REGULATION OF HATE SPEECH: AN ATTEMPTED INTERNAL CRITIQUE OF EGALITARIAN ARGUMENTS

by

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(Under the Direction of Prof. Michael L. Wells)

ABSTRACT

Facing an increase of hate speech incidents on campus and in society at large, egalitarians have made great efforts to advocate (when there is no regulation) or to defend (when there is regulation) hate speech regulation. Meanwhile, civil libertarians have counter argued forcefully. This paper is designed to do an internal critique of various egalitarian arguments. Part I is introduction. Part II and Part III give a concise description of many egalitarian arguments. Part IV tries to do an internal critique of those arguments. Part V is the conclusion: though egalitarians have made a great effort to advocate or defend hate speech regulation, their evidence and reasoning does not support their position very well, especially with respect to the so-called face-to-face hate speech regulation. Part VI is a cursory comment and defense of what federal courts have done so far with respect to hate speech regulation.

INDEX WORDS: Hate speech, Egalitarians, Civil libertarians, Internal critique

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DEDICATION

TO MY INNOCENT AND IGNORANT BUT ASPIRING PAST YEARS

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CHAPTER I

INTRODUCTION

A. The Two Camps

Beginning around 1979, with an increase of hate speech incidents in the society at large,[1] many American universities and colleges began noticing an upsurge of hate speech incidents on campus.[2] In response, many universities and colleges have enacted student conduct rules prohibiting hate speech directed against persons on account of their race, ethnicity, religion, sex, sexual orientation or other factors.[3] Even outside the campus context, there appeared some kind of hate speech regulation.[4] These rules were challenged and struck down by courts,[5] have

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[1] Richard Delgado & David H. Yun, *Pressure Valves and Blooded Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CAL. L. REV. 871, 872 (1994).

[2] *Id.* For a good list of some widely publicized campus hate speech incidents, *see* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343, 349-358 (1991). There has been a similar upsurge in society at large. *Id*. at 348, footnote 26. For a good list of hate speech incidents not limited to the campus context, *see* Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2320-30 (1989).

[3] For example, University of Michigan and University of Wisconsin promulgated new student conduct codes facing such an upsurge. Both codes were challenged and struck down by courts as unduly vague and overbroad so in violation of the First Amendment. *See* Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) *and* The UWM Post, Inc. v. Board of Regents of University of Wisconsin System, 774 F. Supp. 1163 (E.D. Wis. 1991). The University of Michigan rule prohibited "[any] behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status" in "educational and academic centers, such as classroom buildings, libraries, research laboratories, recreation and study centers[.]" *Doe*, 721 F. Supp. at 856. The University of Wisconsin rule prohibited racist or discriminatory comments, epithets or other expressive behavior or physical conduct that intentionally "[d]emean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals[.]" *UWM Post*, 774 F. Supp. at 1165. For a good description of University of Michigan incidents dealt with after the new conduct code was promulgated, *see* Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech:" The View From Without and Within*, 53 U. PITT. L. REV. 631, 639-46 (1992). Between forty and fifty policies have been adopted or modified to redress the problem of increased ethnoviolence on campus. *See* Charles H. Jones, *Equality, Dignity and Harm: the Constitutionality of Regulating American Campus Ethnoviolence*, 37 WAYNE L. REV. 1383, 1399 (1991). Professor Henry McGee has examined the policies of forty schools – fifteen colleges and twenty-five universities. *See* Henry McGee, *A Typology of College and University Racial Harassment and Speech Policies*, quoted in Charles H. Jones, *id*, at 1399-1402.

[4] For example, in May 1997, Village of Skokie, Illinois passed three ordinances to prevent the National Socialist Party of America ("NSPA")'s use of the village hall. Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985). One ordinance stated: "[t]he dissemination of any

prompted hot debates, and split people into two camps: egalitarians and civil libertarians.[6] Egalitarians argue that the issue of equality should occupy the center stage.[7] Since hate speech violates the victim's constitutional right[8] and human right[9] to be treated equally and respectfully,[10] they have advanced various arguments to advocate, if there is no regulation, and to defend, if there is regulation, hate speech rules. In contrast, civil libertarians see a completely different world. They declare that these rules are a free speech problem.[11] Accordingly, from the perspective of free speech protection, they have also advanced a lot of reasons why hate speech, though much deplorable, should not be regulated, [12] and egalitarians are seen by them as aggressors attempting to curtail a precious liberty. [13] How to evaluate this lively exchange?

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materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so, is hereby prohibited." *Id*., footnote 3. *See also* Village of Skokie v. National Socialist Party, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), modified, 69 Ill. 2d 605, 373 N.E.2d 21 (1978), *and* Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978), where the ordinance was truck down. In 1990, City of St. Paul, Minnesota enacted Legis. Code § 292.02, which stated "[w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992). But the primary effort to restrict racist speech in American society is taking place on university campuses today. *See* Robert A. Sedler, *supra* note 3, at 635.

[5] The University of Michigan rule, the University of Wisconsin rule, the Village of Skokie rule and the St. Paul rule were all struck down. *See supra* notes 3 and 4. Besides, in 1995, a California state court struck down a similar Stanford University standard of conduct. Corry v. Stanford, No. 740309 (Cal. Super. Ct. Santa Clara Co. Feb. 27, 1995), on the basis of a California statute which provided that a private university may not impose limitations on speech that would violate the First Amendment if imposed by a public university. *Id*.

[6] Charles H. Jones, *supra* note 3, at 1383. Mr. Jones, like others, often refers to the egalitarians as "equalitarians," but I was persuaded by my major professor Michael L. Wells that the former is a better word. *See also* Richard Delgado, *supra* note 2, 345-48 for a summary of the two camps. It is worth noting that not all those arguing for regulation are traditional egalitarians, for example, Charles R. Lawrence III is a traditional civil libertarian, but he argues for hate speech regulation. *See* Nadine Strossen, *Regulating Hate Speech on Campus: A Modest Proposal*? 1990 DUKE L. J. 484, 496 (1990). But for the purpose of this paper, in order to avoid complication, anyone arguing for hate speech regulation is regarded as an egalitarian, while anyone arguing against regulation a civil libertarian.

[7] Richard Delgado & Jean Stefanic, *Hate Speech, Loving Community: Why Our Notion of "A Just Balance" Changes So Slowly?* 82 CALIF. L. REV. 851, 852 (1994).

[8] Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. REV. 133, 143 (1982).

[9] Mari J. Matsuda, *supra* note 2, at 2344-45.

[10] Richard Delgado, *supra* note 8, at 143.

[11] Richard Delgado & Jean Stefanic, *supra* note 7, at 851.

[12] This is just a very cursory summary of the two camps. For detailed descriptions of arguments from both camps, *see* Parts II and III below.

[13] Richard Delgado & Jean Stefanic, *supra* note 7.

B. Purpose

This paper tries to do such an evaluation, though in a particularly incomplete way: it only tries to do an internal critique[14] of the egalitarian arguments, though at the same time it will of necessity touch upon civil libertarian arguments.[15] Anyway, when egalitarian arguments are strengthened or weakened by subsequent discussion, the civil libertarian case becomes weaker or stronger in an indirect way. In this sense, civil libertarian arguments are evaluated here, though quite incompletely. In addition, this paper will mainly concentrate on theoretical arguments made by egalitarians to establish that hate speech should be regulated. In another word, its emphasis is not on how relevant court decisions have developed and what they are, though there will be a cursory comment on them at the very end of this paper.[16] Accordingly, it does not concern itself with whether hate speech could be regulated in consistence with current free speech law.[17]

C. Structure

In order to do an internal critique of egalitarian arguments, the rest of this paper is divided into several parts. Part II will summarize part of the arguments made by the egalitarians

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[14] "Internal critique" used as an evaluation method in this paper mainly asks this question: assuming egalitarians are right in contending that hate speech should be regulated, how well is their position supported by their evidences and reasoning? *See also* Part IV below for more detailed discussion of the concept of "internal critique."

[15] The main reason is that to do an overall evaluation is simply beyond my ability, since I have found out that it is particularly hard for me to do a good or even mediocre criticism of civil libertarian arguments. Another reason is that to do such an overall evaluation would make this paper unmanageable for me, whose writing skills are not particularly good for this task of overall evaluation.

[16] *See* Part VI below.

[17] This has been done by several authors. *See, e.g.*, Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: a Proposed Policy*, 31 SANTA CLARA L. REV. 345 (1991) (proposing a model hate speech regulation that arguably would stand under the current free speech law framework); *and* Richard Delgado & David Yun, *supra* note 1, at 886-88 (arguing that in the wake of various court decisions, the task of drafting a hate speech regulation rule that would be upheld by courts constitutional is still technically feasible). It seems that they are arguing that the reason that hate speech rules were struck down is that they are poorly drafted. For similar arguments, *see* Rodney A. Smolla, *Rethinking First Amendment Assumptions about Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 208 (1990) ("the University failed to confine sufficiently its definition of covered speech"), *and* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 477-78 n.161 (1990). *But see* Robert A. Sedler, *supra* note 3, at 633 (arguing that no matter how narrowly tailored, any campus hate speech regulation is targeted at racist ideas, thus would be unconstitutional under the current free speech framework). *See also* Nadine Strossen, *supra* note 6, at 495-507 (pointing out that some limited forms of campus hate speech could be regulated consistently with the current constitutional law).

defending regulation of hate speech, which focus on harms of hate speech, the political imperativeness of and legal commitment to hate speech regulation, and the international pro-regulation trend. In a sense, egalitarian arguments in this part could be labeled "affirmative/positive arguments" in that they are offered not mainly as refutation but as affirmative reasons why hate speech should be regulated. This feature distinguishes these arguments from those discussed in Part III, which are offered as refutation to civil libertarian arguments. In this sense, egalitarian arguments in Part III could accordingly be termed as "defensive/passive arguments." The basic structure of Part III is to first summarize civil libertarian arguments and then to focus more closely on egalitarian counterarguments. With Part II and Part III, taken together, constituting a roughly complete picture of egalitarian arguments, Part IV tries to do an internal critique of egalitarian arguments and counterarguments. It is pointed out that their arguments and counterarguments are generally problematic. There are too many incoherencies, contradictions or defects. Part V is a summary of the conclusion of this paper: while egalitarians have made a good case for hate speech regulation, their arguments are far from convincing, not to say conclusive. So their case for hate speech regulation is called into much doubt. Part VI gives a cursory defense of what federal courts have done so far in the area of hate speech. It is argued that what they have done is not only understandable, but also very wise. But before we go to the main body of this paper, a point needs to make clear: the paper is not intended to cover any and all arguments made by all egalitarians. This would be a too ambitious project to be manageable for a person like me with very limited understanding of American constitutional law. So, in an effort to make life easier for myself, in discussion of egalitarian arguments, I will generally concentrate on Richard Delgado's arguments mainly, since seemingly he has been an arch-warrior advocating and defending hate speech regulation

and has written so extensively that his arguments almost represent a full picture of the egalitarian case for hate speech regulation. Of course, when necessary and convenient, other egalitarians' arguments will be discussed also, or at least will be cited (when their arguments are the same with or similar to Mr. Delgado's). In a word, Mr. Delgado's arguments run through the line of narration, while others' dot the line here and there. So, a related point is, the general conclusion of this paper (Part V) only has limited validity. This conclusion should be interpreted contextually only within the framework of this paper, though various specific points of internal critique may apply to egalitarian arguments similar but not covered here.

CHAPTER II

EGALITARIANS: HATE SPEECH SHALL BE REGULATED

When advocating or defending hate speech regulation, egalitarians have argued that hate speech has great and real harms on the victim. In addition, it is also argued that hate speech has great harms on the perpetrator and society as a whole.[18] Furthermore, some egalitarians have even tried to argue that there is political imperativeness of and legal commitment to hate speech regulation. If these are not enough, there is the international pro-regulation trend, to which many egalitarians have made an emphatic appeal. This part will give a summary of these three themes of argument in turn in the following subsections.

A. Harms of Hate Speech

1. Harms to the Hate Speech Victim

Harms of hate speech on the victim include (1) direct mental or emotional distress, (2) personal dignity injury, (3) reputational injury, (4) psychological injury, (5) relational injury, (6) physical injury, and even (7) pecuniary injury. The first harm, i.e., direct mental or emotional distress is the most obvious one, and almost everyone talks about it when defending hate speech regulation.[19] Hate speech's harm to personal dignity,[20] related to the first harm, is quite easy to

[18] One feature of discussion of many egalitarians needs to be noted here. When they are talking about hate speech's harms, they generally tend to mainly talk about hate speech based on race, that is, racial insults, though sometimes they do talk about other types of insults when convenient. For them, undoubtedly, harms of racial insults generally apply to other types of hate speech. *See*, for example, Charles R. Lawrence III, *supra* note 17. In that article, it seems that Mr. Lawrence uses hate speech to mean insulting speech based on one's race, gender, or sexual orientation, *id*. at 436, while mainly using incidents where racial slurs are involved.

[19] *See*, *e.g.*, Richard Delgado, *supra* note 8; Charles R. Lawrence III, *supra* note 17, at 459-61 (using his sister's story to exemplify that hate speech will inflict direct mental or emotional distress in the victim). Besides, it is pointed out that this harm is especially severe when hate speech is delivered in front of others or by a person in a position of authority. Richard Delgado, *id*.

understand. No one would like to be humiliated by degrading words of whatever form. The reputational harm seems an easy question too, since hate speech is often unfounded, and actually is a form of group defamation condemned by *Brown v. Board of Education*,[21] according to one author.[22] To establish other harms of hate speech, the theory of social construction of reality[23] and social studies are heavily relied upon.[24] The social construction of reality theory runs like this: speech communicating low regard for an individual because of one's race tends to create in one those very traits of 'inferiority' that it ascribes to one,[25] especially when one's daily experience tells one that almost nowhere in society is one respected and granted the ordinary dignity and courtesy accorded to others.[26] What makes things worse is that such kind of social construction will happen even in the absence of more objective forms of discrimination – poor schools, menial jobs and substandard housing and so on,[27] since hate speech tend to convey, explicitly or implicitly, traditional stereotypes about the low ability and apathy of the black people or other minorities,[28] and these stereotypes are self-fulfilling prophecies.[29] In a word, with

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[20] Richard Delgado, *supra* note 8, at 146; Richard Delgado, *Book Review: Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 786 (2000).
[21] 347 U.S. 483 (1954).
[22] Charles R. Lawrence III, *supra* note 17, at 462.
[23] Richard Delgado, *Book Review*, *supra* note 20, at 787; Richard Delgado, *First Amendment Legal Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169, 171-72 (1994).
[24] These studies include: a study that American blacks have higher blood pressure levels; an experiment testing blacks and whites of similar aptitudes and capacities that showed the blacks exhibited defeatism, half-hearted competitiveness, and high expectancies of failure; and another experiment where several children were studied. These children are: a black girl who preferred the light-skinned doll than the dark but otherwise identical one; another black girl hated her skin and washed intensively her arms and face until they were almost white; another black child who preferred to use white clay rather than the brown clay to make a little girl since the white clay would make a better girl; and young children who used "rough, funny, stupid, silly, smelly, stinky, dirty" to describe physical characteristics of black people. *See* Richard Delgado, *supra* note 8, at 139-40, 142-43.
[25] Richard Delgado, *supra* note 8, at 146, quoting M. Deutsch, I. Katz & A. Jensen, SOCIAL CLASS, RACE AND PSYCHOLOGICAL DEVELOPMENT 175 (1968).
[26] *Id*, at 136-37, quoting Kenneth Clark, DARK GHETTO 63-64 (1965). *See also* Richard Delgado, *First Amendment*, *supra* note 23, at 172 ("Incessant depiction of a group as lazy, stupid, and hypersexual – or ornamental for that matter – constructs social reality so that members of that group are always one-down. Thereafter, even the most scrupulously neutral laws and rules will not save them from falling further and further behind as private actions compound their disadvantage.").
[27] Richard Delgado, *supra* note 8, at 146.
[28] *Id*.

the effect of social construction of reality, people subject to hate speech become self-doubt, self-hatred and isolated.[30] The problem is a more severe one if it is taken into account that hate speech's psychological effects tend to accompany the victim for a very long time, even a whole life. Those minorities who succeed "do not enjoy the full benefits of their professional status within their organizations, because of inconsistent treatment by others resulting in continual psychological stress, strain, and frustration."[31] This makes hate speech more an evil than otherwise it would be. With one humiliated very often by others, self-doubted, self-hated, and isolated, it follows quite naturally that one's relationships with others are injured.[32] Even one's relationships with members of one's own group are adversely influenced.[33] In addition, according to one author, this long-term psychological injury, in turn, may have physical consequences, for example, making the victim's blood pressure consistently and abnormally high.[34] According to the same author, one's pecuniary interest would be damaged also,[35] since the psychological injury severely handicaps one's ability to pursue opportunities according to an experiment.[36] In addition, there are several social studies suggesting that hate speech has greater impact on children,[37] and this should make us more willing to regulate hate speech.

2. Harms to the Perpetrator

When it comes to harms to the perpetrator, one tends naturally to think about physical harms. Anyway, the perpetrator, by insulting the victim, has a great chance of exciting angry reaction on the part of the victim. Undoubtedly, a deeply wounded victim might attack the perpetrator on the

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[29] *Id*.
[30] *Id*, at 137.
[31] *Id*, at 138.
[32] *Id*.
[33] *Id*.
[34] *Id*. at 139.
[35] *Id*.
[36] *Id*. at 139-40. Here an experiment where some black persons exemplified defeatism and so on is used to support this argument. *See also supra* note 24.

spot. Even if the victim does not win the fight, the chances are that both would be wounded physically. And if the perpetrator is not attacked on the spot due to various reasons,[38] there is still chance that later on the victim, seizing some opportune moment, might physically attack the perpetrator. But it is not such possible physical harms that some egalitarians are concerned about. Their idea is a more subtle one: hate speech reflects stereotypes, which, when held dear by one, will contribute to one's bigotry; so, hate speech, as a form of bigotry, harms one by reinforcing rigid thinking, thereby dulling one's moral and social senses.[39] This kind of blindness will probably lead to a mildly paranoid mentality.[40]

3. Harms to the Society as a Whole

With the victim deeply harmed, and the perpetrator subtly harmed also, the society as a whole undoubtedly loses. But it is not just so. Hate speech, as part of racism, if unaddressed, breaches the egalitarian ideal,[41] a cornerstone of the American moral and legal system.[42] A society where some members are subjected to degradation because of their race hardly exemplifies this ideal.[43] When the legal system fails to address harms of hate speech, a lesson will be conveyed to all that egalitarianism is not a fundamental principle as it is on the books. Thus, even those preferring to live in a truly equal society may be demoralized by such a lesson and become unwilling participators in the perpetration of racism and racial inequality.[44] Anyway, when one is

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[37] *See supra* note 24.
[38] For example, the victim is just one person, but the perpetrator is with several others. Under this circumstance, rational judgment would caution against on-the-spot action. Nonetheless, the victim, if deeply wounded and in a mood to revenge the dignity wound, might attack the perpetrator when he or she is alone.
[39] Richard Delgado, *supra* note 8, at 140.
[40] *Id*. *See also* Mari J. Matsuda, *supra* note 2, at 2338-39. *See also*, Michael Kent Curtis, *"Free Speech" and Its Discontents: The Rebellion against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 422-23 (1996).
[41] Richard Delgado, *supra* note 8, at 140.
[42] *Id*.
[43] *Id*., at 141.
[44] *Id*.

frequently exposed to hate speech degrading others, one tends to think that the message at least conveys some truth.[45]

Furthermore, the society as a whole loses in another sense: hate speech, as part of racism, contributes to a class system or the rigidity of such a system.[46] In a sense, when both the majority and the minorities begin to believe in the message contained in hate speech about bad qualities of minorities, very bad consequences result. The majority members, with bigotry, would be reluctant to accept minority members on an equal basis. On the other hand, the minority members, with self-doubt and self-hatred, would be reluctant to actively communicate with majority members. This will impede the assimilation of minority members into mainstream economic, social and political systems, since these systems are controlled mainly by the white majority.[47] This in turn would cause the minority members to be seen and to see themselves as outsiders.[48] Thus, they are demoralized or angry, choose not to contribute their talents to society; or, even if they want to contribute, they are prevented by the reluctance of the majority members. This mutual reluctance[49] would make the line between the majority and the minority starker, thus making the society less mobile. In a word, with a rigid class system, the society loses the contribution it otherwise would obtain from the minorities, so it loses by tolerating hate speech.

4. Hate Speech is Widespread

Whatever harms hate speech inflicts on the victim, the perpetrator, and society as a whole, if hate speech is just a minor problem, the case for regulation would be still weak. So some egalitarians have made an effort to establish that hate speech is a widespread and thus severe

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[45] Richard Delgado, *Book Review*, *supra* note 20, at 788.
[46] Richard Delgado, *supra* note 8, at 141-42.
[47] *Id*., at 142
[48] *Id*.
[49] It is not just reluctance. Indeed, the majority members are not only reluctant, they consciously use hate speech to preserve for themselves an economically advantageous position. *Id*.; Richard Delgado, *Book Review*, *supra* note 20, 789-91.

problem. In such an effort, the 1990 report[50] of the National Institute Against Prejudice and Violence[51] is commonly cited. According to the report, since the fall of 1986, incidents of ethnoviolence had occurred on more than 250 college campuses.[52] The report also estimated that between 800,000 and one million students annually were involved in these incidents.[53] Besides, it also claimed that approximately twenty percent of minority students experienced some form of ethnic or racial attack during an academic year and that one-fourth were victimized more than once.[54]

B. Political Imperativeness and Legal Commitment

The arguments about political imperativeness and legal commitment are offered to further support regulation of hate speech. According to one author, although hate speech may have abetted the preservation of a social stratification system bringing at least some benefit to the majority, the situation may be changing.[55] The American society today is much more diverse than before.[56] It is more populous, and channels of communication place people in closer contact with each other than ever before, multiplying opportunities for friction.[57] To meet the challenges

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[50] Howard J. Ehrlich, *Campus Ethnoviolence and Policy Options*, 4 NAT'L INST. AGAINST PREJUDICE & VIOLENCE 4 (1990), quoted, for example, in Charles H. Jones, *supra* note 3, at 1389-90.

[51] The predecessor of Prejudice Institute. *See* http://www.prejudiceinstitute.org/whoweare.html#Anchor-55346 (Last visited on Feb. 29, 2004). Though I did not find this report, detailed information contained in the report could be found in several authors' articles. *See*, for example, Charles H. Jones, *supra* note. *See also* Richard Delgado, *supra* note 2, at 343, n1; Richard Delgado & David H. Yun, *supra* note 1, at 872. Besides, by looking at Prejudice Institute's official website, one can have a good grasp of some relevant information contained in the report, and thus can do some meaningful evaluation of the report. For example, the definition of "ethnoviolence" can be found on the website. *See* http://www.prejudiceinstitute.org/ethnoviolenceFS.html(last visited Feb. 29, 2004), where the word "ethnoviolence" is defined to mean "an act or an attempted act which is motivated by group prejudice and intended to cause physical or psychological injury. These violent acts include intimidation, harassment, group insults, property defacement or destruction, and physical attacks. The targets of these acts involve persons identified because of their race or skin color, gender, nationality or national origin, religion, or other physical or social characteristic of groups such as sexual orientation." This definition of ethnoviolence will be discussed later. *See* Part IV (C) below.

[52] Charles H. Jones, *supra* note 3, at 1389, quoting Howard J. Ehrlich, *Campus Ethnoviolence and Policy Options*, 4 NAT'L INST. AGAINST PREJUDICE & VIOLENCE 4 (1990), *i.e.* the 1990 report just mentioned.

[53] Charles H. Jones, *id*.

[54] *Id*, at 1389-90.

[55] Richard Delgado, *Book Review*, *supra* note 20, at 795.

[56] *Id*.

[57] *Id*.

of global competition, society more than ever before needs the contributions and enthusiastic participation of all its members,[58] while hate speech, as discussed above, prevents people from contributing and participating actively. For these reasons, hate speech is no longer a social good.[59] So, regulation of hate speech seems to be logical and necessary.[60] Besides, in a democratic society, deliberation among equals is the keystone.[61] But hate speech denigrates minority groups needlessly, making people unequal. So dealing with hate speech may turn out to be a necessary pre-political reckoning.[62] Without such a reckoning, genuine dialogue based on equal participation and respect will be scarce.[63]

When it comes to legal commitment made by the American society, one tends to think about the equal protection clause,[64] thinking that hate speech violates people's right to be treated equally.[65] But here the legal commitment argument is somewhat different. Since regulation of hate speech is regarded by the civil libertarians as a form of restriction of freedom of speech, it is argued that, even if so, the American society has made a legal commitment to restrict hate speech. Thus, regulation of hate speech does not violate freedom of speech at all. On the contrary, it is our duty to regulate. According to this argument, the legal commitment was made in *Brown v. Board of Education*,[66] which was a case about regulation of racist speech[67] instead of about black children's equal educational opportunity.[68] Segregation was held unconstitutional in

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[58] *Id*., at 796.
[59] *Id*., at 795-96. There is doubt that whether hate speech was once a social good. This question was not specifically dealt with by Mr. Delgado.
[60] *Id*., at 796.
[61] *Id*.
[62] *Id*.
[63] *Id*., at 796-97.
[64] U.S. Const. amend. XIV, 1.
[65] *See*, for example, Richard Delgado, *supra* note 8, at 143.
[66] 347 U.S. 483 (1954).
[67] Charles R. Lawrence III, *supra* note 17, at 438-49.
[68] *Id*., at 438. *See also* Brownstein, *Regulating Hate Speech at Public Universities: Are First Amendment Values Functionally Incompatible with Equal Protection Principles?* 39 BUFF. L. REV. 1, 23 (1991) echoed this interpretation of *Brown*.

Brown not simply because of the bad physical separation of black and white children, but also and primarily because of the message segregation conveys – the message that black children are an untouchable caste, unfit to be educated with white children.[69] Segregation serves its purpose by conveying an idea, which stamps a badge of inferiority upon blacks, and this badge communicates a message to others in the community, as well as to blacks wearing the badge. The message is injurious to blacks. Therefore, *Brown* may be read as regulating the content of racist speech. As a regulation of racist speech, the decision is an exception to the usual rule that regulation of speech content is presumed unconstitutional.[70] So, the civil libertarian argument that hate speech rules are content-based[71] and thus unconstitutional could be well dismissed.

C. International Trend

If all of the above are not adequate to establish that hate speech shall be regulated, egalitarians are not without recourse: there is the clear international trend for regulation. Here frequently Article 4 [72] of the International Convention on the Elimination of All Forms of Racial Discrimination is first relied upon.[73] This article requires state parties to the Convention to

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[69] Charles R. Lawrence III, *supra* note 17, at 439.
[70] *Id.*, at 439-40.
[71] *Id.*, at 440.
[72] Article 4 states: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia:*

(a) Shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offence punishable by law; [and]

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination." *See* Mari J. Matsuda, *supra* note 2, at 2341.
[73] *See, e.g.*, Richard Delgado, *supra* note 2, where Richard Delgado talked about this article first, then other western countries' experience. *Id*. at 362-371.*See also* Mari J. Matsuda, *supra* note 2, at 2341-48, same discussion structure.

punish all dissemination of ideas based on racial superiority or hatred,[74] to prohibit "organizations, and also organized and all other propaganda activities" promoting and inciting racial discrimination,[75] to punish participation in such organization or activities[76] and to prohibit public authorities or public institutions from promoting or inciting racial discrimination.[77] Here, as seen by some egalitarians, there is a good argument against U.S. courts' blind adherence to the incitement doctrine.[78] This article never requires proof of incitement, and it prohibits mere dissemination of racist ideas,[79] since an atmosphere of hatred would inevitably lead to discrimination.[80] What makes the article more unique and important is that as a clearly controversial proposition, it was unanimously adopted by the General Assembly, whereas in other areas of international human rights consensus building, serious ideological debate dooms a proposal to failure. In addition, the Convention gathered an increasing number of state signatures over the years, and even United States is one of the signatory countries, though it in the end failed to ratify it due to its concerns with the Article's free speech inhibiting implications.[81] But many other countries adopted laws consistent with the international convention.[82] These countries include the United Kingdom, Canada, the Netherlands, France, Austria, Germany, Italy, the Scandinavian countries, Australia, and New Zealand.[83] In a word, there is growing

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See also Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Study*, 24 CARDOZO L. REV. 1523, 1554-55 (2003).

[74] Mari J. Matsuda, *supra* note 2, at 2341.

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *Id*. at 2343-44. Mari J. Matsuda was undoubtedly praising Article 4 for its not including a requirement of proof of incitement.

[79] Mari J. Matsuda, *supra* note 2, at 2344.

[80] *Id*.

[81] *Id*., at 2345.

[82] *Id*., at 2346-48.

[83] *Id*., at 2346-48; Richard Delgado, *supra* note 2, at 369-71. *See also* Michel Rosenfeld, *supra* note 73, at 1542-54 (describing hate speech regulation in Canada, United Kingdom and Germany).

international movement toward outlawing racist hate propaganda.[84] Of these countries, the United Kingdom, Canada, and the Scandinavian countries are emphasized as particularly persuasive.[85] The idea is this, because the United States shares a long common-law tradition with the United Kingdom, Canada has adopted a similar constitutional approach to regulation of speech,[86] and the Scandinavian countries have a long tradition of protection free speech,[87] and they all have begun to regulate hate speech, then why cannot the United States just follow suit, especially when there is no significant indication that in these countries free speech is inhibited by hate speech regulations?[88]

D. What is Hate Speech in Egalitarian Arguments?

But what is hate speech, according to egalitarians? This question, though seemingly an obvious one, is actually a difficult one. It is obvious in that almost everyone has a rough understanding of what hate speech is. It is a difficult one in that egalitarians, with just a few exceptions according to my reading,[89] tend to fail to provide a clear definition of what hate speech is in their mind. But it is not necessary for the purpose of this paper to ascertain a clear definition of hate speech consistent with egalitarian arguments, though it is not impossible to do

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[84] *Id*., at 2346.
[85] Richard Delgado, *supra* note 2, at 371.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] One exception is found in Jack M. Battaglia, *supra* note 17, at 346 and n4, where hate speech is defined to be "verbal or behavioral expression which reflects class based animus by reason of race, ethnicity, national origin, gender, religion, handicap, sexual orientation, or other class characteristics which have no relationship to individual value." Here, race, ethnicity, national origin, gender, religion, handicap, sexual orientation or other class characteristics having no relationship to individual value are all included. *But see* Michel Rosenfeld, *supra* note 73, 1523, where hate speech is defined to be "speech designed to promote hatred on the basis of race, religion, ethnicity or national origin." Like theoretical discussions, in actual hate speech regulation rules, there is a great difference on the scope of hate speech. For example, University of Texas only aims at hate speech based on race or ethnicity, while Stanford University and University of Michigan bar insults based on religion, sex, sexual orientation, disability, Vietnam-era veteran status, and so on. So, there is one very expansive concept of hate speech on the one side, while on the other side there is a very limited concept of hate speech. This very indeterminacy of the scope of hate speech contemplated by different egalitarians and hate speech rules reveals the difficulty of drawing the line, -- "[w]e would have a difficult time limiting our descent to a single downward step by attempting to prohibit only racist expression on campus." Nadine Strossen, *supra* note 6, at 537.

so.[90] It suffices to say that (1) many egalitarians talks about slurs based on race, ethnicity, sex, sexual orientation or religion, and they do not make an effort to distinguish one characteristic from another. They discuss them together as they are just one thing;[91] (2) many egalitarians are advocating prohibition of face-to-face hate speech,[92] as some campus hate speech rules prohibit such hate speech;[93] and (3) slurs based poverty are generally excluded in their concept of hate speech.[94] This last point has to do with the uniqueness of hate speech's harms. It is argued that hate speech is particularly evil, since it is based on personal characteristics such as race, ethnicity or sex that are born with one. These characteristics, unlike poverty, cannot be eliminated.[95] Whatever one tries to do, one will not be able to overcome such characteristics. This makes hate speech different from verbal slurs based on one's poverty.[96]

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[90] For example, one can ascertain what constitutes hate speech for a particular author by looking at what regulation he or she is defending. For example, Richard Degaldo have defended University of Wisconsin rule which prohibits remarks that demean based on membership in a racial, religious, or sexual group. *See* Richard Delgado, *supra* note 2, at 344. From this, it can be reasonably inferred that Richard Delgado thinks race, religion and sex/sexual orientation should be included in the hate speech definition. One can look at particular hate speech incidents an egalitarian is deploring to ascertain what characteristics would be included by this author. Still, though there is no clear definition of hate speech generally, many authors do mention in their discussion what kind of remarks should be regulated. For example, in describing a hate speech incident in University of Wisconsin at Madison in 1987, Richard Delgado mentioned "racial and ethnic slurs," *id* at 356. So it could be said that for Richard Delgado slurs based on ethnicity should be included also.

[91] *See supra* note 18.

[92] *See, e.g.*, Charles R. Lawrence III, *supra* note 17, at 452 (explaining reasons for face-to-face hate speech regulation); Richard Delgado & Jean Stefanic, *Ten Arguments against Hate-Speech Regulation: How Valid?* 23 N. KY. L. REV. 475, 488 (1996) (arguing that the line-drawing problem argument against face-to-face hate speech regulation is invalid).

[93] For example, there is good reason to believe that the University of Wisconsin hate speech rule and the University of Michigan rule prohibited face-to-face hate speech. For description of these two rules, *see supra* note 3.

[94] For example, the University of Wisconsin rule and the University of Michigan rule did not include a factor of "poverty." *See supra* note 3. Besides, some egalitarians have explicitly excluded slurs based on poverty from the concept of hate speech, *see e.g.*, Jack M. Battaglia, *supra* note 17, or have explicitly distinguished poverty from race, sex and so on, *see e.g.*, Richard Delgado, *supra* note 8, at 136.

[95] Richard Delgado, *id*.

[96] In one definition of hate speech that I did find, *supra* note 89, there is an open-ended phrase of "other class characteristics which have no relationship to individual value," in addition to a clear list of other personal characteristics such as race, sex and so on. This open-ended phrase tempts one to wonder whether poverty is included. But later in proposing a hate speech rule purportedly would pass constitutional muster, poverty is clearly not included. There the definition of hate speech is "any word, gesture, graphic representation, or symbol which reflects hatred, contempt, or stigmatization by reason of race, ethnicity, national origin, gender, religion, handicap or sexual orientation." *See* Jack M. Battaglia, *supra* note 17, at 382.

CHAPTER III

CIVIL LIBERTARIANS: FROM THE PERSPECTIVE OF EGALITARIANS

Of course, arguments made by egalitarians advocating and defending hate speech regulation are not limited to those cursorily summarized in part II. Facing opposition from the civil libertarian camp, they have counter argued forcefully, purportedly to dispel what civil libertarians have argued. This part takes up with these arguments and counterarguments from the two camps.

A. More Speech?

One most common civil libertarian argument is that more speech is always a preferred response to hate speech.[97] The underlying conception is the theory of marketplace of ideas, [98] which could be traced back to English philosophers John Milton and John Stuart Mill, especially the latter.[99] But for our purpose here, it will be unnecessary to get into these two philosophers' ideas. It suffices to say that their concept of marketplace of ideas was first incorporated by Supreme Court Justice Oliver Wendell Holmes into the American jurisprudence in his famous

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[97] *See, e.g.*, Nat Hentoff, FREE SPEECH FOR ME – BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER, 167 (1992); Robert A. Sedler, *supra* note 3, at 679 (saying that universities can expand their curricula to promote the values of equality and diversity, and to provide their students with increased knowledge about racism, sexism, homophobia and the like in American society and the world); Charles J. Ogletree, Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZAGA L. REV. 491, 508-09 (1996/1997) (Mr. Ogletree, in seemingly concluding that hate speech is an abuse of right, thus morally deplorable but not necessarily legally punishable, suggested that the private citizen, the community and the government have duty to mitigate effects of hate speech, by active participation in the political process, by accepting minority into the neighborhood and taking steps to assuage any fear minorities have of continued acts of racial animus, and by enforcing affirmative action policies, providing affordable housing for minorities, or engaging in programs of education, respectively. In a word, more speech to cure the harms of hate speech);

[98] For a detailed discussion about this theory, *see* Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, *and* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 3 (1984). These two articles voice criticism of this theory. *But see* David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223 (2003), which forcefully and passionately defends the theory.

dissent to *Abrams v. United States*.[100] Ever since then, the theory has become firmly rooted in the First Amendment free speech jurisprudence.[101] Scholars and jurists frequently have used the theory to explain and justify the first amendment freedoms of speech and press.[102] In its classic form, the theory argues that "the best test of truth is the power of thought to get itself accepted in a competition of the market."[103] This theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems. A properly functioning marketplace of ideas ultimately assures the proper evolution of society, wherever that evolution might lead.[104] So, what the "more speech" approach argues is that, let them say hate speech, and we, including hate speech victims, talk back, and through the market process, hate speech and its underlying concepts of racial supremacy, male supremacy and so on will be automatically rejected. Besides, it is especially good if minorities learn to talk back rather than try to resort to hate speech regulation, since talking back clears the air, emphasizes self-reliance, and strengthens one's self-image as an active agent in charge of one's own destiny.[105] Further, a minority speaking out will be able to educate the speaker who has uttered a racially hurtful remark.[106] The idea is that racism is the product of ignorance and fear. If a victim of racist hate speech takes the time to explain matters, the speaker's perception may be so altered that the speaker will not utter racist remarks again. In a word, hate speech rules need to be opposed not only because they limit speech, but also because it is good for minorities to learn to speak out.

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[99] Stanley Ingber, *id*.
[100] 250 U.S.616 (1919).
[101] Michel Rosenfeld, *supra* note 98, at 135.
[102] Stanley Ingber, *supra* note 98, at 2-3.
[103] 250 U.S. at 630 (Holmes, J. dissenting).
[104] Stanley Ingber, *supra* note 98, at 3.
[105] Nat Hentoff, *supra* note 97.
[106] Richard Delgado & David H. Yun, *supra* note 1, at 884 and footnote 88, quoting Yale University President Benno Schmidt's remarks about campus speech at a panel discussion at Yale Law School (Oct. 1, 1991).

To this argument, there is a forceful egalitarian reply. First, it is often unwise or impossible to talk back. Often racist remarks are delivered in several-on-one situations, the hate speech speaker is with others, or they do hate speech together, but the victim is just alone. In this circumstance, to talk back is foolhardy.[107] Don't you see there are many highly publicized racial homicides where the black victim talked back to the hate speech speaker but paid his life?[108] Even if hate speech is delivered in a one-on-one situation, it would be still very hard to for the victim to talk back. For example, how about if one white person says to a black person "Nigger, go back to Africa. You don't belong to America"?[109] This kind of hate speech tends to make one speechless. Then, how can one arguably talk back? Even when successful, talking back is a burden on the victim.[110] Why should the victim be asked to treat a hateful attempt as an invitation for discussion and thus take the burden to persuade?[111] Other racist remarks are delivered in a cowardly fashion, by means of scrawling graffiti on a campus wall late at night or on a poster placed outside a black student dormitory.[112] In these situations, more speech is of course impossible.[113]

What if one argues that more speech or talking back does not mean only on-the-spot response, the victim can respond by later writing and later speeches not specifically targeted at the very hate speech speaker? This question is readily answered by some egalitarians. Sure, in this instance, the victim runs no risk of being physically attacked. But the undue burden is still there. Furthermore, speech is expensive, not all can afford the cost of a microphone, computer, or

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[107] Richard Delgado & David H. Yun, *supra* note 1, at 884
[108] *Id*.
[109] *Id*., at 885. Or how reply when someone calls you a "Jew bastard?" *See* Brownstein, *supra* note 68, at 21 (There is no serious issue to debate if someone calls you a "Jew bastard" to your face.) *See also* Charles R. Lawrence III, *supra* note 17, at 452 (arguing that hate speech is like a "slap in the face" making minorities speechless and flight);
[110] Richard Delgado & David H. Yun, i*d*.
[111] *Id*.
[112] *Id*., at 884.
[113] *Id*.

television airtime.[114] What makes more speech more implausible is that hate speech, by unduly undermining minorities' credibility, makes it harder for the minority speaker to speak out.[115] People tend to do not believe what they are saying. For example, in the course of a conversation among several people, a woman will make a suggestion and the conversation will continue as though little had happened. Later, a man will raise the same idea, which everyone will praise and then describe as "Bill's idea."[116] It is argued that, since the message is the same, the reason for the different reception can only lie in the belief that all women and minorities are inherently unworthy of belief, and this belief is conveyed and strengthened by hate speech.[117]

Egalitarians are also wary of the underlying conception of marketplace of ideas. They have pointed out that marketplace has its process defects, and there is no assurance that the truth will be discovered and the right idea will ultimately win the competition.[118] This is perhaps especially true for United States, since 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 marketplace opened, racism has remained its most active item in trade.[119] This racist idea infects, skews, and disables the operation of the marketplace of ideas like a computer virus.[120] Thus, words and ideas of blacks and other despised minorities are less saleable in the market.[121] Besides, since hate speech silences ideas, the total amount of speech that enters the market also decreases. In a word,

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[114] Richard Delgado, *Book Review*, *supra* note 20, at 791.
[115] *Id*., at 791, 793 ("In earlier eras we refused to hear the testimony of Chinese or black witnesses against parties who were white - we deemed them unworthy to perform that function.") (Citation omitted).
[116] Richard Delgado, *Book Review*, *supra* note 20, at 791.
[117] *Id*.
[118] Charles R. Lawrence III, *supra* note 17, at 467.
[119] *Id*., at 468.
[120] *Id*.
[121] *Id*.

the "process defect" is so ubiquitous, there is no reason to believe that the marketplace of ideas will and does function well.[122]

B. Best Friend?

The idea in the "best friend" argument is that the First Amendment historically has been a great friend and ally of social reformers, including minorities. It is argued that, for example, the civil rights movement of the 1960s depended upon free speech principles.[123] These principles allowed protestors to carry their message to audiences who found such messages highly offensive and threatening to their most deeply cherished views of themselves and their way of life.[124] Only strong principles of free speech and association could – and did – protect the drive for desegregation.[125] For example, the Birmingham parade ordinance that Martin Luther King, Jr. and other demonstrators had violated was declared an unconstitutional invasion of their free speech rights.[126] In a word, without free speech, how could Martin Luther King, Jr. have moved the American public as he did?[127] It is through the market process that King's ideas of civil rights in the end are accepted by the people.

In the eyes of egalitarians, this "best friend" argument is equally an illusion. A "realistic view of history" shows that the system of free speech law has not always served as a staunch ally of minority interests. For example, in the sixties, black protesters sat in, marched, and picketed and so on, and they were often arrested and convicted.[128] True, some of these convictions were

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[122] *Id*. at 469-70.
[123] Nadine Strossen, *supra* note 6, at 567. *See also* David E. Bernstein, *supra* note 98, at 232. Seventh Circuit Judge Frank Easterbrook echoed this argument in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) by stating that "[f]ree speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech…. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is."
[124] Nadine Strossen, *supra* note 123, *id*.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] Richard Delgado, *Book Review*, *supra* note 20, at 793.

reversed on appeal, but only after years and after thousands of dollars of legal fees and untold hours of gallant lawyering.[129] Black protesters' protestation was often concluded by the court to be too intermixed with action or too disruptive of property rights.[130]

And a related argument that free speech has made America a great country[131] is rejected. It is argued that, United States' unquestionable leading position in two principal areas – economic production and military might – shall be contributed not to freedom of expression but bunches of exceptions to it, such as patents, copyrights, trade secrets, and official (military) secrets.[132] Indeed, a truly free press and citizenry, able to speak, learn, and circulate ideas freely in these areas of exception, would have interfered with the development of the prodigious industrial and military base that the United States today enjoys.[133] In addition, hate speech contributes greatly to inequality and social pathology.[134] For example, today, United States ranks low among western industrialized countries in equality of wealth and income, and the figures for infant mortality, life expectancy, and broken families in black and brown communities remain abysmal, and "it seems highly likely that tolerating virulent hate speech and vicious public depiction plays a part in allowing these forms of social misery to develop and persist."[135]

C. Reverse Enforcement?

The "reverse enforcement" argument is that hate speech rules are sure to hurt minorities because they will be applied against minorities themselves.[136] A vicious insult hurled by a white

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[129] *Id*.
[130] *Id*., at 794.
[131] For example, Nadine Strossen, *supra* note 6, at 489 (arguing that free speech is an instrument of progress).
[132] Richard Delgado, *Book Review*, *supra* note 20, at 794.
[133] *Id*.
[134] *Id*.
[135] *Id*., at 795.
[136] *See, e.g.*, Nat Hentoff, *supra* note 97, at 169 (quoting Eleanor Holmes Norton), Nadine Strossen, *supra* note 6, at 512, Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1143-46; *and* Danny J. Boggs, *Reigning in Judges: The Case of Hate Speech*, 52 SMU. L. REV. 271, 274 (1999) ("[N]one of those articles that addressed the question of whether society would be better off without some kinds of speech

person to a black will go unpunished, while even a mild expression of exasperation by a black motorist to a police officer or by a black student to a professor, for example, will bring harsh sanctions. For example, it is asserted that in Canada, shortly after the Supreme Court upheld a federal hate speech code, prosecutors began charging blacks with offenses.[137]

To this argument, it is conceded that, since certain authorities are racist and dislike blacks who speak out of turn, and since a few incidents of blacks charged with hate speech for innocuous behavior have occurred, this argument is plausible.[138] Nonetheless, it is argued, the empirical evidence does not suggest that this is the pattern, not to say the rule. Evidence includes: police and FBI reports showing that hate crimes are committed much more frequently by whites against blacks than the reverse;[139] statistics compiled by the National Institute Against Violence and Prejudice confirming the reports;[140] and the distribution of enforcement seemingly consistent with commission of the offense.[141] True, while an occasional minority group member may be charged with violating a campus hate speech code, these prosecutions seem rare.[142] Still, when a minority person is charged with such a violation, it is not a reason to worry about the hate speech rules, since racism is not a one-way street; some minorities do harass and badger whites[143] and so deserve punishment.[144] But how about a recent study showing that hate speech regulation in South Africa and the former Soviet Union have been used to stifle dissenters and members of minority groups?[145] It is argued that these countries are repressive societies, and

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ever considered that principle in light of the possibility of attacks on the speech that came from their side of the spectrum.").

[137] Richard Delgado & David H. Yun, *supra* note 1, at 880, n 62 (quoting Nadine Strossen).
[138] Richard Delgado & David H. Yun, *supra* note 1, at 880.
[139] *Id*.
[140] *Id*.
[141] *Id*.
[142] *Id*., at 881.
[143] *Id*.
[144] Richard Delgado & Jean Stefanic, *supra* note 92, at 488.
[145] Richard Delgado & David H. Yun, *supra* note 1, at 881.

what has happened there does not apply to United States and similar more progressive countries,[146] i.e., countries with a liberal tradition[147] The likelihood that officials in the United States would turn hate speech laws into weapons against minorities seems remote.[148]

D. Censorship?

Fear of governmental censorship is another prominent civil libertarian argument against hate speech regulation. On the specific level, with respect to on-campus prohibition of face-to-face racial slurs advocated by egalitarians, what does on-campus mean? Is an epithet shouted at several African-Americans from twenty feet away "face-to-face?" Is water buffalo, honkey, or dumb baboon a racial slur?[149] But the argument concerns itself much more with the more general implication of hate speech rules: if hate speech is regulated, a precedent is set for other types of speech regulation, so there is a potential danger for the speech of all dissenters.[150] Why? Because hate speech regulation is content-based and content is not a good basis to distinguish good ideas from bad ones, if it is any basis at all. So, the government is put into a censorship business and there is no means to ensure that the government will not grab the power to inhibit speech, especially dissenting speech, for example, criticism of governmental policies.[151] In a word, we

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[146] Jean Stefanic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate Speech Restriction*, 78 IOWA. L. REV. 737, 742 (1993).
[147] Richard Delgado & Jean Stefanic, *supra* note 144.
[148] Richard Delgado & David H. Yun, *supra* note 1, at 881.
[149] Richard Delgado & Jean Stefanic, *supra* note 147.
[150] Charles R. Lawrence III, *supra* note 17, at 458. Charles R. Lawrence is advocating for hate speech regulation, nonetheless, he admits that there would be such a danger. Besides, there is not only such a possibility, but also evidence showing that it is true danger. *See* Nadine Strossen, *supra* note 6, at 512-13 (quoting Professor Gard to argue that the "fighting words" doctrine actually is unduly used against dissenters).
[151] *See, e.g.*, David E. Bernstein, *supra* note 98, at 236-37 (arguing that the government will entrench itself and expand its power at the expense of the public); John McGinnis, *Reviving Tocqueville's America: The Supreme Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 527 (2002) (arguing that government officials have a natural tendency to suppress speech antithetical to their interests); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 224 (1991) ("[I]f 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"); *and* Robert W. McGee, *Hate Speech, Free Speech and the University*, 24 AKRON L. REV. 363, 390 (1990) (noting that restricting speech threatens to entrench the power of governing elites).

will be on a slippery slope, knowing not where we can stop.[152] If hate speech (fact-to-face or not) is bridled, will we not soon find ourselves tolerating restrictions on classroom speech or political satire in the school newspaper? [153] If we permit our fragile web of speech protection to suffer one dent, might not others soon follow?[154] How can we be assured that the judge or administrator will not impose his or her notion of political orthodoxy on us?[155] Therefore, true, hate speech is offensive, but this is not a sound reason for regulation, other forms of speech, especially dissenting speech, are offensive. There is no genuine distinction between hate speech and, for example, Marxist speech[156] or feminist speech.[157]

Some egalitarians have their reply ready at hand. As to the specific problems surrounding campus hate speech rules, it is admitted that they are indeed difficulties.[158] Nonetheless, it is argued, please have a look at other doctrines that limit speech we do not like, such as libel, defamation, plagiarism, copyright, threat, and so on.[159] These doctrines have the same problem; for example, it can be easily pointed out what a clear-cut case of plagiarism looks like, but at the margin it is less sure. We have long accepted these doctrines,[160] then why should we, while

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[152] Of course, this danger should not be exaggerated, but it should not be minimized either. It is a real danger. *See* Nadine Strossen, *supra* note 6, at 537.

[153] *See*, for example, Robert M. O'Neil, *Colleges Should Seek Educational Alternatives to Rules that Override the Historic Guarantees of Free Speech*, CHRON. HIGHER EDUC., Oct. 18, 1989, at B1, B3; Gary Wills, *In Praise of Censure*, TIME, July 31, 1989, at 71-72. Both are quoted in Richard Delgado & Jean Stefanic, *supra* note 7, at 851, footnote 3.

[154] *See*, for example, Zechariah Chafee Jr., FREE SPEECH IN THE UNITED STATES 223-25 (1942).

[155] *Id*.

[156] *See, e.g.*, Eugene Volokh, *The Limits of Hate Speech: An On-Line Exchange*, LEGAL TIMES, May 1, 1995, at 17 (implicitly arguing that there is no true distinction between hate speech and other forms of offensive speech, for example, advocacy of killing abortion doctors, advocacy of Communism, advocacy of holy wars, advocacy of race riots and so on); Danny J. Boggs, *supra* note 136, at 276, 279 (using as an example an immigrant doctor who had a very hard time going to Les Miserables, a play he thought was wonderful, because the revolutionaries were waving red flags to exemplify the point that there is no genuine distinction between hate speech and Communism, since red flags to some people are as hurtful as is a swastika to a Jew, or a burning cross to a black person);

[157] *See*, e.g., Danny J. Boggs, *supra* note 136, at 271 (arguing that courts have protected speech by political radicals.)

[158] Richard Delgado & Jean Stefanic, *supra* note 92, at 488.

[159] *Id*.

[160] *Id*.

accepting them, resist hate speech rules which are no different from them?[161] To the general implication of hate speech rules worried about by civil libertarian – that hate speech rules constitute a precedent that can be used to restrict other types of speech,[162] such as, the Marxist speech[163] and that government censorship will follow[164] – there is also a ready reply. It is pointed out that harms felt by hate speech victims, mainly minorities, are different from harms felt by people disliking, for example, Marxist speech. Hate speeches are based on a history of slavery or being treated unequally. For example, the African Americans once were considered as commodities instead of equal human beings;[165] women were long denied suffrage;[166] and so on. With this long and rich historical background, hate speech is especially hurtful to the minorities. And on this historical basis, hate speech can be distinguished from other types of should-not-be-regulated speech, even if people find them offensive or harmful, and Marxist speech is one of these should-not-be-regulated types. Still on this historical basis, it is even argued that, hate speech by minorities targeting the white majority are less harmful than hate speech the opposite way,[167] since the white majority does not have a history of being slaved or unequally treated. In

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[161] *Id*. Brownstein made a similar argument. *See* Brownstein, *supra* note 68, at 4 (declaring that complex line-drawing and balancing are intrinsic and unavoidable parts of any first amendment analysis of speech restrictions on public university property.)

[162] Nadine Strossen, *supra* note 6, at 521.

[163] *See, e.g.*, Danny J. Boggs, *supra* note 136, at 274, 279 (arguing that Marxist speech could not be easily differentiated from various types of so-called hate speech).

[164] Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 196-98, 246-47, 273, 278, 289.

[165] Charles R. Lawrence, *supra* note 17, at 468.

[166] U.S. Const. amend. XIX ratified in 1920. Before that, women did not have right to vote.

[167] *See*, for example, Steven H. Shiffrin, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1990). Although Shiffrin does not believe that a general theory of the First Amendment is possible, *id*. at xi-xii, 48, 110, 132, and 150, he nevertheless urges that dissent should occupy the center of any appropriate theory of free speech, *id*. at pp. xi-xii, 10-11, 45-50, and 128-29, and so criticism of existing customs, traditions, institutions, and authorities should receive special protection because of the tendency of entrenched interests to perpetuate unjust hierarchies of power, *id*. at pp. xii, 92, 107-10, 112-20. But racist speech is different. The racist speaker is not truly a dissenter, for he or she merely openly voices views that most citizens hold privately, *id*. at xii and 77. Moreover, racist speech generally targets the powerless as opposed to the powerful, aims to intimidate and harass as opposed to protest, and promotes governmental illegitimacy as opposed to social justice, *id*. at xii-xiii, 77-78. So, racist speech should not be protected. From this argument, it is fair to say Shiffrin would say a black person uttering "redneck" to a white person should not be punished since he or she is criticizing the powerful, but when a whie person uttering "nigger" to a black

addition, even if the slippery slope argument has its merits, it does not mean that it shall be accepted automatically. To accept it, an assessment that the dangers of slipping are greater than the dangers of treating racist speech with impunity must be made.[168]

As to the Marxist speech specifically proffered by civil libertarians, some egalitarians have a reply.[169] This important difference comes from human experience – our only source of collective knowledge, from which we all know that slavery is wrong.[170] This knowledge is reflected in the universal acceptance of the wrongness of the doctrine of racial supremacy.[171] There is no nation left on this planet officially claims that that Hitler was right.[172] Even South Africa, when it is ruled by the white minority by an official policy of apartheid on the basis of white supremacy, tried painstakingly to avoid an explicit ideology of racial supremacy by using the rhetoric of one-step-at-a-time.[173] The universal acceptance of the principle is a mark of collective human progress, which is unique, since this is a world bereft of agreement on many things.[174] On the other hand, Marxist speech is not universally condemned. Many nations adhere to Marxist ideology, and it is impossible to achieve world consensus either for or against this view.[175] Marxism is a philosophy for political organization, distribution of wealth and power, ordering of values, and promotion of social change. So, by its very content, it is political speech going to the

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person should be punished since he or she is targeting the powerless. *See also* Richard Delgado, *Book Review*, *supra* note 20, at 797. It is stated that "[t]hus, words such as 'honky,' 'cracker,' and 'redneck' are insulting for white individuals, but nonetheless lack the socially and politically laden and corrosively dispiriting quality of words such as 'nigger,' 'wop,' 'spic,' 'chink,' or 'kike.' " *Id*. *See also* Richard Delgado, *Book Review*, *supra* note 20, at 798. So, if "racial slurs the opposite way" is not as harmful as hate speech, the fact that at most campuses a white male can be insulted and disparaged with relative impunity, Kors, *It's Speech, Not Sex, the Dean Bans Now*, WALL ST. J., Oct. 12, 1989, at § 1, at 16, col. 3 (cited in Richard Delgado, *supra* note 2, at 359) does not matter to egalitarians. *But see* Mari J. Matsuda, *supra* note 2, 2363-64, saying the opposite way "hate speech" should also be punished.

[168] David Kretzmer, *Free Speech and Racism*, 8 CARDOZO L. REV. 445, 492 (1987).

[169] Mari J. Matsuda, *supra* note 2, at 2358-60.

[170] For example, it is argued, we all know that white minority rule in South Africa is wrong. Mari J. Matsuda, *supra* note, at 2359.

[171] *Id*.

[172] *Id*.

[173] *Id*.

[174] *Id*.

core of ongoing political debate. While Marxist ideas are rejected and abhorred by many, Marxist thought, like liberal thought, neoconservative economic theory, and other conflicting structures for understanding life and politics, is part of the ongoing efforts of human beings to understand their world and improve life in it.[176]

E. Aberration/Minimal?

The arguments that hate speech is aberration and isolated and its harm is minimal is basically an assertion, without supporting statistics or other evidence. For example, it is mentioned that American Civil Liberties Union (ACLU) President Nadine Strossen made a remark at ACLU biennial conference plenary session that hate speech's harm is minimal.[177] A Stanford law professor was said to have interpreted a poster defacement incident[178] in Stanford as the behavior of two rather isolated, ignorant, and misguided youths.[179] To these assertions, if they are just assertions, perhaps the egalitarians would have not taken too much issue with them. But the true point is, behind the civil libertarians' arguments against hate speech regulation lie such attitudes. If not so, if civil libertarians also thought hate speech has great harm and is widespread, how would they argue against regulation? Anyway, these are not just simple assertions, but behind the scene attitudes that need to be addressed seriously. So, the egalitarians have taken great pains to point out that, as discussed above, hate speech is not sporadic or infrequent but widespread.[180] They have further pointed out that, as also discussed above, harm to minorities is not just any

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[175] *Id*., at 2359-60.
[176] *Id*., at 2360.
[177] Nadine Strossen, *Remarks at ACLU Biennial Conference Plenary Session, Racism on the Rise* (June 15, 1989), at 4-8, quoted in Richard Delgado, *supra* note 2, at 372, footnote 250.
[178] Two white freshmen and a black student disputed on the descent of Beethoven. The next night, the two white students defaced a poster bearing the likeness of Beethoven. They had colored the drawing of Beethoven brown, given it wild curly hair, big lips and red eyes and posted it on the door of the black student's dorm room in Ujamaa, the black theme house. They did so in an effort to contest the black student's assertion that Beethoven was of African descent. *See* Charles R Lawrence III, *supra* note 17, at 479, footnote 165.
[179] *Id*.
[180] *See* Introduction of this paper.

harm, but very deep and unique harm, especially when the historical background of slavery or inequality is fully taken into account.[181] Besides, not just minorities (often as victims of hate speech) are deeply harmed, the majority (more possible to be perpetrators) is harmed also, and in the end, the whole society is harmed.[182]

F. Pressure Valve?

The so-called pressure valve argument holds that hate speech prohibition rules increase the danger racism poses to minorities,[183] for forcing racists to bottle up their dislike of minorities means that they will be more likely to say or do something hurtful later. With free speech, racists utter their racist remarks, thus allowing tension to dissipate before it reaches a dangerous level.[184] Therefore, free speech functions as a pressure valve.[185] The egalitarians do not agree. They say the case is quite the contrary.[186] There is psychological evidence indicating that permitting one to say or do hateful things to another increases rather than decreases the chance that one will do so again in the future.[187] Besides, others may follow suit since they may believe that hateful speech is permissible.[188] And the metaphor of pressure valve is really misleading. Human behaviors are more complex than the laws of physics that describe pressure valves, tanks and the behavior of a gas or liquid in a tube.[189] People use words to construct categories for "black," "woman,"

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[181] *See* Part II of this paper.
[182] *See* Part II of this paper.
[183] *See*, for example, Nat Hentoff, *supra* note 97, at 134 (quoting Yale University President Benno Schmidt); Nadine Strossen, *supra* note 136, at 1140-41 (making a similar argument in the context of rules against pornography and their effect on women); Marjorie Heins, *Banning Words: A Comment on "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 590 (1983); *and* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936) ("It would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam.").
[184] Nat Hentoff, *supra* note 96, at 134.
[185] *Id*., at 135.
[186] Richard Delgado & David H. Yun, *supra* note 1, at 878.
[187] *Id*.
[188] *Id*.
[189] *Id*.

"child", "criminal", "wartime enemy" and so on.[190] These categories govern the way people speak of and act toward members of those categories.[191] Social science studies support this argument. These studies include an Iowa teacher's "blue eyes/brown eyes" experiment showing even one-day assignment of stigma can change behavior and school performance,[192] a Stanford experiment assigning students roles of prisoner and prison guard,[193] an interview study about male sexual offenders, and another experiment where one subject administers en electric shock to another when the latter misses a question asked by an authority figure.[194] These studies all show that allowing people to stigmatize or revile others makes them more aggressive, not less so.[195] In a word, "pressure valves may be safer after letting off steam, human beings are not."[196]

G. Should Not Be Driven Underground?

It is argued by Stephen Carter that regulating racist speech will leave minorities little better off than they are now, while screening out hard truths about the way many white people look at minorities.[197] This argument is echoed by sothers when they point out that hate-speech crusaders miss a valuable opportunity to consider the problems of the affirmative action,[198] or that antiracism rules have forfeited communities an opportunity to attack racism since they have swept racism "under the rug".[199] When the problem is under the rug, people do not know who are racists or who are not, and the racist unknown is more dangerous than the racist known.

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[190] *Id*.
[191] *Id*., at 878-79.
[192] *Id*., at 879.
[193] *Id*.
[194] *Id*., at 879-80.
[195] *Id*., at 880.
[196] *Id*.
[197] Stephen Carter, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 177, 179 (Basic Books, 1992).
[198] Dinesh D'Souza, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 231-42 (1991) (suggesting that special programs and codes are necessary because affirmative action has failed or has been overly ambitious).
[199] Vince Herron, *Note, Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. CAL. L. REV. 407, 424 (1994).

To these arguments, it is admitted that there is one valid point: the known racist is less dangerous than the unknown one.[200] Nonetheless, an alternative value is ignored by the civil libertarians: the possibility that the racist will be cured or at least deterred by official rules and policies from exhibiting the behavior.[201] But at the same time, the community has not forfeited an opportunity to discuss and analyze the problem, since "even the best-drafted rules will not suppress hate speech entirely; there will continue to be some incidents of racist speech and behavior."[202] In a word, hate speech rules do not sweep the problem completely under the rug, though they do decrease hate speech incidents.[203] It seems that it is argued that while hate speech rules have the benefit of deterring hate speech, they still give the community an opportunity to face the problem, so they are desirable from whatever perspective.

H. Victimization?

The next argument, i.e., the victimization one, argues that hate speech rules will encourage minorities to see themselves as victims.[204] The idea is, with hate speech rules in place, minorities will tend to rush to authorities every time something wounds their feelings, thus ignoring that they could either speak back or just ignore the offensive words.[205] In other words, a "crybaby" attitude will be encouraged.[206] It is warned that these rules will end up reinforcing a system of supplication and self-abasement; [207] interracial friendship will be prevented; [208] and a "therapeutic" mentality and an excessive occupation with feelings will be reinforced.[209]

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[200] Richard Delgado & Jean Stefanic, *supra* note 92, at 484-85.
[201] *Id*., at 485.
[202] *Id*.
[203] *Id*.
[204] Supreme Court Justice Thomas probably would agree with this argument. *See* Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 2350 (2003) (Thomas, J. concurring in part and dissenting in part) (quoting Frederick Douglass's speech about positive harms done by the affirmative action).
[205] Stephen Carter, *supra* note 197, at 177.
[206] Dinesh D'Souza, *supra* note 199, at 128, 239.
[207] Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV.865, 898 (1993)

To these points, it is replied that, hate speech rules will definitely have no such bad victimization effect. For sure, there are the rules, but minorities are not required to file a complaint whenever they are targeted by verbal abuse,[210] so alternatives still exist as they do before. Minorities can still talk back or ignore hate speech.[211] Hate speech rules simply provide one more avenue of recourse for those who wish to take advantage of them.[212] Besides, even filing a complaint might be considered one way of taking charge of one's destiny: one is active, instead of passively endure invectives.[213] Still, why don't we raise "victimization" as a reason against complaint filing rules when a car is stolen or a house is burglarized?[214] And why don't we encourage people to just rise above it or talk back to their victimizer when their car is stolen or their house is burglarized?[215]

I. Differential Effect?

This argument is concerned with equal treatment of hate speech speakers. It is argued that hate speech rules will have differential effects on ignorant or blue-collar students on the one hand, and richer and refined students on the other hand. Someone gives examples of more refined hate speech and more crude hate speech. The cruder one is: "Out of my face, jungle bunny."[216] And the more refined one is: "LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian

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[208] Dinesh D'Souza, *supra* note 198, at 128, 239.
[209] Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC 46-48 (Sept. 22 & 27, 1993).
[210] Richard Delgado & Jean Stefanic, *supra* note 92, at 486.
[211] *Id*.
[212] *Id*.
[213] *Id*.
[214] *Id*.
[215] *Id*.

aims may be well-intentioned, but given the fact that aptitude tests place African Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide."[217]

To this, it is replied that this argument is "plainly wrong",[218] since both blue-collar and upper-class members of the community will be prohibited from uttering crude racial slurs and epithets.[219] "N, go home; you don't belong at this university", a crude hate speech, no matter if it is spoken by the billionaire's son or the coal miner's daughter, is prohibited by hate speech rules.[220] And if students from richer and upper classes are really less likely to say this kind of words, and more likely to utter only intellectualized versions like the one above, then this may because they are less racist in a raw sense.[221] And this is supported by many social scientists' belief that prejudice tends to be inversely correlated with educational level and social position, and the wealthy and well educated may well violate hate-speech rules less often than others do.[222] Besides, "Out of my face, jungle bunny" is a more serious case of hate speech because (1) it is not open to argument or a more-speech response; and (2) it bears overtones of a direct physical threat, while the more refined example, "deplorable as it is, is answerable by more speech and contains no element of threat."[223] In a word, it seems that it is argued that this difference warrants differential treatment, if one feels compelled to argue that hate speech rules have a differential effect at all.

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[216] Henry Louis Gates, Jr., *supra* note 209, at 45.
[217] *Id*.
[218] Richard Delgado & Jean Stefanic, *supra* note 92, at 486.
[219] *Id*.
[220] *Id*., at 487.
[221] *Id*.
[222] *Id*.

J. Waste of Time/Resources?

Now, we come to the waste-of-time/resources argument. It is urged, for example, that civil rights leaders have better things to do. To concentrate on hate speech rules is myopic and is to benefit only a small number of minority persons,[224] and can only bring about symbolic benefits.[225] So efforts to regulate hate speech would be quixotic or disingenuous.[226] Instead of "picking relatively small fights of their own convenience," they should examine true obstacles impeding racial progress.[227] Why, it is wondered, has this small problem attracted so much attention when there is more serious work to do?[228]

It is counterargued that the waste-of-time arguer may have neglected that eliminating hate speech goes hand in hand with combating so-called "real racism."[229] True, victimization by hate speech is a less serious misfortune than other forms of victimization, for example, of denial of a job, a mortgage, or an educational opportunity. But what is equally true is "that a society that speaks and thinks of minorities disparagingly is tolerating an environment in which these more active forms of discrimination will occur frequently."[230] Hate speech, acting in concert with floods of media imagery, constructs and reinforces a stereotypical picture of minorities in the mind of the public: minorities are happy and carefree, oversexed, criminal, treacherous, untrustworthy, immoral, stupid, and so on.[231] These stereotypes, it is argued, account for much misery in the lives of persons of color. For example, motorists will fail to stop to aid a stranded black driver, police officers will roust African-American youths innocently walking or talking to

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[223] *Id*., at 487.
[224] Donald E. Lively, *supra* note 207, at 892.
[225] Nadine Strossen, *supra* note 6, at 522.
[226] Richard Delgado and Jean Stefanic's summary. *See* Richard Delgado & Jean Stefanic, *supra* note 92, at 483.
[227] Donald E. Lively, *supra* note 207, at 892 (claiming that racial reformers should be examining "the obstacles that truly impede" racial progress, namely bad laws and too little money).
[228] Henry Louis Gates, Jr., *supra* note 209, at 43, 47-49.
[229] Richard Delgado & Jean Stefanic, *supra* note 92, at 482.
[230] *Id*.

each other on the streets, and landlords will act on unarticulated feelings in renting an apartment to a white over an equally qualified black or Mexican.[232] Once minorities of color are rendered one-down in the minds of others, the chances are that they will be more frequently victimized by so-called real discrimination.[233] Furthermore, as civil libertarians and many whites would think, acts of out-and-out discrimination are rare, and today racism tends to be subtle, lying in the arena of unarticulated feelings, practices, and patterns of behavior on the part of institutions and individuals.[234] It is hard to deal with this subtle form of racism. But it happens that thought and language are closely connected: our choice of word, metaphor, or image betrays the attitude we have about a person or subject.[235] So, there is no better tool than a focus on language to deal with this form of subtle racism.[236] When civil libertarians are among those leading proponents of this idea of subtle racism, it is strange that they argue against the best tool to crack down on it.[237] Further, with harms of hate speech so great and unique,[238] it is strange to say that hate speech rules can only bring about symbolic values. Laws and rules affect people's behavior. In a setting where minorities are thought and spoken of respectfully, few acts of out-and-out discrimination would occur, and hate speech rules contribute to such a setting.[239]

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[231] *Id*.
[232] *Id*.
[233] *Id*.
[234] *See* generally Thomas F. Pettigrew, *New Patterns of Racism: Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1985); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); *and* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).
[235] Recall the category argument before mentioned. *See* Part III (F) of this paper.
[236] Richard Delgado & Jean Stefanic, *supra* note 92, at 483.
[237] *Id*.
[238] *See* Part II (A) of this paper.
[239] Richard Delgado & Jean Stefanic, *supra* note 236.

CHAPTER IV

EVALUATION: INTERNAL CRITIQUE OF EGALITARIAN ARGUMENTS

Based on Parts II and III, this part tries to do an internal critique of egalitarian arguments, as an effort to evaluate the debate between egalitarians and civil libertarians. But first a word about what "internal critique" means is necessary. As an evaluation tool used here, it roughly means to examine how well the egalitarian arguments for hate speech regulation are supported by the evidence and logic said to underlie them, even while assuming they are plausibly right in contending that hate speech should be regulated. If the evidence and reasoning are marked by defects and incoherencies, or are unsound or unsustainable, then the egalitarian case for hate speech regulation will collapse.

A. Critique of the Utilization of Social Science Studies

Several social science studies[240] are heavily relied upon by some egalitarians to argue that hate speech inflicts great harms on the victim. This subsection criticizes the utilization of social science studies by arguing that these studies do not support relevant arguments well. The point made here is not that social science studies should never be relied upon, but that when they are used to support an argument or position, careful analysis would be undoubtedly necessary. One should ask at least whether or not the relevant study pertains to one's argument, and one should also be concerned the probability that the study could be used to undermine one's argument and reasoning. This undermining could be in a direct way, that is, the study could be asserted to have

[240] *See supra* notes 24 and 192-96. Examples cited in *supra* notes 192-96 will not be discussed here, but later in Part IV (E) below. The general conclusion of analysis of these social studies/experiments is that the germaneness of them to the egalitarian case of hate speech regulation is quite doubtful. And another point is that it seems that egalitarians

contradicted the very argument it is supposed to support. This undermining could also be in an indirect way, that is, though not directly contradictory to the argument or assertion, the study simply does not support the argument or assertion. The problem with social studies used by egalitarians to support their arguments belongs to the second type.

Take the blood pressure study[241] first. In that study, it is stated that American blacks have higher blood pressure levels than their white counterparts.[242] And since there is evidence that high blood pressure is associated with inhibited, constrained, or restricted anger, and not with genetic factors,[243] this study is argued to be evidence that hate speech, as part of racism, has bad physical consequences on minorities.[244] Even if we do not take issue with the genetic factors, this higher blood pressure could well be explained other ways. Perhaps it is due to the fact that Afro-Americans generally are poorer than whites, so their diet is not healthy, or not as healthy as that of whites; perhaps this is due to the fact that they lead life styles different from those of whites; perhaps it is because of their living environment is not as healthy as whites, and so on. These other explanations, if not well dispelled, cast much doubt on the study's utility as evidence of hate speech's physical harms.

Similar problems mark the experiment used to support the idea that hate speech will adversely affect minorities' pecuniary interest. That experiment allegedly put blacks and whites "of similar aptitudes and capacities" into a competitive situation,[245] and it was found that the blacks exhibited defeatism, half-hearted competitiveness and high expectancies of failure.[246] So, the assertion is, psychological harms caused by racism will severely handicap minorities' pursuit of

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who utilized these studies did not make an effort to carefully analyze these studies. Perhaps they are really too close to equal protection, as criticized by some civil libertarian. *See* Part IV (F) below.

[241] *See supra* note 24.

[242] *Id*.

[243] Richard Delgado, *supra* note 8, at 139.

[244] Richard Delgado, *supra* note 34.

[245] Richard Delgado, *supra* notes 23 and 36.

a career.[247] Let's say this assertion is right, since it is perhaps readily acceptable that timid, withdrawn, bitter, hypertense, or psychotic persons will most probably fare poorly in employment settings.[248] But as with the higher blood pressure study, the results of this experiment are also susceptible of other explanations. For example, the very fact that the black persons exhibited defeatism and so on undermines the assumption that they are comparable to whites in their aptitudes and capacities. Perhaps it happened that the black persons chosen by the experimenter were somewhat defeatists. If some other black persons had been chosen, the result perhaps would have been very different. These other black persons perhaps would have exhibited an aspiring spirit comparable to or even stronger than that of their white counterparts. In a word, this experiment, if it says something, at most says that there are defeatist black persons. And if this experiment and its result are not repeated in enough quantities, the experiment hardly says more.

Similarly, social studies used to support the assertion that racism and racial labeling have even greater impact on children[249] are also susceptible of other explanations not related to racism or hate speech. For example, the black child's preference of light-skinned dolls over dark-skinned otherwise identical ones because he thought dark-skinned ones looked dirty or "not nice" could be contributed to the fact that that when something is dirty, it tends to be black[250] and he, like other children, is constantly warned by parents to stay away from such dirty, and black, things and thus begins to associate black with dirty. So, chances are great that he associates black

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[246] *Id*.
[247] *Id*.
[248] Richard Delgado, *supra* note 8, at 139.
[249] *Id*., at 142-43.*See supra* note 24.
[250] For example, when white clothes are dirty, they tend to be black; the dirt tends to be black; and the sewage water tends to be black, and so on.

with dirtiness on the basis of these daily exposure to dirty things, not due to racism or hate speech.[251]

B. Critique of the Resort to the International Trend

The international trend, as argued by egalitarians, bears heavily on hate speech regulation in United States.[252] They have resorted to international treaties, most prominently Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.[253] The most relevant provisions are its preamble and section (a).[254] Egalitarians have also resorted to other countries' hate speech regulations.[255] We shall turn to the international treaty first, and then to other countries' hate speech regulation experience.

1. Article 4

Article 4's preamble says, "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination…" [256] Its language emphasizes hate speech propaganda and hate speech organizations doing such propaganda.

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[251] The other two examples, i.e., the black girl who hated her skin and washed intensively her arms and face until they were almost white and the black child who preferred to use white clay rather than the brown clay to make a little girl since the white clay would make a better girl, could also be explained in ways other than the stigmatization effect of hate speech, as part of racism. The only one example that seems to not susceptible of such an alternative explanation is the last example: young children who used "rough, funny, stupid, silly, smelly, stinky, dirty" to describe physical characteristics of black people. But even with this example, it would be too hasty to say that it is conclusive evidence that hate speech has severe or more severe impact on children. There is possibility that black people around these children really tend to that way, since black people are generally poorer people in America. They are not as refined as their white counterparts. *See supra* note 24 for these examples.
[252] See Part II (C) above.
[253] *See supra* note 72.
[254] *Id*.
[255] *See* Part II (C) above.
[256] *See supra* note 72.

Section (a) of Article 4 requires state parties to punish "all dissemination of ideas based on racial superiority or hatred…"[257] Here, what is prohibited is "dissemination." So the question one needs to ask is that what constitutes "propaganda" or "dissemination." To answer this question, it is necessary to bear in mind that egalitarians are arguing for regulation of face-to-face hate speech in informal settings,[258] for example, "N, go back to Africa, you do not belong here" said by a white student to a black student on campus in informal settings.[259] But the problem is, does face-to-face hate speech constitute propaganda? Dissemination? Quite doubtful, not to mention that such speech does not come from hate speech organizations. In a word, careful examination of Article 4 indicates that it is intended to condemn systematic efforts of humiliating people, not just any hate speech uttered by private citizens. The Article most probably prohibits hate speech publications, broadcasting, and other hate speech forms of widespread significance, and, when section (b)[260] is taken into account, hate speech organizations. So, a student distributing pamphlets advocating racism[261] and the National Socialist Party in *Village of Skokie v. National Socialist Party*[262] are well covered by the international treaty,[263] but slurs like "N, go back to Africa, you do not belong here" are not, especially if they are uttered by ordinary, private citizens in informal settings, i.e., face-to-face settings.[264]

In summary, while Article 4 does support some regulation of hate speech, it does not support the comprehensive hate speech regulation (which includes face-to-face hate speech regulation) advocated by many egalitarians.

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[257] *Id*.
[258] *See* Part II (D) above and *supra* note 92.
[259] Richard Delgado & Jean Stefanic, *supra* note 92, at 481.
[260] *See supra* note 72.
[261] This incident happened in University of Michigan in January 1987. A nineteen-year-old white underclassman distributed handbills that declared "open hunting season" on all blacks. *See* Richard Delgado, *supra* note 2, at 354.
[262] 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), modified, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).
[263] Since the student most probably was engaging in "dissemination", and the National Socialist Party is an organization prohibited by section (b).

2. Other Western Countries' Experience

There are two problems with the egalitarian resort to other western countries' experience. First, it seems that those countries' experience does not support the comprehensive hate speech regulation advocated by many egalitarians. Let's use as an example Britain's *Race Relations Act*, which is emphasized by several egalitarians.[265] The Act, as enacted in 1965, created a new offense for persons who "with intent to stir up hatred against any section of the public … distinguished by colour, race or ethnic or national origins … publish [] or distribute [] written matter which is threatening, abusive or insulting; or … use [] in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred…"[266] In 1976, realizing that the intent requirement made prosecution especially difficult and rare, the intent requirement was abolished.[267] Further, in 1986, the Act was amended again to permit a constable to arrest without a warrant "anyone he reasonably suspects is committing an offense under this section."[268] But does the Act really support the egalitarian case for face-to-face hate speech regulation? Again, it is quite doubtful. It must be noted that this Act, as described above, emphasizes "publication" or "distribution," not just any private hate speech in a face-to-face situation. As to the prohibition of such language in public places, egalitarians seem to forget that, even after the intent requirement was abolished, the standard of "likely to stir up hatred" is not abandoned. What does this mean? Besides, what constitutes "use in public places?" Does "N, go back to Africa, you do not belong here" uttered face-to-face by a white student to a black student in a low voice constitute "use in public place?" What if it is uttered in a loud voice in a public place, but there are no other people except themselves? Even if there are

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[264] *See supra* note 92.
[265] *See, e.g.*, Richard Delgado, *supra* note 2, at 364-67; Mari J. Matsuda, *supra* note 2, at 2346-48;
[266] Richard Delgado, *id*. at 364.
[267] *Id*. at 365.

other people present, is the standard "likely to stir up hatred" automatically met? Is the fact that the black student is angered sufficient to meet the standard?[269] These questions are not necessarily extreme and unfair, since they pertain to the extent to which the British experience supports the egalitarian case for hate speech regulation, especially face-to-face hate speech regulation. To answer them and ascertain the pertinence, England courts' interpretation needs to be looked into, since Britain has an established long tradition of judge-made law. Without such an examination, it would be too hasty to draw conclusions based solely on the provision itself. Here, for the purpose of this paper, it is not necessary to look into the specific cases. It suffices to say that, there is at least some possibility that British courts would interpret these statutes very narrowly. If so, it would be hard to say that the British Act supports egalitarians' arguments.[270] Their resort to several other countries' experience is similarly problematic.[271]

Second, those countries' experience is simply not enough to establish that free speech will not be impeded by hate speech regulation. For example, in Britain, under the *Race Relations Act* of 1965, there were several important safeguards to protect free speech,[272] and there were few

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[268] *Id*. at 365-66.

[269] Quite doubtful, in my opinion. When "stir up" is used, it seems to mean at least there is possibility that several people would be in a mood of hatred of black people because of the utterance.

[270] Besides, it is worth noting that, after the intent requirement in the Act was abandoned, the Act was used to successfully prosecute leaders of the Black Liberation Movement in the late 1960s. *See* Michel Rosenfeld, *supra* note 73, at 1546-47. This not only means that the reverse enforcement argument made by civil libertarians does has some merits, but also means that this Act perhaps should be regarded as evidence against rather than for hate speech regulation.

[271] For example, in Canada, it appears that the hate speech laws, as stated by egalitarians themselves, emphasize hate speech incidents' threat to peace, not just any hate speech. In Germany, what is outlawed is the spreading of hatred, promotion of genocide, inciting of hatred against minority groups in a manner tending to breach the peace, organization of unconstitutional political parties, and dissemination of propaganda and use of the emblems of these parties. In Norway, as the provision quoted by some egalitarian indicates, it seems that the elements of "public utterance" and "dissemination" are particularly emphasized. The provision states: "Anyone who threatens, insults, or exposes any person or groups of person to hatred, persecution or contempt on account of their religion, race, colour, or national or ethnic origin by means of a public utterance or by other means of communication brought before, or in any other way disseminated among the general public, shall be punished by fines or imprisonment up to two years." *See* Mari J. Matsuda, *supra* note 2, at 2347 for description of the Canada rules, *and see* Richard Delgado, *supra* note 2, at 369-70 for description of relevant rules of Germany and Norway.

[272] These safeguards are (1) prosecutions could only be carried out with the consent of the Attorney General; (2) the statute would apply only to distribution of materials or words spoken in public; (3) only "threatening, abusive or

prosecutions.[273] Even the Race Relations Act of 1986 is ineffective in carrying out its purported task of hate speech prosecution,[274] and the court has tried to interpret the act narrowly.[275] In Canada, each hate speech offense is subject to a number of defenses,[276] and hate speech rules are applied sparingly.[277] In another word, hate speech regulation in those countries[278] is not in its full swing, or is not allowed to be in its full swing.[279] With prosecution rare, those countries' experience simply does not furnish adequate evidence to establish that hate speech regulation will not inhibit free speech.

In addition, one might want to ask questions like "Why are there often various safeguards?" "Why are there often very few prosecutions?" and so on. The answer to these questions is: there is at least some possibility that authorities in those countries are reluctant to seriously carry out their hate speech laws. If one day, in times of stress, they begin to take them seriously enough, we can wait and see what will happen. So, I would rather find in those countries' experience a kind of reluctance rather than a willingness or trend to regulate hate speech. And this reluctance casts much doubt on the assertion that there is an international trend toward hate speech regulation.

C. Critique of Scope, Severity and Uniqueness of Hate Speech

What is discussed in this subsection, to put it in a way consistent with the concept of internal critique as defined in this paper, is the following question: How well the evidence supports the

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insulting" speech would be covered; (4) intent must be shown; and (5) the racial group victimized must be one residing within Great Britain. *See* Richard Delgado, *supra* note 2, at 364-65.

[273] Richard Delgado, *supra* note 2, at 365.

[274] Mari J. Matsuda, *supra* note 2, at 2347.

[275] Richard Delgado, *supra* note 2, at 366.

[276] *Id*., at 368.

[277] *Id*., at 369.

[278] They are: United Kingdom, Canada, the Netherlands, France, Austria, Germany, Italy, the Scandinavian countries, Australia, and New Zealand. *See supra* note 83.

assertions that hate speech is widespread and that it causes severe and unique harms? One by one, arguments that hate speech is widespread, hate speech has severe harms, and these harms are unique are called into doubt.

1. Is Hate Speech Widespread?

The 1990 report of the National Institute Against Prejudice and Violence is relied upon by several egalitarians[280] to argue that hate speech is widespread on campus. The report said that since the fall of 1986, more than 250 college campuses have experienced racial ethnoviolence.[281] It also estimated that between 800,000 and one million students annually were involved in these incidents, [282] and that approximately twenty percent of minority students experienced some form of ethnic or racial attack during an academic year and that one-fourth were victimized more than once.[283] So, it seems that there is a pretty severe situation to worry about. Nonetheless, this report does not necessarily support egalitarian arguments that the situation is bad enough to warrant hate speech regulation. Problems begin with the definition of "ethnoviolence" in that report. "Ethnoviolence" means "an act or an attempted act which is motivated by group prejudice and intended to cause physical or psychological injury. These violent acts include intimidation, harassment, group insults, property defacement or destruction, and physical attacks."[284] Could intimidation, harassment, group insults, property defacement or destruction and physical attacks all be characterized as hate speech? If the distinction of speech and conduct is completely

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[279] Besides, even not in its full swing, there is evidence that Canada hate speech regulation laws have already inhibited free speech to a deplorable extent. *See* David E. Bernstein, *supra* note 98, at 241-45. So this is an additional reason for caution in hate speech regulation.
[280] *See supra* note 51.
[281] *See supra* note 51 for the definition of "ethnovolience."
[282] Charles H. Jones, *supra* note 3, at 1389.
[283] *Id*.
[284] *See* http://www.prejudiceinstitute.org/ethnovilolenceFs.html (last visited on Feb. 29, 2004).

erased,[285] surely they could all be so characterized. But if due regard is accorded to the distinction,[286] then we will be left with "intimidation," "harassment" and "group insults" being cases of hate speech. So, the scope of hate speech is considerably narrowed. Besides, there is another point that needs to be made: how is it determined that relevant acts are motivated by group prejudice? It is hard without voluntary confession of people engaging in ethnoviolence. So, the statistics that there are so many incidents of ethnoviolence are called into doubt. These statistics perhaps at least partly came from this method: whenever some act involves two different groups, the act is generally treated as a case of ethnoviolence, and the group prejudice motivation is assumed. But it is well possible that many of these ethnoviolent incidents are not motivated by group prejudice at all. Here, a further fine distinction needs to be made between an incident motivated by group prejudice and an incident where group prejudice is displayed. For example, when a white student physically attacks a black person on some other ground[287] than hatred of black people, but he leaves behind a message on the wall saying "you black stupid, stay at your home, don't hang around," then this would most probably be wrongly characterized an incident of ethnoviolence. So, the report perhaps has a problem of over-inclusiveness. On these two counts, the report's utility of supporting egalitarian assertion is quite diminished.

Further points could be made with respect to this report. As we recall, the report estimated that between 800,000 and one million students annually were involved in ethnoviolent

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[285] As is done by Charles R. Lawrence III in his argument that *Brown v. Board of Education* is a case prohibiting racist speech on a content-based but not a case about equal educational opportunity as ordinary understood. For Mr. Lawrence's argument to stand as a good argument, the speech/conduct distinction needs to overcome first. And what Mr. Lawrence has done, in my opinion, just conflates the difference between speech/conduct too much. *See* Charles R. Lawrence III, *supra* note 17, at 438-49 for his treatment of this distinction. *See* Part IV (D) (2) below for my criticism of his treatment.

[286] *See* Part IV (D) (2) below.

[287] For example, the black person is a voyeur and the white person has made up his mind to give him a lesson for his "peeping Tom" actions.

incidents;[288] approximately twenty percent of minority students experienced some form of ethnic or racial attack during an academic year; and, one-fourth were victimized more than once.[289] But this does not establish that ethnoviolence or hate speech is a severe problem, since generally statistics necessarily conceal or ignore something significant in evaluating the situation: the severity of relevant incidents. If most of the incidents are not severe or even trivial, then these statistics do not say too much, at least not as much as egalitarians have claimed.[290]

2. Are Harms of Hate Speech Severe?

With the "widespread" issue called into question, the argument that harms of hate speech is severe is called into doubt in the sense that on the general level, if not on the individual level, harms of hate speech are not severe. But this does not dispel that specific individuals subject to hate speech would be harmed severely. Nonetheless, I will argue that harms of hate speech on individuals are not as severe as is claimed by egalitarians. Recall that as relevant social science studies about the physical and pecuniary harms of hate speech are called into doubt,[291] the asserted severity is much diminished. Besides, even if arguments that hate speech does have such physical and pecuniary harms are sound, one would still have to ask to what extent they are valid. Here, it should not be forgotten that relational, physical and pecuniary harms are based on the theory of social construction of reality, which is based on one's frequent exposure to hate speech.[292] And if people are just occasionally subject to hate speech,[293] it would stretch the argument too much to say that most victims will suffer relationally, physically and pecuniarily.

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[288] Charles H. Jones, *supra* note 3, at 1389.
[289] *Id*., at 1389-90.
[290] When hate speech is not widespread, and its harms not severe or unique, as discussed below, then what is the point for hate speech regulation? If the point that hate speech is not widespread and its harms not severe or unique stands, then egalitarians would be in an awkward situation, if they really admit that "[s]peech regulations must be more than simply reasonable; they must meet a real need." *See* Brownstein, *supra* note 68, at 21.
[291] *See* Part IV (A) above.
[292] *See* Part II (A) (1) above for a concise description of this theory.

Further, it is similarly strenuous to use these harms to argue that hate speech needs to be regulated. One hypothetical situation is enough to clarify this point. Suppose one day morning, a minority student met a white law professor. The student said hello or good morning to the professor, who did not reply for whatever reason. Then the minority student wondered why, and continued to walk. Because he was absent-minded, he did not pay due attention to traffic on the road, and was hit and severely injured by a car. It happened that the person drove the car without a license. So the person was put into jail. And it happened that he drove the car of his older brother, the true owner, who, with knowledge that his younger brother did not have a driver's license, very reluctantly yielded to his pleading of "just one time." So, with the accident, the older brother was heavily fined, and then … Undoubtedly, the chains of cause and effect are simply limitless. If one likes it, one can go on and on. The point is, whatever the physical and pecuniary harms of hate speech are, they simply should not have been relied upon, at least should not have been relied upon too much, to support the argument that hate speech should be regulated.[294]

3. Are Harms of Hate Speech Unique?

History is heavily relied upon to argue that harms of hate speech are unique. For example, it is argued that hate speech by a white person to a black person is much more severe than hate speech vice versa.[295] The idea is, whites were not subjected to slavery as blacks were; when a black person is racially insulted, the whole history of slavery comes into play. Accordingly, some egalitarians go further to argue that hate speech by black persons or minorities to whites

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[293] *See* Part IV (C) (1) above, where the argument that hate speech is widespread is criticized. If hate speech is not widespread, the chance that people are subject to it frequently would be small.

[294] This does not mean that one should not talk about such harms, but that one cannot base the necessity of legal regulation on such harms.

[295] *See supra* note 167.

should be regulated while hate speech the opposite way can be left without regulation,[296] though in the wake of several court decisions striking down hate speech regulations, for example, *Doe v. University of Michigan*,[297] they reconsidered their positions to argue for regulation of hate speech of both types, but only in an effort to save hate speech rules previously targeting the white-to-black/minorities hate speech.[298]

This reliance on history, in my view, is quite problematic. True, there is a history of enslaving black people and a history of denial of suffrage to women that most people (excluding white supremacists and male supremacists) deeply and sincerely regret. This history truly makes hate speech by whites to blacks or by men to women much more hurtful than otherwise. But when one resorts to history, one need to remember that history is not everything, and perhaps is not most of the thing. The further time elapses, the weaker the method of relying on history will be, because things are changing fast; and one day people would even find it difficult to understand that history. Today black people have no personal experience with slave history, and women have no personal experience of suffrage denial either. Though nowadays they are not far from discrimination, they are really far from that historical background. Thus, it would be a little tricky to argue that historical background adds more stings into white-to-black or men-to-women hate speech. People are living in this world, not in that older historical one. What makes hate speech more hurtful to them is that today they are unduly denied many social benefits, they are looked down on by others, they are much poorer than others, and so on, not that deeply-regrettable history. Suppose that the passage of time had ended with every vestige of inequality, whites suddenly did not hold any idea of inferiority of black persons, and men suddenly did not hold any idea of inferiority of women, and all the people suddenly had become truly equal in

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[296] *Id*.
[297] 721 F.Supp. 852 (E.D.Mich.1989).

whatever terms,[299] and people ever since had not experienced any discrimination, no matter how trivial; for what reason would a long-since-past historical background matter? If one still wants to argue that history matters, then what matters is a continuous history, not just that still historical background; what matters is personal history, not just that big, general history. But when one really so argues, one is actually arguing that it is actual living experience and not history that matters in evaluating hate speech and its arguably unique harms.[300]

The point that actual living experience matters much more than history in evaluating hate speech leads us to another distinction made by egalitarians in their effort to argue that harms of hate speech are unique: hate speech based on race, sex or other unalterable personal characteristics is more harmful than "hate speech" based on alterable characteristics, such as poverty.[301] But is race, sex or other so-called unalterable characteristics so different from poverty as to the point that it is not inconsistent when hate speech is regulated while disparaging speech targeting the poor is not? If one accepts that personal experience rather than the historical background matters most in evaluating this question, then one would doubt this distinction made

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[298] *See*, for example, Richard Delgado & David H. Yun, *supra* note 1, at 886-88.

[299] For example, the social wealth in their respective hands ever since had been roughly corresponding to their respective share in the population.

[300] A hypothesis would very clearly clarify this point that actual living experience matters much more than history and matters greatest in evaluating hate speech. Suppose there is a total black community, with just one family of whites. This community is a closed, autonomous one. The white family members, from the very beginning, are heavily discriminated against by the black majority. They are insulted daily by the black majority. In another word, they are exposed to "the opposite way" hate speech everyday. Undoubtedly, they will feel deeply harmed. Isn't it that harms they feel are the same deep as harms felt by black people, regardless of the black slavery history? So, when one day a white person, who for some reason from very early on has been subjected to some form of hate speech, for example, has been constantly called "redneck" disparagingly, is insultingly called by a black person "you stupid redneck!" again, isn't that his feelings of being deeply insulted are the same as those of a black person similarly being called "you stupid nigger!"? If one accepts the point that daily experience matters most, then one will find it difficult to argue the harms felt by the white person are less than those felt by a black person. Therefore, the argument that white-to-black hate speech is more harmful than hate speech the opposite way is not a point always true.

[301] Richard Delgado, *supra* note 8, at 136. Actually, disparaging speech targeted at the poor is not covered by "hate speech" talked about by egalitarians at all. They are talking about hate speech based on race, sex, sexual orientation, religion, ethnicity, and so on. The only reason that they talk about disparaging speech targeted at the poor is that they want to distinguish such speech from hate speech to establish that hate speech should be regulated, while other forms of disparaging speech (based on poverty, for example) can be left without regulation.

by egalitarians. True, poor people can change their economic situation. But how easily? To what degree? Generally speaking, the poor tend to be poorer and the rich richer over time, since the poor have few resources to resort to tilt the scale, and some bad luck would suddenly and completely ruin them,[302] while the rich have more resources to utilize to further their interests, and are more able to afford bad luck. It is enough to just think about a poor illiterate couple who are unable to support their children's education. The parents generally cannot get good, well-paid jobs and thus earn just a bare living. The children, since their parents are unable to support their education, will be most probably in the same abysmal position. Since they are doing low-level menial jobs, in their daily life, they have a great possibility of being discriminated against and insulted by others on the basis of their poverty. And because they are illiterate, their chance of advance in the social strata would be dim, and poverty perhaps would accompany them for a whole life, as would discrimination and insults. So, for what reason that while disparaging words targeting them on the basis of their poverty not be prohibited while hate speech based on race, sex or other so-called unalterable personal characteristics is prohibited by law, when it seems that poverty tends to accompany one a whole life and not as alterable as appears? Egalitarians are arguing that the victim's story needs to be considered[303] and if it is duly considered by civil libertarians, they would not object to hate speech regulation. Here, I ask egalitarians to consider a poor child's story. I am from a very poor family. My parents were and are still very poor. I remember that when I was young, in some years, we would often have no money to buy rice. So, now and then we were just eating sweet potatoes, nothing else. Without money, my brothers and I wore worn-out clothes. We were scorned by others, and I was even called "Rags" in the elementary school since I often wore old clothes. That epithet, even today, stings at me very

[302] For example, a family member is diagnosed with a deadly disease.
[303] Mari J. Matsuda, *supra* note 2.

strongly, even when it is used by someone on the road to a beggar. Not only that epithet. Other similar words or even just disparaging attitudes displayed by others make me feel bad and humiliated, thinking back to my early living experience as a poor child.[304]

This personal story that I am at a great reluctance to tell exemplifies two points. First, poverty is not as easily overcome as suggested by egalitarians. Often poverty accompanies one a whole life, just as it accompanied my parents throughout their lives. Second, stigmatization (verbal or not) based on poverty tends to have strong and long-lasting psychological effects on the victim; not only racial humiliation[305] tends to have such effects. Besides, while poverty is not easy to overcome, some so-called unalterable personal characteristics, e.g. sex, are not so hard to overcome. Today, with new medical technology, sex is not unalterable in an ordinary sense, if one is willing to go through surgery. In today's world, transsexuals are no longer an uncommon phenomenon. So, the argument that the difference between race, sex or other unalterable characteristics and poverty warrants that hate speech needs to be regulated while verbal insults on the basis of poverty can be left without regulation is not a sound one.[306]

Furthermore, even if we admit that there is true and stark difference between poverty and race or sex, there is still a problem when it comes to hate speech based on religion. Is there true difference between poverty and religion with respect to hate speech regulation? Theoretically, both can be changed. One can renounce one's former religion and convert into a new one that would not invite hate speech based on religion. True, to change religion is hard, since religion

[304] But reason tells me that I am a little oversensitive due to my earlier experience. So, generally I dismiss those incidents and try to be calm to think people around me more optimistically. This attitude helps but not harms me much.
[305] Or other types of hate speech.
[306] Of course, here I am not arguing that verbal insults based on poverty should be regulated also. Instead, what is argued is just that harms of hate speech are not as unique as is claimed by egalitarians; so the slippery argument made by civil libertarians should be accorded greater weight.

often is assumed with birth. But to change one's economic status, as is shown above, is not so easy either, and poverty also often comes with birth and accompanies one for a whole life.

The point here is that arguments alleging the uniqueness of harms of hate speech are not very soundly supported, and that it is grossly problematic to emphasize history as the basis for treating hate speech differently from other types of disparaging speech based on, for example, poverty. What matters more, and most, is not a general historical background, but one's actual living experience.[307] If egalitarians want to challenge this point, they would have to renounce their reliance on the social construction of reality theory[308] they have heavily relied upon to assert that hate speech, even in the absence of real racism, causes great harms to minorities.[309] Just look at what is quoted to support the assertion that hate speech has great adverse impacts on the victim: "Human beings . . . whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth."[310] Obviously the speaker is talking about one's daily experience. Thus, when it comes to uniqueness of such harms, it looks quite strange and inconsistent that historical background rather than daily experience is emphasized.[311]

D. Critique of Political Imperativeness and Legal Commitment

1. The Political Imperativeness Argument: Not Well Documented

To the egalitarian argument that hate speech is no longer a social good,[312] some criticism for the sake of internal critique can be made. Recall that one of the supporting arguments is the

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[307] Or personal history (if one addicts to the word of "history.").
[308] *See* Part II (A) (1) above, where the theory of social construction of reality is briefly described.
[309] *Id*.
[310] Richard Delgado, *supra* note 8, at 136-37.
[311] The very reason, I figure, as the cursory discussion above somewhat reveals, is that, by resorting to actual living experience, harms of hate speech based on race, sex or other so-called unalterable personal characteristics could not be readily distinguished from harms of "hate speech" based on poverty and other arguably eliminable characteristics. They are just without other choice but to rely on history.
[312] *See* Part II (B) above.

American society has become more diverse. In response, one might ask "compared to what period, the fifties, sixties, seventies, or eighties?" "to what extent?" and "is the extent great enough to support the position that hate speech is no longer a social good?"[313] and so on. If these questions are not clearly answered, there is at least reason to doubt whether the greater diversity in the American society supports the political imperativeness argument; or put it specifically, whether the greater diversity warrants hate speech regulation as argued by egalitarians.[314] With regard to another supporting argument that in a democratic society deliberation among equals is the keystone,[315] while hate speech denigrates minority groups needlessly, making people unequal, so that desired deliberation is impeded[316] if not made impossible,[317] – it needs to point out that occasional, face-to-face hate speech in informal settings does not make people unequal.[318] Only frequent hate speech constituting a hostile environment[319] would have such an effect. So this evidence does not support face-to-face regulation much. Besides, "deliberation among equals" does not require that a private citizen treat another respectfully or equally in informal settings as much as it requires that governments give all private citizens equal access to

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[313] Let's assume that Mr. Richard Delgado is right in saying hate speech perhaps was a social good before.

[314] Besides, as discussed above, *see* Part II (A) above (where a concise treatment of the theory of social construction can be found) and Part IV (C) (1) above (which challenges the egalitarian argument that hate speech is widespread), to prevent people from contributing and participating actively, hate speech needs to be frequent, or at least no occasional. Otherwise, hate speech is no different from calling somebody "stupid." So the political imperativeness diminishes further if the criticism of the uniqueness of harms of hate speech in Part IV (C) (3) above is taken into consideration. Here it is worth noting that I am not arguing hate speech is a social good, but that the argument that it is no longer a social good is not well documented.

[315] Richard Delgado, *Book Review*, *supra* note 20, at 796.

[316] *Id*., at 796-97, where it is argued that without regulation of hate speech, genuine dialogue based on equal participation and respect will be scarce.

[317] *Id*.

[318] Suppose in a black person's whole life, only one day did a white person say something tantamount to hate speech to him or her, he or she is not made unequal. Of course, this is an extreme situation, but it does reveals that the "deliberation among equals" does not support face-to-face hate speech well, at least when such hate speech does not constitute a hostile environment.

[319] Where the theory of social construction of reality can come into play. Here some further criticism can still be made. Suppose in a relatively closed community, a person is frequently subject to hate speech by and only by another one, while the person is respectful and equally treated by all others, there is doubt that a hostile environment could be found in this circumstance. So what is required is not only frequent hate speech, but frequent hate speech from different persons, at least two different persons.

political arena.[320] So, hate speech, at least when it does not come from the government or other forms of organized authorities,[321] does not have much to do with "deliberation among equals." For example, the fact that one white person[322] holds the idea that blacks should not be accorded equal citizenship and often calls blacks disparagingly does not prevent blacks to be equal citizens, when they are accorded equal citizenship by the government. So even if "deliberation among equals" is the keystone of modern democracy, it does not help the egalitarian case for hate speech regulation much.

2. The Legal Commitment Argument: Too Strenuous

For the argument that *Brown v. Board of Education*[323] was about regulation of racist speech[324] instead of about black children's equal educational opportunity[325] to stand as a good argument, one is without other choices but to ignore two distinctions: the conduct/speech and the public/private distinction.[326] First, at least on its face, *Brown* outlawed discriminatory conduct, not speech. Perhaps it could be argued that segregation was held unconstitutional in *Brown* not simply because of the bad physical separation of black and white children, but also because of the message segregation conveys – the message that black children are an untouchable caste, unfit to be educated with white children.[327] But it goes a little too far to argue that *Brown* is

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[320] For example, the equal protection clause, U.S. Const. amend. XIV, 1., is worded to require the government rather than private citizens to treat citizens equally. It states: " … No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In my opinion, with this law and others and their practical enforcement consistent with the spirit embodied in them, the pre-political reckoning is already met.

[321] For example, incorporated bodies, such as a town, an incorporated village and so on.

[322] Or even some white persons, as long as these persons do not constitute a substantial part of the population. Under that circumstance, one shall hesitate to say that hate speech still does not matter, since it is more systematic, and perhaps can much distort the political process.

[323] 347 U.S. 483 (1954).

[324] Charles R. Lawrence III, *supra* note 17, at 438-49.

[325] *Id*., at 438.

[326] For a detailed analysis of these two distinctions and a criticism of the legal commitment argument, *see* Nadine Strossen, *supra* note 6, 542-47.

[327] *Id*., at 439.

primarily[328] based on that message. Do not forget that in *Brown* there is another thread, that is, "separate educational facilities are inherently unequal."[329] Thus it could be argued either way why the Supreme Court reached its holding in *Brown*. Besides, even if one admits the result in *Brown* was primarily dictated by that message of black inferiority, one might ask this question: why does segregation convey that message? Isn't it because there are discriminative behaviors toward them by whites? Isn't it because there is a black slavery history in America? Suppose that there were no discrimination against blacks at all, that there had not been the black slavery history, that whites and blacks were equal in every term, but that segregation had formed by some natural way, then what message would segregation convey? It is a hard and extreme question with no easy answer, but to ask it casts doubt on the argument that the result in *Brown* was primarily based on the black inferiority message. Even when elaborating on the black inferiority message, the Supreme Court rested its argument ultimately on the unequal educational implication of segregation.[330] Furthermore, can anyone deny that ideally[331] "separate but equal" is an attainable goal? The reason why this rule was overruled, I figure, is more because practically[332] it is not attainable than because it conveys a message.

The public/private distinction is conflated by this argument also, since the equal protection clause only restricts government behavior, whereas the first amendment protects the speech of

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[328] *Id*.

[329] 347 U.S. at 495. This is the very argument the plaintiffs made. They contended that "segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws." *Id*., at 488.

[330] The lower court conclusion approvingly cited by the Supreme Court goes this way: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a [racially] integrated school system." 347 U.S. at 494. *See also Id*., footnote 10.

[331] I emphasize the word of "ideally" here.

[332] For the same reason, I emphasize the word of "practically" here.

private persons. But how about *Heart of Atlanta Motel v. United States*,[333] in which the Supreme Court upheld the public accommodations provisions of Title II of the Civil Rights Act of 1964,[334] and implicitly rejected the argument that the absence of state action meant that private discriminators were protected by first amendment free speech and associational rights?[335] To this it should be noted that the provisions were upheld on the basis of Congress's commerce power not on the basis of equal protection.[336] This case does not say private speech could be regulated on the basis of equal protection at all. So, when it comes to equal protection, the public/private distinction still holds.

E. Critique of Egalitarian Counterarguments

Now, we turn to egalitarian counterarguments discussed above in Part III. Let's take the counterargument made to the "best friend" argument first. As described above, it is argued that the system of free speech law has not always served as a staunch ally of minority interests.[337] To this, there are two possible replies. First, the "best friend" argument says free speech, not free speech law, has been minorities' best friend historically. So, to focus on free speech law is somewhat beside the point.[338] Second, the fact free speech law has not always been minorities'

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[333] 379 U.S. 241 (1964).
[334] 42 U.S.C. §§ 2000a-1 to 2000a-6 (1988).
[335] 379 U.S. at 258. This argument is made by Charles R. Lawrence III. *See* Charles R. Lawrence, *supra* note 17, at 448-49.
[336] The motel argued, *inter alia*, that Congress in enacting Title II of the Civil Rights Act of 1964, *supra* note 334, exceeded its power to regulate commerce under Art. I, § 8, cl. 3, of the Constitution of the United States. 379 U.S. at 243-44. The Supreme Court upheld the statute on the basis of Congress' commerce power instead of equal protection, *Id*. at 261, declaring "[w]e, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, …" *Id*., though legislative history indicates that "Congress based the Act on §5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, §8, cl. 3, of the Constitution." *Id*. at 249.
[337] Richard Delgado, *Book Review*, *supra* note 20, at 793.
[338] So, to say minorities "minorities have made the greatest progress when they acted in defiance of the First Amendment," Richard Delgado & David H. Yun, *supra* note 1, at 881, is a distortion of history, or at least a confusion of "speech laws" and "free speech." Free speech is embodied in the First Amendment, while "speech laws" are not necessarily consistent with free speech embodied in the First Amendment, so they are perhaps not part of free speech, thus would be struck down by the Supreme Court. For example, the speech ordinance that criminalized Martin Luther King, Jr. and others was struck down by the Supreme Court as unconstitutional. *See* Part

staunch ally does not undermine the argument that it is generally such an ally.[339] So, the egalitarian counterargument does not stand. True, black protesters had paid great price to win their acquittal on appeal, but one must ask this question: if without a commitment to free speech, would they have been acquitted even after they had paid such a price?[340] Further, if their protestation was really too intermixed with action or too disruptive of property rights, why shouldn't they be convicted anyway?[341] They were convicted on some other basis than their exercising the right to free speech.

The counterargument to the civil libertarian argument that free speech has made United States great is similarly unsound. Arguably United States enjoys its leading position due to exceptions to free speech, such as patents, copyrights and so on. But don't forget that we are all talking contextually. Within this context, these exceptions are an integrated part of free speech. So, when civil libertarians are saying free speech has made America great, they are perhaps not talking about the absolute free, but the contextualized free speech, including those exceptions. If so, this counterargument is totally beside the point. As to the assertion that "it seems highly likely that tolerating virulent hate speech and vicious public depiction plays a part in allowing" such forms

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III (B) above. That is, it was not a free speech law, but a speech inhibiting law. It should not be included in the network of free speech laws. Egalitarians should not have used such bad laws – speech-inhibiting laws - to argue that free speech laws were not an ally of minorities.

[339] Anyway we do not oppose something because it has not always produced desired results. Besides, free speech law is not designed to protect minorities only, why should it have always been their staunch ally? Actually, some egalitarian's own statement confirms the point that free speech was beneficial to minorities historically. *See*, *e.g*., Richard Delgado, *Book Review*, *supra* note 20, at 794 ("Speech may have been a vital tool for organizing and for quickening America's conscience; free speech law (at least as then interpreted) was not.").

[340] One must also ask a particular question: without a firm commitment to free speech, would the ordinance Martin Luther King, Jr. was found to have violated have been struck down by the Supreme Court?

[341] In a Stanford University incident, President Donald Kennedy refused to grant amnesty for students who took over his office in their effort to demand more minority faculty and ethnic studies reform, because he thought these students' behavior was clearly a violation of Stanford's policy against campus disruption. This posture attracted criticism from some egalitarian. It is said this decision is unfair, since white students defaced a poster of 19th century composer Ludwig von Beethoven to portray a stereotypical black face were unpunished. Charles R. Lawrence III, *supra* note 17, 433-34, 467. But is it really unfair? Isn't these minority students' behavior too intermixed with disruptive conduct? And if this office-taking-over conduct should be punished according the university conduct code, why these students should not be punished? From Mr. Lawrence's attitude toward these two incidents, it might be

of social misery as inequality of wealth and income, high infant mortality and so on, is simply not well documented. It is just an assertion, not an argument.

How about the counterargument against the "more speech" solution? Admittedly, it is often very hard or impossible for the victim to respond on the spot; and even to respond later by writing or speech not specifically targeting the very perpetrator would be difficult since speech is expensive.[342] But do not ignore other possibilities. If the victim cannot afford speech, some others who can afford speech and are sympathetic with the victim will stand out and talk back.[343] Besides, if today the society, as is argued by some civil libertarians, is much more diverse than before,[344] then surely it would be much easier for minorities to find effective representatives. Indeed, when hate speech incidents increased on campus, egalitarians began to write and speak against hate speech very extensively. They are minorities' representatives who have participated actively in the "marketplace of ideas." Further, it is undoubtedly true that the marketplace of ideas has its defects, but this does not establish that hate speech should be regulated by the

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fair to say that perhaps he, like other egalitarians, is too close to equal protection. For discussion of this issue, *see* Part IV (F) below.

[342] If it is really expensive. But I do think the point that speech is expensive is exaggerated.

[343] For example, in February 1988, in Dartmouth, four members of *The Dartmouth Review* confronted William S. Cole, a Black professor, at the conclusion of his music history class. The newspaper had recently published a highly critical review of Cole's course. The confrontation turned into a shouting and pushing match between the professor and Review members. Black students charged that the article and classroom incident were racially motivated, while the Review insisted that they were simply fair criticism of a professor's teaching ability. Later, a university panel found three staff members guilty of disorderly conduct, harassment, and invasion of privacy for initiating and secretly recording the "vexatious exchange" with Cole. The event caused a heated exchange between the Review and Dartmouth President James O. Freedman, who criticized the newspaper for "poisoning . . . the intellectual environment," while the Review charged Freedman with censorship and reverse discrimination and even compared him, a Jew, with Adolph Hitler. *See* Richard Delgado, *supra* note 2, at 349-50 for a more detailed description of this incident. Whatever our evaluation of this incident, here Dartmouth President James O. Freedman could afford "expensive" speech and did talk back, though the black professor was not in a position that made him could not afford more speech. Such talking back, if not successful in convincing the Dartmouth Review members, would have some good educating effect upon members of the university community. His talking back arguably would have greater effects than someone else's, since he was in an authoritative position. Actually, this is a position advocated by some civil libertarians. *See*, for example, Jon Weiner, *Racial Hatred on Campus*, THE NATION, Feb. 27, 1989, at 260, 262 (calling on universities to speak out forcefully and frequently on why racist speech is objectionable). Please note that Mr. Wiener is calling on "universities" to speak back not just individual students who have been or would be subjected to hate speech.

[344] Richard Delgado, *Book Review*, *supra* note 20, at 795-97.

government. There is no reason to believe that the government can do a better job, [345] and it may well do a worse job.[346]

The problem with the egalitarian counterargument to the "reverse enforcement" argument is that there is an attitudinal ambivalence in the egalitarian attitudes toward authorities. Remember when arguing against the position that free speech has been minorities' best friend, some egalitarian is really unhappy with the authorities arresting and convicting black protestors who sat in, marched, and picketed and so on,[347] and grudgingly unhappy with courts that too often viewed black protestors' speech or expression as too intermixed with action or too disruptive of property rights.[348] The egalitarians seem to doubt the authorities' commitment to allowing minorities equality in free speech. But here, much more confidence is placed with the authorities. So there is no good basis to worry about reverse enforcement, though there will be some incidents of reverse enforcement, but these incidents are not the pattern, far from the rule.[349] In short, how can egalitarians be confident that the authorities will not enforce hate speech rules unequally when they doubt the authorities' commitment to equal right to free speech? Is it because society has become much more diverse so that the authorities are different now?[350] If so, then how different? These questions, if not answered, cast doubt on the egalitarian counterargument. As to the assertion that hate speech rules will not be used to stifle dissenters in the United States since the United States is more liberal than South Africa and the former Soviet

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[345] David E. Bernstein, *supra* note 98, at 235.
[346] *See*, *e.g.*, *id*. at 236-37 (arguing that the government will entrench itself and expand its power at the expense of the public, and negative externalities of government regulation are likely to outweigh any negative externalities that arise from freedom of expression). *See also supra* note 151.
[347] Richard Delgado, *Book Review*, *supra* note 20, at 793.
[348] *Id*., at 793-94.
[349] Richard Delgado & David Yun, *supra* note 1, at 880.
[350] It is argued that now society is much more diverse but no evidence is offered to support this argument. *See* Richard Delgado, *supra* note 2, at 795-96.

Union countries,[351] one comment can be made: how can we assure that the United States will always be so? The possibility that the United States will become repressive seems dim, but don't forget *Korematsu v. United States*,[352] in which American Japanese were sent to concentration camps while United States was in a relatively more repressive state.[353]

The counterargument that there is no need to worry about the slippery slope is already critiqued above when the uniqueness of harms caused by hate speech is questioned. Here we will only deal with a specific distinction made by some egalitarians: the distinction between hate speech and Marxist speech. It is argued that Marxism is not universally rejected by countries all over the world, while slavery and racial supremacy are, and that this distinction ensures that regulation of hate speech will not lead to a revival of McCarthyism.[354] This distinction is the weakest distinction made by egalitarians.[355] If one day a country or a group of countries begins to rule on the basis of an official policy of racial supremacy, then where is the difference between Marxism and racial hate speech? Further suppose not only that some countries begin to rule on an official racial supremacy policy, but also that Marxism is universally rejected, does this mean that hate speech based on race shall not be regulated while Marxist speech shall be prohibited?[356]

A few more comments on some other counterarguments may end this part of critique. The argument that hate speech is an aberration and isolated and its harm is minimal, though often just an assertion, could not be disregarded easily, especially when the scope of hate speech, the

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[351] *See supra* note 145.
[352] 323 U.S. 214 (1944).
[353] When one bears this case in mind, one perhaps would not argue, as Richard Delgado have done, that the international terrorism crisis is a good opportunity for minorities. Perhaps just the contrary. For example, minorities are subjected to more stringent examination before boarding a flight.
[354] Mari J. Matsuda, *supra* note 2, at 2359.
[355] *See* Danny J. Boggs, *supra* note 136, at 276, where this distinction is criticized.

severity and uniqueness of harms of hate speech are called into question above.[357] And if that criticism has its merits, then the argument that hate speech regulation will leave minorities little better off than they are now could not be easily disregarded also.

As to whether it functions as a pressure valve to "allow" people to utter hate speech, this is a question that could be argued either way. But what is more important and more consistent with the perspective of internal critique is to criticize the social studies used to support the counterargument. The "blue eyes/brown eyes" experiment,[358] the Stanford experiment assigning students roles of prisoner and prison guard,[359] and the experiment of some authority figures asking one to give another an electric shock[360] are all beside the point here. Why? Because among these experiments there is a common feature: subjects are affirmatively required by some authoritative figures to play some roles. The very basis of these experiments is that subjects take their roles seriously. If they had not, these experiments would have been impossible.[361] This makes them clearly different from hate speech. First, people are not encouraged, and certainly not affirmatively required, by authoritative figures to utter hate speech. Second, when some white person says to a black person "you stupid nigger," the black person needs not to play a stupid role; he or she can be as smart as possible. Perhaps these social science studies are more germane to hate speech uttered publicly by official figures, since they are in an official position, some others would think what they say tend to be right and do accordingly, though they are not necessarily affirmatively requiring others to do accordingly. But the egalitarians do not assert

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[356] If there is no true distinction established between hate speech and other verbal insults based on poverty or other extremist speeches like Marxist speech, then the argument that the government will grab the opportunity to censor and chill speech is not one that could be as easily dismissed as egalitarians have thought.
[357] *See* Part IV (C) (3) above.
[358] Richard Delgado & David Yun, *supra* note 1, at 879.
[359] *Id*.
[360] *Id*.
[361] Suppose, for example, in the "blue eyes/brown eyes" experiment, children had not taken their roles seriously, then this experiment perhaps would have brought out no significant result.

that there are cases where official figures utter hate speech at all, not to say there are many such cases. As to the interview study, [362] where it is reported that male sexual offenders did not think they were offenders at all, there is a problem: how do you know the male sexual offenders have said what they were really thinking? Isn't there a great possibility that they were just excusing themselves of their criminal conduct by so saying? Besides, if not the deterring effect,[363] the curing effect[364] of hate speech rules is quite doubtful.

The counterargument offered to the victimization argument is also beside the point. Civil libertarians are arguing that hate speech rules would "encourage" a crybaby attitude, egalitarians reply that minorities are not required to file complaints, filing complaints is just another avenue to deal with hate speech, and filing complaints can be looked at as a way of taking charge of one's destiny. But this reply is weak because it does not answer the victimization argument directly: it does not dispel the possibility that minorities will be "encouraged" to rely upon authorities. As to the analogies, it should be pointed out that when a car is stolen or a house is burglarized, the victimizer does not target the victim directly; instead the victimizer targets the victim's property directly. This is quite different from hate speech, where one person targets another person or a group of persons. Besides, when one's car is stolen or one's house is burglarized, one generally does not know who the victimizer is. This is also different from at least some hate speech, for example, many face-to-face racial slurs.

Egalitarians have made another beside-the-point argument when they are counter arguing against civil libertarian's concern of equal treatment of hate speech speakers. Remember that civil libertarians worry that hate speech rules would have differential effects on blue-collar people and upper-class people. The point civil libertarians have made is that blue-collar members

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[362] Richard Delgado & David Yun, *supra* note 1, at 879.
[363] Richard Delgado & Jean Stefanic, *supra* note 92, at 485.

tend to utter more recognizable hate speech, while upper-class members tend to utter some refined version of hate speech that is not readily recognizable, though they may well harbor even deeper scorn for minorities than blue-collar members. So, the fact that both blue-collar and upper-class people will be prohibited from uttering crude racial slurs and epithets is totally beside the point.

F. Egalitarians: Too Close to Equal Protection

If the internal critique in Part IV stands, and if it really seems that, as is shown above, egalitarians tend to grasp evidence hastily to support their case of hate speech regulation without careful analysis, and that when facing some strong attacks from civil libertarians, some egalitarians do not face them directly, but sidestep them, making counterarguments beside the point to different degrees, then one might ask why they have done so. Perhaps the most plausible reason is that they are really too close to the problem.[365] When they are too close to the problem, they are too eager to be adequately calm and reasoned. Thus they will utilize whatever evidence, such as social science studies and international trends and so on, without doing analysis careful enough first. Their perspective is so much tainted with passion and anxiety that, when facing a

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[364] *Id*.

[365] Steven G. Gey, *supra* note 164, at 225. *See also*, Danny J. Boggs, *supra* note 136, *at 270* (using this example to exemplify the point: Catharine MacKinnon, who has been very active in this area, was asked about an incident at the University of Pennsylvania where the student newspaper had run an article critical of affirmative action and of Malcolm X, and a student group seized all the copies of the newspapers and burned them. And it seems that Professor MacKinnon took the position that the student group's newspaper-burning was protected speech. But Judge Boggs thought that if Professor MacKinnon would certainly not have the same view had it been a male supremacist group that had been burning a women's magazine. And I think this is a fair inference). Facing such a criticism, it is counter argued that why civil libertarians do not see themselves to be too close to free speech. *See* Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 871 (1998). But this counterargument is still another example of evading but not facing the problem. It is the same beside the point. True, perhaps civil libertarians are too close to the cause of free speech and too far from that of equal protection, but this does not dispel the criticism that egalitarians are too close to the cause of hate speech regulation.

very strong argument that it is hard to distinguish hate speech from Marxist speech,[366] some egalitarian even made a distinction between them on an obviously faulty basis.[367]

[366] *See*, for example, Danny J. Boggs, *supra* note 136, at 274, 279 (arguing that Marxist speech could not be easily differentiated from various types of so-called hate speech).
[367] Mari J. Matsuda, *supra* note 2, at 2358-60. *See* Part IV (E) above for a criticism of her argument.

CHAPTER V

CONCLUSION

Based on Parts II, III and IV, the generally conclusion is that, though egalitarians have made good arguments in advocating and defending hate speech regulation, evidence they have garnered does not support their argument very well, especially when it comes to the so-called face-to-face hate speech regulation. So, if the debate between egalitarians and civil libertarians is evaluated on and only on this basis, egalitarians will lose, or at least will not win. In the sense that what civil libertarians have resorted to – free speech – is more entrenched than what egalitarians have resorted to – equal protection, better arguments need to be made to establish the case that hate speech should be regulated. The very sense that free speech could be viewed as more entrenched than equal protection is that free speech went into Constitution much earlier than equal protection.[368]

[368] Free speech entered into the Constitution in 1791, while racial equal protection entered the Constitution in 1868, and sex equal protection with respect to voting rights entered the Constitution even later: in 1920.

CHAPTER VI

EPILOGUE: A DEFENSE OF FEDERAL COURT DECISIONS

If the general conclusion in Part V stands and egalitarians have failed, up to now, to convincingly establish their case that hate speech, especially face-to-face hate speech, should be regulated, then federal courts' reluctance to give support to hate speech regulation is quite understandable. Besides, federal courts' decisions could be defended in another sense: federal courts have taken great pains not to close the possibility of some hate speech regulation. This assertion is supported by both lower court decisions and Supreme Court decisions. In *Doe v. University of Michigan*[369] and *The UWM Post, Inc. v. Board of Regents of University of Wisconsin System*,[370] hate speech regulations of University of Michigan and University of Wisconsin were struck down on the basis that they were overbroad and vague.[371] Both courts have avoided categorical statements that under current free speech law framework, hate speech could not be regulated at all. Similarly, the Supreme Court does not say hate speech cannot be regulated at all either. In *R.A.V. v. City of St. Paul*,[372] the Supreme Court struck down the St. Paul Bias-Motivated Crime Ordinance [373] on the basis that "the ordinance is facially unconstitutional"[374] since it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[375] Or, put it another way, it was constitutionally prohibited

[369] 721 F. Supp. 852 (E.D. Michigan, 1989).
[370] 774 F. Supp. 1163 (E.D. Wis. 1991).
[371] 721 F. Supp. at 866, 867; 774 F. Supp. at 1172, 1179.
[372] 505 U.S. 377 (1992)
[373] *Id*. at 380.
[374] *Id*. at 381.
[375] *Id*.

content-discrimination[376] or viewpoint-discrimination.[377] All in all, the court never said in *R.A.V.* that hate speech could not be regulated at all. This point is most clearly exemplified by the most recent hate speech case, *Virginia v. Black*.[378] In this case, the Supreme Court even affirmatively said that cross burning with the intent to intimate could be banned by a state,[379] though it struck down the Virginia's cross-burning statute on the basis that the prima facie evidence article that provided any burning of a cross should be prima facie evidence of an intent to intimidate a person or group of persons[380] was unconstitutional on its face.[381] So, it seems that the Supreme Court and lower federal courts are not as unsympathetic and undependable as claimed by some egalitarians[382] to the egalitarian cause for hate speech regulation, as long as, subject to other conditions, there is good evidence.[383] It follows that that federal courts could be relied upon to deal with hate speech when it constitutes real threats. This point is confirmed by the hostile environment cases.[384] For example, in *Davis v. Monroe County Board of Education*,[385] in

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[376] *Id*. at 387. The court said, "In our view, the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id*. *See also Id*. at 391.
[377] *Id*. at 391.
[378] 538 U.S. 343 (2003), 123 S. Ct. 1536 (2003).
[379] 123 S. Ct. at 1541.
[380] *Id*. at 1542.
[381] *Id*. at 1541, 1551.
[382] *See, e.g.*, Richard Delgado & Jean Stefanic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CALIF. L. REV. 851, 856-58 (1994) (using the concept of interpretive community to severely question judges' ability to recognize and protect minorities' interest).
[383] In *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, the good evidence is there: history shows that cross-burning conveys a fear of bodily harm in the targeted person or persons. *See* J. O'Conner's treatment of the American cross burning history in this case. 123 S. Ct. at 1544-47. But one must be cautious here. The fact that the Supreme Court is actually not as unsympathetic to the egalitarian case as argued by egalitarians does not lead to the conclusion that it will support broad speech regulation. So to use this fact to support the egalitarian case for hate speech regulation would be problematic, especially if the advocated regulation is very broad. Therefore, the Supreme Court's decision in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), that that racial hatred could be considered in determining the sentence of a convicted defendant does not necessarily mean that the Supreme Court would support hate speech regulation, especially face-to-face hate speech regulation advocated by egalitarians. But it seems that some egalitarians used *Wisconsin* to implicitly support their case for hate speech regulation. *See* Richard Delgado & David H. Yun, *supra* note 1, at 875, where *Wisconsin* was used to implicitly support hate speech regulation, *and* Richard Delgado, *Book Review*, *supra* note 20, at 799, where *Wisconsin* was used expressly to support very broad speech regulation.
[384] These cases include *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (considering peer harassment in public schools), *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75 (1998) (considering same sex harassment in workplaces), *Harris v. Forklift Systems*, 510 U.S. 17 (1993) (holding that, under Title VII of the Civil

reversing the decision of Court of Appeals for the Eleventh Circuit and remanding the case to that court,[386] the Supreme Court held that a private damages action could lie against a recipient of Title IX funding in cases of student-on-student harassment when the recipient acted with deliberate indifference in its programs or activities to known acts of harassment[387] and when the harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.[388] In *Harris v. Forklift Systems*,[389] though Title VII of the Civil Rights Act of 1964[390] on its face only barred conduct that would seriously affect a reasonable person's psychological well being, the Supreme Court held, as long as the environment would reasonably be perceived and was perceived as hostile or abusive, there was no need for it also to be psychologically injurious for it to be actionable.[391] Similarly, in *Monteiro v. Tempe Union High School District*,[392] the Ninth Circuit held that the school's knowledge of and failure to act upon racial slurs by other students constituted discrimination.[393]

Rights Act of 1964, 42 U.S.C.S. 2000e-2(a)(1) which barred conduct that would seriously affect a reasonable person's psychological well being, there was no need for it also to be psychologically injurious, as long as the environment would reasonably be perceived and was perceived as hostile or abusive.), *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), *Monteiro v. Tempe Union High School District*, 158 F.3d 1022(9th Cir. 1998), *and Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

[385] 526 U.S. 629 (1999).

[386] *Id*. at 654.

[387] *Id*. at 632.

[388] *Id*. Or in another word, the harassment constituted a hostile environment, though Justice Kennedy took issue with the appositeness of applying the concept of hostile environment in this student-on-student harassment context, since "schools are not workplaces and children are not adults." *Id.* at 675 (Kennedy, J., dissenting.) This case undermines an egalitarian argument for hate speech regulation. *See* Brownstein, *supra* note 68, at 19. The argument runs like this: true, there will be some worst scenarios in which well-intentioned regulations of racist speech are abused by administrators to stifle robust debate and inquiry in a university, but isn't there also some equally unacceptable scenario in which racist expression renders a university environment uninhabitable (or at least educationally useless) for minority group members? *Id*. My answer is, yes, there is also such an unacceptable scenario if hate speech is not regulated. But, wait, isn't it that this scenario has been taken up by the court in this hostile environment case? When there comes such an environment, victims can resort to courts for protection. So, the fact that there is such a scenario does not support that there should be hate speech regulation.

[389] 510 U.S. 17 (1993)

[390] 42 U.S.C.S. 2000e-2(a) (1).

[391] 510 U.S. at 21.

[392] 158 F.3d 1022 (9th Cir.1998)

[393] *Id*. at 1032-35.

In addition, what federal courts have done is wise for several reasons. First, the upsurge of hate speech on campus in recent years is mostly attributable to a greater presence of minorities on campus.[394] So, in a sense, the upsurge perhaps is a sign that the American society is successful in and on the right track of social integration. If viewed in this way, the upsurge is not so deplorable as egalitarians are arguing. Second, in the sense that hate speech is a part of an ongoing social-integration process, it is a better thing to do to just observe and see what will happen,[395] especially in the early stage, than to make a sweeping rule that hate speech should be regulated. Such a rule would silence arguments and impede understanding, would be a decision too hasty, and would deprive citizens of the opportunity to deal with it themselves. So, federal courts have done a good job to leave the door open to let there be enough room for further development. There is evidence[396] indicating that federal courts, including the Supreme Court, are on the right track in this regard.

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[394] Most studies on the subject and media reports concur in the view that increased racial and ethnic diversity on American campuses, particularly majority race colleges, is the largest single factor in explaining such conflict. *See* Charles H. Jones, *supra* note 3, at 1390-01, and footnotes 27, 28 and 29.

[395] And to interfere when necessary, perhaps, as the hostile environment cases indicate.

[396] *See*, *Are There Any Trendlines?* at http://www.prejudiceinstitute.org/ethnoviolenceFS.html (last visited on Feb. 29, 2004). It is stated that from the mid-1980s through the early part of this decade there has been a steady and rapid increase of ethnoviolence, but by 1995, the number of incidents appears to have stabilized.

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