arts Endowment*, NEW YORK TIMES, Jan. 27, 1995, at C1.

58. Mike Feinsilber, *Museum Cancels A-Bomb Exhibit,* PORTLAND OREGONIAN, Jan. 31, 1995, at A1.

59. Delgado, *Narratives in Collision*, *supra* note 8, at 349-58, 387 n.354 (on the way universities and colleges established hate-speech rules in response to racist incidents).

60. On the way in which hate speech can easily do this, see, e.g., Delgado, *Narratives in Collision*, *supra* note 8, at 387 n.354; Frank Michelman, *Response to Cass Sunstein*, *in* THE PRICE WE PAY: THE CASE AGAINST HATE SPEECH AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., 1995).

61. *See supra* note 28 and accompanying text (argument generally asserted as a matter of faith).

There are situations in which the core-periphery argument does make sense. Providing military defense of a territory may be one; ecology, where protecting lizards may be necessary in order to protect hawks, may be another. But ordinarily, the suggestion that to protect a value or thing at its most extreme reaches is necessary in order to protect it at its core requires, at the very least, an explanation or some offer of a connection. Yet, defenders of hate speech who deploy this argument have not provided one.[62] And, in the meantime, a weak argument does great harm. It treats in grand, exalted terms the harm of suppressing racist speech, drawing illegitimate support from the broad social justification—social dialogue among citizens.[63]

In contrast, the harm to hate speech's victims, out on the periphery, is treated atomistically, as though it were an isolated event, a one-time-only affront to feelings.[64] An injury characterized in act utilitarian terms obviously cannot trump an interest couched in rule utilitarian ones.[65] The Nazi, for example, derives a halo effect from other quite legitimate and valuable cases of speech, while the black is seen as a lone, quirky grievant with hypersensitive feelings.[66] But, in reality, hate speech is part of a concerted set of headwinds, including many other cases of hate speech, that a particular African-American victim will experience over the course of his or her life.[67] If we are willing to defend speech in broad social terms, we should be able to consider systemic, concerted harms as well.

The "speech we hate" argument draws plausibility only by ignoring this asymmetry: it draws on a social good to justify an evil deemed only individual, but which in fact is concerted and society-wide. The unfairness of collapsing the periphery and the center as absolutists do would be made clear if we rendered the argument: "We protect the speech *they* hate in order to protect that which we love." But not only is the argument unfair in this sense, it ignores what makes hate speech peripheral *as speech* in the first place. Face to face hate speech—slurs, insults, put-downs, and epithets—are

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62. For our attempt to provide a number of possibilities, see *supra* note 28.

63. *See* Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-86 (1963) (setting out the underlying rationales of the First Amendment).

64. *E.g.*, Strossen, *Modest Proposal*, *supra* note 5 (terming the effect of hate speech a mere "anxiety" at 492, "offensive" at 497, "unpleasant" at 499, or "harmful" at 533).

65. Rule utility justifies rules and principles by reason of the good (or evil) they produce; act utility judges the consequences of individual acts.

66. *See supra* note 64; *see also* GATES ET AL., *supra* note 5, at 15-16, 62-63, 72 (controversy overblown, injury to victims exaggerated).

67. Delgado, *Narratives in Collision*, *supra* note 8, at 383-84.

not referential. The recipient learns nothing new about himself or herself.[68] Rather, the speech elements are more like performatives, relocating the speaker and victim in social reality. Hate speech is not about the real, but the hyperreal; a Willie Horton ad is like an ad about jeans that makes no factual claim but merely shows a woman and a car.[69]

C. *Mistaking Principles for People*

There is one setting in which it makes good sense to argue from the extreme, or peripheral, case, namely where human beings, as opposed to abstract principles, are concerned. For example, one sometimes hears that the test of a civilized society is the degree of protection it affords its least privileged, most despised members. Thus, prison reformers argue that a society that locks up and warehouses prisoners under crowded and inhumane conditions with little opportunity for recreation, acquisition of jobs skills, or rehabilitation is not deserving of the term civilized. Similarly, society is deemed uncivilized in its treatment of the mentally ill, juvenile offenders, the mentally retarded, and the desperately poor. Here, what we do at the periphery does say something about the way society values qualities like compassion, forgiveness, and the fair distribution of resources. But people (unlike abstract principles) retain their value, retain their distinctive nature, even at the furthest reaches. Human beings are always ends in themselves—there is no continuum of humanness.[70] But our Constitutional system recognizes not one, but many values.[71] As we shall demonstrate, the nature and structure of our jurisprudence mean that we cannot treat principles, not even the First Amendment, in that fashion.

D. *The Nature of Constitutional Continuums*

Every periphery is another principle's core; that is the nature of a multivalent constitutional system like ours.[72] Principles limit other ones: X's right to privacy limits Y's right to freedom of action, and so on. Indeed, the idea of a constitutional principle, like free speech, that has a core and a

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68. For example, "Nigger, get off this campus. Go back to Africa" conveys no new information, since the target obviously knows that (1) he is African-American, (2) his ancestors come from that continent, and (3) some individuals on campus hate him and wish he were not there.

69. *See, e.g.*, JEAN BAUDRILLARD, SIMULATIONS (1983) (on the real and the hyperreal in linguistic theory).

70. It is a principle of Kantian, as well as Judeo-Christian, ethics that human beings are valued not instrumentally—for what they can produce—but because of their value in themselves.

71. For example, privacy, property rights, the exercise of religion, the equal protection of the law, freedom from unreasonable searches and seizures, and from being enslaved.

72. *See supra* note 71.

periphery would be incoherent without the existence of other values (such as privacy or reputation) to generate the limit that accounts for the idea of a periphery. Thus, commercial and defamatory speech, which have a lesser degree of constitutional protection than political speech, are subject to limits not because they are not speech at all, but because they implicate other values that we hold.[73] And the same is true of speech that constitutes a threat, provokes a fight, defrauds customers, or divulges an official secret. All these and dozens of other "exceptions" to the First Amendment[74] are peripheral, and subject to limits, precisely because they reflect other principles, such as security, reputation, peace, and privacy. To argue, then, that speech must be protected at the most extreme case even more assiduously than when its central values are at stake is either to misunderstand the nature of a constitutional continuum, or to argue that the Constitution in effect has only one value.

E. Violation of the Principle of Dialogic Politics

Moreover, to argue in such fashion is to violate a principle that is inherent in our constitutional structure and jurisprudence: the principle of dialogic politics.[75] Law has not one value, but many. Jones wants the privacy of a ten-foot fence; Smith wants more light in his living room. The district attorney wants the ability to protect the community from offenders; all citizens have an interest in not being randomly seized, frisked, and searched. A wants to speak. B does not wish to be defamed. In situations of competing values, judges "balance" the principles, trying to fashion a solution that gives the appropriate weight to each principle.[76] Courts are guided by lawyers and briefs arguing both sides of the case, as well as case law showing how the rights are to be balanced. Inherent in this process is

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73. *See, e.g.*, TRIBE, *supra* note 40, §§ 12-12 to 12-13, 12-15, § 12-18, at 931-34, § 12-36, at 1046-47.

74. For a discussion of these so-called exceptions, see Delgado, *Narratives in Collision*, *supra* note 8, at 377.

75. The term is our own. But it reflects the underlying values of neorepublicanism, the idea that deliberation by the citizenry lies at the heart of our system of law and politics. *See, e.g.*, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503-07 (1988); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 555-57 (1986). Although a powerful political idea, neorepublicanism is not without its defects, see Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581, 1595-98 (1993).

76. On the ubiquitous balancing test and its appearance in many areas of constitutional law, see TRIBE, *supra* note 40, § 10-18, at 457, §§ 12-2, 12-19, § 12-24, at 987, § 12-33, § 14-13, at 1251-55.

what we call "dialogic politics," the commonsense notion that in cases where interests and values conflict, people and principles (through their defenders, of course) ought to be made to talk to each other. In close cases, judges ought to heed both sides; lawyers representing polar views ought to be made to respond to each other's arguments.

But the totalist view admits of no compromise: One's favorite principle remains supreme everywhere it has a bearing, no matter how slight. This means that one is not obliged to talk to those other persons, not obliged to address those other values. If the whole purpose of the First Amendment is to facilitate a system of dialogue and compromise,[77] this is surely a paradoxical view for a defender of the First Amendment to take.

F. Totalism Versus Totalism: When Extremism Cancels Itself Out

Every totalist argument is indeterminate, because it can be countered easily by an opposite and equally powerful countervailing totalism. To continue with the hate speech example, imagine that someone (say, the NAACP Legal Defense and Education Fund) argued in the following fashion: (1) Equality is a constitutional value; (2) the only way effectively to promote equality is to assure that it is protected everywhere; (3) therefore, whenever equality collides with another value, such as free speech, equality must prevail. "We must protect the equality we hate, as much as that which we hold dear." Now we would have two values, the defenders of which are equally convinced that their own value should reign supreme. Each regards the other's periphery as unworthy of protection. To be sure, balancing may be troublesome because it can disguise the political value judgments a judge makes on his or her way to a decision.[78] But totalism is worse—it gives the possessor permission not even to enter the realm of politics at all. At least, balancing encourages the decisionmaker to be aware and take into account the various values and interests at stake in a controversy. With totalism, one has no need to compromise or consider the other side. One finds oneself outside the realm of politics, and instead, inside that of sheer power.

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77. *See* Emerson, *supra* note 63, at 878-86.

78. This is a frequent criticism of balancing, *viz.*, that it is tantamount to the judge's making a thinly disguised value judgment. On the notion that legal reasoning is indeterminate—disguised politics—see generally Duncan Kennedy, *Legal Education as Training for Hierarchy, in* THE POLITICS OF LAW 40 (D. Kairys ed. 1978); Mark G. Kelman, *Trashing*, 36 Stan. L. Rev. 293 (1984).

G. First Amendment Romanticism Versus the Social Construction of Racial Reality

With hate speech and pornography, heeding the ACLU's totalist argument introduces special dangers of its own. Hate speech lies at the periphery of the First Amendment, as the proponents of the totalist argument quickly concede. Yet the reason why hate speech does so is that it implicates the interest of another group, minorities, in not being defamed, reviled, stereotyped, insulted, badgered, and harassed. Permitting a large number of social actors to portray a relatively powerless social group in this fashion helps construct a stigma-picture or stereotype that describes members of the second group as lascivious, lazy, carefree, immoral, stupid, and so on.[79] This stereotype guides action, making life much more difficult for minorities in transactions that clearly matter: getting a job, renting an apartment, hailing a cab.[80] But it also diminishes the credibility of minority speakers, inhibiting their ability to have their points of view taken seriously, in politics or anywhere else—surely a result that is at odds with the First Amendment and the marketplace of ideas.[81] This is an inevitable consequence of treating peripheral regions of a value as entitled to the same weight we afford that value when it is centrally implicated: We convey the impression that those other values—the ones responsible for the continuum in the first place—are of little worth. And when those other values are central to the social construction of a human being or social group,[82] the dangers of undervaluing their interests increase sharply. Their interests are submerged today—in the valuing a court or decisionmaker is asked to perform. And their interests are submerged in the future, because they are thereafter the bearers of a stigma, one which means they need not be taken fully into account in future deliberations.[83] Permitting one social group to speak disrespectfully of another habituates and encourages speakers to continue speaking that way in the future.[84] The way of speaking becomes normalized, inscribed in

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79. On the construction and great staying power of these and similar stereotypes, see, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Life and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992) [hereinafter Delgado & Stefancic, *Images*].

80. *Id.* at 1275-88; Delgado, *Narratives in Collision*, *supra* note 8, at 383-84.

81. Delgado & Stefancic, *Images*, *supra* note 79 at 1287; Delgado, *Narratives in Collision*, *supra* note 8, at 384-85.

82. *See* Delgado & Stefancic, *Images*, *supra* note 79, at 1277.

83. *Id.* at 1261-77, 1287.

84. *Id.* at 1279-88; Delgado, *Words That Wound*, *supra* note 7.

hundreds of plots, narratives, and scripts; it becomes part of culture, what everyone knows.[85]

The reader may wish to reflect on changes he or she surely has observed over the last fifteen years or so. During the civil rights era of the sixties and early seventies, African-Americans and other minorities were spoken of respectfully. Then, beginning in the late seventies and eighties, racism was spoken in code. Now, however, op-ed columns, letters to the editor, and political speeches deride and blame them outspokenly. Antiminority sentiment need no longer be spoken in code but can be proclaimed outright. We have changed our social construct of the black from unfortunate victim and brave warrior to welfare leeches, unwed mothers, criminals, and untalented low-IQ affirmative action beneficiaries who take away jobs from more talented and deserving whites. The slur, sneer, ethnic joke, and most especially face-to-face hate speech are the main vehicles that have made this change possible.

III. THE CORE-PERIPHERY ARGUMENT AND HATE SPEECH: WHY THE ARGUMENT RETAINS ITS APPEAL

As we have seen, the extreme case (or core-periphery) argument rests on an unexamined, paradoxical metaphor.[86] It adopts a view of the Constitution and of dialogue that is at odds with the one we hold.[87] It mistakenly treats subordinate principles as though they were people and ends in themselves.[88] It treats the interests of minorities as though they were of little weight, or as fully protected by merely protecting speech.[89] It ignores the experience of other industrialized nations that have instituted hate-speech reforms without injurious consequences.[90] What accounts for its rhetorical attraction and staying power? We believe that the principal reason is that hate speech and pornography today do not lie at the periphery of the First Amendment, as the ACLU and other advocates urge, but at its center.

In former times, society was much more structured. Citizens knew their places. Women and blacks understood that they were not the equals of white men—the Constitution formally excluded them[91]—and coercive social and

85. Delgado & Stefancic, *Images*, *supra* note 79, at 1275-82.
86. *See supra* part II.B.
87. *See supra* part II.D.
88. *See supra* part II.C.
89. *See supra* part II.B.
90. *See supra* part II.A.
91. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 26-30 (3d ed. 1992).

legal power reminded them if they were ever tempted to step out of line.[92] It was unnecessary to reinforce this constantly—an occasional reminder would do.[93] Today, however, the formal mechanisms that maintained status and caste are gone or repealed.[94] All that is left is speech and the social construction of reality.[95]

Hate speech has replaced formal slavery, Jim Crow laws, female subjugation, and Japanese internment as a means to keep outsider groups in line. In former times, political speech was indeed the center of the First Amendment.[96] Citizens (white, property-owning males, at any rate) took a lively interest in politics. They spoke, debated, wrote tracts, and corresponded with each other about how the Republic ought to be governed.[97] They did not speak much about whether women were men's equals, should be allowed to hold jobs or vote, whether blacks were the equals of whites, because this was not necessary—the very ideas were practically unthinkable.[98]

Today, the situation is reversed. Few Americans vote, or can even name their representative in Washington.[99] Politics has deteriorated to a once-every-four-years ritual of attack ads, catch phrases, sound bites, and image manicuring.[100] At the same time, however, politics in the sense of jockeying for social position has greatly increased in intensity and virulence. Males are anxious and fearful of advances by women;[101] whites fear crime and vengeful behavior from blacks and other minorities; and so on.[102] Hate speech today is a central weapon in the struggle by the empowered to

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92. *Id.* at 30-36.

93. It was not necessary, in other words, to beat, threaten, or lynch every African-American. Only an occasional such act was necessary, because every black knew of the system that supported or winked at such terroristic acts, and was thus constantly aware that he or she could easily become the next victim if he or she committed what the system considered a transgression.

94. For example, the Thirteenth Amendment repeals slavery, the Fourteenth guarantees equal protection of the law, the Fifteenth voting rights, and a panoply of federal and state statutes prohibit discrimination in areas such as housing, public accommodation, employment, and education.

95. *See* Delgado & Stefancic, *Images*, *supra* note 79, at 1261-84 (for a similar thesis).

96. For the role of free speech in Enlightenment thought and politics, see Richard Delgado & David Millen, *God, Galileo and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349, 354-58 (1978).

97. *Id.* at 358-61.

98. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 26-50 (1987) (chronicle of the Constitutional Convention).

99. On Americans' striking ignorance of Washington and national politics, see, e.g., JAMES FISKLIN, DEMOCRACY AND DELIBERATION 57-64 (1991).

100. *Id.* at 63; *see also* PHYLLIS KANISE, MAKING LOCAL NEWS 110 (1990).

101. SUSAN FALUDI, BACKLASH (1990).

102. *E.g.*, Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994).

maintain their position in the face of formerly subjugated groups clamoring for change. It is a means of disparaging the opposition while depicting one's own resistance to sharing opportunities as principled and just. Formerly, the First Amendment and free speech were used to make small adjustments within a relatively peaceful political order consisting of propertied white males. Now it is used to postpone macroadjustments and power-sharing between that group and others: It is, in short, an instrument of majoritarian identity politics. Nothing in the Constitution (at least in the emerging realist view) requires that hate speech receive protection. But ruling elites are unlikely to relinquish it easily, since it is an effective means of postponing social change.

In the sixties, it was possible to believe Harry Kalven's optimistic hypothesis that gains for blacks stemming from the gallant struggle for civil rights would end up benefiting all of society.[103] It was true for a time, at least, that the hard-won gains by a decade of civil rights struggle did broaden speech, due process, and assembly rights for whites as well as blacks.[104] Today, however, there has been a stunning reversal. Now, the reciprocal injury—inhibition of the right to injure others—has been elevated to a central place in First Amendment jurisprudence.[105] The injury—being muzzled when one would otherwise wish to disparage, terrorize, or burn a cross on a black family's lawn—is now depicted as a prime constitutional value.[106] The interest convergence between black interests and broadened rights for whites lasted but a short time. Now, the ACLU defends Aryan supremacists, while maintaining that this is best for minorities, too.[107] Blanket resistance to hate-speech regulations, which many college and university administrators are trying to put into place in order to advance straightforward institutional interests of their own—preserving diversity, teaching civility, preventing the

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103. HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT 6-7 (1966) (suggesting that civil rights gains would benefit all of society, including whites); *see also* GATES ET AL., *supra* note 5, at 17.

104. For example, Goss v. Lopez, 419 U.S. 565 (1975), strengthened due process rights in school disciplinary cases for all students, black or white. A host of cases assured the rights of peaceable assembly and protest. *See, e.g.*, BELL, *supra* note 91, at 424-43 (discussing rights of political protest).

105. *E.g.*, Strossen, *Modest Proposal*, *supra* note 5; GATES ET AL., *supra* note 5, at 187-237 (arguing for strenuous resistance to reforms of hate speech law).

106. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 422-26 (1992) (Stevens, J., concurring) (warning that the majority's opinion has turned First Amendment law on its head—fighting words that were once entirely unprotected are now entitled to greater protection than commercial speech, and possibly greater protection than core political speech).

107. On these paternalistic justifications for the current hate speech regime, see Delgado & Yun, *Pressure Valves*, *supra* note 12 (examining six versions of this argument).

loss of black undergraduates to other schools[108]—generates a great deal of business for the ACLU and similar absolutist organizations.

In a sense, the ACLU and conservative bigots are hand-in-glove. Like criminals and police, they understand each other's method of operation, mentality, and objectives. There is a tacit understanding of how each shall behave, and how each shall gain from the other. Indeed, primarily because the Ku Klux Klan and similar clients are so *bad*, the ACLU gets to feel romantic and virtuous[109]—and the rest of us, who despise racism and bigotry, are seen as benighted fools because we do not understand how the First Amendment really works.

But we do. The bigot is not a stand-in for Tom Paine. The best way to preserve lizards is not to preserve hawks. Reality is not paradoxical. Sometimes, defending Nazis is simply defending Nazis.

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108. Delgado, *Narratives in Collision*, *supra* note 8, at n.354.

109. *See* STEVE SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990) (First Amendment as romance). For a notable example of celebratory First Amendment jurisprudence, see ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).