



Alabama Law Scholarly Commons

Articles

Faculty Scholarship

2018

Legal Realism and the Controversy over Campus Speech Codes

Richard Delgado

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

Follow this and additional works at: https://scholarship.law.ua.edu/fac_articles

Recommended Citation

Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 69 Case W. Res. L. Rev. 275 (2018).

Available at: https://scholarship.law.ua.edu/fac_articles/705

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Alabama Law Scholarly Commons. For more information, please contact cduncan@law.ua.edu.

LEGAL REALISM AND THE CONTROVERSY OVER CAMPUS SPEECH CODES

Richard Delgado[†]

ABSTRACT

Martin Luther King Jr. and Derrick Bell both urged all Americans, white as well as nonwhite, to speak respectfully and, if possible, lovingly to and about each other. Decades later, a vigorous debate has broken out over what we now call “hate speech” and whether society may, and should, prohibit it. Building on previous scholarship, we show that this debate has both a doctrinal and a policy aspect, and that with the advent of legal realism, the doctrinal debate about the constitutionality of hate-speech restrictions is largely over. Much of the energy of the free-speech camp now goes to arguing that even if narrowly drawn measures against hate speech are constitutional, they are unwise as a matter of policy.

We consider several such arguments, concluding that each is much less compelling than its partisans believe. We also examine a drawing-the-line argument that pretends that permitting a decisionmaker to adjudicate offenses will lead to ever-wider incursions against protected speech, and ultimately a regime of official censorship. This argument we also find lacking, for several reasons. We conclude that American institutions are free to enact reasonable hate-speech restrictions in times, like ours, when minorities and women are under siege.

CONTENTS

INTRODUCTION	276
I. ARGUMENT NUMBER 1: THE EXPLODING PRESSURE VALVE	280
II. ARGUMENT NUMBER 2: THE RISK OF REVERSE ENFORCEMENT	281
III. ARGUMENT NUMBER 3: FREE SPEECH AS MINORITIES’ BEST FRIEND	283
IV. ARGUMENT NUMBER 4: MORE SPEECH (TALKING BACK TO THE AGGRESSOR).....	285
V. ARGUMENT NUMBER 5: A WASTE OF TIME OR RESOURCES	287
VI. ARGUMENT NUMBER 6: TILTING AT WINDMILLS.....	289
VII. ARGUMENT NUMBER 7: HATE SPEECH AS BELLWETHER.....	290
VIII. ARGUMENT NUMBER 8: WALLOWING IN VICTIMIZATION?	291
IX. ARGUMENT NUMBER 9: CLASSISM	292

[†] John J. Sparkman Chair of Law, University of Alabama School of Law.

X. ARGUMENT NUMBER 10: WHERE DO YOU DRAW THE LINE? 293
CONCLUSION: STRIKING THE BALANCE WITH AN EYE TO THE TIMES 297

INTRODUCTION

At least 200 universities and many workplaces have enacted policies against hate speech—coarse, cruel language and invective—aimed at making other people, often minorities or women, feel uncomfortable and unwelcome.¹ Many administrators of Internet sites have been doing so as well.² These measures should come as little surprise, for most social scientists now agree that language of this kind is physically and

-
1. See JON B. GOULD, *SPEAK NO EVIL: THE TRIUMPH OF HATE-SPEECH REGULATION* 76–77 (2005); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 358 (1991) [hereinafter Delgado, *Campus Antiracism Rules*] (noting many universities and colleges enacted hate-speech codes or student conduct codes that prohibit hate speech). Scholars have defined hate speech in various ways. See Richard Delgado, *Words that Wound: A Tort Action for Racial, Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 179 (1982) [hereinafter Delgado, *Words that Wound*] (setting out the elements of a cause of action for tortious hate speech); see also Alexander Brown, *Rethorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation*, 9 ALA. C.R. & C.L. L. REV. 1, 2–3 (2018) (describing targeted hate speech as speech that humiliates or degrades the victim); see also *infra* note 3 and accompanying text (describing what specific elements scholars find offensive in hate speech). This article develops and expands some thoughts we have expressed elsewhere, including: Richard Delgado & David H. Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871 (1994) [hereinafter Delgado & Yun, *Pressure Valves*]; Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778 (2000) (reviewing STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)) [hereinafter Delgado, *Legal Realist View*]; Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation: Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994) [hereinafter Delgado & Yun, *Toughlove Crowd*]; Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919 (2017) [hereinafter Delgado & Stefancic, *Four Ironies*]; and Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475 (1996) (conference address).
 2. See DANIELLE CITRON, *HATE CRIMES IN CYBERSPACE* 167–68 (2014) (discussing efforts to restrain hate online); Mike Wendling, *What Should Social Networks Do About Hate Speech?*, BBC: TRENDING BLOG (June 29, 2015), <https://www.bbc.com/news/blogs-trending-33288367> [<https://perma.cc/N3R3-WYUM>] (providing a quote from Jillian York of the Electronic Frontier Foundation).

psychologically harmful to victims and contributes to social stratification and hierarchy.³

When courts struck down early student conduct codes at Stanford,⁴ Michigan,⁵ and Wisconsin,⁶ drafters became much more careful, so that a new generation of rules is likely to survive judicial scrutiny, much as federal laws forbidding workplace harassment already have done.⁷ The slow movement away from First Amendment legal formalism,⁸ with its

-
3. See Richard Delgado & Jean Stefancic, *Four Observations about Hate Speech*, 44 WAKE FOREST L. REV. 353, 362-64 (2009) [hereinafter Delgado & Stefancic, *Four Observations*] (discussing the harms of racism and hate speech); Brown, *supra* note 1, at 2, 36 (same); see also STEVEN HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* 165 (2008); Steven J. Heyman, *When is Hate Speech Wrongful? A Comment on Alexander Brown's Hate Speech as Degradation and Humiliation*, 9 ALA. C.R. & C.L. L. REV. 185, 186 (2018) [hereinafter Heyman, *When is Hate Speech Wrongful?*] (arguing that hate speech causes “deep injury” even when it does not humiliate or degrade its target). Philosopher Jeremy Waldron posits that public monuments celebrating pro-slavery heroes demoralize the public, humiliate African Americans and immigrants, and have little justification. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 72-73 (2012).
 4. *Corry v. Stanford Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995), <https://web.archive.org/web/20050419211842/http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm> [<https://perma.cc/UR4K-8XCS>] (granting a preliminary injunction against a hate-speech code at that university).
 5. See *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (declaring Michigan’s hate-speech code unconstitutional).
 6. See *UMW Post, Inc. v. Bd. of Regents, Univ. of Wis.*, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) (invalidating a student conduct code at Wisconsin that penalized hate speech).
 7. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1991); *Vinson v. Meritor Sav. Bank*, 477 U.S. 57, 73 (1986) (upholding punishment of sexual harassment in employment settings); see also Delgado & Stefancic, *Four Ironies*, *supra* note 1, at 1922-23 (noting, among a number of current ironies, that critics assail campus hate-speech codes at the very time universities seem determined to enact them as a means of improving the campus climate for minorities and women).
 8. *E.g.*, Delgado, *Legal Realist View*, *supra* note 1, at 778-79; Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 170 (1994) [hereinafter Delgado, *Giving Way*] (noting the high degree of formalism in traditional First Amendment case law and observing that it is finally giving way to legal realism).

trove of clichés, maxims,⁹ special doctrines, and per se rules,¹⁰ and toward legal realism,¹¹ promises to accelerate this trend.¹² The current debate thus tends to turn on whether prohibition is wise or fair, not whether it is constitutional—in short, policy arguments, pro and con.

This Article accordingly considers a number of the most common arguments against hate-speech regulation, particularly at universities, concluding that each is flawed. As a result, educational institutions are free to enact such codes if they wish and are prepared to draft them carefully and narrowly.

For example, many opponents of hate-speech regulation argue that regulation will lead to increasing controls and, ultimately, a regime of

-
9. E.g., no content regulation, the best cure for bad speech is more speech, and we must defend with alacrity the speech we hate. *See, e.g.*, Delgado, *Giving Way*, *supra* note 8, at 172–73; Delgado, *Legal Realist View*, *supra* note 1, at 778–79 (noting that the formalist view is passing into history).
 10. *See* Delgado, *Giving Way*, *supra* note 8, at 172; Delgado, *Legal Realist View*, *supra* note 1, at 778 (discussing a number of per se rules that, with repeated use, come to seem sacrosanct, such as no content regulation).
 11. For information on legal realism, see generally Brian Leiter, *American Legal Realism*, in BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005). Legal realism approaches problems like hate speech in terms of balancing, competing alternatives, sociological and scientific knowledge, and the pragmatic need to craft a remedy for a social problem. *Id.* at 50; *see also* Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 516 (1917) (explaining the advantages of legal realism as an approach to law). On the history and development of this school of thought, see generally LAURA KALMAN, *LEGAL REALISM AT YALE* (1986); LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* 18–23 (2014). In general, legal formalism approaches problems in terms of existing categories and looks to precedent for guidance in selecting the right one. Legal realism employs those aids, but considers a broader range of tools, including social science, balancing, and narrative analysis, with the aim of arriving at the best real-world result (hence the term “legal realism.”) An argument over campus hate-speech rules between a legal formalist and a legal realist might proceed as follows. Legal formalist: The proposed rule limits speech, hence, requires a compelling interest and no less onerous alternative. What is worse, it is content-related and is per se unconstitutional. Legal realist: That is incomplete. The rule is an equality guarantee and a reasonable way to assure a campus climate conducive to learning. Here are three sociologists and an expert on minority education who are prepared to say so. *See infra* notes 118–125 and accompanying text on ways to resolve this stand-off.
 12. *See* Delgado, *Giving Way*, *supra* note 8, at 173; Delgado, *Legal Realist View*, *supra* note 1, at 785–98 (discussing forces that are propelling the shift).

official censorship.¹³ Others urge that the best response to bad speech is more speech,¹⁴ or that suppressing hate speech is unwise because it serves as a pressure valve guarding against a more dangerous explosion later.¹⁵ Still others assert that freedom of speech has served historically as minorities' best friend, thus they, most of all, should hesitate to suppress it.¹⁶ Supporters of hate-speech regulation have countered each of these arguments.

Before beginning, a word about norms and social change. Today, the legal norm according to which speech in our society should generally be free, and the social norm which holds that hate speech is offensive and harmful, are misaligned.¹⁷ Twenty years ago, they were not. The social norm against hate speech was weak; one could assert, back then, that what "Joe" just said was hate speech—what of it?¹⁸ Now one cannot. If you do, others will think ill of you and even worse of the speaker.¹⁹ If Joe persists in his ways, the university may throw the book at him and invite him to continue his education elsewhere. Either way, his friends will be appalled and stop inviting him to parties.

In short, the social norm against hate speech is well established. The law, however, lags behind, although courts are beginning to stretch existing legal doctrines such as intentional infliction of emotional distress or hostile workplace to find for the victim of hate speech.²⁰ They are especially sympathetic if the victim is a young person, the perpetrator an authority figure like a teacher or workplace supervisor, and the victim trapped and unable to escape the castigation.²¹

-
13. See Alan Dershowitz, *Dubious Arguments for Curbing Hate Speech of Nazis*, WASH. POST (Feb. 1, 2018), https://www.washingtonpost.com/outlook/dubious-arguments-for-curbing-the-free-speech-of-nazis/2018/01/31/495cd256-fc96-11e7-8f66-2df0b94bb98a_story.html?noredirect=on&utm_term=.7d179ed6a2a5 [<https://perma.cc/WAN4-R3UJ>] (warning of the danger of free speech regulation); see also *infra* notes 102–117 and accompanying text.
 14. See *infra* notes 53–63 and accompanying text.
 15. See *infra* notes 24–34 and accompanying text.
 16. See *infra* notes 42–52 and accompanying text.
 17. See Delgado & Stefancic, *Four Ironies*, *supra* note 1, at 1922–23 (noting this among a number of ironies in the current situation on many campuses).
 18. *Id.* at 1921.
 19. *Id.*
 20. See Brown, *supra* note 1, at 7 n.18, 40; Delgado, *Words that Wound*, *supra* note 1, at 133–34, 150–65; But see Delgado & Stefancic, *Four Observations*, *supra* note 3, at 353–54.
 21. Brown, *supra* note 1, at 8–9 nn.24–25; Delgado, *Words that Wound*, *supra* note 1, at 143.

As though recognizing that the First Amendment is unlikely to protect hate speech for much longer, its defenders have turned to policy arguments. It may well be, they say, that colleges and universities may enforce narrowly drawn hate-speech codes, especially on campuses wracked with unrest. But they should hesitate to do so because the effort will backfire or fail to accomplish its aims.

As we shall see, however, these policy arguments are no more persuasive than is First Amendment absolutism—the idea that all speech should be completely free, with very few or no exceptions.²² Let us now look at a number of such arguments, beginning with some associated with neoliberals of the ACLU persuasion.²³

I. ARGUMENT NUMBER 1: THE EXPLODING PRESSURE VALVE

The so-called pressure valve argument holds that rules prohibiting hate speech are counterproductive because they magnify the danger that minorities suffer as a result of racism.²⁴ Requiring racists to repress expressing their dislike of minorities, gays, women, or immigrants merely increases the likelihood that they will say or do something even more hurtful later.²⁵ Free speech, it is said, serves as a pressure valve, allowing animosity to discharge itself before it reaches a dangerous level. If minorities and their defenders understood this mechanism, they would desist from demanding anti-hate speech rules and conduct codes.

The argument is paternalistic; it says we are denying you what you say you want, and for your own good.²⁶ The rules will merely make matters worse. If you knew where your best interest lay, you would desist from demanding them.²⁷

How should we see this argument? It may well be that hate speech makes some speakers feel better, at least momentarily. But permitting this form of speech to occur freely does not render the victim safer. Evidence shows that allowing an individual to say or do hateful things

22. Delgado, *Legal Realist View*, *supra* note 1, at 793–94 (noting that this change is under way).

23. Delgado & Yun, *Pressure Valves*, *supra* note 1, at 872.

24. *Id.* at 878–80 (discussing this argument and its infirmities).

25. *Id.* at 878; Delgado & Stefancic, *Four Observations*, *supra* note 3, at 365.

26. The argument holds that hate-speech rules are likely to backfire against their intended beneficiaries; once one realizes this, the incentive to support these rules dissipates. See Delgado & Stefancic, *Four Observations*, *supra* note 3, at 365–66; see also Delgado & Stefancic, *Four Ironies*, *supra* note 1, (conceding that giving vent to hate speech may enable some to speak their mind, yet this comes at considerable cost to those who are its target).

27. Delgado & Stefancic, *Four Observations*, *supra* note 3, at 365–66.

to others increases, rather than decreases, the probability that he or she will do so again.²⁸ Moreover, bystanders, observing what the first person has done with impunity, may follow suit.²⁹ Even simple animals act on the basis of perceptual categories. Poultry farmers know that a chicken with a speck of blood may be attacked and pecked to death by others in his flock.³⁰ With chickens, of course, the categories are neural and innate, functioning at a level of instinctive behavior rather than language. But with humans, social science experiments show that much the same holds true and that the way we categorize others influences how we treat them. An Iowa teacher's "blue eyes/brown eyes" experiment showed that even a short-term assignment of stigma could alter behavior and school performance.³¹ At Stanford, Professor Philip Zimbardo assigned students to take on the roles of prisoner and prison guard, but had to discontinue the experiment when some of the subjects started taking their roles too seriously.³² At Yale, Professor Stanley Milgram showed that subjects could be made to violate their conscience if an authority figure ordered them to do so and assured them this was permissible and safe.³³

Allowing people to mistreat others, then, makes them more aggressive, not less. Once someone forms the mental category of deserved-victim—someone who "had it coming"—the person's behavior may advance to include bullying and physical violence.³⁴ Pressure valves may be safer after letting off steam. Human beings are not.

II. ARGUMENT NUMBER 2: THE RISK OF REVERSE ENFORCEMENT

Other advocates posit that hate-speech rules are sure to set back the cause of minorities because the rules will be turned against

28. Delgado & Yun, *Pressure Valves*, *supra* note 1, at 878.

29. *Id.* at 878 (noting this bystander effect).

30. *Id.* at 879 (citing poultry-studies literature).

31. See Stephen G. Bloom, *Lesson of a Lifetime*, SMITHSONIAN MAG. (Sept. 5, 2005), <https://www.smithsonianmag.com/science-nature/lesson-of-a-lifetime-72754306/> [<https://perma.cc/EPA6-RPH6>].

32. See Maria Konnikova, *The Real Lesson of the Stanford Prison Experiment*, NEW YORKER (June 12, 2015), <https://www.newyorker.com/science/maria-konnikova/the-real-lesson-of-the-stanford-prison-experiment> [<https://perma.cc/T5NU-NXAS>].

33. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 8, 165 (1974) (noting how most research subjects would obey unhesitatingly the commands of a fake lab leader, even if they believed that doing so would inflict serious injury on a fellow subject).

34. Delgado & Yun, *Pressure Valves*, *supra* note 1, at 61-62 (citing social science evidence).

minorities themselves.³⁵ A vicious put-down of a black person from a white may go unpunished—perhaps because the hearing officer deems it inconsequential or a mere first offense—but even a mild expression of irritation by a black motorist to a traffic cop or a student to a teacher will bring harsh retribution.³⁶ The reverse-enforcement argument is plausible because some authority figures do dislike minorities who speak out of turn and find reasons to punish them. Nadine Strossen, former president of the ACLU, asserted that in Canada, following a Supreme Court decision upholding a national anti-hate speech law, prosecutors began charging black and native people with hate offenses.³⁷

But empirical evidence shows that this is the exception, not the rule. FBI reports show that hate crimes are committed much more frequently by whites against blacks than the other way around,³⁸ and the same appears to be true for hate speech. Whites commit it, blacks and Latinos, as a rule, do not.³⁹

Racism and racial insults, of course, are not a one-way street; some minorities have harassed and badgered whites and members of minority groups other than their own. And a study showed that in repressive societies, such as South Africa under apartheid and the former Soviet Union, laws against hate speech have in fact been deployed to stifle dissenters.⁴⁰ Yet this has not happened in more democratic countries.⁴¹

-
35. See Nadine Strossen, ACLU Nat'l President, Address to the Judicial Conference, Tenth Circuit Court of Appeals, Durango, Colo. (July 1992) [hereinafter Strossen Address]; Henry Louis Gates, *Let Them Talk*, NEW REPUBLIC, (Sept. 20, 1993) (attributing the same view as Strossen in connection with enforcement of University of Michigan speech code); see also Delgado & Yun, *Toughlove Crowd*, *supra* note 1 (critiquing this position).
36. See Strossen Address, *supra* note 35.
37. See Strossen Address, *supra* note 35; Gates, *supra* note 35; see also Nadine Strossen, *Regulating Hate Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 1994 (putting forward her general position).
38. Delgado & Yun, *Pressure Valves*, *supra* note 1, at 880.
39. One reason may be that hate speech against whites lacks a well-developed vocabulary. See *infra* notes 109–112 and accompanying text.
40. SUSAN D. COLIVER, ET AL., STRIKING A BALANCE, HATE SPEECH, FREEDOM OF EXPRESSION, AND NON-DISCRIMINATION 371 (1992); see also Laura Smith-Clark, *Russian Court Imprisons Pussy Riot Band Members on Hooliganism Charges*, CNN NEWS (Aug. 18, 2012), <https://www.cnn.com/2012/08/17/world/europe/russia-pussy-riot-trial/index.html> [<https://perma.cc/5JZJ-GCPV>].
41. See COLIVER ET AL., *supra* note 40, at 194; Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737, 742 (1993) (providing Canada as an example).

The likelihood that U.S. authorities would turn hate-speech laws into weapons against minorities thus seems remote.

III. ARGUMENT NUMBER 3: FREE SPEECH AS MINORITIES' BEST FRIEND

Many free-speech devotees insist that the First Amendment has served as a great friend and ally of reform leaders.⁴² They point out that without free speech, Martin Luther King Jr. could not have moved massive crowds as he did.⁴³ Other movements, such as those for women's or farmworker's rights, are said to have relied heavily on free speech as well.⁴⁴ This argument, like the ones we have already considered, is paternalistic, based on the supposed best interest of minorities. If they understood where that interest lay, the argument goes, they would not demand regulations limiting what one can say.

But this argument ignores the actual relationship between racial minorities and the First Amendment. Historically, minorities have made the greatest strides when they acted in *defiance* of that amendment.⁴⁵ The 1776 Constitution protected slavery in several of its provisions,⁴⁶ while the First Amendment co-existed comfortably with that practice for nearly one hundred years, until the Reconstruction Amendments finally abolished it. Even then, free speech for women, the former slaves, and the propertyless was simply not high on the agenda of the framers, who appear to have conceived that amendment as protection for the kind of refined political, scientific, and artistic discourse they and their class enjoyed, and not that of the black

42. David L. Hudson, *First Amendment Freedoms Crucial to Civil Rights Movement*, FREEDOM F. INST. (Jan. 15, 1999), <https://www.freedomforuminstitute.org/1999/01/15/first-amendment-freedoms-crucial-to-success-of-civil-rights-movement/> [<https://perma.cc/CTX9-JFUG>].

43. *Id.*

44. *Id.*; see, e.g., LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY (1997) (detailing how women used their First Amendment rights to protest and eventually gain the right to vote).

45. RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT 88 (1997).

46. *E.g.*, U.S. CONST. art. 1 § 9, cl. 1 (limiting the ability of Congress to restrict the slave trade); U.S. CONST. art. 4, § 2, cl. 3 (providing that fugitive slaves must be returned upon demand); JUAN F. PEREA, ET AL., RACE AND RACES: CASES AND MATERIALS FOR A JUST SOCIETY 110 (2d ed. 2007) (listing other clauses that accommodate slavery).

liberators and, later, trade unionists who were trying to turn the world upside down.⁴⁷

Even during the 1960s civil rights era, the relationship of the First Amendment and social progress was not at all simple. Martin Luther King Jr. and his followers did use speeches and other symbolic acts to kindle America's conscience.⁴⁸ But the First Amendment, at least as then construed, offered them little protection.⁴⁹ Authorities pronounced their speech too forceful, too disruptive, spoken in the wrong place or without a permit, and they were arrested and thrown into jail.⁵⁰ Occasionally, their convictions would be reversed, years later, by dint of gallant lawyering.⁵¹ But the First Amendment, as then understood, at best served as a weak shield. *Speech* may have served as a powerful tool for reformers, but our system of free speech did not.

Anyone doubtful of this proposition is invited to consider a brief review of the many First Amendment exceptions to freedom of speech, including words of conspiracy, libel, copyright, plagiarism, official secrets, misleading advertising, words of threat, disrespectful words uttered to a judge, teacher, or other authority figure, and many more.⁵² These exceptions, each responding to some interest of a powerful group—publishers, advertisers, cops, the president—seem logical and necessary, as indeed perhaps they are. But the mere suggestion of a new exception protecting young black undergraduates from castigation while walking home from the library late at night immediately produces consternation. The First Amendment, we learn, must be a seamless web.

But of the course that web is not at all seamless, but full of exceptions and special doctrines reflecting our sense of the world. It allows us to make certain distinctions, tolerates certain exceptions, and functions in ways that we assume will be equally valuable for all. But our examination of history, as well as the landscape of doctrinal

-
47. See LAURA WEINRIB, *THE TAMING OF FREE SPEECH* 271-72 (2016) (noting the origins of modern free speech law in early twentieth-century union activism).
48. *E.g.*, Martin Luther King, Jr., Letter from a Birmingham Jail, *reprinted in* MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* (1964).
49. See Delgado & Yun, *Pressure Valves*, *supra* note 1, at 882; Charles Lawrence, *If He Hollers, Let Him Go: Regulating Hate Speech on Campus*, 1990 DUKE L.J. 431, 466-67.
50. See DERRICK BELL, *Freedom of Expression*, in *RACE, RACISM, AND AMERICAN LAW* 571, 654 (6th ed. 2008) (describing this shift); Lawrence, *supra* note 49, at 466-67 (same).
51. See, *e.g.*, *Boynton v. Virginia*, 364 U.S. 454 (1960).
52. See Delgado & Stefancic, *Four Ironies*, *supra* note 1, at 1938-39 (discussing these and other exceptions); see also Delgado & Stefancic, *Four Observations*, *supra* note 3, at 366-67 (same).

exceptions, shows that the system is far more valuable to the powerful than the powerless; more useful for confining change than promoting it.

IV. ARGUMENT NUMBER 4: MORE SPEECH (TALKING BACK TO THE AGGRESSOR)

Defenders of the abovementioned faith also argue that minorities should learn to talk back to the aggressor when racism strikes.⁵³ Henry Louis Gates, for example, writes that campus conduct codes teach minorities to depend on whites for protection.⁵⁴ Talking back, by contrast, strengthens self-reliance, and helps see oneself as an active agent in charge of one's own destiny.⁵⁵

The "talking back" maxim draws force from First Amendment case law holding that additional dialogue is a preferred response to speech that an audience finds problematic for some reason.⁵⁶ Even apart from this, some commentators assert that it is good for minorities to learn to speak on their own behalf, public speaking being a useful skill.⁵⁷ Minorities who do so may even be able, in the process, to educate the speaker of a racially hurtful remark.⁵⁸ Racism is said to be the product of ignorance or fear; consequently, one who takes the time to explain that a remark was hurtful or untrue may alter the speaker's perception so that she will refrain from repeating the mistake in the future.

Suggestions like these, in common with many paternalistic arguments, are offered with little supporting evidence, virtually as articles of faith. Those who make them are frequently in a position of power and believe themselves able to make things so merely by asserting them. The social world is as they say because it is, basically, their world—they create it that way every day.

But those who hurl racial epithets do so, not so much because they are ignorant ("Gosh, I had no idea you would find the N-word

53. See NAT HENTOFF, *FREE SPEECH FOR ME, BUT NOT FOR THEE* 159, 167 (1992); see also Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1, 6 (2004) (discussing this objection); see also Delgado & Yun, *Pressure Valves*, *supra* note 1, at 877, 883-85 (same).

54. See, e.g., Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 17 (1994).

55. See *Whitney v. California*, 247 U.S. 357, 377 (1927) (Brandeis, J., concurring).

56. See *id.*

57. See HENTOFF, *supra* note 53 at 167 (discussing Malcolm X's belief in the benefits of using language and public speaking to fight racism).

58. *Id.* (positing that language may be used to illuminate and counter issues).

offensive”), but because they feel they can get away with it. Their aim, whether unstated or not, is to reassert power and authority over the victim.⁵⁹ One who talks back is perceived as issuing a direct challenge to that power. Racist remarks are often delivered in several-on-one situations, in which responding in kind is risky.⁶⁰ Others arrive anonymously, via email, graffiti scrawled on a campus wall late at night, or notes attached to a black student’s dormitory door.⁶¹ In these situations, more speech, of course, is not a readily available remedy.

Racist speech is rarely a mistake that could be cleared up by discussion. After all, what would be the answer to a remark like, “Nigger, go back to Africa. You don’t belong here”? Try to imagine a victim who draws himself up with dignity and says: “Sir, you misconceive the situation. Prevailing ethics and constitutional interpretation hold that I, an African American, am an individual of equal dignity and entitled to attend this university in the same manner as others. Now that I have made you aware of this, I am sure you will modify your conduct in the future.”

The notion that talking back is safe for the victim or informative for the racist simply flies in the face of reality. It ignores the power dimension that lurks behind such speech, requires minorities to run serious risks, and treats hate speech as an invitation for discussion. Even when successful, talking back is burdensome. Why should minority undergraduates, already busy securing their own education, be charged with educating others?

As we have seen, four arguments against hate-speech regulation associated with liberals fail to hold up when examined under the lens of critical race theory or even common sense. cursory examination showed how indeterminate some of the arguments are, dependent on one’s starting position.⁶² Several illustrate what Derrick Bell termed

59. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* 38 (Constance Farrington trans., 1963) (1961) (discussing colonial language as a discourse of power); see also Heyman, *When is Hate Speech Wrongful?*, *supra* note 3 (discussing injury resulting from hate speech).

60. Indeed, many cases of racial homicide began in just this fashion: A group began badgering a black person; the person talked back and paid with his life. See FANON, *supra* note 59, at 25–26; Delgado & Yun, *Pressure Valves*, *supra* note 1, at 884.

61. See Delgado & Yun, *Pressure Valves*, *supra* note 1, at 884.

62. See *supra* notes 24–34 and accompanying text (discussing the pressure-valve argument, which holds that the proper lens for evaluating hate speech is First Amendment law so that the inconvenience that a hate speaker suffers from having to refrain himself is of greater consequence than that of the victim of hate speech forced to suffer it in silence). The proper balance between these two interests could, of course, be examined under the Fourteenth Amendment—that is, as a violation of the equality principle—in which case the analysis could proceed quite differently.

interest convergence—they persuade only if one concedes a point, such as that minorities of color should absorb hateful comments uncomplainingly because free speech is their best friend, whether they know it or not.⁶³ Narrative analysis—another mainstay of critical race theory—shows the role of metaphors, such as the pressure-valve analogy, in conducting discourse and belief to predetermined destinations. What, then, of arguments that derive from conservative premises?

V. ARGUMENT NUMBER 5: A WASTE OF TIME OR RESOURCES

Other arguments are associated not with neoliberal but conservative politics and have at their heart the idea that slurs directed against people of color are no more serious than ones directed against whites. Doubting this equation threatens a prime conservative tenet, the level playing field. As we shall see, however, the First Amendment version of that field—namely, the marketplace of ideas⁶⁴—is not at all level but slanted against much of the population, so that talking back is rarely a satisfactory option. Let us now examine some of these articles of the neoconservative faith.

Many writers of this disposition argue that railing against hate speech is a waste of precious time and resources.⁶⁵ Donald Lively, for example, writes that anti-hate speech activists ought to have better things to do. Hate-speech reform, even if successful, will benefit only a small number minorities.⁶⁶ Instead of “picking relatively small fights of their own convenience,” those who champion civil rights should be examining the obstacles that truly slow racial progress such as bad laws and too little money.⁶⁷ Henry Louis Gates, in a cover story in the *New Republic*, echoes this view, asserting that combating racist speech does

63. Indeterminacy, a central tenet of legal realism, holds that most legal arguments based on doctrine can be made, with equal force, from the opposite direction. *See, e.g.*, Brian Leiter, *Legal Indeterminacy*, CAMBRIDGE (Feb. 1, 2009), <https://www.cambridge.org/core/journals/legal-theory/article/legal-indeterminacy/EF75AE51DF911A47CE95E42CB657D84A> [<https://perma.cc/5AV9-EE2F>] (defining legal indeterminacy).

64. *See infra* notes 107–113 and accompanying text.

65. *See* Delgado & Yun, *Toughlove Crowd*, *supra* note 1, at 1812–13 (discussing this argument).

66. *See id.* at 1812 (citing Donald Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865, 893 (1994)).

67. Donald E. Lively, *Racial Myopia in the Age of Digital Compression*, in SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES 87 (1994).

lip service to civil rights without dealing with the material reality of economic subordination.⁶⁸ Dinesh D'Souza comments that campus radicals advocate hate-speech regulations because doing so is easier than studying hard and getting a first-rate education.⁶⁹

These arguments may contain a small grain of truth. But does this mean that efforts to control hate speech are a waste of time? Not at all. What these writers ignore is that eliminating hate speech may be an important step toward reducing real, old-fashioned racism. Certainly, being the victim of hate speech is a less serious injury than being denied a job or an apartment. But it is equally true that a society that speaks of minorities in a derogatory fashion is engaged in creating an environment in which discrimination of all types will occur more frequently. Hateful discourse, whether taking the form of one-to-one invective or of media imagery, constructs a picture of minorities in the public mind.⁷⁰ This stereotype guides action, including motorists who fail to stop for a stranded black driver,⁷¹ police authorities who harass African American youths innocently walking with friends or awaiting a table at Starbucks,⁷² or landlords who act on unarticulated hunches in renting an apartment to a white over an equally or more qualified black or Mexican.⁷³

68. Gates, *supra* note 35, at 1, 23–26.

69. See DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 188 (1991).

70. This picture or stereotype varies from era to era but is rarely positive, including traits such as happy and carefree, lascivious, criminal, devious, treacherous, untrustworthy, immoral, and of lower intelligence. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ill?*, 77 CORNELL L. REV. 1258, 1261–75 (1992) (discussing the history of stereotypes of four minority groups); see also Delgado & Stefancic, *Four Observations*, *supra* note 3, at 368 (discussing how images resulting from hate speech deprive victims of credibility).

71. See Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 76–77 (1996) (discussing norm theory and helping behavior).

72. See Alex Horton, *Starbucks CEO Apologizes After Employee Calls Police on Black Men*, WASH. POST (Apr. 15, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/14/starbucks-apologizes-after-employee-calls-police-on-black-men-waiting-at-a-table/?utm_term=.70f4c425f2af [https://perma.cc/F75T-RHMP]; see also Paul Butler, *Much Respect: A Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004) (discussing remedies for police violence and profiling).

73. See John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233 (1995) (discussing remedies for housing segregation).

Even when they do not rise to this level of harm, racial barbs are painful. A white motorist who suffers an epithet (“watch where you’re going, you imbecile”) may be momentarily stunned. But the incident does not call upon a cultural legacy the way a racial epithet does, nor does it deny the victim’s dignity and personhood.

Most conservatives, like many white folks today, think that acts of out-and-out discrimination are rare.⁷⁴ The only kind of discrimination that remains, they believe, is subtle or institutional, lying in the arena of unarticulated feelings, practices, and patterns of behavior.⁷⁵ But if so, would not a forthright focus on speech and language be one of the few means for addressing this form of subtle racism? Thought and language are closely connected; words offer a window into our unconscious. Our choice of word, metaphor, or image gives signs of the attitudes we have about a person or subject.⁷⁶ One who receives a demand to reconsider his or her use of language may begin to reflect on the way he or she thinks about a subject. Of course, speech codes would not reach every form of demeaning speech or depiction. But a tool’s unsuitability to redress every aspect of a problem is no reason for refusing to employ it where it is effective.

VI. ARGUMENT NUMBER 6: TILTING AT WINDMILLS

Conservatives also posit that trying to regulate hate-speech is doomed or quixotic.⁷⁷ White people will never agree to limit themselves

74. See Ryan Struyk, *Black People and Whites See Racism in the United States Very, Very Differently*, CNN (Aug. 18, 2017), <https://www.cnn.com/2017/08/16/politics/blacks-white-racism-united-states-polls/index.html> [<https://perma.cc/FPP9-498Y>].

75. David Clarke, *Systematic Racism is so Rare in America, the Media Can’t Stop Lying About It*, HILL (Nov. 13, 2017), <http://thehill.com/opinion/civil-rights/360083-systemic-racism-is-so-rare-in-america-the-media-just-cant-stop-lying> [<https://perma.cc/PGX8-JM4B>] (discussing contrasting views of the extent of institutional racism); see also Delgado & Stefancic, *Four Observations*, *supra* note 3, at 367–68 (noting how mainstream writers often ignore the incessancy and compounding effect on racial categorization on a victim exposed to it over a long period or lifetime).

76. See Steve L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1107, 1114 (1989) (discussing how metaphors shape how we reason); Lera Boroditsky & Lauren A. Schmidt, *Sex, Syntax, and Semantics*, 22 PROC. OF THE ANN. MEETING OF THE COGNITIVE SCI. SOC’Y. 1, 1 (2000) (addressing the question: Does language shape thought?); *Id.* at 2 (“Grammatical Gender”).

77. See *supra* notes 64–69 and accompanying text.

in this manner, and, even if they did, the Supreme Court would never allow it.⁷⁸

But is the effort to curb hate speech doomed or pointless? A host of Western industrialized democracies have instituted laws against hate speech and hate crime, often in the face of initial resistance.⁷⁹ Some, such as Canada, Great Britain, and Sweden, have traditions of respect for free speech and inquiry rivaling ours.⁸⁰ And of course, many college and university campuses have enacted hate speech rules of various kinds, essentially challenging the ACLU to sue them, which the organization often does.⁸¹

Speech-regulation is not at all doomed, but common. Powerful actors such as government agencies, the writers' lobby, and industries like agribusiness have often been quite successful at coining free-speech exceptions to suit their interest—libel laws, defamation, false advertising, copyright, plagiarism, words of threat, and words of monopoly, just to name a few.⁸² Each of these exceptions seems natural and justified—because they are time-honored—and perhaps each is. But the interest underlying each one seems no less than that of a young black undergraduate set upon by hate-filled toughs while walking late at night on campus. Need and policy have a way of being translated into law. The same may happen with hate speech, indeed already has occurred on a level of informal social norms.⁸³

VII. ARGUMENT NUMBER 7: HATE SPEECH AS BELLWETHER

Hate speech supporters also urge that one should not drive hate speech underground, but let it remain out in the open.⁸⁴ The racist whom one does not know, the argument goes, is more dangerous than one whom one does.⁸⁵ Moreover, on a college campus, incidents of overt racism or sexism can serve as useful spurs for discussion, institutional self-examination, and campus forums.⁸⁶ It can also prompt useful self-

78. That is, the argument goes, like tilting at windmills.

79. DELGADO & STEFANCIC, *supra* note 45, at 146.

80. *Id.*

81. *See supra* note 1 and accompanying text.

82. Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid*, 24 N. KY. L. REV. 475, 484 (1995).

83. *See supra* notes 17–21 and accompanying text.

84. *See* Delgado & Yun, *Toughlove Crowd*, *supra* note 1, at 1816.

85. *Id.*

86. *See* Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249,

examination. Yale law professor Stephen Carter, for example, writes that regulating racist speech will leave minorities no better off than they are now, while screening out “hard truths about the way many white people look at us.”⁸⁷ In similar fashion, Dinesh D’Souza points out that “hate-speech crusaders are missing a valuable opportunity. When racist graffiti or hateful fraternity pranks proliferate, minorities should reflect on the possibility that this may signal something basically wrong with affirmative action. Instead of tinkering [pointlessly] with the [public] signs of malaise, [minorities] ought to” own up to the possibility that their behavior may lie at the center of the problem.⁸⁸

This argument in one respect does make a valid point. Everything else being equal, the racist who is known is less dangerous than the one who is not. But the argument ignores a third possibility, namely that racists who are cured, or at least deterred by firm rules from acting as they once did, are preferable to either of these two. Since most conservatives believe that rules and penalties change conduct—are indeed among the strongest proponents of heavy penalties for crime⁸⁹—they should consider the possibility that campus guidelines against hate speech and assault would deter many of those who would otherwise be inclined to perform those behaviors.

VIII. ARGUMENT NUMBER 8: WALLOWING IN VICTIMIZATION?

Many conservative critics of hate-speech rules also hold that they encourage minorities to see themselves as victims.⁹⁰ Instead of rushing to the dean of students every time they hear something that wounds their feelings, minorities ought to learn to speak back or simply ignore the offending act.⁹¹ A system of rules and procedures only reinforces in their minds that they are weak and in need of protection, that their lot in life is to be a victim rather than an active agent in charge of one’s

1271 72 (1995) (positing that incidents of campus hate speech provide teachable moments and that convening town halls is a preferred response).

87. See STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 179 (1992).

88. DELGADO & STEFANCIC, *supra* note 45, at 87.

89. See, e.g., John Q. Wilson, *Thinking About Crime: The Debate over Deterrence*, ATLANTIC (Sept. 1983), <https://www.theatlantic.com/past/docs/politics/crime/wilson.htm> [<https://perma.cc/UN3B-DKHM>] (positing that criminals will hesitate to commit offenses if they know that this will bring harsh retribution).

90. See Delgado & Yun, *Toughlove Crowd*, *supra* note 1, at 1818 19 (discussing “The Victimization Argument: Do Hate-Speech Rules Encourage Passive, Dependent Behavior”).

91. *Id.* at 1818.

destiny. Carter, for example, writes that anti-hate-speech rules appeal to “those whose backgrounds of oppression make them especially sensitive to the threatening nuance that lurks behind racist sentiment;”⁹² Lively, that they reinforce a system of “supplication and self-abasement;”⁹³ D’Souza, that they discourage interracial friendships and encourage a crybaby attitude;⁹⁴ and Gates, that they reinforce an unhealthy preoccupation with feelings.⁹⁵

But would enacting hate-speech rules necessarily encourage minorities to wallow in victimhood? Not at all, for other alternatives will remain available as before. Nothing requires an African American or lesbian student to file a complaint when racism strikes; he or she can talk back, have a fight, or walk away and ignore it if he or she sees fit. Hate-speech rules simply provide an additional avenue for those wishing to take advantage of them. Indeed, one could see filing a complaint as a way of taking charge of one’s destiny—one is active, instead of passively absorbing one’s misfortune when verbal abuse strikes or pretending it did not happen.

Note that we rarely make the victimization charge in connection with other offenses that we suffer, such as having a car stolen or a house burglarized, nor do we encourage those victimized in this way to “rise above it,” talk back to their victimizers, or steal their car in return.⁹⁶ If we see recourse differently in the two situations, could it be because we secretly believe that a person of color who suffers revilement at the hands of a group of racists is in reality not a victim of something serious, but a complainer? If so, it would make sense to encourage such a person not to dwell on the event. But this is not the same as saying that filing a complaint deepens victimization; moreover, it is untrue. Racist speech is the harm, filing a complaint is not. No empirical evidence suggests that filing a civil rights complaint causes one to feel worse about oneself.

IX. ARGUMENT NUMBER 9: CLASSISM

Still other conservatives dismiss the effort to enact anti-hate speech rules as classist.⁹⁷ The rules, they say, will only end up punishing what naïve or blue-collar students do and say,⁹⁸ while the more refined put-

92. CARTER, *supra* note 87, at 177.

93. DELGADO & STEFANCIC, *supra* note 45, at 87.

94. *See* D’SOUZA, *supra* note 69, at 128, 139.

95. *See* Gates, *supra* note 35.

96. SHOULD THERE BE LIMITS TO FREE SPEECH? 40 (Laura K. Engedorf et al. eds., 2003).

97. *See* Delgado & Yun, *Toughlove Crowd*, *supra* note 1, at 1819–20.

98. *Id.* at 1819.

downs of the highly educated will go unpunished.⁹⁹ Henry Louis Gates offers two versions of what a minority student might hear, from an advisor (A), and from an angry fellow student (B):¹⁰⁰

(A) Advisor: 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 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) Angry Student: Out of my face, jungle bunny.

In one respect, the classism argument is misguided. If, in fact, the highly educated academic advisor is less likely to utter harsh words like those in example B, but only intellectualized versions like the one in the first example, this may be because the person is less racist in a raw sense. If, as many social scientists believe, racism tends to be inversely correlated with educational level,¹⁰¹ well-educated people like the academic advisor may end up violating hate-speech rules less often than others. And in any event, "Out of my face, jungle bunny" is a more serious example of hate speech because it is not open to a more-speech response and has overtones of an outright physical threat. The "long slide" version, while deplorable, is unlikely to be coupled with a physical threat, and is answerable by more speech. For example: "That's not true, Professor. Not all of us are on a downward slide. My friend Jamila made the dean's list last semester."

X. ARGUMENT NUMBER 10: WHERE DO YOU DRAW THE LINE?

A final argument, which holds that hate speech may be wrong, but prohibition is not the answer because it leads to censorship, is one of the relatively few that both the right and the left make.¹⁰² Activists of

99. *Id.*

100. Gates, *supra* note 35.

101. See Delgado, *Campus Antiracism Rules*, *supra* note 1, at 373 (citing authorities illustrating the economic-competition theory of race and racism).

102. Perhaps because both deplore censorship and governmental intrusion into private affairs.

the ACLU persuasion oppose hate-speech restrictions because, although they detest racism, they love free speech even more. For their part, the right tolerates hate speech because it is government, in most cases, that would be regulating it, and in this arena, governmental control raises the specter of censorship.¹⁰³

Gates and Lively, for example, write that history teaches that regulating speech generally backfires because free speech is a vital civic good and even more essential for minorities than others.¹⁰⁴ Moreover, it leads to censorship. If we allow an arm of the state to decide what speech is harmful, they will become increasingly intrusive and soon little of the right of speech will survive.¹⁰⁵

But the term “censorship” is appropriately attached only to measures allowing the heavy hand of government to fall on weaker, unpopular private speakers or dissidents who are attempting to criticize government itself. Hate-speech regulation raises few of these concerns. Hate speakers are criticizing not government, but someone weaker than they. By the same token, the speech being punished is far from the core of political expression. It communicates few ideas except “I can’t stand you and people like you.” It silences the victim and deprives the public of his voice.¹⁰⁶ When the government regulates hate speech, it increases social dialogue, rather than the opposite.

Tough-love conservatives find arguments like these compelling because this form of speech calls into question a principal tenet of the conservative faith: the level playing field.¹⁰⁷ In First Amendment theory, the name of that playing field is the marketplace of ideas, in which all sorts of ideas supposedly vie on equal terms to establish themselves in the minds of those an audience. Out of that engagement, truth (the best idea of all) will hopefully emerge.

The difficulty that hate speech poses for the conservative mind is, simply, that there is no correlate—no analog—for hate speech directed toward whites.¹⁰⁸ By the same token, no countering message could cancel out the harm of “Towelhead, you don’t belong on this campus—go back to Syria.”

103. DELGADO & STEFANCIC, *supra* note 45, at 92–93.

104. Lively, *supra* note 66, at 884, 897–98; Gates, *supra* note 35.

105. Lively, *supra* note 66, at 884, 897.

106. *See* Delgado & Stefancic, *Four Observations*, *supra* note 3, at 368 (discussing silencing and how racial castigation can cause a victim to grow silent).

107. *See* Girardeau Spann, *Disparate Impact*, 98 GEO L.J. 1133, 1141 (2010).

108. *See* GOULD, *supra* note 1, at 14 (noting this argument).

Racial vitriol aimed at underdogs wounds—nothing that whites have to undergo is comparably damaging.¹⁰⁹ The word “honky” is more a badge of respect than a put-down.¹¹⁰ “Cracker,” although disrespectful, still implies power, as does “redneck” or “the man.”¹¹¹ Terms like “nigger,” “wetback,” “faggot,” and “kike” resound against entire cultural histories of oppression and subordination.¹¹² They remind the target that his group has always been and remains unequal in status to Euro-American whites. Even the most highly educated African American or Latino knows that he or she is vulnerable to the slur, the muttered expression, and the fishy glance on the sidewalk or from the passing cop and realizes that his graduate degree and well-tailored suit are no protection from mistreatment at the hands of the least-educated bigot.

Hate speech, then, wounds in a way that finds no precise parallel in the experience of white people. Nor does a victim have any effective means to speak back or counter it, even when it is physically safe for him to do so. Moreover, the most frequently targeted groups evoke little sympathy from others when they ask for recourse or protection. Society instead asks, Why don’t you simply talk back?¹¹³ Or, let it roll off your back? In other settings, the combination of these features would lead a spectator to conclude that the playing field is not level but is instead sharply slanted. Imagine, for example, an athletic competition in which one side is denied a powerful weapon—say, the forward pass—while the other is permitted to deploy this weapon freely, because the rules prevent the first side from doing anything to counter it (such as knocking down the ball). Moreover, changes in the rules are not permitted because they would violate the charter that established the game in the first place.

Surely, we would say that such a competition is rigged. Yet, something like this describes the predicament of minority victims of hate speech. Conservatives cannot allow themselves to see this, however, since it goes against some of their most basic assumptions, free competition and merit.

109. See MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* (1993) (discussing the harms of hate speech); see also Brown, *supra* note 1 (same).

110. See Delgado, *Legal Realist View*, *supra* note 1, at 797 (discussing “honky”).

111. *Id.* (discussing “redneck”).

112. See RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* 47–76 (2004) (chapter 4, “The Strange Career of Four Special Words”).

113. See *supra* Part IV.

But hate speech will not go away by merely insisting on ideologically based truths that “must be so,” by suggesting responses that “ought to work,” or by blaming the victim or telling him that the problem is all in his head. It renders campuses uncomfortable and threatening to young students at vulnerable points in their lives. It helps construct and maintain a social reality in which some are constantly one-down. It creates and tolerates a culture at odds with our basic commitments and values.

Coming to terms with it does pose serious problems for a society committed both to equality and to freedom of speech.¹¹⁴ But resorting to facile arguments like those discussed here does little to help. Those who make them should allow themselves to see what almost everyone else does—that hateful remarks and invective are a virulent form of inequality reinforcement—and join the serious search now gaining force for a remedy.

Derrick Bell, Martin Luther King Jr., and their followers in the critical race theory school would find the conservatives’ arguments against hate-speech rules even less worthy of serious consideration than those that their liberal counterparts deploy. Some are simple power moves;¹¹⁵ as such they violate Martin Luther King Jr.’s hope for a loving community.¹¹⁶ Others, by depicting reasonable university regulations as evincing a crybaby attitude or an upper-class bias fly in the face of an insistent demand that legal rules rise or fall based on how they seem from the bottom up.¹¹⁷ We are, then, left with a vexing dilemma: How to manage a situation in which legal rules and hopes collide?

114. See Delgado, *Campus Antiracism Rules*, *supra* note 1 (demonstrating how the twin narrative or constitutional paradigms equality and free speech collide in terms of case law, political theory, historical heroes and martyrs, and sacred texts, and suggesting at least one means of resolving this standoff); Delgado & Stefancic, *Four Observations*, *supra* note 3, at 357–58 (same).

115. See *supra* notes 52, 60–62, 81–83, 111 and accompanying text.

116. See, e.g., Obery M. Hendricks Jr., *Martin Luther King, the Beloved Community and the Socialist Idea*, HUFFPOST (Mar. 2, 2014, 11:14 PM), https://www.huffingtonpost.com/obery-m-hendricks-jr-phd/martin-luther-king_b_4886641.html [https://perma.cc/DV87-RHY4].

117. See, e.g., Mari Matsuda, *Looking to the Bottom: Critical Race Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (extending Rawls’ difference principle to issues of race and distributive justice).

CONCLUSION: STRIKING THE BALANCE WITH AN EYE TO THE TIMES

The best approach may be to take both sides seriously.¹¹⁸ Society should strike a balance between the two sets of values—equal protection and free speech—at play in light of current social needs.¹¹⁹ Essentially, society needs free speech values when it is stuck.¹²⁰ These values facilitate change, contestation, and challenges to orthodoxy.¹²¹ They should preponderate during times of social stasis, when society as a whole begins to feel the need for broad systemic changes in how we live and govern ourselves. During these times—such as the Sixties—we should allow wide scope for challenging, even scathing speech. It behooves us, during these times, to tip the balance in favor of what society then needs most, namely change.

At other times, however, society's foremost needs lie in protecting groups that are in need of breathing space and an opportunity to consolidate gains. In times like these, the opposite needs take first place. Society then must tend to equal protection and human dignity. New groups need a chance to find their places. Displaced workers need time to adjust to a new economy. Global forces require nations to find new relations with one another. Technology demands changes in how we communicate, find information, relate to one another, and entertain ourselves. These are periods of social turmoil, strain, and upset.

As a glance at any day's headlines will show, we are now in such a period, one in which equal protection values take precedence over ones associated with the First Amendment. During times like these, fledgling groups are in need of protection. They need society to be predictable and the social institutions trustworthy. In short, they need the values of equal protection more than those of social change and ferment.

118. See Richard Delgado, *Free Speech Progressive or the Opposite?*, FIRST AMEND. WATCH (June 27, 2018), <https://firstamendmentwatch.org/first-amendment-watch-roundtable-richard-delgado-responds-to-louis-michael-seidman/> [<https://perma.cc/J47R-5QGV>].

119. *Id.*

120. See, e.g., Edward Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984) (noting the destabilizing ability of protest and counterspeech, and distinguishing free-speech rights from other constitutional values which are in danger of being empty, indeterminate, and useless for social movements).

121. *Id.*

Today, hate crimes are up,¹²² conservative forces rule,¹²³ immigrants are under threat,¹²⁴ and society threatens religious bans on who may immigrate here.¹²⁵ It is time to remind everyone—indeed, each other—of the need to proceed with equality and equal personhood in mind. This would include protection for struggling groups encountering a tide of hate speech in institutions such as college campuses. That effort, of course, generates powerful reactions from the free-speech side, which warns against moving too far in that direction. And so, the social dialectic proceeds, one liberty-enforcing period followed by one of civil rights activism, and so on into the foreseeable future. We should be careful to understand how the dialectic works and remember that each side's values are part of the vital course of human events. Otherwise, we may fall into the dangerous trap of succumbing to the loudest voice when, sometimes, it is the softer one that most merits our attention.

-
122. *F.B.I.: US Hate Crimes Rise for Second Straight Year*, BBC NEWS (Nov. 13, 2017), <http://www.bbc.com/news/world-us-canada-41975573> [<https://perma.cc/43H9-SKDN>].
 123. Lee Edwards, *Can Conservatism Rise Again?*, HERITAGE FOUND. (Mar. 10, 2017), <https://www.heritage.org/conservatism/commentary/can-conservatism-rise-again> [<https://perma.cc/PWP6-W2GW>].
 124. *E.g.*, Michael D. Shear & Julie Hirschfeld Davis, *Trump Threatens to Deport Dreamers and Urges Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/us/politics/trump-daca-dreamers-immigration.html> [<https://perma.cc/XF89-QQZ3>].
 125. Richard Wolf, *Supreme Court Shows Support for President Trump's Immigration Travel Ban*, USA TODAY (Apr. 25, 2018, 11:41 AM), <https://www.usatoday.com/story/news/politics/2018/04/25/supreme-court-support-president-trump-immigration-travel-ban/547495002/> [<https://perma.cc/2Q4T-LA2K>].