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EQUALITY AND FREEDOM OF EXPRESSION: THE HATE SPEECH DILEMMA

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"The plain fact is that not all free speech is good speech. Which means that freedom of speech is not always a sound or just public policy."¹

"It is central to the idea of a liberal society that, in respect to words as opposed to deeds, persuasion as opposed to force, anything goes. . . . *A liberal society is one which is content to call 'true' whatever the upshot of [free and open] encounters turns out to be.*"²

I.

Harry Kalven, Jr., once wrote: "One is tempted to say that it will be a sign that the Negro problem has basically been solved when the Negro begins to worry about group-libel protection."³ If Kalven was right, then perhaps one ray of hope relieves the bleak evidence of a lack of progress, if not a downright retrenchment, in the struggle to overcome racism. In recent years, several statistical sources have indicated that bias-motivated physical violence and verbal hostilities are on the rise.⁴ College campuses in particular have reported an alarming increase in verbal altercations in which minority and women students have been the targets of demeaning, sometimes vicious expression.⁵ These re-

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1. W. BERNIS, FREEDOM, VIRTUE AND THE FIRST AMENDMENT 125 (1957).

2. R. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 51-52 (1989).

3. H. KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 11 (1966).

4. See, e.g., 1 SYNTHESIS: LAW AND POLICY IN HIGHER EDUCATION No. 1, at 1 (Jan. 1989); Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. Times, May 29, 1990, at C1, col. 1 (reporting on the data that indicate that hate crimes have increased since 1988). Firmer figures on bias crimes may soon be forthcoming, insofar as the Justice Department, pursuant to a new law, will conduct a five-year study of crimes motivated by racial, religious, ethnic, or sexual prejudice. The authorizing statute is the Hate Crime Statistics Act, Pub. L. No. 101-275, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 140 (approved Apr. 23, 1990). See Rosenthal, *President Signs Law for Study of Hate Crimes*, N.Y. Times, Apr. 24, 1990, at B6, col. 6.

5. See, e.g., Cole, *Background to the University of Michigan Policy Development*, in REGULATING RACIAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM 13 (T. Hustoles &

ports prompted attempts to regulate racial and other forms of verbal abuse on campus,⁶ which in turn spawned legal action⁷ and critical commentary.⁸ The focus of the commentary has been the uneasy tension between robust protection of offensive expression and protection of the dignity and physical integrity of potential victims of such expression.

The issue, of course, is hardly new. In the late 1970's, many people participated in similar discussions when Frank Collin, an avowed Nazi sympathizer, proposed to give a speech in the predominantly Jewish community of Skokie, Illinois.⁹ During the late 1940's and early 1950's, commentators confronted related issues when group libel statutes were enacted in response to World War II's sobering lessons about the peculiar seductiveness of hate speech.¹⁰ Indeed, these two eras epitomize the two competing national instincts that make the problem of hate speech so wrenchingly difficult.

In 1952, the Supreme Court sided with those who believe that hate speech is subject to state regulation because of the state's interest in preventing violence and in protecting the esteem and dignity of its citizens.¹¹ By the 1970's, however, the judicial response to offensive speech shifted toward granting this expression broad first amendment protection, lest the government engage in impermissible content regulation of speech.¹²

W. Connolly, Jr., eds. 1990) (Publication of the National Association of College and University Attorneys); France, *Hate Goes to College*, 76 A.B.A. J. 44, 44 (1990); Metz, *Bad Apples, Evil Deeds*, STUDENT LAW., Feb. 1990, at 33, 33; Fiske, *Fabric of Campus Life Is In Tatters, A Study Says*, N.Y. Times, Apr. 30, 1990, at A15, col. 1; Carmody, *Trying to Make Campuses Civil (and Safe) Again*, N.Y. Times, Nov. 22, 1989, at B10, col. 3.

6. See REGULATING RACIAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM, *supra* note 5, at 57-130 (collecting campus speech regulation policies and policy drafts from Stanford University, The University of Texas, University of California, University of Wisconsin System, New York University School of Law, Harvard Law School, University of North Carolina-Charlotte, and Emory University).

7. Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); see Case Comment, *Recent Case: First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech*, 103 HARV. L. REV. 1397 (1990) (commenting on Doe).

8. See, e.g., Finn, *The Campus: "An Island of Repression In a Sea of Freedom,"* COMMENTARY, Sept. 1989, at 17; Hentoff, *Watching What You Say on Campus*, Wash. Post, Sept. 14, 1989, at A23, col. 3.

9. See D. DOWNS, NAZIS IN SKOKIE (1985); D. HAMLIN, THE NAZI/SKOKIE CONFLICT: A CIVIL LIBERTIES BATTLE (1980).

10. See Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167 (1955); Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942); Wilson, *Beauharnais v. Illinois, Bulwark or Breach?*, 14 CURRENT ECON. COMMENT 59 (1952); Note, *Statutory Prohibition of Group Defamation*, 47 COLUM. L. REV. 595 (1947).

11. *Beauharnais v. Illinois*, 343 U.S. 250, 258-63 (1952).

12. See, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

The revival of this debate in the 1990's reveals that neither resolution proved entirely satisfactory. In recent legal scholarship, writers have proposed three approaches to hate speech, each with its own internal complexities and variations. The first approach allows hate speech in order to maximize opportunities for individual expression and cultural regeneration.¹³ The second, highly controversial approach represses hate speech through sanctions that range from official and private reprimands to criminal prosecutions in order to promote equality and the non-subordination of potential hate speech targets.¹⁴ Aggressive versions of this approach urge that hate speech should be punishable only when directed at members of a historically subordinated group, not dominant group members.¹⁵ The third, emerging approach attempts to accommodate the "worthy passions" of the first two approaches.¹⁶ The accommodationists endorse tightly worded, cautiously progressive measures that tend to proscribe only targeted vilification of a person on the basis of race, gender, religion, ethnic origin, sexual orientation, or other protected characteristics.

For people who, like the accommodationists, resonate to poles of this debate, the issue can seem irresolvable. The issue is difficult even for people who have very strong ties to potential or actual victims of these slurs. One of my students, the daughter of two Nazi concentration camp survivors, is a striking example of this tendency. She has observed firsthand the psychological aftermath of religious persecution and, as she puts it, "the extreme fragility" of this Jewish subculture.¹⁷ Despite her close familiarity with the personal consequences of this persecution, however, she is unsure whether religious hate speech should be denied constitutional protection:

When I read the arguments for criminalizing this speech, or for disallowing the Nazis to speak in Skokie, I am utterly persuaded. Then, when I read the counterarguments that favor allowing this speech, even in Skokie, I think "That's right too." If I had to decide, I think I would say that *this* population is

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13. See *infra* notes 67-87 and accompanying text.

14. See *infra* notes 88-166 and accompanying text.

15. See Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357-58 (1989).

16. See Grey, *Civil Rights v. Civil Liberties: The Case of Discriminatory Verbal Harassment*, SOC. PHIL. & POL'Y, Spring 1991, at 81.

17. Interview with Gloria Goldman (Apr. 1990).

unique and should be protected from the psychological harms of reliving the Holocaust. But I am torn, and would be disinclined to go much further.¹⁸

Many people share this woman's empathy with the potential victims of hate speech, yet are uncertain that suppressing harmful speech is the lesser evil. Even people who themselves have been targets of these assaults have expressed hesitation.¹⁹

The competing concerns that make this controversy so difficult include both abstract, constitutional, and philosophical factors and intensely concrete, practical ones. The central constitutional dilemma is that the Bill of Rights protects both individual autonomy and certain collective goals, like equality. This constitutional paradox in turn reflects a more general, philosophical quandary: we strive to reconcile the competing claims of contingency and solidarity²⁰ and to protect the special role of free discourse in a society, like ours, that is responsive to both claims. Disagreements regarding the constitutional meaning of equality, the proper role of government in inculcating values, and the constitutional and social significance of group identity versus individual personality further compound these theoretical complexities.

Practical problems add to the theoretical difficulties. First, both of the proposed "solutions" to the problem of hate speech—suppression and protection—evoke nonfrivolous charges that they will cause serious social harms. They conjure up the dual spectres of McCarthyism on the one hand and spirit-murdering²¹ denials of equality on the other. Second, both proposals may trigger forceful opposition. Protecting hate speech, especially in controlled environments like the workplace or school, fosters an atmosphere of incivility and tension, which can give rise to unrest and even physical disruptions. Yet, suppressing hate speech, especially under the "one-way" proposals of some civil rights theorists, risks charges of censorship or reverse discrimination, which likewise can give rise to intergroup hostilities and potential disruptions. Another student expressed this latter concern during a seminar discussion of this problem. As he put it, "There is no

18. *Id.*

19. See, e.g., A. NEIER, *DEFENDING MY ENEMY* (1979); Gunther, *No*, *STANFORD LAW*, Spring 1990, at 7.

20. This is Richard Rorty's phrase. See R. RORTY, *supra* note 2, at xiii-xvi.

21. This is Patricia Williams' phrase. See Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

way, in the high school that I attended, that the students would accept a rule that said the blacks could call the whites racist names, but the whites could not call the blacks racist names. The students would laugh in your face, or worse.”²²

Finally, there are the formidable problems of defining an epithet or slur and containing the adverse consequences of restricting this speech. Is it racist, for example, to state that African-Americans are better athletes than whites?²³ Is it homophobic to declare that AIDS is a product of reckless gay male sexual practices?²⁴ People express concern that the rules that restrict hate speech will be overbroad and could stultify intergroup discourse or chill academic discourse,²⁵ political satire or social commentary,²⁶ contemporary rap music, or other forms of artistic expression.²⁷ Many worry that regulation of hate speech will lead

22. Remarks made during Education Curriculum and the Law Seminar, Stanford Law School (Fall 1990).

23. The Jimmy-the-Greek debacle raised this issue. He was fired from his job as a sports commentator after making stereotypical comments about African-American athletes. *E.g.*, Goodwin, *CBS Dismisses Snyder*, N.Y. Times, Jan. 17, 1988, at E1, col. 5.

24. Andy Rooney made similar remarks during an edition of the *60 Minutes* television program, which prompted charges of bias against gays. The reactions to his remarks, and to his short-term suspension for making these remarks, varied. *See, e.g.*, Gerard, *CBS News President Ends Rooney's Suspension*, N.Y. Times, Mar. 2, 1990, at C32, col. 3; Gartner, *Silencing Rooney, Or Anyone, Hurts Us All*, Wall St. J., Feb. 22, 1990, at A15, col. 4; Rabinowitz, *Echoes of the '50s in Rooney Witch Hunt*, Wall St. J., Feb. 14, 1990, at A14, col. 4.

25. A recent controversy at City College in New York raised the issue of “academic freedom” and racism. A white professor, Dr. Levin, wrote three articles in which he claimed empirical support for the view that, on the average, African-Americans are significantly less intelligent than whites. An African-American professor, Dr. Jeffries, argued that “ice people”—people of European ancestry—are fundamentally materialistic and intent on domination, whereas “sun people”—people of African ancestry—are essentially humanistic. The viewpoints expressed by Dr. Levin drew a negative response and prompted an investigation by the faculty and administration; those of Dr. Jeffries did not. This disparate treatment triggered discussion regarding whether and when academic freedom should encompass remarks that some people regard as both bad science and racist. *See* Berger, *Professors' Theories on Race Stir Turmoil at City College*, N.Y. Times, Apr. 20, 1990, at B1, col. 2; *cf.* Schlesinger, *When Ethnic Studies Are Un-American*, Wall St. J., Apr. 23, 1990, at A14, col. 1 (arguing that “the cult of ethnicity, pressed too far, exacts costs—as, for example, the current pressure to teach history and literature not as intellectual challenges but as psychological therapy”).

26. The Rooney controversy brought this concern to public attention. *See* Gartner, *supra* note 24; *see also* Barron, *Andy Rooney Returns to “60 Minutes,”* N.Y. Times, Mar. 5, 1990, at C14, col. 4.

27. The recent banning of the album *As Nasty As They Wanna Be*, by the African-American group 2 Live Crew, raises the issue of censorship and racism. A federal district court judge in Florida declared the 2 Live Crew album obscene. *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578 (S.D. Fla. 1990); *see also* Gates, *2 Live Crew, Decoded*, N.Y. Times, June 19, 1990, at A23, col. 2; McFadden, *Shock Greet Banning of Rap Album*, N.Y.

to regulation of other forms of offensive and confrontational speech, like flag burning or other political expression. Some grouse that the attempt to control hate speech may be manipulated to attempt to enforce "politically correct" attitudes, with a strong tilt toward the left. Others, more sympathetic to the regulation proposals, worry that once hate speech regulation identifies certain terms as unlawful epithets and slurs, inventive racists will coin new ones faster than the regulators can master the new vocabularies. Indeed, the effort to regulate may inspire these inventions or send them underground.²⁸ Many people argue, therefore, that no *workable* solution to hate speech is possible. Any regulation would be either too chilling of good speech or so narrow as to be purely symbolic and likely unenforceable.

Proponents of hate speech regulation have offered rejoinders to these practical arguments. First, they argue that until we adopt these measures we cannot know whether they will prove effective or have bad side effects. Other countries that have adopted group libel laws—including Canada and Great Britain—have not reported a catastrophic erosion of civil liberties or free

Times, June 8, 1990, at A10, col. 1.

Some observers argue that the selective enforcement of obscenity laws may be explained by racism and by the dominant culture's misapprehension of the culture-specific "hyperbole" and the "vernacular traditions of African-Americans" within the lyrics. Gates, *supra*. As such, enforcement of speech regulation—including hate speech regulation—may repress outgroup, countercultural expression more often than expression of the dominant culture.

The recent Mapplethorpe controversy and the restrictive language attached to the 1990 appropriations bill for the National Endowment for the Arts raise related concerns. The worry is that expansion of the category of punishable "obscene" or "offensive" speech will chill homoerotic artistic expression. See Blau, *Among Arts Grantees, Some Reservations But Few Rejections*, N.Y. Times, July 9, 1990, at B1, col. 1; Honan, *Arts Endowment Withdraws Grant For AIDS Show*, N.Y. Times, Nov. 9, 1989, at A1, col. 2.

For a thoughtful commentary on recent freedom of speech issues and the increasing willingness of longstanding civil liberties advocates to consider restrictions on speech to promote other values, see Lewis, *Friends of Free Speech Now Consider Its Limits*, N.Y. Times, June 29, 1990, at B7, col. 3. Lewis uses the flag burning controversy, the hate speech debate, and the banning of 2 Live Crew's album as examples of issues that divide first amendment commentators and suggests that dissimilar treatment of these three types of offensive speech may be difficult to justify. Yet, those who favor banning hate speech often are opposed to banning 2 Live Crew records or flag burning. See *id.* at col. 5.

28. See, e.g., Beth, *supra*, note 10, at 181-82 (arguing that group libel laws are ineffective, in part because they strike at the manifestation of prejudice instead of the prejudice itself); Gibbs, *Bigots in the Ivory Tower*, TIME, May 7, 1990, at 104, 106 (arguing that speech regulation drives obnoxious impulses underground, "along with many ideas that deserve to be aired").

speech.²⁹ Second, the fact that a statute is largely symbolic or educational hardly renders it a useless measure. The symbolic and educational effects of a public law may be good and worthwhile.³⁰ Third, the reformers observe that many laws are quite difficult to enforce,³¹ but this does not mean we should not have enacted them. Finally, hate speech proponents reply that we can define hate speech in a sensible and just manner. Useful, workable terms that are equally fluid and contextual abound in law,³² such as "reckless behavior," "obscenity," "invasion of privacy," and "intentional infliction of emotional distress."

These philosophical, constitutional, and practical factors illustrate the extreme difficulty of striking an appropriate balance between the strong claims of civil discourse and the strong claims of untrammelled expression. In the following pages, I explore these complexities in greater detail and defend my endorsement of an accommodationist approach to hate speech regulation.

II.

Perhaps a cause, but certainly a reflection, of our ambivalence toward untrammelled speech is the Supreme Court's first amendment jurisprudence. The Court has assigned varying degrees of protection to different types of speech, depending on the purported social value and potential harm of the speech. For example, the Court has concluded that obscenity promotes no worthwhile first amendment end and thus is not protected speech.³³ Commercial speech,³⁴ defamation,³⁵ speech in schools³⁶ and in the

29. See, e.g., Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 333; Matsuda, *supra* note 15, at 2341-48.

France recently joined this international effort, when the French National Assembly approved a bill that would bar anyone guilty of inciting racial hatred from holding elected office or government jobs. See *France Enacts Penalties for Inciting Racism*, N.Y. Times, May 4, 1990, at A7, col. 5. This bill was apparently a response to recent violence in France against Arab immigrants and, in particular, to Jean Marie Le Pen, a French conservative politician who employed racism in his political arguments and campaigns.

30. See, e.g., Grey, *supra* note 16, at 104-05.

31. Such laws include laws against sexual assault, job discrimination, defamation, drug trafficking, or domestic violence.

32. See, e.g., Arkes, *supra* note 29, at 294-95.

33. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-61 (1973) (upholding the constitutionality of a ban on pornography).

34. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-63 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-71 (1976).

35. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974) (involving a private figure); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (involving public officials).

36. See, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986).

workplace,³⁷ and speech that inflicts intentional emotional distress³⁸ all receive less than full first amendment protection.

Yet the Court also has said that "[t]here is no such thing as a false idea,"³⁹ that "[o]ne man's vulgarity is another's lyric,"⁴⁰ and that speech content is an inappropriate basis for government speech regulation.⁴¹ Most recently, in its controversial flag burning cases, the Court reaffirmed its commitment to the general notion that the offensiveness of expression, by itself, is not grounds for its suppression.⁴² Speech that falls outside of the Court's designated categories of "low value" expression thus cannot be censored absent an imminent danger of serious disruption⁴³—a clear and present danger.

Taken together, these holdings reveal an uneven, fitful pattern of protection for speech and an unwillingness to give full weight to the bromide that the best cure for bad speech is always, and only, more speech. The Court has acknowledged that, in some circumstances, with certain types of expression, the state may interrupt the message or even ban it altogether.⁴⁴

Most constitutional experts nevertheless interpret the Court's current position to be that racial and other types of epithets and insults are "high value," maximally protected speech, unless they are "fighting words," uttered face-to-face and likely to trigger physical violence.⁴⁵ According to some scholars, the justifications for this protection are that we must: defend against a slide down

37. See, e.g., *Connick v. Myers*, 461 U.S. 138, 146-49 (1983).

38. See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (involving a public figure).

39. *Gertz*, 418 U.S. at 339-40.

40. *Cohen v. California*, 403 U.S. 15, 25 (1971).

41. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92, 100-01 (1972) (noting that "[p]redictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter") (emphasis added). See generally Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194-97 (1983) (discussing the "merits and limitations of the content-based/content-neutral distinction").

42. *United States v. Eichman*, 110 S. Ct. 2404 (1990); *Texas v. Johnson*, 109 S. Ct. 2533, 2541 (1989). See generally Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1982) (discussing the Court's unwillingness to hold that symbolic flag burning is constitutionally protected speech).

43. *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940); see also *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (concluding that the state could not punish speech given at a rally by a Ku Klux Klan leader absent a showing of incitement of imminent lawless action).

44. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

45. *Id.* at 572.

the slippery slope of constitutional protection into unreasonable repression of "good speech";⁴⁶ remain steadfast in our commitment to government neutrality toward speech content;⁴⁷ teach the national value of tolerance through restraint of the strong inclination to silence dissonant voices;⁴⁸ secure greater liberty and social stability by permitting this rancorous speech and thereby defusing or exhausting the hostility through speech ventilation, rather than physical violence;⁴⁹ and finally, trust the audience to reject bad ideas and embrace good ones.

Thus, if a Nazi sympathizer today wishes to give a public speech extolling the virtues of Hitler, he may do so. Moreover, if the crowd reacts with shouting or threats of physical violence, the appropriate police response is to contain the hecklers, if possible, not to punish the speaker.

Although in 1952 the Court upheld a "group libel" statute that criminalized the speeches of a neo-Nazi or any other speaker who "'exposes the citizens of any race, color, creed or religion to contempt,'" ⁵⁰ later cases cast serious doubt upon whether that decision remains good law.⁵¹ Consequently, a conservative reading of contemporary constitutional law reveals that hate speech cannot be suppressed unless it satisfies the very narrow conditions of the Court's fighting words doctrine.⁵²

46. Matsuda, *supra* note 15, at 2351 n.164 (describing argument made by several people who oppose her recommendation that racist speech be criminalized).

47. See, e.g., T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 398 (1970); F. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 97 (1981). For a relatively recent discussion by the Supreme Court of the content-neutrality doctrine, see *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754-46 (1989).

48. See L. BOLLINGER, *THE TOLERANT SOCIETY* 237 *passim* (1986); cf. D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 192 (1986) (arguing that group libel laws violate a contractarian theory of the first amendment and ignore that "[w]e most undercut, as a democratic community of equal respect, substantive ideologies of racial and other inequalities when our principles extend to exponents of such views the dignifying equal respect for their moral powers as persons"). Both Bollinger and Richards evince considerable optimism about the possibility of reclaiming and reforming those who hold deep prejudices through the therapeutic/moral process of treating them as equals capable of rationality and reasonableness. Critical race theorists are fairly skeptical about the usefulness of this sort of redemption-through-dialogue.

49. See generally T. EMERSON, *supra* note 47, at 6-7 (describing the stabilizing function of free speech, under which open airing of expression avoids the violent movement that repression might trigger). But see Matsuda, *supra* note 15, at 2352 n.166 (arguing that history belies the claim that airing racist speech reduces racial violence; on the contrary, "escalating racist speech always accompanies escalating racist violence").

50. *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952) (quoting ILL. REV. STAT. ch. 38, § 471 (1949)).

51. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1966); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

52. The Court first described the fighting words doctrine in *Chaplinsky v. New*

This reading renders unconstitutional several of the proposed forms of hate speech regulation, including the University of Michigan's notorious, broadly worded disciplinary rules⁵³ and other reform efforts that go beyond face-to-face verbal attacks to include group libel as a disciplinable offense.⁵⁴ Some people further argue that statutes that specifically name racist, sexist, homophobic, or other forms of harassment as grounds for punishment are also unconstitutional, insofar as these statutes are overbroad, vague, and impermissible forms of viewpoint discrimination.⁵⁵

A conservative reading, however, is not the only possible interpretation of the case law. Several writers argue that if we examine the Court's first amendment doctrine as a whole and measure the value of epithets and slurs against the traditional justifications for first amendment protection, then a different picture emerges.⁵⁶ A longer, more comprehensive view of the matter shows that the Court already has approved content-specific speech regulation for reasons that resemble those offered in favor of hate speech regulation. Moreover, the case law repeatedly recognizes that, in some settings, privacy and other interests justify speech regulation. Analogies to obscenity, intentional infliction of emotional distress, physical assault, sexual harassment at work, and the law of defamation support the claim that even traditional free speech principles, coupled with principles of equality as expressed in *Brown v. Board of Education*,⁵⁷ indicate that hate speech regulation is, or should be, constitutional.⁵⁸

To the extent that the case law does not comfortably support the most radical arguments for criminalizing hate speech, how-

Hampshire, 315 U.S. 568 (1942). Subsequent decisions have narrowed considerably—some say they have obliterated—this exception. *See, e.g.*, *Lewis v. City of New Orleans*, 415 U.S. 130, 133-34 (1974); *Plummer v. City of Columbus*, 414 U.S. 2, 3 (1973) (per curiam); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Gooding v. Wilson*, 405 U.S. 518, 522-24 (1972). As Charles Lawrence noted, however, several of these cases involved defendants who made offensive remarks to people in positions of relative power over the speaker. *See Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 453 n.92.

53. *See Doe v. University of Mich.*, 721 F. Supp. 852, 856-58 (E.D. Mich. 1989).

54. *See, e.g.*, Matsuda, *supra* note 15, at 2357-58.

55. *See, e.g.*, Heins, *A Comment on "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 588 (1983) (critiquing Richard Delgado's proposed adoption of a separate tort for racist speech).

56. *See, e.g.*, Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 178-79 (1982); Matsuda, *supra* note 15, at 2349-51.

57. 347 U.S. 483 (1954).

58. *See, e.g.*, Matsuda, *supra* note 15, at 2348-51.

ever, some writers urge a rethinking of the old parameters and an extension beyond the prevailing metaphors and clichés. For example, they describe the “marketplace of ideas” metaphor⁵⁹ as misleading and insensitive to the relative market power of different speakers.⁶⁰ They critique the counterspeech remedy for bad speech as insufficiently mindful of the disutility and even physical danger of meeting some forms of verbal harassment with verbal repartee.⁶¹ Indeed, the general, traditional free speech justifications appear quite feeble when they are invoked in defense of the specific example of hate speech. Thus, say some scholars, judges should move beyond formalism and contextual theory, lest we “degenerate from an abiding faith in the First Amendment to an obsession with the ‘alluring abstractions’ of neutral principles.”⁶²

In particular, the advocates of hate speech suppression underscore the concrete psychological and physical harm that hate speech causes its victims.⁶³ Such speech, they admonish, is a far cry from the type of reasoned, political discourse thought to be core value first amendment expression.⁶⁴ Moreover, these private acts of repression—no less than any official policy of discrimination—can constitute flagrant denials of the principles of equality and full political participation of all citizens.⁶⁵ Interweaving narratives and personal anecdotes into their doctrinal arguments, the civil rights theorists submit that hate speech is speech that government both can, and should, regulate—far more than the narrow fighting words exception allows.⁶⁶

Doctrine therefore yields no clear answer to whether the first amendment protects speech that is as confrontational and potentially destructive of human dignity and social solidarity as is hate speech. The Court’s holdings can be construed—or extended—to support either suppression or protection of verbal harassment, though not with equal ease. In any event, the dominant interpretation, which suggests this speech is protected, is subject to

59. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

60. See, e.g., Lawrence, *supra* note 52, at 468 (“The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade.”).

61. See *id.*; Matsuda, *supra* note 15, at 2355-56.

62. L. TRIBE, *CONSTITUTIONAL CHOICES* 219 (1985) (quoting *Lathrop v. Donohue*, 367 U.S. 820, 849 (1961) (Harlan, J., concurring)).

63. See Matsuda, *supra* note 15, at 2331-41.

64. See, e.g., Delgado, *supra* note 56, at 175-79.

65. See Matsuda, *supra* note 15, at 2337-39.

66. See, e.g., *id.*

substantial criticism, as the critical commentary and the Court's vacillating position on the matter prove.

One thing is clear from the case law and the critical commentary: both the Court and nearly all theorists agree that government can regulate speech when the potential harm of allowing the expression seriously outweighs the potential harm of suppressing it. The disagreements thus spring from different estimations of the degree and nature of the harm in hate speech and the harm in its suppression, which arise from competing visions of the world as it stands and the ideal conditions to which we should aspire. Understanding these underlying assumptions and perfectionist aims is an essential first step toward a sensitive response to the hate speech dilemma.

III.

The approach to hate speech that is most familiar to contemporary Americans is that urged by the civil liberties theorists. Their argument, which urges broad protection of offensive expression, hinges on faith and fear. The faith is in people's capacity to withstand, reject, or fob off insults, or to engage in critical and effective counterexpression. The fear is of people's tendency to define the category of offensive ideas too broadly and idiosyncratically, so as to suppress important criticisms of orthodoxy and to curtail revolutionary possibilities and individual creativity. The analytical premise of the civil liberties approach is that freedom of expression is the baseline condition of democracy.⁶⁷

Civil libertarians insist that government cannot censor or hinder speech on the basis of the viewpoint expressed, no matter how offensive.⁶⁸ They reject the argument that racial insults and epithets are mere inarticulate grunts undeserving of protection. Slurs are words, and as such have ideational content, however vulgar and confrontational. Government thus cannot cut off this expression unless and until a fight or other serious disruption is imminent.⁶⁹ Otherwise, government would be violating the principle of content neutrality by distinguishing among ideas and privileging some viewpoints over others.⁷⁰ The civil liberties theorists posit that regulation of racial or other specific types of

67. Beth, *supra* note 10, at 180.

68. See, e.g., R. RORTY, *supra* note 2, at 51-52.

69. See, e.g., F. HAIMAN, *supra* note 47, at 94-99.

70. See *supra* note 41 and accompanying text.

epithets and insults is unconstitutional because it implicitly favors one viewpoint—that discrimination against someone because of her race, gender, ethnicity, sexual preference, or religion is wrong—over others—that members of these groups are bad, inferior, or otherwise deserving of contempt.

The argument that hate speech regulation constitutes nonneutral, content-based discrimination is a powerful and rather subtle objection that may become clearer with an example. Assume that male students yelling “faggot” verbally assault a gay man on a college campus. Nearly everyone would agree that this speech is offensive and hurtful. A libertarian, however, would argue that regulation of this insult, but not other kinds of wounding verbal insults (for example, “asshole”), implicitly embraces the normative statements that homosexuality is an acceptable lifestyle and that discrimination on the basis of sexual preference is wrong. One might respond that a content-neutral explanation justifies the selective regulation; that is, the injury is greater with a sexual preference insult than with other slurs because of the history of pervasive legal and social discrimination against gays and lesbians. But members of many groups—such as people with handicapping conditions—likewise could claim a history of social abuse and legal injury. If, at the root, the argument for punishing the epithet “faggot” without punishing all demeaning slurs includes the normative claim that discrimination on the basis of sexual preference is wrong, or worse than other forms of insults, then the argument does seem to violate a strict neutrality principle. Moreover, the particular normative claim it implies does not coincide with majority attitudes.⁷¹ If some people believe that homosexuality is wrong, and if some of them express this viewpoint venomously and inelegantly by calling someone a faggot, then how can we demand that they be silenced without making a controversial judgment about the content of their expression? Unless we ban *all* such insults and epithets, or equally hurtful means of expressing our unease with another’s difference, then we seem to be endorsing government regulation of the content, if not the viewpoint, of the speech.

71. In a survey conducted in 1988, 74% of the respondents responded affirmatively to the statement “[h]omosexuality is always wrong.” In 1973, only 70% responded affirmatively. R. NIEMI, J. MULLER, & T. SMITH, *TRENDS IN PUBLIC OPINION: A COMPENDIUM OF SURVEY DATA* 195 (1989). In 1988, however, 57% responded affirmatively to the question whether homosexuals should be allowed to teach college, whereas in 1973 only 47% agreed with this statement. *Id.* at 123.

If this characterization is an apt description of the impact of hate speech regulation, then one can readily appreciate why many first amendment defenders, especially libertarians, feel compelled to condemn such regulation. To them, the underinclusiveness of the regulation is a sign of an underlying governmental preference for the idea of nondiscrimination. However worthy and widespread this idea may be, some theorists insist that government cannot promote nondiscrimination by censoring speech in opposition to it.⁷²

One might instead propose that racial or gender epithets, rather than homophobic slurs, are a more appropriate subject for suppression, because fourteenth amendment jurisprudence makes clear our public stance toward the idea of race and sex discrimination, whereas discrimination against gays and lesbians is not, at present, unconstitutional. In other words, hate speech regulation is supportable whenever the speech is directed at members of a "suspect (or quasi-suspect) class," as defined by equal protection jurisprudence.

Civil libertarians also would reject this refinement, however, because it draws political consensus justifications into the argument for suppressing speech, a move that collides directly with the conventional wisdom that the first amendment exists primarily to protect the right of political dissidence. In essence, the argument implies that national consensus, as expressed in the emerging interpretations of the Bill of Rights, is a proper limitation on free speech. The obvious problem with this argument is that if we freeze national consensus at any particular historical moment and repress all speech that is seriously inconsistent with, or regresses from, that viewpoint, then we will curtail revolutionary possibilities. In many ways, subordination and equality are contested, contextual, and fluid phenomena. Although we may be willing to bound our interpretations of the fourteenth amendment to current estimations of equality, the free speech clause is more future-directed and focused on generating alternative interpretations.

A second objection to anchoring an argument for repressing racial or other epithets to the Constitution is that this makes possible the awkward argument that these epithets are a form of political counterexpression. For example, a vulgar sexist slur could be characterized as a revolt against the fourteenth amend-

72. Cf. Heins, *supra* note 55, at 592 n.39 ("Tolerating ugly, vicious speech is a small but necessary price to pay for the freedom to advocate social change and justice.").

ment proscription of discrimination against women. This move would locate hate speech in the "core" of first amendment protection and thus would strengthen the claim that it deserves the highest level of speech protection.

A final objection to an argument that invokes majoritarian values in defense of speech suppression is that this argument runs contrary to the basic assumption that the first amendment exists to protect the minority from an oppressive "pall of orthodoxy."⁷³ The Bill of Rights, after all, is the antimajoritarian rider to the democratic Constitution. It exists to protect the individual from the overwhelming force of the community, at least in some isolated and "fundamental" respects. Thus, although a majority of the community may wish to express its commitment to equality by censoring speech that vilifies people because of their race or other protected status, the first amendment prevents it from doing so. The community can restrict the act of discrimination or engage in activity or speech that fosters equality, but it cannot inculcate this value by suppressing speech of those who disagree with it.

These civil liberties objections to hate speech regulation are based, in part, on an exceptional emphasis on individual freedom from the dominant community. Such freedom is difficult to square with the community's desire and obvious need to inculcate its members into certain preferred communal values and practices. Other political theorists, such as neorepublicans and other communitarians, are more comfortable with this inculturation instinct and may even celebrate it. Civil liberties theorists, in contrast, are suspicious of the dominant community and are anxious to preserve ways of individual escape from its coercive influence. To them, the first amendment is the main vehicle of escape.

The civil libertarians' distrust of the dominant community springs in part from a strong belief that many, if not all, alternatives to dominant communal practices may be legitimate and valuable. Freedom of expression maximizes the chances that these alternatives can challenge, supplement, and even supplant the dominant practices. The result is a more vigorous, adaptable, and generative society. Given these beliefs, the civil liberties theorists view *any* retreat from, or effort to contextualize, the rule that offensive speech is protected speech as a threat not

73. See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (involving statute requiring teachers to sign loyalty oath).

only to individualism, but also to cultural pluralism and vitality.⁷⁴

Another signal apprehension of the libertarians is that approval of hate speech regulation may open the door to other normative judgment calls, which could lead to the suppression of other worthy forms of dissidence, not merely the speech of Frank Collin and his ilk.⁷⁵ Fear of this boomerang effect is, in their minds, considerable and should make people wary of *any* "ought-based" arguments for hate speech suppression. That is, they might concede that some speech is bad—even worthless—but believe it is too risky to try to carve out exceptions to fit only such speech.

In support of their claims that the harm in suppression is real and that the risk that the power will be abused is substantial, civil liberties theorists point out that the word "McCarthyism" is both homegrown and of recent vintage.⁷⁶ The McCarthy era shows that first amendment provincialism can be ruinous to human lives and that freedom of speech is always vulnerable to capture by shifting political and moral alliances, even in the United States. Moreover, libertarians are inclined to warn, the victims of free speech repression here and elsewhere often have been civil rights activists. Thus, civil rights theorists, of all people, should recognize that the expectation that government will do good things with expanded power to regulate "uncivil" speech is simply at odds with much American historical and contemporary experience. Indeed, conversation-closing moves of any kind are the *modus operandi* of those who favor the status quo, not of those who wish to change it. Civil liberties theorists thus regard the decision to abandon aggressive first amendment protection "in this case" as inconsistent with a commitment to rethinking the status quo, and even as a form of civil rights movement heresy.⁷⁷

The foregoing points reveal that the civil liberties objection to hate speech regulation takes two forms. The first form is that content regulation is wrong *per se*, as a matter of neutral first amendment principles. The second form is strategic. This form

74. See, e.g., Beth, *supra* note 10, at 180-81.

75. This is the slippery slope argument. See Matsuda, *supra* note 15, at 2351-52 (summarizing this prong of the civil liberties position).

76. See, e.g., Rabinowitz, *supra* note 24; see also Matsuda, *supra* note 15, at 2359-60 (discussing the "McCarthyism" objection to hate speech regulation).

77. See, e.g., Heins, *supra* note 55, at 592 n.39 ("The civil rights movement of 20 and 25 years ago would have been crippled, if not crushed, without the protection of the first amendment.").

maintains that even if some content, including hate speech, deserves to be silenced because it is worthless or evil, governmental content regulation nevertheless is too dangerous because we cannot devise a truly distinctive, easily understood, and cabined rationale for censoring hate speech, but not other forms of offensive speech.

* * *

The libertarian approach to offensive expression often is justified in terms of two, alternative philosophical stances. The first stance is that of post-Enlightenment rationalism, which holds that objective reason and truth exist, that the pursuit of "Truth" is our highest aspiration, and that reason is the compass that points us to Truth. Classical American first amendment theory reflects these rationalist assumptions, insofar as freedom of speech is often justified in terms of this truth-seeking objective. Indeed, the most common description of the purpose of broad freedom of expression is that such freedom is essential to the advancement of knowledge and the discovery of truth.⁷⁸

Many modern philosophers, however, have become skeptical of rationalism in ways that are relevant to the traditional liberal first amendment justifications. Some scholars now maintain that our notions of good and evil are contingent,⁷⁹ and that reason, trust, and meaning are determined historically and culturally—not objectively or ahistorically.

The contingency claim is destabilizing and imperils the traditional rationalist justification for freedom of expression. The strongest and least palatable form of this claim suggests that all ideas, and thus all forms of discourse, may be relative because we have no neutral, ahistorical way of choosing among them. Thus, either we can choose arbitrarily and oppressively from among the competing expressive possibilities, or we can abolish most, if not all, restrictions on conversation, in recognition of the contingent nature of our understandings.

Few theorists, however, embrace this strong version of the contingency insight. Most writers would reject the claim that *all* conversations are equal. Nevertheless, they are persuaded that rationalism is a far less useful or convincing construct than previously believed. Skepticism thus has become their first, and often controlling, instinct, particularly when confronting matters of moral or political philosophy.

78. T. EMERSON, *supra* note 47, at 6-7.

79. See, e.g., R. RORTY, *supra* note 2, at 61.

Skepticism has changed some liberal thinkers. Those who have remained liberals despite the demise of rationalism have had to reevaluate their political assumptions, including their assumptions regarding free speech. Most have concluded, however, that liberalism can survive the alleged death of rationalism, and that liberalism minus rationalism still points toward free and open discourse.⁸⁰

The revised liberal argument for free speech is expressed in different, yet familiar, terms—such as “[o]ne man’s vulgarity is another’s lyric.”⁸¹ The outcome, however, remains the same: an embrace of free and open discourse, no matter how jarring the ideas. If anything, the contingency insight makes the liberal argument for unbridled speech more, not less, compelling because strong rationality claims drop out of the equation and thus do not bound the sphere of protected discourse.

The practical difference between the older “liberalism based on rationalism” and the newer “liberalism minus rationalism”⁸² thus may not be profound. Both formulations express the liberal end in Millian terms: it is an attempt to effect an optimal balance between leaving the individual’s private life alone and preventing suffering.⁸³ Both formulations also would embrace strong versions of the claim that “in respect to words as opposed to deeds, . . . anything goes.”⁸⁴

Liberals under either view encounter extreme theoretical difficulties, however, whenever words resemble deeds and cause serious human suffering. Only by invoking the often arbitrary distinction between speech and conduct,⁸⁵ by romanticizing the current conditions for free and open discourse, and by exaggerating the usefulness of counterspeech or averting one’s eyes can

80. *Id.* at 57.

81. *Cohen v. California*, 403 U.S. 15, 25 (1971).

82. R. RORTY, *supra* note 2, at 57.

83. *Id.* at 63.

84. *Id.* at 52.

85. For an illuminating discussion of the conduct/speech distinction in an analogous context, see Ely, *supra* note 42, at 1495-98. Ely concludes that burning a draft card is “100% action and 100% expression.” *Id.* at 1495. As such, the conduct/speech distinction is unhelpful. Instead, the Court should ask

whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant’s conduct had no communicative significance whatever.

Id. at 1497; see Lawrence, *supra* note 52, at 440-44 (rejecting civil liberties argument that conduct/speech distinction protects racist speech).

liberals remain comfortable defending hate speech. To regulate the content of speech is to undermine a liberal first principle: truth is discovered in, or is whatever results from, free and open discourse—not the marker of its permissible contours. Yet, to permit hurtful discourse is to violate another baseline assumption: individual freedom is subject to restriction when it causes harm to others.

Historically, liberals escaped from this circle by establishing a strong presumption against speech censorship. Liberals demand that the suffering caused by speech be more powerful than that caused by other forms of behavior before the speech can be suppressed. Consequently, liberals tend to favor only those restrictions that seem absolutely necessary to preserve the most basic conditions of civil discourse and hence will endorse, *at most*, a rule that proscribes speech hurled in a victim's face like a punch *and* that is likely to inspire immediate physical retaliation.⁸⁶ Only when a racial or other epithet satisfies these conditions can it be proscribed.

The liberal justification for restraining these assaults, though, relies solely on the analogy to a physical assault, rather than relying on psycho-emotional concerns. The reasons for this restriction are several. First, much speech contains the potential for causing psychological or emotional wounds. This potential disinclines liberal theorists to endorse a rule that psychologically wounding speech is regulable, because such a rule would be too open-ended. Second, liberals discount the psycho-emotional harms of speech because they tend to presume that all people have or should develop the fortitude for penetrating, destabilizing, and invasive verbal volleys. This corresponds with liberalism's assumption that individuals are powerful and atomistic beings with an extensive and equal capacity for self-definition.

"Suffering" thus assumes a restrictive, rather elusive meaning within liberal philosophy—one that is narrower than psychic or emotional harm. Defining the proper balance between private freedom and preventing human suffering is an ongoing liberal inquiry, not a matter of ready reference to a canon. In general, however, the liberal assumption is that offensive speech, *by itself*, is not a sufficiently wounding invasion to merit repression, unless

86. See, e.g., Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 198 (1990) ("Nearly everyone seems to concede that a verbal attack directed at a particular individual in the sort of face-to-face confrontation that presents a clear and present danger of a violent physical reaction may be penalized.").

uttered intolerably close to the target and threatening to cause imminent, extreme, and usually physical consequences.

These philosophical, political, and practical observations offer a richer sense of why a civil liberties theorist would defend the right of the Klan to speak in Chicago's Marquette Park or of Frank Collin to speak in Skokie. They also indicate why defending that right is such a distasteful liberal task. Liberals tend to assume that speech is not cruelty in most instances, but they know that this assumption is weak as applied to hate speech. They also recognize that intolerance can threaten the baseline social condition of a liberal society: general recognition and respect for our shared vulnerability to the pain of humiliation.⁸⁷

Liberal theory thus handles poorly the problem of racist and other vicious slurs and epithets. A political philosophy that emphasizes endless ways of escape from cultural norms offers no good response to the problem of whether to allow escape into oppression of difference. As such, the hate speech issue presses against liberalism's fontanel—the place where its theoretical vocabulary is least compelling, most paradoxical, and least responsive to real world conditions and actual human experience.

IV.

These vulnerabilities in liberal thought are not lost on the civil rights theorists. In particular, they object to the way in which liberal argument tends to assume away human pain in order to preserve its basic formula that the answer to bad speech is counterspeech.

The civil rights theorists reverse the priorities set by liberal theorists. In their view, equality trumps speech, insofar as freedom of speech is meaningless absent true equality.⁸⁸ This reversal leads the civil rights theorists to favor restriction of hate speech in the form of student discipline, civil remedies, and criminal sanctions. The most radical of their proposals is that hate speech directed at a member of a subordinated group should be punish-

87. See R. RORTY, *supra* note 2, at 91.

88. See *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFFALO L. REV. 337, 360 (1989) (remarks of Mari Matsuda made at the James McCormick Mitchell Lecture, State University of New York at Buffalo School of Law, Nov. 4, 1988) ("[I]f I were to give primacy to any one right, and if I were to create a hierarchy, I would put equality first, because the right of speech is meaningless to people who do not have equality."); Lawrence, *supra* note 52, at 467 ("[W]e see equality as a precondition to free speech . . .").

able, whereas hate speech directed at a member of the dominant group should not be.⁸⁹

The strong civil rights critique of the liberal objection to hate speech regulation is binary. The first line of attack is paradigm-accepting, in that the theorists argue from within the traditional first amendment framework in defending hate speech regulation. The second line of attack is paradigm-shifting. This more radical step to the critique challenges the liberal assumptions that hold up the civil liberties conceptual structure. Once these support beams are weakened, the traditional content-neutrality principle itself becomes less persuasive, not merely subject to tight exceptions.

The paradigm-accepting step rejects a narrow construction of precedent and emphasizes that the Supreme Court already has made content-based distinctions in other areas.⁹⁰ The general first amendment practice is to suspend judgments about good and bad speech as often as possible and to destabilize claims to authority by allowing confrontational, revolutionary, offensive speech on our streets and in our parks. We do, however, have numerous Court-approved exceptions to this rule. Speech interests often must yield to interests in privacy,⁹¹ curtilage,⁹² reputation,⁹³ and repose.⁹⁴ Moreover, when it comes to children, we forego even the pretense of value skepticism and openly inculcate community estimations of decency and democracy through government-run education, despite the first amendment.⁹⁵ Thus, cultural, historically bound estimations of "harm to the community" already limit freedom of expression, despite our alleged commitment to value relativism or to the "marketplace of ideas."

The civil rights theorists believe that the harm produced by hate speech equals or exceeds the harm produced by the body of speech that already receives less than full first amendment protection. Drawing on social science data, psychological studies,

89. See Matsuda, *supra* note 15, at 2357-58.

90. Indeed, all of the scholars who argue for hate speech regulation make this point. Their observation, which often is the first sentence in a brief or judicial decision that endorses speech restriction, is simply that freedom of speech is not absolute. See *infra* notes 110-13 and accompanying text.

91. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973).

92. *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970).

93. *Gertz*, 418 U.S. at 323.

94. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

95. See, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979).

historical practices, and personal experience, the civil rights theorists maintain that racism is a distinctively abusive phenomenon, so that the government may prevent injuries based on race in ways it cannot prevent other kinds of assaults to a person's dignity.⁹⁶ They cite *Brown v. Board of Education*⁹⁷ as constitutional recognition that racism is a distinctive social harm and that the fourteenth amendment protects against stigmatic injuries, as well as economic, political, and physical ones.⁹⁸ Regulation of discriminatory speech, they argue, is a logical and constitutionally defensible extension of *Brown*.

The civil rights theorists also believe that the liberal refusal to view hate speech as low value expression betrays insensitivity to the nature and seriousness of racial insults.⁹⁹ Only people who have not experienced this abuse, they remark, are inclined to assume that a racial epithet is no worse than a nonracial invective, such as "Asshole!," and that a racial epithet thus should be subject to no more restriction than this other sort of verbal attack. The civil rights scholarship tries to bridge this empathy gap with narratives and other empirical evidence that make vivid the nature and the severity of the wound racism inflicts.¹⁰⁰

Some of the civil rights theorists—at least thus far in development of their proposals—claim that the wound of *racism*, versus other forms of discrimination, truly is distinctive. It is *sui generis*, according to Mari Matsuda.¹⁰¹ Yet several of the new hate speech proposals extend beyond racial slurs and include slurs against women, religious groups, gays and lesbians, and members of other outgroups. The apparent basis for including these other groups is that slurs and epithets based on gender, religion, sexual preference, and certain other characteristics likewise are subordinating, degrading, *and* implicitly connected to physical violence.¹⁰² The peculiar power of these slurs is tied to historical patterns of abuse against the protected class members, which render the members of all of these marginalized groups more vulnerable to group-referent slurs than members of dominant groups.¹⁰³

96. See, e.g., Delgado, *supra* note 56, at 135-49; Lawrence, *supra* note 52, at 458-66; Matsuda, *supra* note 15, at 2331-41.

97. 347 U.S. 483 (1954).

98. See Lawrence, *supra* note 52, at 438-40.

99. *Id.* at 460, 462.

100. See, e.g., Matsuda, *supra* note 15, at 2326-31; Williams, *supra* note 21, at 139-42.

101. Matsuda, *supra* note 15, at 2360.

102. See *id.* at 2335, 2358; Williams, *supra* note 21, at 139-42.

103. See Williams, *supra* note 21, at 141.

The civil rights theorists invoke the fighting words doctrine,¹⁰⁴ but with a twist. Fighting words, in constitutional parlance, mean words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁰⁵ More specifically, the phrase refers to words that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."¹⁰⁶ Some civil rights theorists argue that the Court should extend the fighting words doctrine to include epithets that are directed more generally at all members of the group, on the theory that such speech likewise inflicts injury and threatens the social peace and the mental peace of the members of the target group.¹⁰⁷ Moreover, they deny that likely physical retaliation is the proper standard for measuring the acceptability of insults. Instead, a "fight or flight" response should be the measure,¹⁰⁸ in recognition that physical retaliation is not a prudent or natural response for many members of marginalized groups. "Flight" refers both to physical withdrawal and to the internal adverse emotional reaction to verbal attack.¹⁰⁹ Thus, civil rights theorists favor, at a minimum, a "fighting words plus" version of the *Chaplinsky* formulation.

The civil rights theorists also observe that extensive, relatively noncontroversial case law supports the government's right to regulate hate speech in certain restricted venues. The "captive audience" doctrine,¹¹⁰ the "public forum" doctrine,¹¹¹ and the case law that permits government-as-employer,¹¹² government-as-educator,¹¹³ or government acting in other capacities with significant control over speech all provide stable authority for the claim that highly offensive speech, including hate speech, can be controlled in certain contexts, even if it cannot be controlled on the street corner.

104. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

105. *Id.*

106. *Id.* at 574.

107. See, e.g., S. KENNEDY, *THE KLAN UNMASKED* 282 (1990); Matsuda, *supra* note 15, at 2335.

108. See, e.g., Lawrence, *supra* note 52, at 452; Matsuda, *supra* note 15, at 2356. The disutility of counterspeech for gays and lesbians may be particularly striking, in that homosexuality can be hidden in ways that gender and race cannot. Counterspeech may imperil the presumption of heterosexuality.

109. See sources cited *supra* note 108.

110. See, e.g., Lawrence, *supra* note 52, at 456; Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 5 (1990).

111. See *infra* text accompanying notes 209-10.

112. See, e.g., *Connick v. Myers*, 461 U.S. 138 (1983).

113. See cases cited *supra* note 36.

This paradigm-accepting step to the civil rights theorists' argument draws heavily on Richard Delgado's 1982 article, in which he outlined a tort remedy for racial insults.¹¹⁴ Delgado argued that the available tort remedies of intentional infliction of emotional distress, invasion of privacy, and libel, by themselves, inadequately redress the special problem of hate speech.¹¹⁵ He therefore recommended development of a new tort that is tailored to the particular and distinctive psychological and physiological injury occasioned by racist speech, but that resembles closely the tort of intentional infliction of emotional distress.¹¹⁶ In essence, his proposal takes what we would ordinarily regard as evidence of the outrageousness of an insult—that it is racial, draws on a history of subordination, and implies physical violence—and uses that evidence as the basis for forming a subcategory of "outrageous per se" remarks, that is, racial insults. The plaintiff still must prove damages,¹¹⁷ intent to demean, and that a reasonable person would understand the particular language used to be a demeaning racial insult.¹¹⁸ What she need not do, under Delgado's proposal, is establish that racial insults constitute a serious civil wrong. Thus, his proposal, like the proposed extensions of the fighting words doctrine, relies heavily on traditional legal concepts, but expands those concepts to take particular, customized account of the problem of racism and other forms of group-status bias against marginalized people.

In summary, the paradigm-accepting step to the argument for hate speech regulation emphasizes two things: the harm to victims of hate speech is serious, and the value to society in allowing this speech is slight. Thus, according to the civil rights account, if the first amendment is about balancing harms and values in speech, then the balance tips in favor of suppressing hate speech.

One could stop at this point and join issue on the problem. Indeed, lay discussions of the matter tend to hover at this level of abstraction, and policy decisions often are made without a deeper inquiry. But, as was true of the civil liberties approach to hate speech, one can understand fully the civil rights approach only if one dips below this surface into the underlying philosophical and political assumptions that animate these writers. And,

114. See Delgado, *supra* note 56, at 179-81.

115. *Id.* at 150-65.

116. *Id.* at 179.

117. *Id.* at 166-67.

118. *Id.* at 179-81.

as was true of the liberal approach to hate speech, these background assumptions have a subliminal, if not always articulated or apprehended, impact on the frontline lay discussions. The two approaches represent, in many important respects, quite different views of the world—differences that must be understood if they are to be transcended.

The differences become manifest in the paradigm-shifting step to the more radical civil rights proposals. These proposals would make hate speech unlawful in all settings, not merely in face-to-face individual confrontations. Here, the civil rights theorists shed the cramping influence of traditional discourse and attempt to blaze new paths. Their arguments become more threatening to liberal thought and more resistant to accommodation efforts. They also become more arresting, in part because the writers use narrative in their arguments and in part because the analytical arrows strike at such undeniably crucial liberal targets.

The first move of the radical civil rights theorists is to challenge liberals' devotion to individualism. They argue that an overemphasis on the individual and a disregard for the "group(s) behind the man" infects first amendment theory, as it does other aspects of constitutional law.¹¹⁹ To discount the significance of group affiliation, however, is to miss the true harm of group vilification. If one is defined in part by one's group affiliations, then statements that demean one's group *are* a matter of individual concern and injury. Thus, racist comments do wound self-esteem, even if they are not targeted at a particular member of the group.

The salience of group identity also is relevant to our theory of rights. If these subgroups are integral to the personal identity of subgroup members, then discrimination against a subgroup, as such, will disable its members. Some scholars therefore urge that wrongs to the group deserve group-sensitive remedies like affirmative action.¹²⁰

The argument that group identity is important to human personality, and that to recognize its importance points toward banning group libel, is not new. In 1942, David Riesman authored a thoughtful defense of group libel statutes in which he relied

119. For a discussion of the relevance of group affiliations—such as racial and religious group applications—to individual identity, see Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148 (1976); Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 306-09 (1986). See generally A. MACINTYRE, *AFTER VIRTUE* (2d ed. 1984) (conceptions of justice often are based on group identity).

120. See, e.g., Fiss, *supra* note 119, at 150-51.

on the significance of groups within the social process.¹²¹ His observations sound prescient and likely have influenced many contemporary writers who advocate a similar approach to hate speech. Riesman wrote:

In the political as in the economic struggle, modern democracy operates through the interplay of group activities, and it is through participation in groups that persons contribute to the social welfare and develop their individual capacities. Hence, defamatory attacks on groups are attacks both on the pluralistic forces which make up a democratic society and derivatively on the individual members whose own status derives from their group affiliations. Yet the very importance of groups in the democratic process means, if stratification is to be avoided and a dynamic social life retained, that each group must be subject to the scrutiny and criticism of opposing groups—and of its own membership. Here again, policy must be discriminating in judging what sorts of criticism—though mistaken in fact—further the democratic cause and what sorts of defamatory falsehoods hinder it.¹²²

As Riesman observed, the most significant obstacle to group libel statutes in the United States is not definitional problems or other technical difficulties; it is “the American heritage of middle-class individualistic liberalism.”¹²³ He rejected this strong embrace of individualistic liberalism in favor of democratic principles. This democratic bias led Riesman to endorse a civil action for group libel and to deny that the Constitution bars such a remedy.¹²⁴ The regulation he endorsed, however, anticipated that truth would be a defense to a charge of group libel.¹²⁵ This method is a very clumsy way of dealing with the harm of most epithets, in that few slurs are phrased as statements of fact. What is admirable about Riesman’s piece, therefore, is not that he managed to work out an ideal response to hate speech, but that he offered such an illuminating unpacking of Americans’ resistance to hate speech regulation and laid some of the intellectual foundation for modern civil rights proposals.

This is not to say, however, that Riesman’s democratic principles necessarily solve the riddle of how to handle hate speech

121. Riesman, *supra* note 10.

122. *Id.* at 731.

123. *Id.* at 734.

124. *Id.* at 777-80.

125. *Id.* at 777.

any better than liberalism does. In the above-cited passage, Riesman acknowledges that intergroup defamation both imperils and furthers democracy. To limit speech that is an outgrowth of tensions between and among groups, including racial groups, thus is to risk limiting "core value" political speech, even under Riesman's democratic approach. That is, we may acknowledge the importance of group affiliations to human personality and reject more aggressive versions of individualism, yet still be uncertain whether a particular form of confrontational speech between groups is a tolerable feature of democratic or communal life. Nevertheless, an awareness of the significance of group affiliation to human personality clearly enhances one's appreciation of the wound of racism, misogyny, or homophobia. This awareness, which the civil rights theorists stress, makes hate speech appear less worthy of protection. When coupled with a rejection of strong individualism, this awareness may tip the harm/benefit balance in favor of hate speech suppression.

In recent years, many constitutional scholars have joined in the Riesman critique of the liberal emphasis on individualism. Several of these scholars have attempted to define a more republican version of constitutionalism, one more mindful of the benign aspects of community and the ways in which we are all shaped, defined, and realized by these connections.¹²⁶ These communitarian theories may prove useful to the civil rights theorists, at least to the extent that they lend support to arguments for suppressing hate speech. Communitarianism is responsive to appeals to solidarity, shared values, and the authority of the community to impose standards of civility on those who threaten the integrity of the whole or of its subgroups. Communitarians thus may be more inclined than are liberals to suppress hate speech in the interest of group solidarity.¹²⁷ As such, communitarians and civil rights theorists may become allies on the issue of hate speech regulation.

126. See, e.g., A. MACINTYRE, *supra* note 119, at 253-55; M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 11 (1982); Michelman, *The Supreme Court, 1985 Term—Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4, 53-59 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 30 (1985).

127. See Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 689-90 (1988); cf. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 316-17 (1989). Robert Post likewise has leaned toward a communitarian/Habermasian approach to the first amendment in his scholarship, though he takes up the specific issue of hate speech in detail for the first time in this Symposium. See Post, *The Constitutional Concept of Public Dis-*

This alliance does not mean, however, that civil rights theorists necessarily embrace communitarianism, or that all communitarians necessarily would endorse group libel laws. Civil rights theorists are outcome- rather than process-oriented. Until the outcome of equality is achieved, process-oriented models are of secondary concern.

Moreover, as many writers have cautioned, pure communitarianism is only as attractive as the community in question.¹²⁸ In an oppressive, nonegalitarian community, to defer to the communal will would be unbearable. Civil rights theorists are unlikely to embrace unmodified communitarianism or any other pure political model and follow it wherever it leads; instead, they begin with a view of where they wish to go and adopt political theories, or parts thereof, most likely to get them there. Their destination is a society in which human difference is not the occasion of subordination.¹²⁹

This firm commitment to a specific substantive outcome is remarkable and further separates the civil rights theorists from the liberal theorists. The civil rights theorists make unapologetically ought-based arguments. For example, Mari Matsuda has said that "[w]e can attack racist speech—not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong."¹³⁰ The contingency insight makes this absolute moralism sound "unmodern" as well as illib-

course: *Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990) [hereinafter *Constitutional Concept*]; Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297 (1988) [hereinafter *Cultural Heterogeneity*].

128. For a thoughtful critique of the communitarian movement and the dilemma of authority or legitimacy within communitarian theory, see Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 80-81 (1989). Kahn argues that communitarian theory offers no basis for choosing among communities, a relativism that civil rights theorists would dislike. He states:

A theory of community cannot provide an adequate ground of authority. Instead of speaking directly of authority, Dworkin speaks of legitimacy, but the point is the same. The argument for legitimacy is designed to provide the grounds for the authority of the legal rules of this community rather than other competing communities. This, however, is precisely what communitarian theories cannot provide.

Id.

129. A more extreme and contested construction of the civil rights approach to human difference is radical culturalism, which maintains not only that an ideal culture would be free from subordination, but that subordinated people, because of their experience, possess a distinct and superior moral voice. See, e.g., Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 346-47, 359-60 (1987).

130. Matsuda, *supra* note 15, at 2380.

eral, especially when invoked as a reason to suppress speech, rather than conduct.

This moralism nevertheless appeals to some peoples' very strong sense that relativism is bad social policy, if not bad metaphysics. Very few people, including intellectuals, truly believe that all ideas are of equal social value. Most people feel, though not with equal passion, that we both can and must give less approbation to the ideas of Hitler than to those of Dr. King. That is, even if we presently lack a convincing, ahistorical matrix with which to justify our choices, we still believe we know evil when we see it.¹³¹ The civil rights theorists invoke our particular "knowledge" that racism is wrong and suggest that we retreat from the "infinite expansion" concept of public discourse to one that better accounts for this particular, shared knowledge.

A third departure from liberalism which appears in the civil rights theorists' scholarship is the renunciation of the public/private distinction.¹³² Here again, the intellectual seeds were sown some years ago, but are now beginning to bear more impressive and abundant fruit. As applied to the hate speech issue, the argument is as follows:

[T]he choice in the group libel problem is not between the restraint of free expression and the absence of restraint. It is rather a choice between two forms of restraint: one carried out by private groups operating outside the law, and another, of a more limited nature, carried out by legal authorities under the constraints of a formal statute.¹³³

That is, coercion of individual expression may occur regardless of whether we regulate hate speech. Government is not the only instrument of individual oppression; indeed, government may often be the only way to prevent this oppression. To erect an arbitrary barrier between the public and private spheres and to argue that constitutional violations arise only when government acts—not when it fails to act—is to let stand circumstances that may seriously compromise the constitutional aspirations of equality *and* of free and open dialogue.

131. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (observing that although he could not define hard-core pornography, "I know it when I see it").

132. *See, e.g., Lawrence, supra* note 52, at 444-49; Matsuda, *supra* note 15, at 2378-79.

133. Arkes, *supra* note 29, at 284-85; *see also* Lawrence, *supra* note 52, at 446-47; *cf. Michelman, supra* note 127, at 306-09 (discussing the nature of state action when the state chooses not to place limits on the private publication of pornography).

Applying this reasoning, the civil rights theorists argue that when government does not regulate hate speech, it lends its imprimatur to assaults on values espoused in *Brown v. Board of Education*.¹³⁴ Omission, in this case, is commission. The civil rights violation thus is linked to the government and is a matter of constitutional moment.¹³⁵

More generally, these scholars note that significant Supreme Court cases already have outflanked the Maginot Line between public and private discrimination.¹³⁶ Moreover, federal statutes impose extensive nondiscrimination mandates on private employers, such that vigorous insistence that the Line cannot be crossed comes too late. As a compelling example, civil rights theorists note that sexual harassment is speech *and* a violation of federal law.¹³⁷ Hostile environment claims of workplace discrimination likewise represent occasions in which speaker autonomy collides with victim equality, but the equality interests prevail.¹³⁸ Thus, argue some theorists, states may pass laws that regulate hate speech in other, less restricted settings, including public fora, in order to promote the compelling state interest in equality.

A final distinguishing characteristic of the civil rights approach to hate speech is methodological. Many of these scholars employ narrative in order to stir imagination and to inspire recognition of the harm in racism and in other subordinating instincts.¹³⁹ They abandon the detachment that is characteristic of traditional legal scholarship and engage in storytelling as a means of sparking empathic understanding. But they do so with a common mission: to further the cause of equality. In this way, they engage in the activity that Richard Rorty recently described as the only one that can bind humans together and eliminate cruelty.¹⁴⁰ He

134. 347 U.S. 483 (1954).

135. See, e.g., Matsuda, *supra* note 15, at 2378-79.

136. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 622-24 (1984) (upholding state law banning exclusion of women from private civic organizations); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-88 (1980) (holding that state constitutional provisions could force private property owners to allow free speech on their property).

137. See, e.g., Post, *Correspondence: The Perils of Conceptualism: A Response to Professor Fallon*, 103 HARV. L. REV. 1744, 1747 (1990).

138. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-67 (1986) (holding that creation of a hostile environment through sexist speech violates title VII). See generally Strauss, *supra* note 110 (discussing the first amendment ramifications, often overlooked by courts, of regulating sexist speech in the workplace).

139. See, e.g., Lawrence, *supra* note 52; Matsuda, *supra* note 15, at 2326-31.

140. "Within an ironist culture, by contrast, it is the disciplines which specialize in thick description of the private and idiosyncratic which are assigned this job." R. RORTY, *supra* note 2, at 94.

believes that "novels and ethnographies which sensitize one to the pain of those who do not speak our language must do the job which demonstrations of a common human nature were supposed to do."¹⁴¹ If his is an accurate account, then the deepest significance of the civil rights scholarship may lie not in the specific proposals for legal reform, but in the way in which the literature sensitizes us to the pain of others and fills the void left by philosophy's failure to point us on a sure path to truth and virtue.

* * *

Few people oppose the civil rights substantive agenda of eliminating cruelty and combatting discrimination. Some nevertheless take issue with the civil rights approach to hate speech. One objection is that, like the liberalism that underlies the civil liberties approach, the equality theory that underpins the civil rights proposals is vulnerable to analytical critiques.¹⁴² A second objection is that the specific proposals fail to respond fully to several of the practical objections mentioned earlier.¹⁴³

The first, analytical problem is that the equality theory on which some theorists rely runs contrary to some constitutional theory and popular sentiment. Mari Matsuda proposed a one-way version of hate speech regulation, under which slurs against subordinated people are punishable, whereas slurs against dominant group members are not.¹⁴⁴ The advantage of this approach is that it takes into account our shared sense that the impact of the epithets used against marginalized groups is far greater than that of slurs against dominant groups. This approach also rescues from punishment the speech of African-American rap groups like 2 Live Crew¹⁴⁵—at least under a hate speech statute—as well as other confrontational and racist speech used by outgroups to attack the dominant group. The underlying assumption, with which I agree, is that equality is not merely a matter of identical social and legal treatment of individuals, but it also must take into account inequalities in legal and social outcomes and the historical maldistributions of social goods and political power.

Many Americans, however, have difficulty accepting an asymmetrical account of equality. For example, a very thoughtful university president, who presided over the changeover of a

141. *Id.*

142. See *infra* notes 144-53 and accompanying text.

143. See *infra* notes 154-66 and accompanying text.

144. See Matsuda, *supra* note 15, at 2357.

145. See *supra* note 27.

formerly all-male liberal arts college to a coed institution, once expressed utter amazement that some people who opposed the university's all-male admissions policy did not also object to a neighboring school's all-female admissions policy.¹⁴⁶ He saw this position as fatally contradictory and as a denial of the principle of gender equality. In his view, equality means that discrimination on the basis of gender works both ways. A college should deny access to neither men nor women because of their gender. Asymmetrical hate speech proposals thus might well jar his and other people's notion of equal treatment because whites could be punished for racist talk, whereas people of color could not.

In effect, the Matsuda approach makes the criminality of speech hinge on the race of the speaker and the victim. As such, the approach collides with the constitutional principle expressed by Justice Stewart in *Loving v. Virginia*,¹⁴⁷ that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor."¹⁴⁸

Even a civil statute could violate popular and judicial notions of equality when viewed as a remedial measure designed to correct past imbalances of power. As *Richmond v. J.A. Croson Co.*¹⁴⁹ and the Court's more recent *FCC* decision¹⁵⁰ demonstrate, however, the status of the argument that past, general discrimination against a subgroup constitutes a good, present reason for state or local government to adopt wide-ranging, race-conscious remedial measures remains constitutionally complex and politically charged. A group libel statute that protected some, but not all, subgroups from racial slurs based on whether the subgroup members were victims of past discrimination may well encounter the same judicial and social resistance as have government contract set-aside programs and affirmative action plans.

Contemporary constructions of equality thus seem to range from straightforward, procedural equality—everyone treated the

146. Conversation with John D. Wilson, President of Washington and Lee University (Feb. 1984).

147. 388 U.S. 1 (1967).

148. *Id.* at 13 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring)).

149. 488 U.S. 469 (1989) (holding that "strict scrutiny" test applies to court review of city-imposed racial classifications, including those designed to remedy past discrimination).

150. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) (holding that congressionally mandated benign racial classifications need only serve important federal governmental objectives and be substantially related to those ends).

same under an individual rights model—to more aggressive, substantive equality—everyone entitled to equal outcomes, including group rights, as a component of the analysis. These disagreements about the meaning of equality, of course, are highly relevant to the hate speech controversy. If one disputes the underlying equality-of-outcome-across-groups theory, one likely will reject the group-sensitive remedy that grows out of this theory. Moreover, to impose *speech* limitations based on a culturally contested theory seems especially wrong.

The analytical problems with this one-way approach to hate speech regulation go beyond the fact that it relies on a contested interpretation of equality. It arguably asks the government to take a side in intergroup hostilities,¹⁵¹ if only to even the score. This is not, under traditional theory, a proper government role. Rather, government is expected to remain neutral when policing intergroup conflicts. To intervene in a manner that protects only one opponent may evoke charges of favoritism or capture, despite the fact that the violent impact of hate speech tends to occur only one-way.

The one-way proposal also sets forth an amorphous criterion. Who, exactly, are the historically subordinated, marginalized groups in American society? Economically marginalized people include whites, especially white women. Moreover, census reports indicate that by the turn of the century one out of every three American students will be a minority.¹⁵² As cultural pluralism

151. This point is complex, in that *both* the civil rights theorists *and* the civil liberties theorists invoke "group-generating" arguments in favor of their positions. Civil rights theorists claim that silencing hate speech will promote cultural pluralism, in that the power of dominant groups to harass nondominant groups is destructive of pluralism's ends. Civil liberties theorists counter that nonsuppression of hate speech better serves group-generating ends, in that free speech allows minority racial, religious, and other groups to enlarge themselves. See Beth, *supra* note 10, at 180-81; see also Post, *Cultural Heterogeneity*, *supra* note 127 (discussing tensions between group identity claims and individualism). Thus, even when a lone speaker engages in expression, a potential "inter-group" hostility problem exists: the group that the speaker would like to *create* through counterexpression stands opposed to the offended audience. Thus, "cultural pluralism" arguably is enhanced whether we allow hate speech or cabin it.

When one considers the relatively small membership of some extremist organizations, the argument that hate speech is speech of the "dominant" group grows more complex. For example, David Hamlin reports that best estimates of the membership of Frank Collin's neo-Nazi political organization, the National Socialist Party of America, run no higher than two dozen members. D. HAMLIN, *supra* note 9, at 2. Indeed, as it happens, Frank Collin's real name is Frank Cohn, and he is the son of a Nazi death camp refugee. *Id.* at 5-6.

152. MULTICULTURAL EDUCATION: ISSUES AND PERSPECTIVES xi (J. Banks & C. Banks eds. 1989).

increases, intercultural conflicts are inevitable. The downturn in the economy almost certainly will hone these frictions, particularly if recent studies of the roots of racism prove accurate.¹⁵³ If the stress and frustration of eroding economic turf cause some white Americans on the economic fringe to resort to hateful racial invectives, it may be poor social policy to subject their taunts to criminal prosecution or civil damages, but not those of their Mexican-American, African-American, or Asian-American neighbors. Likewise, in communities in which African-American, Hispanic, or Asian representation in positions of political authority is equal to, or superior to, that of whites, there may be no contemporary reason why a mayor or council member of color should be excused from a law that makes racial slurs a crime. For all of these reasons, a one-way approach to hate speech may prove to be bad social policy.

A second, conceptual and practical difficulty that arises with all of the civil rights theorists' proposals, whether one-way or two-way, is that their most compelling evidence of the harm in hate speech involves only racial discrimination. In order to meet the objection that too many kinds of speech are emotionally wounding to permit psychic pain alone to justify suppression, the civil rights theorists have responded that racist speech inflicts a *distinctive* harm.¹⁵⁴ Yet some of their proposals nevertheless cover misogynist speech, homophobic speech, and, in some cases, speech that attacks people on the basis of religion, age, or handicap.¹⁵⁵ This opening up of the definition of hate speech threatens to undermine the justification that hate speech causes a *distinctive* stigmatic wound. The argument that all of these groups have comparable histories of subordination and vulnerability to physical violence may not convince some critics, particularly those who fear elastic exceptions to freedom of expression.

153. See Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. Times, May 29, 1990, at C1, col. 1 (reporting that social scientists attribute the recent escalation of racial tensions to economic worries and link hate crimes to economic downturns; economic stress creates insecurities, which cause people to seek reaffirmation of their identity—including racial identity); cf. Goleman, *Homophobia: Scientists Find Clues to its Roots*, N.Y. Times, July 10, 1990, at C1, col. 1 (reporting that researchers believe that, although for some men the antigay reaction is a way of confirming their own sexuality, most bias against gays and lesbians is traceable to fear and self-righteousness, attitudes supported by institutional bias against homosexuals).

154. See *supra* text accompanying notes 101-03.

155. See, e.g., Lawrence, *supra* note 52. Lawrence endorses the Stanford policy, which includes all of these characteristics. *Id.* at 449-51.

Expansion of the category of protected characteristics beyond race also undermines the appeal to communal knowledge as a basis for controlling speech. Perhaps we all know that racism is wrong, but we surely do not all know that homophobia is wrong.¹⁵⁶ Also, we clearly disagree about which specific manifestations of racism, homophobia, or misogyny are wrong. For example, some people believe that racist speech by outgroups is not wrong, whereas others disagree. Indeed, if everyone agreed about all of these things in the way some theorists insist, then the traditional remedy of counterspeech would be a highly effective, even unnecessary, means of drowning out the hate message, at least for group libel directed at a general audience. That is, the "wrongness" of racist or other forms of hate speech remains contextual *and* contested. But if it is contested, then the knowledge justification for suppressing most hate speech disappears.

On the other hand, if the civil rights theorists limit the definition of hate speech to include only racial slurs, which some of them have, then other problems emerge. They may alienate loyal civil rights allies and cause hurtful, factitious disputes. Moreover, they may appear to rank human suffering in ways that may not be justifiable or likely to produce positive social change. The better move thus may be to broaden the category of protected characteristics and to cultivate our vocabulary of the shared features of racism, misogyny, homophobia, and religious persecution, rather than to stress the distinctive nature of racism. But, as indicated previously, this move makes the hate speech exception fairly open-ended.

The reflexive nature of prejudice gives rise to another potential objection to some of the hate speech proposals. Charles Lawrence argues convincingly and eloquently that racism is pervasive and

156. See *supra* note 71. Unlike racist or sexist speech, homophobic speech is often unacknowledged as such, even by otherwise "politically correct" people. National consensus, as expressed in constitutional case law or state statutes, is not clearly opposed to discrimination on the basis of sexual preference. The military, state criminal laws, employers, and people in general continue to punish individuals for their homosexuality. In a particularly compelling discussion of the depth of our national homophobia, Paul Schmidtberger points out that public schools can, and often do, routinely banish from the classroom and school libraries any positive accounts of gays and lesbians. P. Schmidtberger, *The Right to Know Yourself: The Case For Fair Treatment of Homosexuality in Public School Libraries* (unpublished manuscript, on file with author). This systematic censorship jars few people's sense of the first amendment in public schools. In contrast, a similarly restrictive school policy that banned discussions of racism or sexism, or that eliminated all texts that dealt with race or gender, or that made clear that they were written by African-Americans or women, would be horrifying to nearly everyone.

often unconscious.¹⁵⁷ As such, racist slurs often may be made with no specific intent to wound or insult others. A recent incident that brought this problem to popular attention involved the *60 Minutes* television program commentator, Andy Rooney. Rooney made several statements on television and to a reporter that sparked charges that he was biased against gays and African-Americans.¹⁵⁸ Rooney defended his remarks in part on the ground that he intended no slur, and he insisted that he was unaware that the statements would offend others.¹⁵⁹ If, however, "Rooneyisms" are the product of ignorance and bone-deep, subconscious racism, then to punish people, especially with criminal sanctions, for these unintentional, reflexive acts of cruelty seems harsh. Some of the hate speech proposals nevertheless do not list specific intent as a condition of punishment.

On the other hand, if hate speech regulation covers only intentional slurs, then a significant body of equally hurtful speech will remain unregulated. Indeed, this may leave the *heart* of the problem unregulated. A panel discussion of hate speech on campus, held at the University of Arizona, raised this issue. Both a representative from WINGSPAN, a campus gay and lesbian association, and an African-American university administrator panel member remarked that skinheads and other members of hate groups were not their main concern. Rather, these panelists most feared "the boy next door."¹⁶⁰ That is, they regarded the unintentional acts of racism and homophobia as more threatening and destructive than the occasional, clearly outrageous outburst of slurs and epithets commonly understood as hate speech. Yet, to write statutes, especially criminal statutes, that proscribe these unwitting forms of racism struck these two panelists, and most members of the audience, as unreasonable.

This leads to another objection to the extant civil rights proposals: the constitutional proposals may be exercises in futility.¹⁶¹ The real problem with hate speech, some argue, is the underlying attitude.¹⁶² Only very intrusive regulation, such as mandatory

157. See Lawrence, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

158. See *supra* note 24.

159. See Barron, *Andy Rooney Returns to "60 Minutes,"* N.Y. Times, Mar. 5, 1990, at C14, col. 4.

160. Remarks of panelists at campus forum on verbal harassment, University of Arizona College of Law (Mar. 28, 1990).

161. See, e.g., T. EMERSON, *supra* note 47, at 398 (discussing the likely ineffectiveness, as well as the unconstitutionality, of group libel laws).

162. See, e.g., Beth, *supra* note 10, at 181-82.

consciousness raising, might actually dislodge the prejudice that animates hate speech. The proposed hate speech statutes thus will not begin to solve the problem. These commentators point out that the people in the nations that have adopted hate speech laws like the ones now being proposed in the United States have *not* become less racist. They also remark that silencing bigots only sends bigotry underground and may give bigots martyr status to boot.¹⁶³

The civil rights rejoinder to the argument that bigotry will go underground is, "Good." Because the speech is intrinsically harmful, stopping the speech is just as worthwhile as stopping a slap, or a rape, even though the aggressor may still want to hurt you. This justification, however, only supports stopping the speech if and when it is like a slap or other physical harm, which points toward a tighter causation requirement than the more aggressive civil rights proposals anticipate. It points toward proscribing only fighting words, not the less immediate harm of group libel.

If one instead says that the harm lies in its effect on society, not only on a targeted victim, then one comes close to saying that the audience cannot be trusted to weigh the value of the speech on its own. First amendment doctrine counts such a view of people as a bad reason to restrict speech. Unless we have specific proof that this speech is peculiarly seductive and appeals predominantly or exclusively to noncognitive instincts, perhaps like hardcore pornography, then the argument is fatally paternalistic, in many people's minds.

The final obstacle to the civil rights proposals is the quite powerful continued resistance to the total collapse of the public/private distinction. As some admonish, this distinction has been a principal bulwark against governmental invasion of individual privacy, which many civil rights advocates favor. Thus, despite significant erosion of the distinction in certain areas,¹⁶⁴ such as

163. See, e.g., F. HAIMAN, *supra* note 47, at 98. Louisiana State Senator Bagert recently cited concern that censuring racists may give them martyr status as a reason not to censure State Representative David Duke, the former KKK leader who ran for the United States Senate. Bagert was Duke's opponent in the Senate race. See *G.O.P. Plan to Censure Klan Figure is Dropped*, N.Y. Times, Mar. 13, 1990, at A25, col. 1.

164. The erosion of the distinction is apparent in two 1980's Supreme Court decisions, in which the Court upheld state regulation that restricted private conduct that conflicted with constitutional values. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). The private actor in *PruneYard* was a shopping center; in *Roberts*, it was the Jaycees. In both cases, the Court concluded that the state could draft rules that restricted the private actor's conduct, in the interest of promoting a compelling state interest in freedom of expression, as in *PruneYard*, or equality, as in *Roberts*.

the workplace, many people would strongly object to a rule that imposed on private, individual actors—versus private, institutional ones—identical restraints as are placed on public actors.

Moreover, these critics would offer the doctrinal objection that the Court recently rejected the claim that governmental omission equals commission, even when the omission resulted in the severe physical and mental impairment of a young child.¹⁶⁵ The Court's reluctance to embrace an omission/commission equation, even under such compelling circumstances, likely stems from its fear that this would expose the government to limitless liability under 42 U.S.C. § 1983.¹⁶⁶ The post-Brennan Supreme Court, in particular, is unlikely to rule that governmental failure to regulate hate speech by private individual actors constitutes a government violation of the victim's *constitutional* rights, except, perhaps, in restricted environments like the workplace or public schools, in which federal antidiscrimination laws are particularly pervasive and well-accepted limits on private conduct.

These practical and conceptual objections to the civil rights proposals demonstrate that even people who are disenchanted with the liberal approach to hate speech may be reluctant to adopt the full civil rights agenda. The conflicting accounts of equality, the practical and political consequences of endorsing group-conscious regulation of speech, and the complexity of defining hate speech in a way that addresses the real injury without colliding violently with even minimalist notions of individualism, all make total allegiance to the more aggressive proposals hard to secure. Thus, although the civil rights discourse makes lucid the gravity and the nature of the harm in hate speech, it does not provide an obvious response to how best to prevent or reduce that harm.

V.

The weaknesses of pure liberalism, coupled with the shortcomings in strong versions of the civil rights approach, have led some scholars to seek another approach. These reformers have authored or endorsed proposals that defer to many of the liber-

165. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (refusing to hold a state liable for injuries caused by a parent, even though the welfare agency suspected child abuse prior to the injuries).

166. 42 U.S.C. § 1983 (1988) (imposing civil liability for deprivation of rights, privileges, or immunities guaranteed by the Constitution).

tarian claims and objections, but that likewise acknowledge the strength of the central civil rights proposition that the harm in some hate speech outweighs the potential harm of suppressing it.¹⁶⁷ In several cases, the proposals deal with the specific problem of hate speech on college or university campuses.¹⁶⁸

Unlike the civil liberties theorists, the sponsors and endorsers of these accommodationist proposals conclude that hate speech is an appropriate subject for censorship. Unlike the advocates of the strong civil liberties proposals, however, accommodationists do not, for the most part, favor regulation of group libel.¹⁶⁹ The accommodationist proposals share the common characteristics of being tightly worded, context-specific, and closely tied to the fighting words doctrine and/or the tort of intentional infliction of emotional distress. In essence, the proposals seek to regulate targeted, intentional vilification of a person or small group of persons in a face-to-face encounter on the basis of a protected characteristic.¹⁷⁰

The protected characteristics vary among the proposals. Some list only racial insults.¹⁷¹ One covers racial, ethnic, or religious group insults.¹⁷² Another proscribes slurs based on sex, race, color, handicap, religion, sexual orientation, or national or ethnic origin.¹⁷³ Still another discusses insults based on race, religion, ethnic origin, gender, or sexual preference.¹⁷⁴ These specific dif-

167. Examples of scholarship that endorses an accommodationist position include: Delgado, *supra* note 56; Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985); Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990); Grey, *supra* note 16; Lawrence, *supra* note 52; Smolla, *supra* note 86. *But see infra* note 169.

168. See Grey, *supra* note 16; Lawrence, *supra* note 52; Smolla, *supra* note 86.

169. Rodney Smolla is an exception, though he restricts the context in which he would regulate group libel to special settings or occasions like the classroom or government-sponsored speech. See Smolla, *supra* note 86, at 205-06. Whether Charles Lawrence or Richard Delgado would vote against a group libel statute is not clear, however. Rather, their arguments in favor of more restricted regulation seem based more on a sense that broader statutes are very unlikely to survive a constitutional challenge. As such, they endorse progressive measures that stand a better chance of passing constitutional muster, but likely are not unsympathetic to the more aggressive approach advocated by Mari Matsuda. See Lawrence, *supra* note 52, at 450 n.82 (stating that he supported a rule that would have prohibited hate speech in all common areas—except in the case of organized and announced speeches and rallies; he also would have endorsed a “one-way” proposal).

170. See, e.g., Downs, *supra* note 167; Greenawalt, *supra* note 167; Grey, *supra* note 16.

171. Delgado, *supra* note 56, at 179.

172. Smolla, *supra* note 86, at 208-09.

173. Grey, *supra* note 16, at 91.

174. Greenawalt, *supra* note 167, at 288.

ferences among the proposals are important and are likely to prove quite relevant to their success in any court challenge. The more narrow the provision, and the closer it conforms to the fighting words doctrine or traditional tort law, the more likely the regulation will be upheld.

Some of the proposals that deal with campus speech regulation rely heavily on contextual justifications. Specifically, they propound that the university is a special community, within which at least minimal regulation of civility is necessary.¹⁷⁵ Racial and other epithets may so disturb students that they cannot study or interact fully with their teachers or classmates, and thus may become alienated from the life of the college or university. Moreover, *Brown v. Board of Education*¹⁷⁶ makes clear that full educational equality goes beyond provision of physical resources and includes the intangible elements that produce an environment of full and equal participation in the life of the college or university.¹⁷⁷ As such, some accommodationists conclude that hate speech regulation is a logical and necessary extension of the public university's commitment to equal access and nondiscrimination within higher education.¹⁷⁸ An environment of hostility and intergroup tension, they remark, is hardly conducive to genuine realization of these goals. The relatively restricted campus environment, coupled with the way in which racism and other biases can undermine the educational process, thus provide the government-as-educator greater speech regulation authority than it has as regulator of the general public safety and welfare.¹⁷⁹

Rodney Smolla expressed this sentiment in the following terms, terms that most accommodationists likely would endorse:

A state university is different from a public elementary or high school because by tradition a university is a place of uninhibited public discourse and should remain so. A university, however, is also a unique *community* in which the state should be permitted to require of its members higher levels of rationality and civility than the state may impose on the general population. It should be permissible for the state to require that members refrain from racist attacks *at certain*

175. See, e.g., Smolla, *supra* note 86, at 207.

176. 347 U.S. 483 (1954).

177. See, e.g., Lawrence, *supra* note 52, at 464-66.

178. See, e.g., Smolla, *supra* note 86, at 206-07.

179. *Id.*

places and times as a condition for entry into this special community.¹⁸⁰

In addition to substantial agreement on these campus-specific concerns, nearly all accommodationists would agree with the following general observations about targeted hate speech:

If racial and ethnic epithets and slurs are to be made illegal by separate legal standards, the focus should be on face-to-face encounters, targeted vilification aimed at members of the audience. As to these, expressive value is slight, because the aim is to wound and humiliate, or to start a fight. Since fighting words are already punishable and the tort of intentional infliction of emotional distress is available, what would be the significance of separate provisions for the language of group vilification? They could stand as symbolic statements that such language is peculiarly at odds with our constitutional values; and they could relieve prosecutors, or plaintiffs, from having to establish all the requisites of a more general offense or tort.¹⁸¹

In essence, accommodationists approve of the basic Delgado formulation, though some would extend his proposal beyond racial slurs to include other protected characteristics. They acknowledge that this formulation is a departure from the usual requirement of content-neutrality, but regard it as a warranted departure for the reasons advanced by the paradigm-accepting strand of the civil rights argument.¹⁸² Indeed, the accommodationist position is essentially a civil rights position that works within the existing constitutional framework.

The principal objections to this "fighting words plus" approach to hate speech are those listed in the foregoing discussion of objections to the civil rights proposals.¹⁸³ In particular, some object that this moderate civil rights approach is merely symbolic¹⁸⁴ and may be the worst of both worlds, not a delicate synthesis that rescues the most attractive arguments of both sides. Civil libertarians also point out that the perversion of first amendment

180. *Id.* at 207.

181. Greenawalt, *supra* note 167, at 306 (citations omitted).

182. *See, e.g.*, Grey, *supra* note 16, at 91-92.

183. *See supra* notes 142-66 and accompanying text.

184. *See* Smolla, *supra* note 86, at 199 (describing such a regulation as "relatively impotent"); *see also* Grey, *supra* note 16, at 104 (conceding that the main purposes of his proposals are educational and symbolic).

goals is more, not less, outrageous when speech regulation occurs on a public university campus.¹⁸⁵

The following, final sections address these objections and discuss briefly the reasons why I agree with the accommodationists, despite these objections.

VI.

Henry David Thoreau once wrote, "It takes two to speak the truth,—one to speak, and another to hear."¹⁸⁶ The accommodationists' writings reflect an effort to hear both the liberal and the civil rights arguments regarding hate speech regulation. Their midground position may be unsatisfactory to both sides, in the sense that neither side receives all that it desires. But it also may be satisfactory in the best first amendment sense, in that it demonstrates that discourse can influence thinking.

The Stanford policy,¹⁸⁷ drafted by Tom Grey, strikes me as the most convincing of the accommodationist proposals, in terms of both its specific provisions and Grey's explanation of the policy. This policy defines verbal harassment as speech or other expression that

(a) is intended to insult or stigmatize individuals on the basis of protected characteristics;

(b) is "addressed directly" to those insulted or stigmatized; and

(c) makes use of insulting or "fighting" words,¹⁸⁸ defined as words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."¹⁸⁹

The protected characteristics include "sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."¹⁹⁰ Punishable words are further defined as those "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of" protected characteristics.¹⁹¹ The aim of the policy is to cover only gutter epithets of bigotry—and even

185. See, e.g., Gunther, *supra* note 19, at 7 (observing that "[u]niversity campuses should exhibit greater, not less, freedom of expression than prevails in society at large").

186. H. THOREAU, *Wednesday*, in *A WEEK ON THE CONCORD AND MERRIMACK RIVERS* 235, 267 (C. Hovde ed. 1980).

187. Grey, *Responding to Abusive Speech on Campus: A Model Statute*, RECONSTRUCTION, Winter 1990, at 50.

188. *Id.* at 51.

189. *Id.* at 50 n.1 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

190. *Id.* at 51.

191. *Id.*

then, only when targeted at an individual or small number of people.¹⁹²

The attractive characteristics of this policy are several. First, it limits speech regulation to the circumstance in which we are most confident that regulation may be warranted: *targeted, shocking, verbal affronts*. In essence, the policy simply means that a male college student should not be allowed to approach a woman and call her a "cunt" to her face. Nor can a student call a lesbian a "dyke," a gay man a "faggot," an African-American a "Nigger," or a Jew a "Kike"—to their *faces*.

The limited reach of the Stanford policy keeps it within the boundaries of sound first amendment practice and philosophy. The social interest in protecting these attacks is negligible, whereas the interest in preventing them is, as the civil rights theorists have demonstrated, compelling. That is, the harm/benefit balance tips in favor of speech restriction in this context. Few people likely would object to the legal restraint of a white man who followed an African-American woman down the street, yelling racial and sexual epithets. Indeed, for all the sound and fury of the civil liberties theorists, the likelihood is that an arrest for harassment made under these circumstances would be upheld.¹⁹³

As such, the compelling narratives of the civil rights theorists lead me to worry less about whether this part of the Stanford policy goes too far than whether it goes far enough. For example, the proposal does not cover group libel. Thus, a student or other speaker could use these same words, or express equally destructive and prejudicial viewpoints without using epithets, in a speech to a general campus audience. Why should a college tolerate such discourse, knowing it may wound or enrage some of its students, and compromise further its already fractured efforts to create an environment that celebrates diversity and that welcomes equally all students? The most convincing answer is that group libel laws control ideas, rather than their harmful effects. Only by abandoning altogether our confidence in the audience and our fundamental notion that counterspeech is reasonably effective can we declare that hate speech should be per se regulable in all situations. The civil liberties arguments against hate speech regulation convince me that more expansive regulation than the Stanford policy anticipates is unwise.

192. *Id.* at 52-53.

193. Conversation with Sgt. John A. Leavitt, Tucson Police Dep't (Aug. 6, 1990).

Recent absurd instances of speech regulation, like Florida's attempt to ban bumper stickers that read "Shit Happens,"¹⁹⁴ should make us apprehensive indeed about delivering to any state officials, including educators, more speech control than the Stanford policy offers. Moreover, anyone who has participated in counterspeech against the neo-Nazis or the Klan likely recognizes that—at least when given time to prepare such counterdemonstrations—the counterspeech can be powerful and highly effective. In addition, in some cases, those people who are likely to be enraged or scored by the bigot's rantings may avoid confrontation by staying out of the area.

I do not mean to imply, by any means, that avoiding the confrontation is a costless or entirely convincing response to verbal bigotry, insofar as the targets of hate speech may be forced out of public settings and into their homes in order to feel safe. As these safety zones get narrower, the lives of potential targets of bigotry become more stunted and unnatural. Women know this and have fought against it on college campuses and elsewhere, in efforts to "take back the night." Fear of verbal harassment, no less than fear of physical assault, may change one's work patterns, jogging paths, choice of evening entertainment, and social patterns.

Despite these serious potential liberty losses, however, I am prepared to avert my eyes in order to promote the free and open discourse ends of the first amendment—at least when the harassment is a general, purely verbal attack on all women. For example, I was willing to look away when confronted recently by a young man wearing a T-shirt that read "Women are property." (I would not have dreamed, by the way, of engaging in counterexpression; he was an athletic person and substantially larger than I am.) Likewise, I support the University of Arizona's decision that a speaker who often stands in our college mall and declares that women are "whores" as women pass by cannot be silenced. If, however, he confronted a particular woman or a small group of women and continued his verbal assault, he would, in my view, become subject to restraint, depending upon the nature of the epithets and the confrontation. The Stanford policy would treat these situations as I have, and it strikes me as the appro-

194. Act effective Oct. 1, 1988, ch. 88-381, 1988 Fla. Laws 381 ("prohibiting persons who own or operate a motor vehicle from affixing to such vehicle any sticker, decal, emblem or other device containing certain obscene descriptions, photographs or depictions").

priate balance between strong individual expressive freedom and the prevention of human suffering.

The Stanford policy also captures best what I regard as the most salient distinction between slurs based on race, gender, or other protected characteristics and other types of words that wound. The key factor is the implicit link to force, indeed to physical violence. For example, a racial epithet invokes the history of physical violence against, and legal subjugation of, African-Americans. This aspect of the epithet, even more than the facts that group affiliation partially defines the self and that race is involuntary,¹⁹⁵ is what makes the racial epithet distinctive. Thus, the target of a racial epithet reasonably may interpret it as an overture to, or reminder of, violence. Likewise, a sexist epithet is heard as an act of aggression and an allusion to rape or other form of physical violence. The fear these epithets evoke is a fear of force, of power. This fear is most powerful, and the remark is most invasive, when the epithet is uttered close enough to carry out the implicit threat, face-to-face, and when the target of the remark is alone or in a small, relatively defenseless group.

I approve, therefore, of continued invocation of the phrase "fighting words" because I regard it as a better reminder of the subordinating and violent character of hate speech than the phrase "intentional infliction of emotional distress." In the case of group libel, which is directed at a general audience, the immediate fear of physical violence is more attenuated. This speech, absent aggravating circumstances, is objectionable primarily because it perpetuates venomous stereotypes. Stereotypes are often reductive and degrading. But they also are part of an ideological framework, however flawed. In essence, stereotypes are shorthand versions of a more elaborate analysis. Wrong-headed ones are bad empirical claims. Rooting out the most pernicious stereotypes should remain primarily an educational endeavor, not a punitive one.

The second attractive feature of the Stanford policy is that it is *not limited to racial slurs*. Despite the argument that expanding the protected characteristics may undermine the "distinctive injury" defense of hate speech regulation, I favor the broader definition for two reasons. First, it avoids the wrong turn of attempting to rank these related forms of human suffering. I doubt, for example, that the pain of the epithet "faggot" is

195. Cf. Downs, *supra* note 167, at 654 (focusing on involuntariness of race as a key factor in the harm of racial insults).

measurably less than that of a racial slur. In any event, it strikes me as bad social policy to even try to distinguish among these cognate types of pain. Second, as discussion of the various hate speech proposals continues, other outgroup commentators likely will be able to produce sufficient evidence that epithets based on gender, sexual orientation, handicap, and religion wound in ways that are comparable to the wound of racial epithets.

One may argue that this list is still underinclusive, in that it fails to cover *all* types of stigmatizing remarks. This criticism is, in some ways, fair. Yet, one can distinguish, as Cass Sunstein has,¹⁹⁶ between underinclusiveness that is a function of "capture" of the regulator by factions or of self-interested decisionmaking versus underinclusiveness that is not a product of either. The underinclusiveness of the policy cannot fairly be characterized as self-interested or as a product of factional tyranny. It has not excluded for political reasons any obviously deserving candidates for protection. The list of protected characteristics is broad enough to cover the entire population, as each of us belongs to an ethnic group, has a gender and race, a sexual preference, and an opportunity to effect ties to a religion. If the policy neglects some obvious group—though none comes to mind—it is not because personal reasons or narrow partisan politics unduly influenced the drafter.

Furthermore, the remaining underinclusiveness of the regulation in no way diminishes the claim that the verbal attacks that are included are serious assaults on human dignity. Simply because life offers up many forms of injury does not, by itself, disable the government from preventing some but not all of them. In any event, a principled distinction can be made between the kind of dignity assaults that the Stanford policy includes and those that it omits, in much the same way that we already make legal distinctions between the self-esteem and economic injuries caused by the statement, "You're fired!" and those caused by the statement, "You're fired because you're African-American!"

A third, commendable feature of the Stanford policy is that it is *not* "one-way," though it most certainly would have a one-way impact. The proposal is framed in terms that anticipate the theoretical possibility that epithets against *any* racial group might

196. See Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 613-17. But see Stone, *Comment: Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL'Y 461, 476-79 (1987) (disagreeing with Sunstein's analysis and with his conclusion that antipornography regulation is justifiable content regulation).

be regulable. Our practical, contemporary reality is such that no racial epithet against a white person, as such, would satisfy the Stanford policy's standard of "outrageousness."¹⁹⁷ Nevertheless, the proposal is not explicitly wedded to a one-way theory of discrimination. Thus, the criminality of the act does not hinge on race per se, though the outrageousness of an assault may be a product of actual race relations. This is not, I believe, a figleaf. With the tort of intentional infliction of emotional distress, no reason precludes a jury's taking into account the history of discrimination against African-Americans when assessing the outrageousness of a verbal assault against an African-American. Similarly, the college disciplinary body can take into account this same history when weighing the offensiveness of a racial insult under the Stanford hate speech regulation. In addition, a police officer or judge can distinguish between the breach of the peace occasioned by a white man taunting an African-American woman with sexual and racial epithets, and an African-American man calling a white man a "honky."

That slurs against whites would not satisfy the hate speech standard at present reveals the limited reach of the Stanford policy. It covers only outrageous discourse under very circumscribed circumstances. This is, to my way of thinking, a positive attribute. Again, the policy strives to leave maximal room for protected discourse, while taking into account the most serious harm of speech that barely resembles *genuine conversation*—a worthy goal under either liberal or democratic visions of a good society.

The objection that the limited reach of the policy means it serves only symbolic, rather than concrete, ends is unconvincing. Civil liberties people, who in the same breath express deep fear that such policies will chill speech and set dangerous precedent, tend to raise this objection. A *purely* symbolic, hortatory rule would not, one would think, also pose a great threat to free expression. In any event, our experience with the deterrence value of sexual harassment regulation suggests that sanctioning discriminatory speech may well influence conduct and enhance

197. The Stanford policy, however, does not rely merely on the open-ended word "outrageous" in defining punishable speech. The Supreme Court rejected use of this standard as a limit on public discourse in *Hustler Magazine v. Falwell*, 485 U.S. 46, 55-56 (1988). For a provocative analysis of *Falwell* and the concept of public versus private discourse, see Post, *Constitutional Concept*, *supra* note 127, and Fallon, *Correspondence—Post on Public Discourse Under the First Amendment*, 103 HARV. L. REV. 1738 (1990) (critiquing aspects of Post's analysis).

the lives of protected class members. Women who have been working for the past fifteen years likely would report that, although harassment remains a serious workplace problem, things *have* changed for the better, in that much offensive verbal conduct now is widely regarded as improper work conduct and grounds for reprimand by management. Regulation of face-to-face verbal assaults likewise may offer nonnegligible protection against a properly narrow category of harmful speech.

The fourth, extremely important feature of the Stanford policy is that it underplays the significance of the educational "mission" as a justification for hate speech regulation. In fact, the policy, although crafted for a campus, offers a defensible approach to hate speech regulation in any setting. In this way, it avoids the mistake committed in other campus speech regulation proposals of exaggerating the inculcation authority of universities and colleges. Instead, the policy is based on an "equal access" justification that applies in most, if not all, public contexts.¹⁹⁸

The underlying and highly complex constitutional issue is this: Should government-as-educator be granted greater "value inculcation" authority than government-as-regulator? Put another way, the question is whether first amendment principles, or their application, should change within the university setting. The Stanford policy implies that the answer is usually "no." It does not refashion the first amendment for campus life. This approach does not preclude university officials from maintaining that, in some areas of the campus such as dormitories or classrooms, there is a greater need to regulate conduct, including speech, than on the campus mall. This conclusion would hold true, however, regardless of whether the same functions were conducted in an off-campus location. Moreover, the analysis has nothing to do with the university's mission, in either a content- or a viewpoint-specific sense. Rather, the analysis addresses order, safety, and the extent to which speech can be so disruptive of a legitimate governmental activity that the activity cannot be performed. The Stanford policy thus corresponds with a *Tinker*-type¹⁹⁹ approach to speech on campus, under which only speech that threatens to cause substantial and material disruption of school functioning can be suppressed. This risk will be greater, of course, in the more controlled and function-specific setting of the classroom or the dormitory. But this basis for suppression is

198. Grey, *supra* note 16.

199. *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503 (1969).

quite different than one of "inculcating fundamental values necessary to the maintenance of a democratic political system"²⁰⁰ or inculcating "'the habits and manners of civility.'"²⁰¹

The significance of avoiding "inculcation" or "educational mission" talk in defending hate speech regulation on campus is greater than some commentators may appreciate. These are open-ended words, which educational administrators at all levels of education often invoke as reasons to chill student, faculty, or other staff expression. Indeed, despite the widespread assumption that freedom of speech and academic freedom are protected vigorously on college campuses, the actual pattern of freedom of speech enforcement for public employees reveals that they enjoy quite limited protection—even in educational settings.²⁰² Moreover, in a number of recent decisions, the Supreme Court has retreated from the broad protection of student expression and relied heavily on the inculcation role and the importance of assimilating students into cultural norms of civility and decency.²⁰³ Although these cases dealt with high school students, they betray the seductive nature of words like "inculcation," "citizenship," "civility," and "decency." Even if inculcation is an indispensable function of elementary and high school education, it should be rejected as an inappropriate function of colleges and universities.²⁰⁴

When strong civil rights theorists, and some accommodationists, discuss the question of the general, value-positing authority of universities, they tend to be more microscopic than telescopic. They invoke only *Brown v. Board of Education*,²⁰⁵ rather than the general case law that deals with the right of government-as-educator to inculcate values.²⁰⁶ As such, they likely mean to encourage inculcation only of the specific value of *equality*, not the more general values of civility, decency, or even, necessarily, democracy. That is, they favor hate speech regulation as an

200. *Ambach v. Norwick*, 441 U.S. 68, 77 (1979).

201. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)).

202. See generally Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987).

203. See cases cited *supra* note 36.

204. See, e.g., A. GUTMANN, *DEMOCRATIC EDUCATION* 173-74 (1987) (observing that although inculcation of communal values is proper in primary and secondary education, it is not proper at the college and university level).

205. 347 U.S. 483 (1954).

206. See, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Ambach v. Norwick*, 441 U.S. 68 (1979).

extension of antidiscrimination law, not as a revived, expanded form of in loco parentis authority for educators. Their antidiscrimination purpose, however, should be expressed more narrowly than some of these theorists have stated it, lest their argument for campus hate speech regulation be misread as an argument for expansive power of school administrators to establish civility rules for the special community of the university.

In my view, any wide-ranging claim that public colleges and universities should be able to inculcate values through disciplinary measures misstates the proper role of these public institutions. I believe that the more compelling argument is that public schools at this level should not seek to inculcate values, at least not by regulating student expression.²⁰⁷

My reasons for rejecting any effort to impose the general value of civility on campus through speech regulation are based on traditional first amendment assumptions and the features of college campuses that apply to those assumptions. The traditional first amendment remedy for bad speech—counterspeech—likely stands a better chance of succeeding on a college campus than in almost any other public or private setting. Campuses are relatively bounded communities.²⁰⁸ They are geographically contained, with various institutional means of implementing and shaping dialogue. College students are among the more verbally adept members of the population and are poised between youth and maturity. They thus should be relatively responsive to dialogic appeals. Moreover, school authorities and other college community members have ample opportunities to influence the attitudes of this population other than by punishment. School officials can organize symposia, sponsor speakers, or otherwise condemn racist attitudes without expelling the students who hold such attitudes. Consequently, the conditions for critical dialogue are, or should be, particularly well met on a college campus. If counterspeech is no remedy here, then it likely is no remedy anywhere, a conclusion I am unwilling to embrace.

I therefore side with those who would rely on the counterspeech remedy, *except* in the egregious situations that fall within

207. Cf. *Papish v. Board of Curators*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169, 187-88 (1972) ("The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."); see also Gunther, *supra* note 19, at 7 ("University campuses should exhibit greater, not less, freedom of expression than prevails in society at large.").

208. See P. GOODMAN, *THE COMMUNITY OF SCHOLARS* 3 (1962) (arguing that colleges and universities are the only face-to-face, self-governing communities still active in modern society).

the Stanford policy. That is, hate speech on campuses should be subject to essentially the same limitations as it is beyond campus borders. This includes, however, the accommodations that make sense in various campus locations, based on the need for order and security—but not on a desire for ideological conformity or for the preservation of a distinct university culture. In other words, I endorse the Stanford policy not because it constrains seriously harmful speech on a *campus*, but because it constrains seriously harmful speech.

A fifth, related advantage of the Stanford policy is that it also eschews reliance on the Court's often incoherent and analytically dubious public forum doctrine, in which the Court carves up public space and assigns degrees of expressive freedom on the basis of whether it declared the space a "public forum," "limited public forum," or "nonpublic forum."²⁰⁹ This case law is subject to serious criticism, though the Court seems determined not to rethink it.²¹⁰ A full discussion of the Court's public forum doctrine is beyond the scope of this Essay. Nevertheless, the most worrisome aspect of the doctrine is that the Court has used it principally to constrict, rather than to expand, expressive freedom. In effect, the Court's zoning analysis affords government authority over so-called nonpublic forums with no meaningful judicial oversight. The result is an overbroad, often senseless, cordoning off of public space from the first amendment. Although sound, geographically specific reasons exist for speech rights to rise or fall, the Court's public forum doctrine is an inadequate tool for expressing those reasons. Until the Court adopts a more sensitive analysis of the relevance of location to speech, reformers do well to avoid reliance on this analysis.

The drafters of the Stanford policy succeeded in this regard. The policy does not claim that a college campus or any part thereof is a "nonpublic," "limited public," or full "public" forum.

209. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *United States v. Grace*, 461 U.S. 171 (1983); *Perry Educators' Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981); *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981); *Adderley v. Florida*, 385 U.S. 39 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233. But see Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1784-800 (1987).

210. See *United States v. Kokinda*, 110 S. Ct. 3115, 3119-21 (1990) (plurality opinion) (distinguishing the sidewalk in front of a courthouse, which is a public forum, from one near the entrance to a United States Post Office, which is not).

Instead, it justifies regulation of hate speech on the basis of the nature of the words and speaker/target proximity. The verbal harassment deemed punishable is that which triggers a "fight or flight" response—a form of assault. Given the limited nature of the identified harm, no good reason exists to declare that the speech is worse on campus than elsewhere. Just as geographical location per se tends not to change the nature of a battery, this location has little bearing on the nature of hate speech. Personally targeted hate speech is wounding and should be regulable, whether it is hurled at your face while on campus or while standing on the sidewalk across the street from campus.

Thus, the Stanford policy commits neither the "educational mission" nor the "limited public forum" mistake. The formulation is therefore less susceptible to future misuse by school officials seeking greater disciplinary or moral authority over students. Instead, the policy reinforces the view of college and university students as adult bearers of impressive first amendment rights, rather than as near-adults subject to greater speech and conduct restrictions than their noncollege-going peers. Moreover, it avoids the dubious move of declaring public college campuses to be communities distinct from the surrounding national and local communities, with broad value inculcation authority over their members.

Finally, the policy anticipates discipline only of intentional misconduct and leaves all other aspects of encouraging students to be good citizens to methods other than discipline. That is, the policy relies heavily on the traditional assumption that socially desirable behavior should be a product of uncoerced interaction, of speech and counterspeech. The policy polices only the most confrontational, intentionally harmful, and least conversational interactions. The college or university may officially denounce "Rooneyisms," but "Rooneyisms" cannot be the basis for student discipline. I favor this sanctioning of only intentional misconduct, despite the considerable harm in unintentional hate speech, because I am persuaded that punishment of unintentional misconduct is too potentially chilling of good speech and may promote more ill-will and subterranean hostility than positive change. It would, in effect, give the arguments against hate speech regulation a distracting and powerful hook; even people who are quite sympathetic to moderate hate speech proposals might balk if students were punished for unintentional racism.

In sum, the Stanford policy is a reasonable attempt to accommodate the strongest arguments of the civil liberties and the

civil rights theorists. The policy offers meaningful protection against the most vicious verbal harassment, but preserves considerable room for highly confrontational countercultural discourse. The policy anticipates that the principal remedy for racist and related forms of verbal aggression would remain counter-speech, including public-sponsored education rather than speech suppression.

VII.

All of the extant scholarship on the hate speech issue acknowledges prejudice as a bad social phenomenon that should be confronted and condemned. Commentators differ only on the proper method for attacking it. All likewise agree that government can officially decry inequality and can actively promote nondiscrimination through methods other than criminal sanctions. One method on which commentators agree is government-sponsored education regarding the harms of discrimination. If, however, government-sponsored education is to be our principal weapon against hate speech and the prejudice that animates it, then we must overcome both practical and constitutional obstacles.

For public universities, a call to equality-through-(re)education presents a serious practical challenge. This solution assumes that college educators will accept responsibility for reconciling equality and free expression aspirations and that their efforts are likely to be more effective than discipline. Indeed, any proposal that leaves to education the task of combatting racism, sexism, and homophobia must consider the features of public education that might undermine this effort. If, for example, faculty are unwilling or unable to assume the task of contradicting racist or other discriminatory messages, then any campus hate speech proposal that relies on their counterspeech cooperation is likely to fail.

At present, the equality agenda often is treated more as a discrete, special interest project of a few faculty and staff than as a pervasive and widely shared responsibility. On many campuses, equality issues other than those raised by the student admissions and the faculty and staff recruitment policies are shunted to a distant, universitywide committee or a special task force. The members of these committees typically include, mostly or exclusively, people who already apprehend the insights of outgroup scholars. Likewise, within the curriculum, the issues of sexism, racism, or homophobia tend to be explored in seminars

or specialty courses, in which the professors and the students already perceive the nature and degree of harm in these forms of intolerance. In the law school culture, the equality literature tends to be the province of outgroup scholars and constitutional law insiders. As such, the immediate prospect of widespread adoption of educational programs that promote the deeper, consciousness-raising agenda of the civil rights theorists seems dim. Yet, unless the equality agenda becomes a pervasive and central part of the educational program, the counterspeech remedy may be no remedy, which could embitter those who favor stronger disciplinary measures.

On the other hand, if colleges and universities demanded, in a systematic, substantive, and curricular way, that all faculty assume the task of combatting the prejudice animus, they could encounter significant resistance from faculty and students. Strong versions of the educational counterspeech remedy implicate pedagogy, reading assignments, selection of enrichment speakers, library collections, hiring, admissions, and core course requirements. If these educational remedies to hate speech were coordinated and mandated, some people would perceive them as a form of official indoctrination, rather than as prejudice-offsetting, pluralistic education. Opponents of these remedies likely would insist that repression of academic independence, student free expression, and ideological pluralism can result from mandatory educational strategies as well as from disciplinary policies. Indeed, the potential discourse-chilling impact of a required curriculum already has surfaced as a major issue in the ongoing contemporary debate between the multiculturalists and those who favor more traditional notions of "core curriculum" content.

The first amendment implications of the educational counterspeech remedy to hate speech are subtle and intractable. Public education, including higher education, is a form of government speech. As such, the substantive content of that education is a matter of constitutional moment. Both as a practical and a theoretical matter, an aggressive education/counterspeech remedy to hate speech could threaten liberal free speech values as fundamentally as a disciplinary proposal. Yet, unless government abdicates all involvement in education and in fighting discrimination through education, it cannot avoid this potential conflict with the first amendment. The point of this observation, for purposes of this Essay, is simply that rejection of punitive measures in favor of educational ones does not eliminate all constitutional or practical hurdles. It simply shifts to educators, rather

than legislators or disciplinary bodies, the complex task of balancing the competing claims of equality and expressive autonomy.

VIII.

I began this Essay with a quote from Richard Rorty, in which he expresses the strong liberal preference for "free and open" discourse. Let me close with another passage from the same text, in which he defines the conditions of this conversational ideal:

"Free discussion" here does not mean "free from ideology," but simply the sort which goes on when the press, the judiciary, the elections, and the universities are free, social mobility is frequent and rapid, literacy is universal, higher education is common, and peace and wealth have made possible the leisure necessary to listen to lots of different people and think about what they say.²¹¹

This passage is worth underscoring. It reveals that the liberal's high regard for free expression presupposes several conditions that remain unmet. As we work toward a society in which these conditions are in fact satisfied, we may need, on occasion, speech rules that take into account actual circumstances, not merely ideal ones. The accommodationist proposals, particularly the Stanford policy, seem to me to be fairminded attempts to deal with things as they are, without abandoning the more general aspiration of free and open discourse. These proposals are not completely faithful to either a strong liberal or a strong civil rights philosophy; but then, neither are we.

211. R. RORTY, *supra* note 2, at 84.