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COMMENT

Fighting Racism: Hate Speech Detours*

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INTRODUCTION

A white male student shouts to a black woman student, "My parents own you people." Fliers are distributed declaring "open season on blacks" in which blacks are referred to as "saucer lips, porch monkeys, and jigaboos." White students spit on and taunt Asian-American students. A letter is addressed to a black student dormitory that discusses "wip[ing] all g.d. niggers off the face of the earth."[1]

More than 100 colleges and universities have enacted hate speech codes[2] in response to numerous racial and related incidents on college campuses. The National Institute Against Prejudice and Violence has documented a dramatic increase in ethnoviolence, affecting literally thousands of students on hundreds of campuses.[3] Universities have garnered

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* This Article contains material that the reader may find offensive.

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1. Kim W. Watterson, Note, *The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech*, 52 PITT. L. REV. 955, 960 (1991).

2. Anthony DePalma, *Battling Bias: Campuses Face Speech Fight*, N.Y. TIMES, Feb. 20, 1991, at B9.

3. Howard Ehrlich, *Campus Ethnoviolence and the Policy Options*, 4 NAT'L INST. AGAINST PREJUDICE & VIOLENCE 41 (1990).

praise from some for taking a stand against racism, yet condemnation from others for intruding upon freedom of speech.[4]

This Article will argue that hate speech represents the wrong issue on which to concentrate. Legalistic and free speech nets trap the unwary, creating diversions from more important antiracism efforts. The nets come complete with untenable distinctions between crude and sophisticated hate speech and with other insuperable problems, such as distinguishing between protected and unprotected speech within a blurred field of categories.

Deflating the importance of hate speech regulation does not entail discounting the impact that hate speech has on its victims or minimizing the connection between hate speech and racism. The hate speech victim's injury and the perpetrator's attitude can better be dealt with by directly confronting the nonspeech manifestations of racism. If the effects of racism, i.e., institutional structures and practices, did not loom so large, the victim would have less about which to be sensitive. Therefore, instead of concentrating on ways to counter the deplorable incidents of hate speech, we should use the speech incidents to address the more fundamental problems of racism, or to challenge the structures underlying racism directly. Words can hurt, but the sticks and stones of racism harm in even greater ways.

Instead of taking free speech as the framework for rejecting hate speech regulation as many of the analyses do,[5] I take antiracism as the point within which to evaluate hate speech regulation. Defenders of free speech operate from noble principles, many of which I applaud, but they often operate from a perspective of pristine principles that ignore contextual complexity. An antiracism perspective puts forth an explicit political position fully immersed in political context.

From an antiracism perspective, hate speech regulation creates a detour. The first diversion, taken up in Part I, consists of the search for a legal pigeonhole for making hate speech an actionable offense. There is no consensus regarding the justification for hate speech regulation. A similar confusion, addressed in Part II, surrounds the attempts by universities to devise policy goals that undergird hate speech regulation. Ironically, universities have failed to adopt the most obvious policy goal, formulated in terms of antiracism. The diversionary nature of hate speech regulation begins to emerge more clearly when the difficulties of making a distinction between crude and sophisticated hate speech are spelled

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4. This Article will concentrate on racism, but the arguments are applicable to other forms of subjugation, such as sexism and homophobia.

5. *See, e.g.*, Carl Cohen, *Free Speech and Political Extremism: How Nasty Are We Free to Be?*, 7 L. & PHIL. 263 (1989); FRANKLYN HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981).

out in Part III. In this section, I will also explain how these difficulties make up part of a larger problem of drawing a boundary between protected and unprotected speech. As will be illustrated, the boundary problem reaches a point of absurdity when it becomes apparent that even talking about hate speech proves problematic. Recommendations for replacing the free speech approach to fighting racism are set forth in Part IV. As I will explain in Part V, the expressions of racism can best be dealt with by making them part of the factors that heighten the punishment for already existing crimes.

I. The Search for a Legal Pigeonhole

The various legal pigeonholes within which regulators have attempted to restrict hate speech include: free speech-fighting words,[6] hostile work environment,[7] group libel,[8] tort,[9] and international human rights (the

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6. In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Supreme Court first articulated the fighting words test and refused to give First Amendment protection to words that were likely to provoke violent responses. Chaplinsky said the following to a law enforcement officer: "You are a God damn racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Id.* at 569. In Cohen v. California, 403 U.S. 15 (1971), the Court refused to extend the fighting words doctrine to an inscription on the back of a jacket that was not intentionally directed at any specific individual or individuals. The fighting words approach to hate speech is embodied in a number of university codes, including the University of Connecticut, University of Conn. Student Handbook 61 (1990-91); The University of Wisconsin, Wis. Admin. Code § 17.06 (Aug. 1989); and Stanford University, Stanford Univ., Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment (1990). For a defense of the fighting words approach to hate speech, see Charles R. Lawrence III, *If He Hollers let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431.

7. In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court ratified the common law extension of Title VII's prohibitions against quid pro quo sexual harassment to a hostile work environment. A number of universities have adopted the hostile work environment approach to hate speech. *See, e.g.*, Emory Univ., Campus Life 112 (1990-91); Kent State Univ., University Life, Digest of Rules and Regulations 12-13 (1988); University of N.C. at Chapel Hill, The Instrument of Student Judicial Governance 5-7 (1991). To prove that a hostile work environment exists, the complainant must show a series of repeated incidents, not simply a single event.

8. In Beauharnais v. Illinois, 343 U.S. 250 (1952), the Supreme Court adopted a group libel analysis. However, many claim that *Beauharnais* is no longer good law. Nevertheless, a number of commentators have attempted to revive the group libel approach. *See, e.g.*, Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 Sup. Ct. Rev. 281 (advocating a group libel approach); David Kretzmer, *Freedom of Speech and Racism*, 8 Cardozo L. Rev. 445 (1987); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 Colum. Hum. Rts. L. Rev. 11 (1985); Kenneth Lasson, *In Defense of Group-Libel Laws or Why the First Amendment Should Not Protect Nazis*, N.Y. L. Sch. Hum. Rts. Ann., Spring

International Convention on the Elimination of All Forms of Racial Discrimination).[10]

The analysis of this Article is confined to those regulatory attempts that counter hate speech within the context of free speech. The reasons for placing an emphasis on the speech aspects of hate speech are both obvious and subtle. By its very nature, hate speech is about speech. Yet, on a more subtle level, the speech component of hate speech places the issue within a set of categories that doom hate speech regulation as a relatively ineffective means of combatting racism. While the other legal categories listed above differ markedly in their analyses, all focus on the speech element. Working within the confines of speech actually serves to divert opponents of racism from more important issues. As discussed below, a key indicator that hate speech regulation diverges from a policy of antiracism is found in the policy goals articulated by various universities.

II. University Goals

Although universities differ as to the type of regulations adopted to regulate hate speech, the following serves as a fairly typical example:

> Arizona State University ("A.S.U." or "the University") is committed to maintaining hospitable educational, residential, and working environments that permit students and employees to pursue their goals without substantial interference from harassment. Additionally, diversity of views, cultures, and experiences is critical to the academic mission of higher education. Such diversity enriches the intellectual lives of all, and it increases the capacity of a university to serve the educational needs of its community.
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> A.S.U. is also strongly committed to academic freedom and free speech. Respect for these rights requires that it tolerate

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1985, at 2798; David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 Colum. L. Rev. 727 (1942); Note, *A Communitarian Defense of Group Libel Laws*, 101 Harv. L. Rev. 682 (1988). The University of Kansas has adopted a group libel approach to hate speech. University of Kansas Student Handbook 28 (1990-91).

9. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) (proposing a tort cause of action against racial hate speech). The University of Texas has modeled part of its hate speech code on the common law tort of intentional infliction of emotional distress. University of Tex., General Information, Institution Rules of Student Services and Activities 174, App. C (1990-91).

10. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989).

> expressions of opinions that differ from its own or that it may find abhorrent.
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> These values of free expression justify protection of speech that is critical of diversity and other principles central to the University's academic mission. However, values of free expression are not supported, but are undermined by acts of intolerance that suppress alternative views through intimidation or injury. Institutions of higher education must stand against any assault upon the dignity and value of any individual through harassment that substantially interferes with his or her educational opportunities, peaceful enjoyment of residence, physical security, or terms or conditions of employment.[11]

This policy statement typifies those of universities that have drafted regulations concerning hate speech. Such statements contain the following, sometimes conflicting, policy goals: maintaining civility and decorum, instilling citizenship and virtue in students,[12] protecting students from harm,[13] fostering diversity, protecting academic freedom, and protecting freedom of speech. The perspectives on hate speech codes differ with respect to the position taken on the last two policy goals.

The positions on the hate speech issue divide roughly according to which policies are adopted. Those advocating a strong form of regulation accept the first four policy goals (civility, virtue, protection, and citizenship). Those proposing a weaker form of regulation accept the same four policy goals and add the academic freedom goal. This weaker form of regulation lessens the scope of the regulations because it makes the classroom immune from regulation by what the advocates of strong regulation would believe qualifies as hate speech. Those favoring a weaker set of regulations draw a sharp distinction between crude hate speech and sophisticated hate speech, the latter of which would avoid regulation because of adherence to the academic freedom policy goal. Those opposed

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11. Policy Statement Supporting Diversity and Free Speech at Arizona State University, at 1.

12. Professor Suzanna Sherry has collected some illustrations of hate speech regulations that invoke a virtue rationale, as, for example, the Ohio State preamble, which states that "acceptance, appreciation of diversity, and respect for the rights of others must be institutional values for a major public university and are values that it must impart to its students and to society as a whole." Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 940 (1991).

13. Protecting students from harm is the doctrine underlying in loco parentis. *See, e.g.*, MICHAEL A. OLIVAS, LAW AND HIGHER EDUCATION, 599-615 (1989). For an analysis that extends the protective function to the hate speech context see Charles H. Jones, *Equality, Dignity and Harm: The Constitutionality of Regulating American Campus Ethnoviolence*, 37 WAYNE L. REV. 1383, 1418 (1991).

to regulation of hate speech base most of their arguments on a strong commitment to freedom of speech. Whatever virtue these antiregulators might see in the other policy goals, they find them insufficient to justify restrictions on hate speech, in whatever variety.

Notice that I have not invoked any policies that manifest a university's commitment to the eradication of racism, sexism, ethnocentricism, and homophobia.[14] This helps to illustrate the tenuous link between hate speech codes and antiracism. When universities provide a rationale for a hate speech code, they omit any reference to antiracism.

An explicit formulation of an antiracism policy might be:

> "Eradication of group subjugation in the form of racism, sexism, ethnocentrism, and homophobia."

Generally, universities do not articulate their policy goals in bold form.[15] Public universities avoid policies such as this one because proclaiming the outright condemnation of subjugation makes a political commitment favoring certain groups, thereby violating the university's claims to neutrality. However, wholesale condemnation is exactly what universities should proclaim, even if it violates some sense of neutrality. Universities need to develop an overall plan of action to combat subjugation; hate speech regulation may or may not be part of that overall plan. In fact, a university could consistently adopt an effective antiracism policy and implement it without any hate speech code. In any case, hate speech regulation would play, at best, a minor role instead of occupying its current position at center stage.

Universities that declare a strong antiracism policy are on firmer ground than are those who advocate either strong or weak regulation of hate speech. No matter what their cast, regulators find themselves entangled in a legalistic, free speech web that poses insuperable problems. Weak regulators need to draw a questionable distinction between crude and sophisticated hate speech. The strong regulators open the door to academic censorship. All advocates of hate speech regulation find themselves mired in the problem of where to draw the line between protected and unprotected speech. These problems do not simply serve as a challenge for the regulators to become more sophisticated in mapping out

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14. For the sake of brevity I shall incorporate sexism, homophobia, and ethnocentricism under the rubric of racism.

15. An exception is provided by the Board of Regents of Higher Education of the Commonwealth of Massachusetts: "Racism in any form, expressed or implied, intentional or inadvertent, individual or institutional, constitute an egregious offense to the tenets of human dignity and to the accords of civility guaranteed by law." BOARD OF REGENTS OF HIGHER EDUC., COMMONWEALTH OF MASS., POLICY AGAINST RACISM AND GUIDELINES FOR CAMPUS POLICIES AGAINST RACISM 1 (June 13, 1989).

their positions. They forcefully demonstrate the need to abandon regulation and give priority to positive programs that begin to address the serious problems of subjugation facing colleges, and society at large. Universities ought to take the lead in fighting racism. Let us turn to an examination of these problems.

III. The Boundary Problem

A. Crude Versus Sophisticated Hate Speech

Crude hate speech, according to some proponents of hate speech regulation, consists chiefly of racial or ethnic slurs and vulgar epithets that are on their face offensive to those at whom they are directed. Sophisticated hate speech may consist of words that appear to merely state a fact but are, in fact, disparaging of a racial, ethnic, or other target group. An example of sophisticated hate speech would be as follows: "Black children in the United States have a mean intelligence quotient (IQ) score of about eighty-five, as compared with one hundred for the white population, on which the test was standardized."[16]

The context of hate speech can change a supposedly simple factual statement into a controversial one. Assume that a claim about low IQs among blacks is made in the context of a lecture designed to demonstrate the inheritability of IQ. In the course of the lecture, the lecturer might say nothing about the intellectual inferiority of blacks,[17] yet the inference hangs in the air.

The added contextual features make this a prime example of what Professor Mari J. Matsuda has called the case of the "Dead-Wrong Social Scientist."[18] According to Matsuda's analysis, this represents a sophisticated version of hate speech that, while admittedly offensive, should not be subject to prohibition because it does not have the following characteristics of crude hate speech: a persecutorial, hateful, and degrading message of racial inferiority directed against a historically oppressed group.[19] Accordingly, universities should not foster racial slurs

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16. Stephen Rose et al., Not in Our Genes: Biology, Ideology, and Human Nature 118 (1984). I purposefully cite a critique of the race/IQ debate by authors who clearly reject the project of imputing IQ scores on the basis of race to highlight an instance of "mention" as opposed to "use." *See infra* discussion Part V. *See also* Jensen, *How Much Can We Boost IQ and Scholastic Achievements?*, 5 Harv. Educ. Rev. 1 (1969). *Cf.* Stephen J. Gould, The Mismeasure of Man (1981).

17. I have decided, with some reluctance, to use the term "black" throughout the paper instead of "African-American" in order to more sharply contrast the term with "white." Many writers, including African-Americans, have adopted the same convention.

18. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2364 (1989).

19. *Id.* at 2365.

and epithets, but they should encourage debate over controversial academic positions, even if those positions support, however indirectly, racism.

Despite Matsuda's claims, sophisticated hate speech such as the IQ claim are actually within the sphere of hate speech regulation that Matsuda promotes because theories linking race and IQ possess the elements of crude hate speech. First of all, in order to place the IQ statement in the unregulateable sophisticated hate speech category, Matsuda has to assume that the "dead-wrong social science theory of inferiority is free of any message of hatred and persecution."[20] This assumption cannot be made so easily. The scientific status of a claim does not thereby free it from the charge of perpetuating hate and persecution. Scientists do not need to ascribe racial inferiority directly. The victims and others will draw the inference of inferiority without the need for anyone to say it directly. Although the IQ message does not necessarily deny the personhood of target group members, it does degrade by association—not by statistical association because a group member may be above the average[21]—but rather by psychological association.

Secondly, while the degrading aspects of the message may be more subtle in the scientific case than those of crude speech, sophisticated speech can have a persecutorial and hateful intent once it is fully analyzed. The speaker's intent is not as easy to analyze as the distinction between crude and sophisticated hate speech might suggest. It seems that crude hate speech clearly stems from racial animosity and that sophisticated hate speech may not—at least not without considerable more analysis.[22] However, the intent of crude hate speakers is often more complicated than it seems on the surface. Take an incident at Stanford University in which a white student, identified as "Fred," defaced a poster of Beethoven to represent a black stereotype and placed it outside the room of a black student. Fred, a German Jew, could not understand why blacks did not react the same way to what he considered "teasing" as he did to the incidents of antisemitism that ran rampant in his English boarding school.[23] This information about Fred at least raises questions as to whether or not Fred's symbolic speech stemmed from racial animosity. Although I cannot do justice to the debate over the relationship

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20. *Id.*

21. I owe this point to Professor Robert Simon, Department of Philosophy, Hamilton College.

22. I owe the formulation of this position to Professor Jorge Garcia, Department of Philosophy, State University of New York—Buffalo.

23. PATRICIA J. WILLIAMS, ALCHEMY OF RACE AND RIGHTS 111 (Harvard Univ. Press 1991).

between race and IQ, the intent underlying the sophisticated hate speaker seems just as complicated as those of crude hate speakers such as Fred. When fully analyzed, more racial animosity may underlie the seemingly innocent scientific pronouncements than meets the eye.[24]

Finally, historically, so-called scientific theories of racial inferiority have served as powerful mechanisms of subjugation. The harms to group interests flowing from scientifically supported institutional forms of racism are of a far greater magnitude than the individual hurt feelings associated with incidents of racial slurs.[25] Although, theoretically, both crude and sophisticated forms of hate speech can be confronted simultaneously, a focus on the crude dimensions of hate speech may well divert political energy away from the difficult task of ferreting out the more subtle forms of sophisticated hate speech.

Those attempting to distinguish between crude and sophisticated speech resort to another argument. Face-to-face racial insults do not deserve First Amendment protection because the injury from being called a terribly offensive, vulgar name is instantaneous, allowing no time for dialogue and rational deliberation.[26] These are often referred to as "fighting words," which fall outside the range of constitutional protection.[27] In fact, the offensive level of slurs and epithets reaches such heights that it would be inappropriate to respond verbally to this type of abuse. Rational deliberation seems neither possible nor appropriate in the midst of crude hate speech.

However, crude speech does not neatly fall outside the gambit of rational discourse while sophisticated speech fits comfortably within the realm of debate and argumentation. Crude speech is not immune from rational deliberation. Even in the heat of a crude speech incident, rational dialogue could emerge, however unlikely that may be. More plausible is a situation in which the crude speech incident becomes a stimulus for

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24. To take one example, it now appears that Sir Cyril Burt, who promoted the hereditary nature of IQ, harbored an animosity towards the poor that affected his work. Burt once wrote in a notebook: "The problem of the very poor-chronic poverty: Little prospect of the solution of the problem without the forcible detention of the wreckage of society or others preventing them from propagating their species." ROSE ET AL., *supra* note 16, at 87. Those asserting a link between race and IQ depended a great deal on Burt's data, which later turned out to be fraudulent.

25. For a discussion of different kinds of harms, see JOEL FEINBERG, HARM TO OTHERS 33-36 (Oxford Univ. Press 1984) (1926). Kretzmer narrowly confines himself to the kind of harm likely to stir up a racial group. This leads him to allow research findings showing a lower IQ for racial minorities. *See* Kretzmer, *supra* note 8, at 500. Far greater harms than audience reaction are at stake with scientific findings.

26. Lawrence III, *supra* note 6, at 452.

27. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cohen v. California, 403 U.S. 15 (1971).

later dialogue. The University of Michigan enforcement model, for example, included a provision for informal mediation before initiation of formal procedures.[28] Therefore, the crude hate speech incident could serve as an opportunity to open dialogue over abusive speech.[29]

Alternatively, sophisticated hate speech does not always leave room for informed rational debate between its proponents and representatives of vulnerable groups.[30] A presentation demonstrating the inverse relation between racial characteristics and intelligence given by an instructor in the classroom may leave little room for challenge, particularly from racial minority students. Students find themselves in a deferential power relationship with their professors. For example, according to one report, "at the University of Washington, a professor called in campus police to bar a student from class who had questioned her assertion that lesbians make the best parents."[31] Situations like these do not lend themselves to rational and open dialogue. In contrast, crude hate speech may lead to helpful debate. For example, students at Arizona State University reacted to a racist flier, containing crude speech, by organizing open discussions where they could educate others about the hurt resulting from the speech.[32]

One further problem with the distinction between crude and sophisticated hate speech deserves attention. Some perpetrators of crude speech simply may not have yet learned the sophisticated, polite, academic, indirect, but far more effective means of subjugation and subordination.[33] The crude yell epithets and racial slurs; the sophisticated

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28. Doe v. University of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989).

29. Alan E. Brownstein, *Hate Speech at Public Universities: The Search for an Enforcement Model*, 37 WAYNE L. REV. 1451 (1991) (proposing an informal education as opposed to a formal enforcement model of hate speech regulation).

30. *See* Henry W. Saad, *The Case for Prohibition of Racial Epithets in the University Classroom*, 37 WAYNE L. REV. 1351, 1357 (1991) ("[A] minority who is the object of racial, sexual or ethnocentric epithets in the park may leave or engage in verbal combat. In the classroom, however, a student is victimized by racial or ethnocentric invective should not be forced to resort to such activity."). Mr. Saad represented the University of Michigan in Doe v. University of Michigan.

31. Henry J. Hyde & George M. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469, 1472 (1991).

32. Nat Hentoff, *The Right Thing at ASU*, WASH. POST, June 25, 1991, at A19.

33. When the *California Lawyer* magazine recently ran an article on gay lawyers, it received the following "sophisticated" letter from an attorney:

> Nothing today is more striking in our culture than the sexual mania of the Jews who edit, write and read current publications. Our legal magazine presents a good insight into the Jewish psyche-greed for money, inveterate vulgarity, complete disregard of non-Oriental norms of decency and an insatiable itch for all the uglier aspects of sex. I believe that the progressive deterioration of

bemoan diversity and collect data to show how blacks manifest their inferiority through intelligence tests or through being immersed in a culture of poverty.

Some of the cruder forms of hate speech, as a well-publicized case at Brown University illustrates, come from the mouths and pens of sophomoric college students in varying states of intoxication.[34] Although I am not minimizing the hurt that can stem from these incidents, it would be foolish to view these incidents as being at the forefront of racism. One cannot help but wonder whether the crude/sophisticated distinction depends upon the differential power and status positions of students and professors.

The arguments marshalled so far against the distinction between crude and sophisticated hate speech have not succeeded in showing that the distinction is impossible to maintain. They do show the inadequacy of the lines drawn so far. The distinction forces the advocate of weak regulation to make unpleasant choices between types of speech. The problem described in this Section is part of a larger problem within the hate speech issue, namely, drawing the boundary lines.

B. Other Boundary Problems

Basically, the regulators of hate speech must face the problem of what speech to include under their restrictions and what speech to exclude. The regulations have the following problems:

1. Too Narrow.—With respect to those regulations now in place, many regulations actually cover only a small range of activities. Stanford University's hate speech regulation states:

> 4. Speech or other expression constitutes harassment by personal vilification if it:
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> a). is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
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> b). is addressed directly to the individual or individuals whom it insults or stigmatizes; and

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morality can be directly attributable to the growing predominance of Jews in our national life.

David Margolick, *At The Bar*, N.Y. TIMES, Oct. 9, 1992, at D16.

34. Brown University expelled undergraduate student Douglas Hann for an incident involving racial epithets and alcohol abuse. *Student at Brown Is Expelled Under a Rule Barring 'Hate Speech,'* N.Y. TIMES, Feb. 12, 1991, at A17.

c). makes use of insulting or "fighting" words or non-verbal symbols.[35]

Thus, under the "fighting" words model, the speech must be targeted directly against and at specific individuals or an individual, and it must be intentional. Crude, direct (individually targeted), intentional speech covers few instances. In fact, the very incident (in which a white student left on a black student's door a poster of Beethoven drawn as a black caricature)[36] that served as a stimulus to the construction of the hate speech code at Stanford would not be covered by Stanford's regulations. Fred, the white student, did not address his expression directly at the black student, identified as "Q.C.," and the Stanford disciplinary board did not find any injury to Q.C. Yet, the incident provoked the ire of blacks and others on the campus.

2. Too Broad.—Regulations can sweep far too broadly, applying to seemingly innocuous jokes, innuendoes, and derogatory remarks.[37] A hate speech regulation can chill speech far beyond the speech exemplified in the paradigm cases, thereby blocking ways to deal with the problem. Many times prejudicial attitudes can only be brought out into the open for examination if they find expression through various speech mechanisms. Stifling the relatively more innocuous expressions of prejudice in the form of jokes may actually stimulate the manifestation of hatred in more pernicious forms.[38]

3. Hate Speech Within and Between Protected Groups.—The classical case of crude hate speech occurs when a white male student addresses a black student in a derogatory manner. However, as the following examples illustrate, instances of hate speech do not always fall into the classical mode:

(1) A black male graduate student in social work stated, "Homosexuality is a disease."[39]

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35. Thomas C. Grey, *Civil Rights Versus Civil Liberties: The Case of Discriminatory Verbal Harassment,* 8 Soc. Phil. & Pol'y 106-07 (1991) (citing Stanford Univ., Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment (1990)).

36. *See supra* notes 22-24 and accompanying text.

37. The University of Michigan Office of Affirmative Action issued a set of later withdrawn guidelines on actionable hate speech that included: "You tell jokes about gay men and lesbians. You laugh at a joke about someone in your class who stutters." *See* Doe v. University of Michigan, 721 F. Supp. 852, 858 (E.D. Mich. 1989).

38. The University of Michigan Office of Affirmative Action Guideline gave the following as an example of blatant racial harassment: "A male student makes remarks in class like 'Women just aren't as good in this field as men' thus creating a hostile learning atmosphere for female students." *Id.*

39. *Id.* at 865.

(2) A dental student in a course taught by a minority female professor accused the teacher of being unfair to minorities; the teacher charged that the remark jeopardized her tenure.[40]

Perhaps these cases can be handled by treating the perpetrator's group affiliation as irrelevant to the determination of whether the instances qualify as actionable hate speech. Membership in a protected class should not make someone immune from regulation. However, the examples demonstrate the types of entanglements within which weak regulators find themselves—protected groups pointing fingers at other protected groups. The examples also help to point out that speech regulation does not constitute a very strong way to fight racism, because it may result in imposing more punishment than necessary. In fact, protected groups may feel a disproportionate impact from the regulations.

4. Nonparadigmatic Cases.—Many candidates for hate speech regulation do not fit the paradigm of clearly offensive or vulgar epithets. Consider the following example: "I'd had too much experience that women were only tricky, deceitful, untrustworthy flesh."[41] The derogatory element in this statement, attributed to Malcolm X, may not be as blatant as the paradigmatic case, but some women consider it just as loathsome.[42] Regulators need to consider whether regulations should extend beyond direct epithets.

Furthermore, an offensive derogatory comment may be directed at a dominant or majority group by a disadvantaged or minority group. Such an incident occurred at the University of Connecticut when "a student was ordered to move off campus and forbidden to enter university dormitories for putting a sign on her dorm room listing preppies, bimbos, men without chest hair, and homos as people who should be shot at sight."[43]

5. Already Proscribed.—Finally, does prohibiting hate speech cover anything more than current laws prohibit? Most incidents of hate speech complaints occur in conjunction with other violations. At the University of Wisconsin, all serious cases, i.e., those resulting in probation or suspension, involved some other violation of the student code of conduct, such as assault, whereas all charges involving only the use of racial epithets were resolved informally.[44] This indicates that serious incidents

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40. *Id.* at 866.

41. MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 226 (Ballatine Books 1992).

42. Members of protected groups should not be exempt from criticism or punishment when they themselves engage in hate speech polemics. Blacks are just as capable of making sexist, anti-Semitic, and homophobic remarks as are white males. I owe this clarification to Professor Michael Gorr, Department of Philosophy, Illinois State University.

43. Hyde & Fishman, *supra* note 31, at 1487.

44. Patricia Hodulik, *Racist Speech on Campus*, 37 WAYNE L. REV. 1433, 1441-45 (1991).

of racism are already actionable and that hate speech is best handled through informal mechanisms.

The boundary problem, as exemplified by the problems discussed above, may pose nothing more than a challenge to make the delineations more precise. Regulators need to meet these challenges in order to provide an adequate theory of hate speech. I doubt that regulators can devise a theory strong enough to overcome the various aspects of the boundary problem. To put these doubts in a more concrete form consider the following case study.

C. An Illustrative Interlude

In a public presentation of this paper, I peppered the analysis with many illustrations of hate speech, some of which I mentioned in the opening of this written version. The first response from the audience came from a woman who asked why I had used the examples. Anticipating her concern, I invoked the distinction, taken from some sophisticated literature in the philosophy of language, between *using* a word and *mentioning* a word. Mentioning a word, i.e., talking about a word, is not the same thing as actually using a word. "Alas," I implored, "I only *mentioned* but did not *use* hate speech. Mentioning "number" in the metalanguage about arithmetic has a far different character than using number in the object language. Similarly, I merely mentioned hate speech for illustrative purposes and did not use it."[45] Hardly satisfied with my intellectual maneuvering, she replied that she could not hear any of my substantive claims because she was so offended by my *use* of hate speech. Before I could muster a more informed reply, a fellow panelist, representing the antiregulation position, jumped to my defense, assuring the audience that although he would not have had the audacity to do what I had done, he defended my right to do so.

The incident dramatically raises three important issues, which I explore in the following subpart of this Section. The first two issues seem to support the regulation position, but they actually undermine the case for regulation, confirming the third problem, the monopoly of the free speech perspective.

1. Hidden Sophisticated Hate Speech.—First of all, my invocation of the distinction between using and mentioning a word did utilize the very same crude/sophisticated hate speech distinction that I had, then, and have, in this Article, attacked. *Mentioning* examples of hate speech may help to legitimate hate speech. It may produce offense no different

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45. For a defense of the use/mention distinction in the context of the hate speech debate, see Peter Linzer, *A White Liberal Looks at Racist Speech*, 15 ST. JOHN'S L. REV. 187, 213-19 (1991).

from unsophisticated *use* of hate speech. The victims could be just as offended and harmed by the persistent *mention* of hate speech as by the occasional blurting out of crude hate speech.[46]

Professor Patricia Williams cites the following example of the sophisticated mentioning of hate speech: "[A] constitutional-law exam in which students are given the lengthy text of a hate-filled polemic entitled 'How To Be a Jew-Nigger' and then told to use the First Amendment to defend it."[47] Williams finds this and other examples "highly inappropriate" in the sense that the writers "use race, gender, and violence in ways that have no educational purpose, that are gratuitous and voyeuristic, and that simultaneously perpetuate inaccurate and harmful stereotypes as 'truthful.' "[48] Even *mentioning* hate speech can therefore result in harm.[49]

Nevertheless, while the charges brought against even the mere mention of hate speech do have some validity, they do not justify more sanctions and more regulations. Rather, the charges lead to an impasse; talk about hate speech becomes difficult if not impossible when no one can talk about hate speech.[50] In a sense, the analysis of hate speech has become too sophisticated, clouding over the more primary goal of fighting racism in its more pernicious forms.

2. Social Meaning.—A second issue concerns who determines the meaning of an alleged incidence of hate speech. I am not the one to determine what offends and harms in these cases. Regulators and antiregulators alike (at least, those who do not come from the protected classes) assume, incorrectly, that they can determine harm in these instances. The victims, and not their self-proclaimed advocates, of hate speech need to determine the social meanings. Those in the dominant groups must respect the victims' determination. Victims determine social meanings in these contexts.

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46. "[A] case can be made that a lecturer on crime statistics who mentions that some ethnic groups have a higher crime rate than others, uses insulting language." Kretzmer, *supra* note 8, at 489.

47. WILLIAMS, *supra* note 23, at 84.

48. *Id.* at 85.

49. It is worth noting how certain kinds of *mentioning* have become more acceptable than others. Writers and editors of journal articles leave some examples of hate speech intact, whereas they almost always leave it to the reader's imagination to fill in the blanks for obscene language with examples such as "F____ you." Swearing and cursing have more editorial sanctions lodged against them than do racial epithets. The editors excised a number of examples of crude hate speech from this Article.

50. Sanctioning the mentioning of hate speech could result in muffling those who propose hate speech regulation because they do it by citing hate speech. Charles Lawrence begins his Article advocating hate speech regulation with a long list of examples of hate speech. *See* Lawrence, *supra* note 6. Patricia Williams makes the following comment: "[A] prostitute becomes seen only as a 'cunt'." WILLIAMS, *supra* note 23, at 185.

Those of us who do not belong to the typical victim classes should listen to those harmed by hate speech, and we should take preventive measures to protect the victims. For word and deed often go together, arm and fist, making up the complex array of racism, sexism, and homophobia. Allowing racist speech to go unchallenged may well create an opening for racism to take hold in its more vicious forms.

The protections against hate speech are not symmetrical, applying equally to whites and blacks, to men and women, to straights and gays. I challenge you to hurl hate speech my way, for "my way" includes the well-paved, sanitized roads of white, heterosexual, male privilege. The protections must encompass the vulnerable. What is needed is an understanding of who makes up the vulnerable classes.[51] We must walk a tightrope on which we both praise and condemn our differences. We must encourage criticism that pushes the bounds of tolerance without sacrificing our understanding of each other and ourselves.

Above all, we must find the courage to face the despicable hatreds that envelop our everyday lives and that thrive within each of us. The true color-blind, gender-neutral test lies in whether we can face ourselves in the mirror and confess our deep-seated bigotry, irrespective of our own race, gender, etc.[52] Only then can we fully dismantle the structures that allow oppression and subordination to fester and thrive.

Finally, we must appreciate that words have a tremendous power. Hate speech regulators have a powerful argument when they point to past mistakes. Antisemitic defamation flourished for decades before the Nazi rise to power, thereby providing a supportive cultural background for the "Final Solution."[53]

However, although the power of words and the racist aspects of hate speech should not be underestimated, neither should they be overestimated. Speech, rightfully determined by the victims as hateful and harmful, remains speech. It deserves condemnation in no uncertain terms, but it does not qualify for formal sanctioning. No one should deny the individual and group harm that comes from racial epithets. Yet, if victims determine social meaning, then the boundary problem arises once again because many groups can legitimately make an actionable claim. For example, religious fundamentalists could reasonably object to degrading remarks about those believing in God and homophobia.

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51. For an attempt to spell out a constitutional theory of disadvantaged groups, see Thomas W. Simon, *Suspect Class Democracy*, 45 U. MIAMI L. REV. 107 (1990).

52. A recent survey found that two-thirds of white students at the University of Maryland were almost totally oblivious to racial incidents that eighty percent of Afro-Americans vividly recalled.

53. Charles H. Jones, *Equality, Dignity and Harm: The Constitutionality of Regulating American Campus Ethnoviolence*, 37 WAYNE L. REV. 1383, 1423-24, n.156.

Moreover, if victims determine social meaning, then regulators need to step aside. Victims rarely constitute even a majority of the regulator class. Victims need to become the regulators. Otherwise, regulators would be guilty of paternalism, determining the potential harm inflicted upon victims from their own, nonvictim perspective. Placing potential victims in policy-making roles has its virtues, but it also replaces one boundary problem with another. Who chooses the potential victims and on what grounds? Without an explicit commitment to antiracism, universities face many difficulties in providing answers to those questions.

3. The Free Speech Takeover.—Even if a group justifiably finds sophisticated, and, of course, crude hate speech offensive and harmful, it does not necessarily follow that the speech should be banned. After all, at some point the incidents of hate speech need to be reported in order to be evaluated. Attacking sophisticated speech that mentions hate speech not only stymies the ability to bring the speech to public view,[54] it imposes First Amendment discourse upon what is really a racism issue. The important issue at stake is racism and not free speech. At some points, antiracism and free speech concerns dovetail; the voices condemning racism need First Amendment protection.[55] Nevertheless, giving free speech the center stage imposes grave risks. The danger with First Amendment discourse is that it can swamp many other equally, if not more, important concerns. A law school, for example, may do all it can to halt the proliferation of hate speech incidents while at the same time making little or no attack on the structural features of racism by refusing, for example, to establish clinic programs that primarily serve poor urban blacks, or by refusing to fund adequately loan forgiveness programs that provide students with an incentive to seek public interest employment.[56]

In short, the cynic sees, with some justification, hate speech as a speech issue having all the makings of an academic issue, in the double sense of "academic." Academic issues thrive when they stay largely at the level of words, and academics love to argue over words. The fight takes place over words while the structures continue to subjugate and

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54. "Racist speech can be used as a 'social thermometer' that allows us to 'register the presence of disease within the body politic.'" Hyde & Fishman, *supra* note 31, at 1489.

55. Richard Delgado, in an address to the State Historical Society in Madison, Wisconsin, captured the effect of permitting low-level racism to persist when he stated: "It prevents us from digging in too strongly, starting to think we could really belong here. It makes us a little introspective, a little unsure of ourselves; at the right low-grade level it prevents us from organizing on behalf of more important things." *See* Lawrence, *supra* note 6, at 476.

56. The University of Michigan may have been guilty of enacting a hate speech code for almost solely symbolic reasons. *Id.* at 477 n.161.

subordinate unabated. Controversial issues such as hate speech arouse the passions, but, like so many academic issues, the action taken on them has little practical or political impact.

Take another aspect of the cynic's view of the hate speech controversy. The hate speech issue fits a model of ideological impotency as well as academic inaction. Having lost a major war but also having won modest victories against racism and sexism, liberals and leftists find themselves in the middle of a backlash. Unable to declare any recent major victories, they thrash out against the most visible and easily targeted enemy, symbolized by the drunken Brown University fraternity birthday boy. In casebook fashion, the peculiarities of mildly dramatic incidents become blown up to form their own reality, while the more pernicious forms of racism in the streets and in institutional structures blithely pass by unchallenged.

The cynic's views, while not entirely accurate, should at least give the regulator some cause for alarm. Given all the difficulties facing an advocate of hate speech regulation, is the pain worth the gain? The recommendations discussed below, suggesting a more productive approach, offer an alternative to the free speech route.

IV. Recommendations

I have tried to argue in the strongest possible terms for the adoption of two seemingly incompatible positions: the informal condemnation of hate speech in its crude and sophisticated versions, and the inadequacy of a free speech approach to the problem of racism. As a way of reconciling these, consider the following proposal. The regulation of hate speech becomes less of an issue the more it is tied to a more far-reaching program that attacks the heart of racism and its kin. In fact, the more programs a university adopts to combat the substance of racism, the less it will need to even consider hate speech regulations. Antiracism, in effect, swamps free speech.

Universities as educational institutions quite naturally respond to racism with educational programs, requiring students to take courses in different American cultures.[57] Some universities use educational programs in place of hate speech regulations.[58] The University of Florida cites the

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57. "The University of Minnesota requires that all students take at lest two courses on different American cultures. Mt. Holyoke and Tufts University have a similar requirement. The University of California, Berkeley, Faculty Senate recently ruled that all undergraduates must take at least one course in American Cultures." Carnegie Found. for the Advancement of Teaching, Special Report: Campus Life In Search of Community 20, 32 (1990).

58. *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*" 1990 Duke L.J. 484, 562-69.

following examples of nonlegal steps to foster good race relations and diversity: the annual affirmative action conference, the annual multicultural retreats, and special events to celebrate diversity.[59]

If educational programs make up the only concerted effort that a university takes to combat racism, then a consideration of hate speech regulations makes some sense if for no other reason than to raise the issue of racism within an applied context. However, neither hate speech regulations nor educational programs should occupy the centerpiece of a university's antiracism platform. The education programs reflect a university's commitment to foster diversity which, although related in some respects, is not the same thing as a commitment to fight racism.[60] The University of Florida has retreats and conferences to promote diversity. Yet, the University also had policies that harmed its racial minority employees by changing the working hours of a predominantly black work force among its janitorial staff without notice. Many articles have appeared in academic journals on hate speech; I have yet to see one that addresses the nonacademic hiring policies of universities.

Antiracism policies must take priority. To the extent that hate speech regulations and educational programs help to effectuate antiracism, they have a strong justification. As I have tried to indicate, because of the conceptual entanglements connected to hate speech regulations, the regulations probably do not aid the fight against racism. Moreover, when structures that reproduce and increase the disparity between the races remain unchallenged, hate speech regulations and educational programs will have little impact on racism.

Universities need to develop programs that undermine the structural supports for racism. They need to carefully examine their employment practices, investment decisions, faculty reward systems, and community service. By focusing on single incidents involving sole perpetrators, hate speech codes primarily address individual racist attitudes, and it remains unclear whether the codes effectively alter attitudes or seriously address victims' injuries. Moreover, while attacking individual attitudes, far more dangerous forms of organized group structures may flourish unabated. For example, in the name of neutrality a university may find itself forced to fund and otherwise support a white student union that preaches white supremacy so as not to neutralize its support of a black student union.

The following list of recommendations for universities summarizes this Section and projects the discussion into the next:

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59. Letter from Pamela J. Bernard, General Counsel, University of Florida (May 4, 1992). For another example of advocating a lame response to racism, see Peter Linzer, *White Liberal Looks at Racist Speech*, 65 ST. JOHN'S L. REV. 187, 236-44 (1991).

60. *See supra* notes 14-15 and accompanying text.

> (1) Hate Speech. Abandon hate speech codes as diversionary except where they can be demonstrated to play a role in a larger coordinated plan to combat racism.
> (2) Hate Associations. Withdraw institutional support for organizations that promote racism. Support efforts to undermine racism, such as educational and research efforts developed in order to help disadvantaged groups. Redefine faculty service so as to reward efforts in these directions.
> (3). Hate Crimes. Amplify sanctions and punishments for those activities already categorized as offensives that contain hate elements.

The next Section takes up this last suggestion in the context of the recent United States Supreme Court case *R.A.V. v. City of St. Paul.*[61]

V. Hate Speech Versus Hate Crime

Several teenagers in St. Paul, Minnesota, entered the fenced backyard of a black family and burned a cross. Their conduct violated a 1990 ordinance, which read:

> Whoever places on a 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.[62]

The Minnesota Supreme Court reversed a trial court finding that the ordinance, as impermissibly content-based, violated the First Amendment.[63] The Minnesota Supreme Court found the ordinance constitutional in that it reached only fighting words, which the Constitution does not protect.[64] The United States Supreme Court reversed,[65] finding the ordinance facially invalid under the First Amendment.[66] In delivering the opinion of the Court, Justice Scalia found the ordinance content-based in that it prohibited only certain types of speech.[67]

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61. 112 S. Ct. 2538 (1992).
62. *Id.* at 2541.
63. *Id.*
64. *In re* Welfare of R.V.A., 464 N.W.2d 507 (Minn. 1991).
65. *St. Paul*, 112 S. Ct. at 2550.
66. *Id.* at 2547.
67. *Id.* at 2548.

Undoubtedly, this case will engender a cottage industry of commentaries, all within the context of free speech. Given that it raises serious questions about the constitutionality of hate speech codes, the case supports the position adopted in this Article.[68] However, the case has a much more important lesson to teach. I think that the key to the situation (not necessarily to the case) lies outside the realm of speech. St. Paul made the same mistake that many universities have by addressing speech, first and foremost. As Justice Scalia noted in the first footnote to the case, the conduct might have violated Minnesota statutes that carry significant penalties, such as terroristic threats, arson, and criminal damage to property (to say nothing of a charge not challenged by the petitioner in the case, racially motivated assaults).[69] Adding extra punishment to something that already is an offense would prove a far better course than to create a new offense out of whole cloth, which exactly describes the hate speech code approach.[70]

The above approach, the nonspeech road, does not underestimate the harm induced by burning crosses in the yards of blacks. A strong case can be made that society should regard it as more injurious to burn a cross on the lawn of a black family than to burn a tree on the lawn of an environmentalist because blacks comprise a suspect class deserving greater constitutional protection than environmentalists. However, that does imply that one form of expressive activity should be proscribed and the other protected. Recognizing the differences in harm can best be captured in the context of meting out punishments for already existing offenses.[71]

VI. Conclusion

Hate speech can rile the emotions. Racism is on the rise. Hate speech cannot be condoned. Yet, universities need to take a long, hard look

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68. Surely, those codes that select out only certain kinds of fighting words for regulation are subject to challenge. *See* Scott Jaschik, *Campus 'Hate Speech' Codes in Doubt After High Court Rejects a City Ordinance*, Chron. of Higher Educ., July 1, 1992, at A19.

69. *St. Paul*, 112 S. Ct. at 2541, n.1.

70. For an example of making an existing crime, such as assault and battery, more serious if motivated by racial animosity, see Ill. Ann. Stat., ch. 38, para. 12-7.1(a), (b) (Smith-Hurd Supp. 1990) ("A person commits ethnic intimidation when, by reason of . . . race . . . he commits assault. . . . [A]ny person who commits ethnic intimidation as a participant in a mob action . . . which results in the violent infliction of injury . . . shall be guilty of a Class 3 felony.").

71. If the racially or other forbidden motive could only be proved based on the speech or expression of the accused person, then policies that prescribe harsher penalties for certain offenses when the motivation is racial, etc. would be subject to constitutional challenge. However, speech and expression would seldom be the only forms of proof in these cases. *Cf.* Robert M. O'Neil, *A Time to Re-Evaluate Campus Speech Codes*, Chron. of Higher Educ., July 8, 1992, at A40.

at the less visible forms of racism and to take the lead in adopting a truly antiracism agenda. The enactment of hate speech codes does have a symbolic impact. Unfortunately, it may have only a symbolic value.

Enacting and implementing hate speech codes has its price. Considerable time and energy are expended; new foes come to the forefront, and legal and constitutional entanglements abound. Under one scenario, hate speech codes may make it easier to propose later more sweeping antiracism policies.[72] However, another scenario seems more likely. The divisiveness caused by the debate over hate speech codes will make universities more reluctant to implement necessary structural changes. Hate speech proponents will have won a Pyrrhic victory, resulting in some exercising more care in their talk but leaving the structural features of racism largely intact.

Universities can no longer avoid making an explicit commitment to the fight against racism. Racism tears apart the very fabric of society, making universities less viable institutions. Affirmative action should not only concern itself with admissions and hiring policies. Rather it should serve as the center for the university to take affirmative steps to combat racism through some of the following means: reward faculty members whose teaching, research, and service address racism; make socially responsible investments that counter racism; put your own house in order; and avoid the hate speech trap.

Hate speech constitutes a form of racism, but its racist implications have limits. It is a racism connected to attitude and generally connected only in tangential ways to overt racist actions and deeply embedded racist structures.

Hate speech also harms, but the harms have more deep-seeded roots. Hate speech deeply wounds not because of the speech itself, but because of the background conditions that make the harm possible in the first place. Hate speech can divert attention away from the conditions of racism. The fight against racism cannot afford diversions.

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72. I owe this suggestion to Professor Andrew Altman, Department of Philosophy, George Washington University.