Transforming Free Speech: Rights *and* Responsibilities

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I. INTRODUCTION

> Words are the most basic tools of thought. Those who cannot use them skillfully will be handicapped not only in communicating ideas to others, but also in defining, developing, and understanding those ideas themselves.[1]

Strong advocates of liberty insist that freedom of speech enshrines, more than any other freedom, the liberty of the individual. This is manifest in the constitutional protection they accord to free speech under the First Amendment,[2] in the emphasis they place on speech as the benchmark of a free

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[1] YALE UNIVERSITY, *Yale College Programs of Study, Fall and Spring Terms, 1993-94*, *in* BULLETIN OF YALE UNIVERSITY at 15 (ser. 7, Aug. 1, 1993).

[2] The *a priori* conception of free speech is not only based on the liberal roots of the First Amendment. It also reflects a zealous belief that the First Amendment provides exhaustively for freedom of speech, as is apparent from the wording used. For example, the First Amendment provides that "no one" shall be denied the freedom of speech. *See* U.S. CONST. amend. I; *see also infra* note 7. *See generally* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L.

society,[3] and in the affirmative relationship they draw between free speech and the free flow of ideas.[4] Nationalists add that free speech is the cherished property of a nation borne out of resistance to exploitation.[5] These assertions are affirmed in a philosophy of free speech that is principled, rooted in natural law,[6] and reflected in the intention of the Framers.[7]

REV. 719 (1975); Abraham Lincoln, Gettysburg Address (1863), *in* THE AMERICAN TESTAMENT 119 (Mortimer Adler & William Gorman eds., 1975).

[3] *See generally* Lyle Denniston, *Absolutism: Unadorned, and Without Apology*, 81 GEO. L.J. 351 (1992); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 225, 229 (Geoffrey R. Stone et al. eds., 1992); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

[4] *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919).

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe . . . the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .

Id. at 630 (Holmes, J., dissenting). On the market-place rationale underlying free speech, see Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967). *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

[5] As Justice Fortas maintained in Tinker v. Des Moines School District, 393 U.S. 503 (1969), free speech engenders "[a] sort of hazardous freedom—[a] kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id.* at 506–09; *see also* Healy v. James, 408 U.S. 169 (1972). Charles Fried echoes this nationalistic sentiment: "It is the strongest affirmation of our national claim that we put liberty ahead of other values . . . . [I]n freedom of expression we lead the world." Fried, *supra* note 3, at 229. On the argument that free speech is "rooted" in the First Amendment which, in turn, inheres "in this Nation's history and tradition," see Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion). *See also* Griswold v. Connecticut, 381 U.S. 479 (1965); Whitney v. California, 274 U.S. 357, 375 (1927); Schenck v. United States, 249 U.S. 47, 51 (1919) (Brandeis, J., concurring).

[6] Natural law underscores the interpretation of free speech under the First Amendment. *See, e.g.*, *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring); Pierce v. United States, 252 U.S. 239, 273 (1920) (Brandeis, J., dissenting). Natural rights philosophy has returned to the Supreme Court with a vengeance, with the appointment of Justice Clarence Thomas. On Justice Thomas's resort to natural law precepts, see Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63 (1989). *See generally* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993) (providing five perspectives on the historical development of natural rights theory). On the transportation of natural law philosophy to the American states, see, for example, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 437 (Max Farrand ed., 1937); Essay of Brutus to the Citizens of

This Article critiques these assumptions about free speech. It argues that speech is not free when it undermines the democratic ends of society, nor ought it be protected when it violates the natural and constitutional law roots upon which it is founded. The alternative is to recognize that a right of free speech is accompanied by a responsibility for that speech. That responsibility is part of the right itself.[8] It is also an important way of protecting the right in a constitutional democracy.[9]

The Article is divided into three parts. Part I evaluates the roots of free speech in a dignitarian and an instrumental paradigm. It then critiques these roots in light of the minority critique of free speech. Part II evaluates a communitarian alternative, arguing that it partially addresses deficiencies in traditional conceptions of free speech.[10] Part III advances a transformative conception of free speech. Using university hate speech codes as an illustration,[11] it argues that a right of free speech is accompanied by legal responsibilities for that speech. Drawing from the writings of Wesley

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the State of New-York (Nov. 1, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 372 (Herbert J. Storing ed., 1981). On the contention that freedom of expression is a natural right, see, for example, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1024 (Bernard Schwartz ed., 1971); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 499 (photo. reprint 1937) (Jonathan Elliot ed., 2d ed. 1836).

[7] *See, e.g.*, Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245. Meiklejohn once wrote: "I must . . . speak not for absolutism in all its forms, but only for my own version of it." *Id.* at 246 n.4. *But cf.* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 36–38 (1986); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966).

[8] On this responsibility, see *infra* part V.

[9] Despite an intractable libertarianism that, all too often, is imputed to the First Amendment, this is not apparent historically, nor is it justified today. On the lack of a clear intent on the part of the drafters of the First Amendment and the virtue of interpreting the First Amendment dynamically, see Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919). *See also* ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH (1920). *See generally* Hamburger, *supra* note 6. For a famous debate over the "absolute" nature of the Bill of Rights and freedom of speech, see Konigsberg v. State Bar, 366 U.S. 36, 49–56 (1961); *Id.* at 56–80 (Black, J., dissenting); Dennis v. United States, 341 U.S. 494, 524 (1950) (Frankfurter, J., concurring). *See also* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 865–67 (1983); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Harry Kalven, Jr., *The* New York Times *Case: A Note on 'The Central Meaning of the First Amendment'*, 1964 SUP. CT. REV. 191; Meiklejohn, *supra* note 7.

[10] *See infra* part II.

[11] *See infra* part VI.

Hohfeld,[12] it proposes that the association between rights and responsibilities leads to a workable conception of rights and furthers the ends of social justice.[13]

The unifying theme running throughout this Article is that a free and democratic society depends upon the health of social discourse within it. That health is fostered by a guarantee of *free* speech. However, current construals of that guarantee have failed to promote *free* speech in fact. A preferable construal of the guarantee of free speech is, first, to avoid limiting the right of *free* speech to a wholly negative relationship between the individual and the state, and second, to characterize *free* speech communally in light of legal responsibilities that inhere within it.[14]

II. THE FEIGNED ROOTS OF FREE SPEECH

> [P]utting the decision as to what views shall be voiced largely into the hands of each of us [is based on] . . . *the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect policy* . . . .[15]

Free speech is associated with the bedrock principle, embodied in the Declaration of Independence and the Bill of Rights, that everyone has a right to liberty.[16] Rooted in natural law thought,[17] this principle seemingly traces back to John Locke's assertion "that every Man hath . . . . [a] Natural Freedom, without being subjected to the Will or Authority of any other Man."[18] The benefit derived is assumed to be a communal *good* based on "the belief that no

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[12] Wesley N. Hohfeld, *Rights and Jural Relations*, *in* PHILOSOPHY OF LAW 308 (Joel Feinberg & Hyman Gross eds., 3d ed. 1986) [hereinafter Hohfeld, *Rights*].

[13] *See infra* part V.

[14] For the contrary proposition, that the guarantee of free speech is intended to protect the individual from the incursions of the state, see UWM Post v. Board of Regents, 774 F. Supp. 1163, 1169 (E.D. Wis. 1991); Fried, *supra* note 3, at 229.

[15] Cohen v. California, 403 U.S. 15, 24 (1971) (emphasis added); *see also* EMERSON, *supra* note 7, at 79–80.

[16] *See, e.g.*, Black, *supra* note 9. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[17] On the natural law roots of freedom of expression, see, for example, HORTENSIUS [GEORGE HAY], AN ESSAY ON THE LIBERTY OF THE PRESS 18–19, 38 (1799).

[18] JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, ch. VI, § 54 (Peter Laslett ed., 2d ed. 1967). On the natural law roots of free speech, see LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985); David A. Anderson, *The Origins of the Free Press Clause*, 30 UCLA L. REV. 455 (1983). *But cf.* Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263 (1986).

other approach would comport with the premise of *individual dignity and choice* upon which our political system rests."[19]

Locke's natural law conception of free speech is elaborated by a dignitarian and an instrumental paradigm respectively. The dignitarian paradigm holds that all persons have a fundamental right to human dignity as a matter of *right reason* and that free speech is the fundamental basis of human dignity.[20] The instrumental paradigm holds that free speech is necessary to promote the free flow of ideas.[21] The dignitarian paradigm regards free speech as a *liberty* that is fundamental in itself.[22] The instrumental paradigm protects speech on account of the benefits it provides society.[23]

Both dignitarian and instrumental paradigms are embodied in a negative conception of liberty, encompassing three elements: (i) the belief that the individual's right not to have his speech restricted by the state is fundamental in and of itself; (ii) the belief that the individual's right to speak promotes the well-being of a free and democratic society; and (iii) the belief that any

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[19] *Cohen*, 403 U.S. at 24 (emphasis added); *see also* EMERSON *supra* note 7, at 79–90.

[20] On the roots of dignitarian free speech in deontologic liberalism, see Immanuel Kant, *On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice'*, *in* KANT'S POLITICAL WRITINGS 61–92, (Hans Reiss ed., 1970). *But see* RONALD DWORKIN, A MATTER OF PRINCIPLE 353–65 (1985); JOHN RAWLS, A THEORY OF JUSTICE 31–33 (1971). The moral epistemology underlying the dignitarian paradigm is that it *can* consistently be maintained that it is intrinsically wrong to repress the right of free speech and further that the use of speech is a moral determination for the speaker to arrive at, not for the state to impose upon that individual. The moral value of free speech is determined *a priori*. *See infra* part II.A.

[21] On this instrumental insistence that the democratic ends of society are best served through a free market-place in ideas, see *supra* note 4.

[22] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[23] In objecting to free speech as an "inherent right," Vincent Blasi evaluates speech in light of its "checking" and "diversity" values. He concludes that both

> values rest on assessments of social consequences rather than notions of inherent right. Both avoid being linked too closely with eighteenth-century rationalism or with other optimistic philosophies concerning the nature of truth or the inevitability of progress. Both emphasize the value of speech to the recipient of messages, rather than to the sender. Finally, both values affirm the significance of free expression, even in a society in which the processes of communication are seriously distorted by concentrations of resources and techniques of manipulation.

Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 554.

and of itself; (ii) the belief that the individual's right to speak promotes the well-being of a free and democratic society; and (iii) the belief that any infraction upon the liberty of the individual gives rise to a slippery slope that ends in enslavement.[24] The underlying assumption is that liberty, like life, "has a central place in our shared scheme of values and opinions."[25] "Sacred or inviolable" in nature, the "deliberate destruction" of that liberty "dishonor[s] what ought to be honored."[26] The result is an almost religious devotion to the liberty of speech. Any concerted restraint upon liberty, it is assumed, is to be "but a short step [from] . . . suppression pure and simple."[27] Any move along the slippery slope towards restricting speech is to undermine democracy itself.[28] The overriding premise is that individual liberty itself constitutes the democratic *good*. A constitutional guarantee, "free speech ultimately serves only one true value . . . 'individual self-realization.'"[29] Dogmatically conceived, it is the "Kantian right of each individual to be treated as an end in himself."[30]

Courts frequently invoke both dignitarian and instrumental paradigms to protect the liberty of the person. In a range of decisions, from *Chicago Police Dep't v. Mosley*[31] and *Collin v. Smith*[32] to *Street v. New York*,[33] they warn that

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[24] *See, e.g.*, Fried, *supra* note 3, at 229, 232–37; Redish, *supra* note 3.

[25] RONALD DWORKIN, LIFE'S DOMINION 70 (1993).

[26] *Id.* at 74.

[27] Fried, *supra* note 3, at 228.

[28] This fear of the regulation of speech is apparent in reaction to governmental action taken against the American Communist Party in the 1950s. *See* 18 U.S.C. § 2385 (1988) (commonly referred to as the *Smith Act* of 1940). *See generally* Nathaniel L. Nathanson, *Freedom of Association and the Quest for Internal Security: Conspiracy from* Dennis *to Dr. Spock*, 65 NW. U. L. REV. 153 (1970). On the conviction of the primary organizers of the Party, see Dennis v. United States, 341 U.S. 494 (1951). With the weakening of the McCarthy era, the finding in *Dennis* was undermined in Yates v. United States, 354 U.S. 298 (1957). *See also* Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965). *But see* Scales v. United States, 367 U.S. 203 (1961); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

[29] Redish, *supra* note 3, at 593. Harry Triandis, a social psychologist, has observed that the United States is "among the most individualistic cultures of the world." Harry Triandis, *Cross Cultural Studies of Individualism and Collectivism*, *in* 37 CURRENT THEORY AND RESEARCH MOTIVATION: NEBRASKA SYMPOSIUM OF MOTIVATION 41, 44 (John Berman ed., 1989).

[30] Fried, *supra* note 3, at 233.

[31] 408 U.S. 92, 95–96 (1972).

[32] 578 F.2d 1197, 1206 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

[33] 394 U.S. 576, 593 (1969).

any infraction upon free speech will erode democracy itself.[34] They reinforce this claim on grounds of constitutional originalism,[35] in light of natural law and libertarian idealism,[36] and in terms of a marketplace in ideas.[37] Insisting that judges remain neutral towards the content of speech,[38] they do not differentiate

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[34] For example, in insisting that freedom of expression includes the right to burn the flag, the Court in Texas v. Johnson, 491 U.S. 397 (1989), advanced a classical slippery slope argument:

> Could the Government ... prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

Id. at 417. On the relationship between authoritarianism and restrictions on free speech, see T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1969).

[35] *See, e.g.*, Antonin Scalia, *Originalism, The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (Here, Justice Scalia describes himself as a "faint hearted originalist."); *see also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (Scalia, J.); Miller v. California, 413 U.S. 15 (1973); Rosenblum v. Metromedia, 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Garrison v. Louisiana, 379 U.S. 64 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964); Roth v. United States, 354 U.S. 476 (1957). *See generally* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

[36] *See, e.g.*, David F. McGowan & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825 (1991). Messrs. McGowan and Tangri add: "Bereft of immutability ... the communitarian view offers no other criterion for differentiating among the claims of different communities to have their defining characteristics dressed up in constitutive garb and given the power to suppress speech." *Id.* at 866.

[37] Those who hold this viewpoint ordinarily subscribe to a libertarian marketplace in ideas. However hostile the exchange between speakers, they believe that the exchange still produces a greater *good*, on balance, than would arise in its absence. They also treat any state infraction upon speech as unbridled totalitarianism. On this marketplace ideology, see generally Ingber, *supra* note 4. *But cf.* Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 729 (1983); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974–77 (1978).

[38] As Robert Bork would have it, a neutral interpretation affirms the principle of free speech under the First Amendment. *See* Robert Bork, *Neutral Principles and Some First Amendments Problems*, 47 IND. L.J. 1 (1971); *see also* Charles Fried, *Liberalism, Community, and the Objectivity of Values*, 96 HARV. L. REV. 960 (1983) (reviewing MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982)). *But cf.* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the 'Hunch' in*

between *good* and *bad* speech.[39] Flatly stated by Justice Scalia, in striking down a hate speech ordinance in *R.A.V. v. City of St. Paul*,[40] "the [Bias-Motivated Crime O]rdinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the [content of] the speech . . . ."[41]

These dignitarian and instrumental paradigms underlying free speech rest on two false premises. They assume that an individuated right of free speech inheres in natural law. They suppose, further, that courts ought to be neutral towards the content of speech so as to preserve an individuated and natural right to speak. Even proponents of natural law reject these assumptions. They well appreciate that political society is *not* neutral towards the content of speech. They also recognize that political society delineates the nature of individual liberty in its own interests. In "political society," John Locke clearly insisted, "every one . . . hath quitted this natural power, *resigned it up into the hands of the community*."[42] Similarly, St. Thomas Aquinas emphasized that "[t]he object of the Law is *the Common Good*,"[43] while man's "natural inclination [is] to know the truth about God *and to live in society*."[44]

The dignitarian paradigm is also deficient in conceiving of dignity from the perspective of the speaker, at the expense of the dignity of the target. The result is social injustice. This injustice is most apparent when speech is used to silence or invite violence, as when speech is used to silence the voice of

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Judicial Decisions, 14 CORNELL L.Q. 274 (1929). For arguments in favor of comparatively unqualified right to free speech, well before Fried's articles, see Black, *supra* note 9. For general discussion on the judicial *duty* to decide cases neutrally, see especially HERBERT WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961). *See also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). *But cf.* Lawrence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

[39] *See supra* note 38. For the argument that free speech ought to be protected in general on account of its checking value, see Blasi, *supra* note 23. This *checking value* is most evident in relation to the freedom of the press. *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). On the attempt by scholars to limit restrictions on speech to the private, as distinct from the public realm, see EMERSON, *supra* note 7, at 105.

[40] 112 S. Ct. 2538 (1992).

[41] *Id.* at 2542. *But see* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

[42] *See* LOCKE, *supra* note 18, at bk. II, ch. VII, § 87 (emphasis added).

[43] THOMAS AQUINAS, SUMMA THEOLOGICA, LAW IN GENERAL qu. 90, art. 2 (Fathers of the English Dominican Province trans., 1948) (emphasis added).

[44] *Id.* at qu. 94, art. 2 (emphasis added).

difference or provoke conflict.[45] As Justice Holmes expounded in *Schenck v. United States*,[46] the "question in every case [in which the state regulates speech] is whether the words used . . . create a clear and present danger *that they will bring about the substantive evils that Congress has a right to prevent*."[47] As a result, some courts decline to guarantee "fighting words" that likely would provoke retaliation,[48] just as they attribute fault to *private* speech that is lewd, indecent, profane,[49] or libelous.[50] However much dignity the

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[45] *See, e.g.*, AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 110–13 (1984). On the capacity of the law of libel to empower a white and male elite, see NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETATIVE HISTORY OF THE LAW OF LIBEL (1986).

[46] 249 U.S. 47 (1919).

[47] *Id.* at 52 (emphasis added).

[48] For an example of "fighting words" in a campus hate speech code, see the proposals of the University of Montana's Student Conduct Code Revision Committee, cited in Thomas Huff, *Addressing Hate Messages at the University of Montana: Regulating and Educating*, 53 MONT. L. REV. 157 (1992).

> "Fighting words" are those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so. Such words include, but are not limited to, those terms widely recognized to be derogatory references to race, ethnicity, religion, sex, sexual orientation, disability, and other personal characteristics. "Fighting words" constitute "harassment" when the circumstances of their utterance create a hostile and intimidating environment which the student uttering them should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities.

Id. at 162 n.24. For cases on the "fighting words" doctrine, see, for example, *infra* note 75.

[49] *See* Miller v. California, 413 U.S. 15 (1973); *cf.* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). *See generally* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988).

[50] *See* Loren P. Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167 (1955); David Reisman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942); David Reisman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282 (1942); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988); Note, *Statutory Prohibition of Group Defamation*, 47 COLUM. L. REV. 595 (1947). For challenges to the group libel concept, see the dissenting opinions in Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (Black, J., dissenting); *id.* at 277 (Reed, J., dissenting); *id.* at 284 (Douglas, J., dissenting); *id.* at 287 (Jackson, J., dissenting). There is considerable argument in favor of group libel statutes. *See, e.g.*,

individual might acquire from engaging in sexually explicit expression in front of a post office,[51] judges sometimes denounce such conduct as "fighting words"[52] that incite imminent lawlessness,[53] that vilify public policy,[54] or simply, that are obscene.[55]

Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77 (1984); Kenneth Lasson, *Racial Defamation As Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985); Joseph Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950); Mark S. Campisano, Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979); Note, *A Communitarian Defense of Group Libel Laws*, *supra*.

[51] *See* United States v. Kokinda, 497 U.S. 720 (1990). Similarly, judges have determined whether to uphold restrictions on the right of the NAACP to run a charity drive in the federal workplace in Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985) (holding that an annual charitable fund-raising drive conducted in the federal workplace does not occur in a public forum and that expression there is not subject to the stringent test of protection that applies to speech in public forums). In addition, courts devise criteria by which to differentiate between public forums in which everyone enjoys freedom of expression from those in which only *some* do. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–47 (1983); Widmar v. Vincent, 454 U.S. 263 (1981).

[52] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

[53] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[54] *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 266–67 (1951). On the vilifying impact of pornography upon women both as individuals and as a community, see Catharine MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 337–38 (1984). *But see* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

[55] *See* Miller v. California, 413 U.S. 15 (1973). Courts sometimes rely upon peripheral arguments to reconcile dignitarian and instrumental paradigms. For example, in public regulation cases like Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970), the Supreme Court limited the dignitarian right of the individual to use the post office to send sexually provocative and pandering advertisements by transforming the threat of public harm into a property claim. Using a cost-benefit analysis, it determined when the Government's interest in limiting the use of its property to its intended purpose outweighed the interest of those wishing to use the property for other expressive purposes. *Id.* at 738 (holding that the post office could order the publisher to desist from such mailings to the addresses of complainant recipients); *see also* Frisby v. Schultz, 487 U.S. 474 (1988); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985); Martin v. City of Struthers, 319 U.S. 141 (1943). Even more explicitly, in Cantwell v. Connecticut, 310 U.S. 296 (1940), the Supreme Court restricted freedom of expression on grounds that it constituted a "clear and present danger," not to the victims of such speech, but to "traffic upon the public streets." *Id.* at 308. The clear and present danger rule was originally enunciated by Justice Holmes in Schenck v. United States, 249 U.S. 47, 52 (1919). *See also* Snepp v. United States, 444 U.S. 507 (1988); United States v. Progressive, Inc., 467 F. Supp. 990, 999 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

The dignitarian and instrumental paradigms also fail to take account of the communal nature of liberty. They fail to appreciate that liberty encompasses the freedom to enjoy a condition of life, beyond the negative right of the individual to protection from state intrusion. They ignore that communal liberty is possible only when responsibilities are imposed upon individuals, communities, and the state not to intrude upon such a condition of life.[56] They overlook the fact that speech interferes most with the democratic process when the defect of prejudice bars groups subject to widespread vilification from participation in the political process and causes governmental decision-makers to misapprehend the costs and benefits of their actions.[57]

In conclusion, the dignitarian paradigm relies on an unduly restricted conception of personhood. Insistent upon the autonomy of the person, it passes over the extent to which personhood derives from the mutual interdependence among persons. That interdependence is possible only when the dignity of the person encompasses the dignity of the target as a condition of social and political life itself.[58]

The instrumental paradigm is similarly self-limiting. It trusts in an overly restrictive marketplace in ideas in which the *good* derives solely from the acts of independent right-holders. It ignores the instrumental loss that stems from speech that seeks to, or has the effect of, disrupting the free flow of ideas. Most importantly, it restricts the flow of ideas within the democratic state by declining to distinguish between *free* speech and speech that *abuses* free speech.[59] Judges who still insist upon an unfettered right of speech experience a "conflict between the rights of a particular speaker . . . and the competing

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[56] *See* LEON E. TRAKMAN, REASONING WITH THE CHARTER, ch. 2 (1991). For a somewhat comparable view, see Kenneth L. Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME L. REV. 183 (1980) [hereinafter Karst, *Equality and Community*]. Professor Karst argues that communities that are abused by other communities are denied equality, while individuals who are denied equal standing with other individuals are subject to unequal treatment. *Id.* at 186–87. *See generally* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986) [hereinafter Karst, *Paths to Belonging*]; David Sugarman, *The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science*, 46 MOD. L. REV. 102 (1983) (reviewing RICHARD A. COSGROVE, THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST (1980)).

[57] ELY, *supra* note 38; *see also* Triandis, *supra* note 29, at 102 (suggesting that such neutrality is "consistent with a justification of racism through the affirmation of the *status quo.*"). *See generally* CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS 4–5 (1979); JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 135–58 (1991).

[58] On this interdependence in communitarian thought, see *infra* note 106.

[59] For challenges to the reliance placed on the free flow of ideas within a mythical marketplace, see *supra* note 37.

interests of the community as a whole,"[60] not limited to any one discrete minority.[61] Judges who treat the rights of the speaker as a necessary means towards the democratic *good* overlook speech which threatens that *good*.

A. *False A Priorism*

Any challenge to the dignitarian paradigm underlying free speech necessarily requires that courts reckon with two false assumptions underlying liberty: that the nature and content of liberty are determined *a priori* and that courts ought not to redefine the meaning of liberty *ex post*.[62] Applied to constitutional law, it is assumed that *both* the liberty to speak *and* the content of that speech have pre-determined meanings. This assumption is doubtful because it ignores the extent to which the nature and content of liberty are

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[60] *See* Ronald Dworkin, *Is the Press Losing the First Amendment?*, N.Y. REV. BOOKS, Dec. 4, 1980, at 49, 52, *quoted in* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 93 (1984); *see also* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1526 (1988). The competing interests of the community, arguably, include the interests of discrete minorities to be protected from the abuse effected by individual rights. As Justice Frankfurter commented in Beauharnais v. Illinois, 343 U.S. 250 (1951):

> It would . . . be arrant dogmatism . . . for us to deny that the . . . [l]egislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.

Id. at 263. Despite the willingness of the Supreme Court to recognize a group libel action in *Beauharnais*, the influence of that decision has declined considerably over the years. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 82 (1964) (Douglas, J., concurring) ("*Beauharnais v. Illinois*, . . . a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system . . . ."); *see also* Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring), *cert. denied*, 394 U.S. 930 (1969).

[61] On the historically unequal treatment of ethnic and racial minorities, see AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977); PROTECTION OF ETHNIC MINORITIES: COMPARATIVE PERSPECTIVES (Robert G. Wirsing ed., 1981); Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219 (1991); Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992); Lance Liebman, *Ethnic Groups and the Legal System*, *in* ETHNIC RELATIONS IN AMERICA 150 (Lance Liebman ed., 1982); Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984). *But see* Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989).

[62] On the *a priori* conception of free speech, see *supra* note 2.

determined *ex post*. Courts determine the worth of free speech *ex post* in asserting that individuated conceptions of free speech ought to prevail over the alternatives. They protect the right of the KKK to insult African Americans and Jews only because they place a greater value upon the right to speak than the social harm that stems from its exercise.[63]

In summation, *a priori* conceptions of freedom of expression fail because they treat *ex post* consideration of the social effect of speech as irrelevant. They fail, too, because they ground the liberty to speak in a conceptual permanence at the expense of functional need.[64]

An alternative approach is to conceive of freedom of expression in light of its impact upon particular communities, for example, upon discrete, insular, and visible minorities. This is the essence of the minority critique of freedom of expression.

B. *The Minority Critique*

> I look at myself
> and see part of me
> who rejects my father and my mother
> and dissolves into the melting pot
> to disappear in shame.
> I sometimes
> sell my brother out
> and reclaim him
> for my own when society gives me
> token leadership
> in society's own name.[65]

The most cogent critique of the feigned roots of free speech in an *a priori* and individuated liberty is evident in the writings of critical race theorists like Charles Lawrence, an African American; Richard Delgado, a Hispanic American; and Mari Matsuda, an Asian American.[66] All three fault the

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[63] *See, e.g.*, Denniston, *supra* note 3; Meiklejohn, *supra* note 7; *cf.* EMERSON, *supra* note 7; Blasi, *supra* note 23.

[64] The falsity of this conceptual permanence is most apparent in the doubtful assertion that the First Amendment gave freedom of expression an immutable character. As Zechariah Chafee once remarked: "The truth is, I think, that the framers had no very clear idea as to what they meant by 'the freedom of speech or of the presss' . . . ." Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 898 (1949) (reviewing ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948)).

[65] R. GONZALES, I AM JOAQUIN (1972).

[66] *See* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Richard Delgado, *Words That Wound: A Tort Action for*

prevailing free speech doctrine on dignitarian and instrumental grounds. First, racist speech accentuates the disempowerment of those who traditionally were denied access to power.[67] Second, it perpetuates that disempowerment by devising institutional, even state-sanctioned barriers to exclude minorities from the mainstream.[68] Third, it reinforces these barriers by drawing a false continuum between racial differentiation and racial discrimination.[69] Fourth, it forces minorities either to submit to hatred or mete out hatred in response to hatred.[70] Minorities who respond to racist taunts likely are accused of engaging

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Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133, 137 (1982); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2358 (1989). On the historical treatment of ethnic minorities, notably as immigrants to the United States, see CATHERINE SILK & JOHN SILK, RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE (1990); SPLIT IMAGE: AFRICAN AMERICANS IN THE MASS MEDIA (Jannette L. Dates & William Barlow eds., 1990); RAYMOND W. STEDMAN, SHADOWS OF THE INDIAN: STEREOTYPES IN AMERICAN CULTURE (1982); EUGENE WONG, ON VISUAL MEDIA RACISM: ASIANS IN THE AMERICAN MOTION PICTURE (1978); *see also* The King and Osborn, 94 Eng. Rep. 425 (K.B. 1732); GORDON W. ALLPORT, THE NATURE OF PREJUDICE 400–404 (1979); TAMA STARR, THE 'NATURAL INFERIORITY' OF WOMEN: OUTRAGEOUS PRONOUNCEMENTS BY MISGUIDED MALES (1991).

[67] *See* Lawrence, *supra* note 66, at 459; *see also* Matsuda, *supra* note 66, at 2360.

[68] On the history of organized racism the practices of the KKK, see Christian Knights of the Ku Klux Klan Invisible Empire v. District of Columbia, 919 F.2d 148 (D.C. Cir. 1990); JOHN D. ALPINE, REPORT ARISING OUT OF THE ACTIVITIES OF THE KU KLUX KLAN IN BRITISH COLUMBIA 30 (1981); ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971); Michael S. Russell, *The Ku Klux Klan and the Proper Perspective on the Scope of 42 U.S.C. § 1985(3)*, 2 REGENT U. L. REV. 73 (1992). On the history of racism in the constitutions of particular American states in the seventeenth and eighteenth centuries, see FUNDAMENTAL CONSTITUTIONS OF CAROLINA 107 (1669), *reprinted in* NORTH CAROLINA CHARTERS AND CONSTITUTIONS, 1578–1698, at 132 (Mattie Erma Edwards Parker ed., 1963); MARYLAND ACTS OF ASSEMBLY I, *noted in* SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 371–79 (1968). *See generally* Michael W. McConnell, *America's First 'Hate Speech' Regulation*, 9 CONST. COMMENTARY 17 (1992).

[69] For an excellent description of the fear that the "hierarchical majoritarian variation of voice" of color might perpetuate this continuum, see John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2170 (1992); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2015 (1991).

[70] For a somewhat vehement postulation to this effect, see Derrick Bell, *Racism: A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93 (1989); Derrick Bell & Pretta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988). *See also* ROGER DANIELS & HARRY KITANO, AMERICAN RACISM: EXPLORATION OF THE NATURE OF PREJUDICE (1970); Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?*, 80 GEO. L.J. 1879 (1992). *But*

in reactive racism.[71] Minorities who remain silent are deemed to submit in racism. The result is indignity and protracted social tension arising from words that "wound,"[72] that reduce minorities to "caricature[s],"[73] or that depict them as "an untouchable caste, unfit to be educated with white children."[74] Racial minorities who react to their indignity with "fighting words" cannot win. They are condemned, even though "fighting words" might "provoke the average person to retaliation."[75] They are shunned for "breach[ing] . . . the peace,"[76] even though the "average person" might have acted similarly under comparable conditions of provocation.[77] The result is a pervasive private and public hurt.[78]

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cf. SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990); Stephen Carter, *The Best Black, and Other Tales*, 1 RECONSTRUCTION NO. 1, at 6 (1990); Randall J. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

[71] *See, e.g.*, Berta Blen, Note, *To Hear or Not to Hear: A Legal Analysis of Subliminal Communication Technology*, 44 RUTGERS L. REV. 871 (1992).

[72] *See* Delgado, *supra* note 66, at 137; *see also* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Richard Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

[73] Lawrence, *supra* note 66, at 483; *see also* Matsuda, *supra* note 66, at 2361–62. Charles Lawrence argues that "being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face. The injury is instantaneous." Lawrence, *supra* note 66, at 452. Richard Delgado identifies "feelings of humiliation, isolation, and self-hatred" and doubts about one's self-worth and identity that arises from hate speech. Delgado, *supra* note 66, at 137. Patricia Williams calls racist speech "spirit murder." Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 139 (1987).

[74] Lawrence, *supra* note 66, at 439. Lawrence is referring here to Brown v. Board of Educ., 447 U.S. 483 (1954). He elaborates, stating that the Court *there* "held that segregated schools were unconstitutional primarily because of the *message* segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children. Segregation serves its purpose by conveying an idea. . . . Therefore, *Brown* may be read as regulating the content of racist speech." Lawrence, *supra* note 66, at 439–40; *see also* William B. Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995 (1984).

[75] Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942); *see also* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Schenck v. United States, 249 U.S. 47 (1919).

[76] *Chaplinsky*, 315 U.S. at 572.

[77] On the subordinating effect of hate speech upon, among others, racial groups, see Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95; Matsuda, *supra* note 66, at 2361–63.

[78] The state's tacit protection of racist speech is sometimes apparent in the support governments give to those who wish to preserve racially exclusive zones, restrictive

In the words of Mari Matsuda, those who "proclaim . . . [the] racial inferiority" of members of racial minorities render the *genus* "at once . . . alike and inferior."[79]

The minority critique demonstrates admirably that racist speech is hurtful in depicting African Americans as a criminal class,[80] or blaming them for declining property values, as was noted by the Court in *Beauharnais v. Illinois*.[81] Racist speech clearly is offensive when it transforms the roots of

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covenants, and white electoral primaries. *See* MELVIN UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 649–51 (1988). The state also tacitly condones racist speech in refusing to intervene in the interests of discrete minorities who are excluded, *inter alia*, from schools, housing projects, and government employment itself. On the state's involvement in racist speech, see, for example, FCC v. Pacifica Found., 438 U.S. 726 (1978); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970); Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). *See generally* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (arguing that true freedom of speech cannot occur without equality of position). On the distinction drawn by the Supreme Court between physical and emotional harm arising from hate speech, see David Goldberger, *Sources of Judicial Reluctance to Use Psychic Harm as a Basis for Suppressing Racist, Sexist and Ethnically Offensive Speech*, 56 BROOK. L. REV. 1165 (1991). *See also* Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990).

[79] Matsuda, *supra* note 66, at 2358. As a further exemplification of the communal intent and attributes of racist speech, see UWM Post Inc. v. Board of Regents of the Univ. of Wis. System, 774 F. Supp. 1163, 1167–68 (E.D. Wis. 1991). One student was reported to have said to "an Asian-American student: 'It's people like you—that's the reason this country is screwed up' and . . . . '[w]hites are always getting screwed by minorities and some day the Whites will take over.'" *Id.* at 1167; *see also* Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

[80] The imprisonment rate for African American men in the United States in 1988 was 965 per 100,000. The equivalent rate with White men was 155 per 100,000. Kevin Reed et al., *Race, Criminal Justice and the Death Penalty*, 15 WHITTIER L. REV. 395, 396 (1994) (citing *Black, White Incarceration Rules*, OVERCROWDED TIMES, May 1991, at 6). According to national figures, in 1990, 23% of African American men between 20 and 29 were in prison, on parole, or on probation. The equivalent number of White men in that position was only 6.2%. Sam Meddis, *Young Black Generation in Legal Web*, USA TODAY, Oct. 11, 1990, at 3A; *see also* Sam Meddis, *Black Imprisonment Highest in USA; New Study: Rate Tops S. Africa's*, USA TODAY, Jan. 7, 1991, at 2A (asserting that 3 out of 100 African American men in the United States are imprisoned and that this number exceeds the number of Black South Africans imprisoned in South Africa under Apartheid at that time); Sharon Shahid, *We're Saying If We Don't Try Something New, We Are Doomed*, USA TODAY, Aug. 15, 1991, at 11A.

[81] 343 U.S. 250, 266 n.21 (1952) (Frankfurter, J.).

crime in poverty into a reason to hate those who are poor and black.[82] Social upheaval *is* also a likely consequence of unrestricted hate. One such upheaval, Derrick Bell warns, is a simmering race war that transcends the inner cities of America.[83]

Despite its vivid depiction of reality, the minority critique does more to describe a social condition than to prescribe a legal remedy. It *demonstrates* the extent to which racist speech ferments social upheaval. It does not reconcile itself to speech that, however critical, is permissible on grounds that it redresses social tensions. As a result, the minority critique successfully disputes the majoritarian interest in the right to free speech, but it fails to provide a medium through which to reconcile the adverse claims of the speaker to freedom *of* expression and the target to freedom *from* expression.[84] It also deals only cursorily with other instances of hate speech, as when words wound

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[82] *See generally* GORDON W. ALLPORT, *supra* note 66; OLIVER C. COX, CASTE, CLASS AND RACE: A STUDY IN SOCIAL DYNAMICS (1948); HARRY H.L. KITANO, RACE RELATIONS 127–29 (3d ed. 1985); RACE, CLASS, CULTURE IN AMERICA: CRITICAL PERSPECTIVES OF THIRD WORLD AMERICA (L. Shinagawa ed., 1983); GEORGE E. SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION (4th ed. 1972); PIERRE L. VAN DEN BERGHE, RACE AND RACISM (2d ed. 1978); Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295 (1990).

[83] *See, e.g.*, DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (3d ed. 1992). *See generally supra* note 70.

[84] This is not meant to reject the "storytelling" narrative in which minorities demonstrate that the negative rights of members of mainstream society are preserved at the expense of minorities. However, this *is* meant to challenge the view, all too often supported by some critical race theorists, that extending negative rights to minorities, will even the balance. My argument is that the negative conception of rights is internally flawed in excluding alternative conceptions of rights, as well as in denying transformative means of identifying them. On storytelling, see especially PETER L. BERG & THOMAS LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1967); NELSON GOODMAN, WAYS OF WORLDMAKING (1978); ON NARRATIVE (W.J.T. Mitchell ed., 1980); PAUL RICOEUR, TIME AND NARRATIVE (Kathleen Blarney & David Pellauer trans., 1984); Richard Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Tony M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2101–04 (1989). *See also* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991). For an excellent argument for the development of rights consciousness along racial lines, see Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

women, religious minorities, and disabled persons for reasons *other than* racism.[85]

An alternative is to conceive of free speech in light of communal conceptions of liberty, beyond the minority critique. This arises when free speech is valued according to the communal conditions in which speech is exercised, including the conditions that affect the parties to each speech relationship. This approach is inherent in communitarian thought.[86]

III. A COMMUNAL LIBERTY

On communal liberty, Charles Taylor states:

> But when we think of a human being, we do not simply mean a living organism, but a being who can think, feel, decide, be moved, respond, enter into relations with others; and all this implies a language, a related set of ways of experiencing the world, of interpreting his feelings, understanding his relation to others, to the past, the future, the absolute, and so on. It is the particular way he situates himself within this cultural world that we call his identity.[87]

A communal liberty identifies two related images of liberty: the liberty to be different and the liberty to be respected by others on account of that

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[85] This is most apparent in the writings of Richard Delgado. His primary assumption is that "words wound"; he does not deal with the fact adequately that the abuse of other liberties also can wound. On the social upheaval fermented by racist speech, see Crenshaw, *supra* note 84; Delgado, *supra* note 66; Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). *But see* John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988).

[86] On communitarian claims to liberty, see generally TRAKMAN, *supra* note 56, ch. 3. Interestingly, the minority critique itself draws from communitarian values in challenging liberal values. For example, Alex Johnson critiques liberal values thus:

> [I]n the writings of communitarians, one can identify a number of arguments that attempt to explain why the liberal view of the self is inadequate: the liberal view of the self (1) is empty; (2) violates our self-perceptions; (3) ignores our embeddedness in communal practices; (4) ignores the necessity for social confirmation of individual judgments; and (5) pretends to have an impossible universality or objectivity.

Johnson, *supra* note 69, at 2055.

[87] Charles Taylor, *Hegel: History and Politics*, *in* LIBERALISM AND ITS CRITICS 182 (Michael J. Sandel ed., 1984).

difference.[88] These images are expressed affirmatively, in protecting the right of each discrete *community* to express *its* distinct identity, beyond the right of the individual to assert his liberty against the state.[89] Communal liberty is affirmed positively in promoting self-empowerment through communal empowerment. It is preserved negatively in redressing threats to liberty, such as threats to the liberty of African Americans who are denigrated on account of race.[90]

In its most enlightened form, communal liberty embodies the "shared values of a civilized social order . . . the essential lessons of civil, mature conduct."[91] It is affirmed in its capacity to perpetuate relations of trust and mutual respect among individuals from different communities. It is preserved negatively, in redressing the communal harm suffered by those who were denied liberty historically and seek redress on account of its ongoing violation.[92]

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[88] Liberty that underscores the right to be both different and recognized for that difference inheres in the affirmative action debate. *See* Alan D. Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L. REV. 705.

[89] This protection accorded ethnic, racial, and religious communities includes the individual. On such community protection in international law, see S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837 (1990). Professor Anaya argues in favor of affirming the liberty of ethnic historical communities, as well as those who have suffered oppressive treatment contrary to international law governing human rights. *Id.* at 838–44. Arguably, international law warrants a wide protection of the right to self-determination. The charter of the United Nations explicitly aims "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace." U.N. CHARTER art. 1, ¶ 2. However, the principle of self-determination has been highlighted by the International Court of Justice only as an "operative right to the decolonization of non-self-governing territories." Western Sahara, 1975 I.C.J. 12, 121 No. 61 (Oct. 16).

[90] On these negative and positive images of communal liberty, see generally Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219 (1991).

[91] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). Rodney Smolla remarked to similar effect: "Only through communal living . . . may men achieve virtue." Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 173 (1990).

[92] On the importance of this communal identity, see Ronald R. Garet, *Community and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983). *See generally* MICHAEL

Both the liberty *to* speak and the liberty *from* speech are attributes of communal liberty. The liberty *to* speak consists of the communal means by which individuals convey their opinions, thoughts, and ideas to others. The liberty *from* speech encompasses the communal means by which that liberty *to* speak is constrained in the interests of those who are subjugated by speech.[93] It is in weighing the liberty *to* speak against the liberty *from* speech that the communal perimeters of liberty are determined. It is in perfecting the balance between the two that speech is rendered the most "uninhibited, robust and wide-open."[94]

IV. A COMMUNITARIAN VIEWPOINT

Liberal democracy is only possible if people feel bound to the state by "ties derived from a common dwelling place with its associations, from common memories, traditions and customs, and from the common ways of feeling and thinking which a common language and still more a common literature embodies."[95]

Communitarian thought holds that the nature of rights ought to be determined in light of their contribution to communal life.[96] Free speech is valuable, then, because it contributes to the continuity of family, social, and

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SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). The nature of communal identity is a frequent topic of discourse in Canada. *See* JOHN WEINSTEIN, ABORIGINAL SELF-DETERMINATION OFF A LAND BASE (1986); Evelyn Kallen, *Ethnicity and Collective Rights in Canada (1981), in* ETHNIC CANADA 38 (Leo Driedger ed., 1987); Khayyam Z. Paltiel, *Group Rights in the Canadian Constitution and Aboriginal Claims to Self-Determination, in* CONTEMPORARY CANADIAN POLITICS: READINGS AND NOTES 26 (Robert J. Jackson et al. eds., 1987). *See generally* VERNON VAN DYKE, HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION (1985); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, 2 CAN. J.L. & JURISPRUDENCE 19 (1988); Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J.L. & JURISPRUDENCE 217 (1991).

[93] On the communal nature of liberty in relation to hate speech, see, among others, Thomas I. Emerson, *Towards a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). *But see* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 153-54, 282-83 (1985).

[94] Justice Brennan enunciated these words in New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[95] THOMAS H. GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 130-31 (1941).

[96] *See generally* Stephen A. Gaudbaum, *Law, Politics and the Claims of Community*, 90 MICH. L. REV. 685 (1992); Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984).

religious life, not because it promotes some abstract *good*.[97] The rationale is twofold: there is virtue in preserving a community identity[98] and that identity ought to inform the rights of those who interact within the community, including the individual.[99]

This communitarian ideology is readily applied to free speech.[100] First, communitarian thought retreats from the view that free speech necessarily has an *a priori* meaning that is culturally neutral. This enables speech to be analyzed in light of the cultural values of the community in which it arises and upon which it has an impact. Second, communitarian thought is able to contextualize free speech in light of cultural history. This facilitates a reasonable assessment of, say, the history of racism in American literature[101]

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[97] *See* CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

[98] On the virtue of preserving the identity of minorities, see AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977); PROTECTION OF ETHNIC MINORITIES: COMPARATIVE PERSPECTIVES, *supra* note 61; Liebman, *supra* note 61.

[99] *See, e.g.*, Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852 (1989); Amy Gutman, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985); Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J.L. & JURISPRUDENCE 217 (1991). On the communitarian perspective in general, see WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (Douglas MacLean ed., 1992); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 15 (1991); ALASDAIR C. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, *in* THE BILL OF RIGHTS IN THE MODERN STATE, *supra* note 3, at 519; Peter Weston, *The Rueful Rhetoric of Rights*, 33 UCLA L. REV. 977 (1986).

[100] It should be emphasized that, while communitarian thought has not centered on the free speech debate, its application to that debate follows the principles repeatedly articulated by its proponents. *See infra* part VI.

[101] For a history of racism directed primarily at African Americans, see THE BLACK EXPERIENCE IN AMERICA: SELECTED ESSAYS (James Curtis & Lewis L. Gould eds., 1970); DONALD BOGLE, TOMS, COONS, MULATTOES, MAMMIES, AND BUCKS: AN INTERPRETATIVE HISTORY OF BLACKS IN AMERICAN FILMS (1973); IMAGES OF BLACKS IN AMERICAN CULTURE: REFERENCE GUIDE TO INFORMATION SOURCES (Jessie C. Smith ed., 1988); WINTHROP D. JORDON, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO, 1550–1812 (1968); WILLIAM L. VAN DEBURG, SLAVERY AND RACE IN AMERICAN POPULAR CULTURE (1984); Alan W.C. Green, *"Jim Crow," "Zip Conn": The Northern Origins of Negro Minstrelsy*, 11 MASS. REV. 385 (1970); J. Stanley Lemons, *Black Stereotypes as Reflected in Popular Culture, 1880–1920*, 29 AM. Q. 102 (1977). For racism and Native Americans, see generally ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT (1978); NAOMI CALDWELL-WOOD & LISA A. MITTEN, I IS NOT FOR INDIAN: THE PORTRAYAL OF NATIVE AMERICANS IN BOOKS FOR YOUNG PEOPLE (1991); ROY H. PEARCE, SAVAGISM AND CIVILIZATION: A STUDY OF THE

or the impact of racism upon the immigration practices of the American state.[102] Third, communitarian thought allows speech to be evaluated in terms of the culture of discrete communities. For example, it enables racist speech to be appraised in terms of the values and practices of, say, the Ku Klux Klan and African Americans who both happen to live in Montgomery, Alabama. Finally, communitarian thought enables liberty to be applied to multifold communities, not limited to racial and ethnic minorities.[103]

Communitarian thought is useful in mediating between individual and community conceptions of rights. For example, it accepts that individuality is central to the development of cultural identity.[104] But communitarians also recognize that culture informs free will differently in different context.[105] This allows them to evaluate free speech in light of its impact upon personhood, viewed through the prism of cultural relations.[106]

Despite these virtues, communitarian thought remains flawed in relation to free speech. Faced with an apparent conflict between individual rights and community interests, the communitarian response is either to raise individual rights above community interests, or to treat community interests as a loose

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INDIAN AND THE AMERICAN MIND (rev. ed. 1965); ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); Robert H. Keller, Jr., *Hostile Language: Bias in Historical Writing About American Indian Resistance*, 9 J. AM. CULTURE 9 (Winter 1986).

[102] Discrimination in immigration is most evident in respect of Asian Americans. *See, e.g.*, MUTUAL IMAGES: ESSAYS IN AMERICAN-JAPANESE RELATIONS (Akira Iriye ed., 1975); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989); RICHARD A. THOMPSON, THE YELLOW PERIL 1890–1924 (1979).

[103] *See generally* Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Speech*, 40 UCLA L. REV. 103, 116 (1992).

[104] To some extent liberals, like Ronald Dworkin, concern themselves with a "liberal community." A liberal community, in effect, consists of a community of habituated and self-determining individuals. However, that community also embraces the solidarity that individuals bring to one another through their mutual associations. *See, e.g.*, Dworkin, *supra* note 61.

[105] *See, e.g.*, CYNTHIA H. ENLOE, ETHNIC CONFLICT AND POLITICAL DEVELOPMENT 15–25 (1973); H.M. KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES 41–45 (1924); R.A. SCHERMERHORN, COMPARATIVE ETHNIC RELATIONS: A FRAMEWORK FOR THEORY AND RESEARCH 51 (1970); Michael Novak, *Cultural Pluralism for Individuals: A Social Vision*, *in* PLURALISM IN A DEMOCRATIC SOCIETY 34–36 (Melvin M. Tumin et al. eds., 1977). On the tensions between liberalism and democracy within a liberal democracy in general, see generally C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY (1977); C.B. MACPHERSON, THE REAL WORLD OF DEMOCRACY (1966).

[106] Challenges to speech along communitarian lines are most evident in relation to group libel laws. *See generally* Tanenhaus, *supra* note 50; Campisano, *supra* note 50; Note, *A Communitarian Defense of Group Libel Laws*, *supra* note 50.

infrastructure around which individuals exercise their rights.[107] Neither approach is tenable simply because neither provides any means of choosing between them. Either communitarian interests constitute an anecdotal additive to individual rights; or they have some indeterminate influence upon those rights. Communitarian scholars generally fail to provide a solution.

A transformative vision of free speech, in contrast, can accommodate both individual and community interests. For example, it can conceive of the right to free speech in accordance with the legal responsibilities that arise between those who speak and those who are likely to be affected by speech. In this way, a transformed conception of free speech can mediate between the social and cultural practices of those who assert the right to speak *and* those who claim to be harmed by it.[108]

V. A TRANSFORMATIVE ALTERNATIVE: RESPONSIBILITIES

A transformative conception of free speech maintains that legal responsibilities inhere within the right to speak itself. These responsibilities are owed variously to the state, civil society, and discrete communities. They are determined in light of social properties that are attributed to rights themselves. For example, the individual's responsibility for using speech that is treasonous is an attribute of his right. In exercising his right to speak, he is expected not to do so in a treasonous manner.[109]

A transformative conception of free speech also imposes responsibilities upon the state. For example, the state is responsible to preserve liberty from state intrusion and to safeguard the democratic ends to which that liberty is

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[107] The somewhat permeable proposition advanced by communitarian scholars, like Charles Taylor, that individual rights serve as first order rights, while community rights operate at the second order, deals only cursorily with the inevitable conflict that arises between them. *See, e.g.*, TAYLOR, *supra* note 97.

[108] *Compare* TRAKMAN, *supra* note 56, ch. 3 *with* Karst, *Equality and Community*, *supra* note 56. Professor Karst argues further that communities that are abused by other communities are denied equality, while individuals who are denied equal standing with other individuals are also the subject of unequal treatment. *Id.* at 186–87. *See generally* Karst, *Paths to Belonging*, *supra* note 56; Sugarman, *supra* note 56.

[109] The argument, here, is that the right of free speech *itself* includes a responsibility for that right. This argument is consistent with the assumption that the right to speak is contingent upon the social interest in that right. It is apparent, too, in the natural law thought upon which the dignitarian paradigm underlying free speech is grounded. *See supra* text accompanying note 42; *see also* Emerson, *supra* note 93, at 909–13. *But see* R. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 153–54, 282–83 (1985).

directed.[110] Applied to free speech, it is responsible to ensure that speech does not defeat the ends of peace and public order. This responsibility, arguably, includes its obligation to discourage the use of speech that divests racial and ethnic minorities of self-respect.[111]

The transformation of free speech is accomplished by recognizing that liberty is determined by an interrelated set of social and legal relations. Among these is the relationship between rights, not limited to free speech, and responsibilities arising from those rights. "A political order in which rights consciousness is highly developed is prone to instability unless counterbalanced by norms of duty, obligation and responsibility."[112] Wesley Hohfeld, writing over fifty years ago, offered a partial transformation of rights along these lines. He situated rights, not simply in relation to duties, but as one of four basic legal relations, their opposites and correlates.[113] While rudimentary in nature, his approach provides a useful starting point in which to construct legal responsibilities to accompany rights.[114]

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[110] *See* TRAKMAN, *supra* note 56, ch. 2.

[111] On the relationship between individual rights and community interests in relation to ethnic minorities, see generally VAN DYKE, *supra* note 92; Johnston, *supra* note 92; McDonald, *supra* note 92.

[112] A.C. Cairns & C. Williams, *Constitutionalism, Citizenship and Society in Canada: An Overview*, *in* CONSTITUTIONALISM, CITIZENSHIP AND SOCIETY IN CANADA 1, 3 (A.C. Cairns & C. Williams eds., 1985).

[113] Hohfeld, *Rights*, *supra* note 12; *see also* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Conceptions*].

[114] Hohfeld's schema is useful in transforming the right to free speech. At the same time, his schema is deficient in not imposing any corresponding obligation or responsibility upon the right-holder.

Hohfeld's conception of basic legal relations is depicted as follows:[115]

Basic Legal Relation	Opposite/ Contradictory	Correlative
Right *A*'s claim against *B*	No-Right *A*'s lack of claim against *B*	Duty *B*'s duty to respect *A*'s claim
Privilege *A*'s freedom from *B*'s claim	Duty *A*'s duty to respect *B*'s claim	No-Right *B*'s lack of claim against *A*
Power *A*'s affirmative control over a legal relation	Disability *A*'s lack of affirmative control over a legal relation with respect to *B*	Liability *B*'s subjection to *A*'s control over a legal relation
Immunity *A*'s freedom from *B*'s power	Liability *A*'s subjection to *B*'s control over a legal relation	Disability *B*'s lack of control over a legal relation with respect to *A*

Hohfeld's idea is that the rights and privileges of each member of society are balanced against the rights and privileges of others.[116] *A* gets a right for *B*'s duty owed to *A*, and *A* gets a privilege for *B*'s lack of a claim.[117] Applied to free speech, *A* has a right to speak which *B* has the duty to respect, or *A* has a privilege in respect of which *B* lacks a claim against *A*. *A* has a corresponding duty to respect *B*'s rights, such as *B*'s rights to personal security. *A* also has no claim in respect of *B*'s privileges.

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[115] The schema has four basic legal relations: rights, privileges, powers, and immunities. These, and the other underlined terms within the table above, are Hohfeld's. *See* Hohfeld, *Rights*, *supra* note 12.

[116] *See* Hohfeld, *Conceptions*, *supra* note 113, at 745 ("[A] large number of fundamentally similar rights resid[e] in *one* person; and any one of such rights has as its correlative one . . . of a large number of . . . fundamentally similar duties residing respectively in *many* persons."); Hohfeld, *Rights*, *supra* note 12, at 317 ("[T]he deeper the analysis, the greater becomes one's perception of fundamental unity and harmony in the law.").

[117] *A* also has a power for *B*'s disability and an immunity on account of *B*'s lack of control over *A*.

Hohfeld's legal relations are appropriately framed in two situations.[118] In situation 1, the speaker has a right which the listener has a duty to respect and the state has the duty not to infringe. In situation 2, the speaker has a duty to respect the listener's right, while the state has a duty not to infringe that right. The relationship between speaker, listener and state is characterized diagrammatically as follows:[119]

	Speaker (*S*)	**Listener (*L*)**	**State (*P*)**
situation 1	*S* has a right against *L*	*L* has a duty to respect the right of *S*	*P* has a duty not to infringe right of *S*
situation 2	*S* has a duty to respect the right of *L*	*L* has a right against *S*	*P* has a duty not to infringe right of *L*

These situations are readily applied to free speech. In situation 1, the listener has a duty to respect the speaker's right. In situation 2, the speaker has a duty not to infringe the listener's right. The two situations are mutually interdependent. So long as the speaker does not violate the listener's right, the speaker's right remains intact and the listener has a duty to respect it. So long as the listener does not violate the speaker's right, the listener's right prevails and the speaker has a duty to respect it.

Hohfeld's schema of basic legal relations is dynamic in several respects. It extends basic legal relations beyond rights *stricto sensu*, to include powers, privileges, and immunities. It conceives of such relations in light of their correlatives and opposites; and it imposes a duty upon the state not to violate them. In this respect, Hohfeld's schema extends legal relations significantly beyond the negative relationship between the individual and the state.[120]

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[118] Hohfeld likely conceived of freedom of speech as a privilege, not a right. This is consistent with the dignitarian assumption that speech is a privilege that inheres in personhood itself. *See supra* note 115 and accompanying table. For convenience and in the interests of simplicity, freedom of expression will be treated as a right in the analysis below. This right is variable in nature; it is subject to community norms; and it varies in light of the particular relationship between the parties.

[119] This diagrammatic representation is a general extrapolation from Hohfeld's analysis. It does not attempt to exhaust the analytical possibilities that arise under his conception of legal relations. In addition, it treats free speech as a right, rather than as a privilege. *See supra* note 118.

[120] On this negative relationship, see TRAKMAN, *supra* note 56, ch. 2.

Despite its virtues, Hohfeld's structure of rights remains limited. First, it fails to evaluate the content of rights, privileges, and duties. If a speaker has a right or privilege to speak, the listener has a correlative duty or no-claim, regardless of the content of each relationship. Second, Hohfeld's schema does not take account of the social and cultural conditions that surround rights, privileges, and duties. To use Richard Delgado's phraseology in relation to racist speech, it does not pay regard to the social conditions under which "words wound" and racist speech impinges upon race relations.[121]

Third, Hohfeld's schema assumes that *A*'s rights are unlimited so long as they do not violate the rights of *B*, or others like *B*. This fails to recognize the interests of *B* and others like *B* that are not expounded as rights. For example, *A* has no duty to respect *B*'s interest in preserving a distinct cultural identity, so long as *B*'s interest is not protected by a right or privilege. Once it is found that *A* has an unqualified right to speak, *A* is free to use that right to humiliate *B*. The justification for passing over *B*'s interest falling short of a right is to assume that, once *A*'s right or privilege is found to exist, *B* automatically has a correlative duty or no-claim.[122] This ignores the social conditions under which *A* exercises his right or privilege, as when he uses speech to injure *B*. It also passes over the potential harm to the public that can arise from the use of such an unqualified right or privilege.[123]

Despite its pitfalls, Hohfeld's conception of legal relations can be rendered transformative by acknowledging that the nature and content of rights and privileges depends upon the social conditions under which they are exercised.[124] This can be accomplished by imposing an *internal* restriction upon Hohfeld's legal relations, especially but not exclusively upon rights. This

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[121] *See* Delgado, *supra* note 66.

[122] The fact that *B*'s competing interests are not protected in Hohfeld's schema is complicated by the further assumption that everyone has comparable rights. This assumption is doubtful in ignoring imbalances in the nature of correlatives and opposites.

[123] This limitation in Hohfeld's schema arises in the analytical requirement that *B* respect *A*'s right and that *A* respect *B*'s right, so that the right of each constitutes the necessary duty of the other.

[124] On the virtue of orienting rights around a social context that includes responsibilities, see TRAKMAN, *supra* note 56, ch. 2. In this Article, I argue that legal relations that are expressed solely through a conflict between particular parties, passing over the mediatory potential of a wider social context. The value of recasting rights in the context of expansive duties and responsibilities was recently asserted by the Honorable Mr. Justice Frank Iacobucci of the Supreme Court of Canada. *See* Frank Iacobucci, *The Evolution of Constitutional Rights and Corresponding Liberties: The Leon Ladner Lecture*, 26 U.B.C. L. REV. 1, 14–19 (1992). Arguably, his approach readily applies to the reconstitution of free speech.

internal restriction could be called a *responsibility*.[125] Rather than *A* having a right or privilege to freedom of expression that is unqualified within its own sphere, *A* could have a right only by accepting a responsibility towards those at whom that speech is directed, or who are proximately affected by it.[126] *A*'s right would then attract a responsibility to respect interests that are not protected by rights, such as the cultural interest of people like *B* not to be harmed by words of hate. The nature of *A*'s responsibility, in turn, would depend upon the nature of *A*'s rights and the effect of their exercise upon the interests of people like *B*.

The schema proposed below modifies Hohfeld's basic relations in four primary respects. First, in addition to the value that is accorded *A*'s responsibility to respect the rights of others like *B*, *A* also has a responsibility to respect interests that are not represented as rights. These interests include, among others, the interest in preserving one's ethnic distinctiveness. Second, *A*'s responsibility is a legal responsibility. It is owed not only to *B*, but also to others like *B*. For example, if *B* is an African American, *A* conceivably owes a responsibility to other African Americans whose interests are detrimentally affected by *A*'s speech. Third, the nature of *A*'s responsibilities vary in accordance with the manner in which *A* exercises his rights in relation to others, like *B*. For example, *A* ordinarily assumes a greater responsibility for persistently using racist epithets to degrade African Americans than when he does so unconsciously on a single occasion. Fourth, the rights and responsibilities of both *A* and *B* hinge upon the social context. Applied to racist speech, that context encompasses, *inter alia*, the history of racism, its manifestation in speech and its impact upon particular communities or individuals.[127]

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[125] The restriction is "internal" and "positive" in nature. It grants *A* the right to free speech so long as he assumes a responsibility to exercise that right in a manner that ensures continuing social dialogue. The purpose is to insure that each party, including speaker and listener, "gets" and "gives" something. An "external" and "negative" restriction, in contrast, gives *A* the right to speak unless his speech impairs the right of another or others.

[126] Similarly, *B* has a responsibility to respect *A*'s privilege to speak as an interpleader before a court of law. *B*, in turn, is disabled by the court's power to point to *A*'s guilt, unless *A* possesses some form of immunity.

[127] On this history of racism, see *supra* text accompanying notes 101–02.

This modified construction of legal relations is depicted graphically as follows:[128]

	Basic Legal Relation			
	Legal Advantage	**Responsibility**	**Opposite**	**Correlative**
Right	*A*'s claim against *B*	*A*'s responsibility to respect *B*'s (and others') interests in the exercise of *A*'s right	*A*'s lack of claim against *B*	*B*'s obligation to respect *A*'s claim
Privilege	*A*'s freedom from *B*'s claim	*A*'s responsibility to respect *B*'s (and others) interests in the exercise of *A*'s freedom	*A*'s obligation to respect *B*'s claim	*B*'s lack of claim against *A*

These modified legal relations are best explained in relation to racist speech. The first step is to identify the social context that surrounds the rights, responsibilities, or no-rights of the parties. For example, the context surrounding racist speech takes account of a particular history of organized racism, its embodiment in religious, social, and cultural institutions, and its incorporation into private and public law. That context also encompasses the social, cultural, and religious interests of the parties. For example, the speech rights of KKK members reflects their racist culture, including its subordinating effect on the cultures of others, such as that of African Americans living in the rural South. Finally, an examination of the social context helps to determine the nature of responsibilities owed by the parties. For instance, the extent to which KKK members are responsible for racist speech depends upon their position of wealth, power, and influence *vis-à-vis* the target of their speech.[129]

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[128] Responsibilities would attach to powers and immunities as well. However, the goal here is not to identify the full spectrum of legal relations, but to decide how rights like freedom of speech ought to be construed. On powers and immunities within Hohfeld's schema, see *supra* note 115 and accompanying table.

[129] On the relationship between the KKK and racism, see *supra* note 68.

This transformative conception of legal relations has the advantage of taking account of the specific relationship between the parties. For example, the character of *A*'s responsibility for racist speech depends upon the nature of his intent, as well as his reasonable foresight of the effect of his speech upon the intended audience.[130] The underlying assumption is that his responsibility hinges upon the extent to which he intends the exercise of his right to have a destructive effect upon others, or he acts in reckless disregard of that effect, and the degree to which he reasonably foresaw the ensuing harm.[131] It follows that, the more deliberately or recklessly *A* uses racist speech to degrade African Americans and the more readily he foresees ensuing harm, the greater will his responsibility likely be for that speech.[132]

This is not to claim that, once *A* has violated a responsibility towards others like *B*, *A*'s speech is *per se* unconstitutional. The constitutionality of *A*'s conduct depends upon the determination that *A* has violated his responsibilities in such a manner, or to such an extent, that his speech ought to be treated as unconstitutional. Such a determination is made, for example, when the state treats speech as "fighting words" and denies those words constitutional protection.[133] In contrast, speech might be constitutionally protected, but still restricted. For example, *A*'s speech might be permitted, but subject to restrictions because it threatens to disturb the peace. In such circumstances, *A*'s

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[130] As a working definition, racial communities consist of racial or ethnic groups that are united constitutively, through historical affiliation, and instrumentally, through their decision to associate. Constitutive affiliations stem, *inter alia*, from ancestral association, family, and kinship. Instrumental affiliations develop through choice. Racial minorities affiliate constitutively, in their historical, sociological, and familial roots. They also associate, instrumentally, through the choice of their members to identify with, preserve, and develop those roots beyond their constitutive origins. On the distinction between constitutive and instrumental affiliations among communities, see MICHEAL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 147–50 (1982). *See generally* BELLAH ET AL., *supra* note 93.

[131] Courts would be unlikely to have difficulty applying this approach to speech rights as the analysis is quite consistent with common law reasoning.

[132] It is noteworthy that Canada has incorporated a hate speech provision in its criminal code that imposes responsibility upon those who express hatred towards others. *See* Criminal Code, R.S.C., ch. C-46, § 319 (1985) (Can.). "Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable [racial, religious, or ethnic] group . . ." shall be guilty of a criminal offense. *Id.* For an interpretation of this provision before the Supreme Court of Canada, see Regina v. Zundel, [1992] 2 S.C.R. 731; Regina v. Keegstra, [1990] 3 S.C.R. 697; Canadian Human Rights Comm'n v. Taylor, [1990] 3 S.C.R. 892; Regina v. Andrews, [1990] 3 S.C.R. 870. *See generally* TRAKMAN, *supra* note 56, ch. 2.

[133] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also supra* note 75.

words are not *per se* unconstitutional, but he is still accountable for using them contrary to law. Of course, *A* might also be held accountable directly to *B* in private law, as when *A* employs speech to slander *B*.[134]

The state also assumes responsibilities for speech in fulfilling its mandate to maintain the well-being of civil society.[135] This includes a responsibility to redress the social ills of racism, sexism, and other forms of bigotry, including bigoted speech. Whether this responsibility arises under the rubric of public policy, social morality, or good government, the state is obliged to redress conduct that interferes with the public order. Arguably, its mandate also encompasses regulating racist speech that disrupts communal life.[136]

This transformative approach expands upon the context surrounding legal relations which is dynamic in nature. For example, it ensures that the rights and responsibilities of *A* and *B* depend upon their discrete relationship, viewed in the context of their social, cultural, and political environment. It maintains, further, that this context encompasses legal relations between community and community and between community and individual, not just between individual and state. This expansive social context has the advantage of allowing rights and responsibilities to be conceived in light of personal and interdependent relations, as distinct from *a priori* ones. Applied to racist speech, the transformative goal is to evaluate racist speech in light of the personal identity, integrity, and self-esteem of speaker and target, envisaged in light of the cultural background of both.

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[134] On the relationship between free speech and community harm in private law, notably in group libel suits, see Jeffrey S. Bromme, Note, *Group Defamation: Five Guiding Factors*, 64 TEX. L. REV. 591 (1985); Note, *A Communitarian Defense of Group Libel Laws*, *supra* note 50.

[135] The state might assume a direct responsibility on grounds of public order and social morality, or a vicarious responsibility in order to protect the interests of the listener. For example, it might assume a direct responsibility to redress racist speech that threatens to produce violence against the public interest. It might assume vicarious responsibility in trying to protect a particular listener from becoming the target of a vicious verbal attack that is likely to stifle any reasonable response.

[136] On the regulation of racist speech, see *supra* notes 70–85 and accompanying text.

This transformative construction of legal relations, involving speaker, listener, and state, is depicted graphically as follows:

	Speaker (*S*)	Listener (*L*)	State (*P*)
situation 1	*S* has a right against *L* *S* also has a responsibility to respect the interests of *L* in the exercise of *L*'s right	*L* has a duty to respect the right of *S*	*P* has a duty not to infringe the right of *S* *P* also has a responsibility to promote *S*'s responsibility to *L*
situation 2	*S* has a duty to respect the right of *L*	*L* has a right to be protected from the exercise of *S*'s right *L* also has a responsibility to respect the interest of S in the exercise of *S*'s right	*P* has a duty not to infringe the right of *L* *P* also has a responsibility to ensure *L*'s right is not oppressive to *S*

In the first situation, the speaker exercises a right to speak, which the listener has the duty to respect. However, the speaker also has a responsibility to respect the listener's interest in the exercise of the listener's rights. For example, the speaker is obliged to respect that racist speech can subvert the dignity and self-esteem of the listener. The state has both the duty not to infringe the rights of the speaker *and* the responsibility to promote the speaker's responsibility towards the listener.

In the second situation, the listener has an interest in being protected from speech that degrades him. He is also responsible to respect the speaker's right to speak. This infers that, while the listener has an interest in not enduring the indignity of racist speech, he is also responsible not to have a chilling effect upon speech simply because it addresses racial issues. The state, in turn, is responsible to mediate between the target's right not to be degraded by speech,

and the target's responsibility not to try to repress speech simply because the target dislikes it.[137]

This mediation between rights and responsibilities might well lead to the dilution of "all-or-nothing" rights claims in favor of modified alternatives. For example, social and political consensus might evolve around the virtue of treating freedom of speech as a fundamental attribute of a free society. However, further consensus might require that such freedom be exercised responsibly in the context of distinct legal relations. This might induce both dignitarians and instrumentalists to acknowledge that free speech is essential in a democratic state, but that unrestrained speech can give rise to huge social costs in provoking, say, racial conflict.[138] It might also lead to remedies that affirm the right to speak precisely because it is the subject of responsibilities. For example, the speaker might be entitled to employ racist speech, but only if he assumes a particular responsibility on account of that speech.[139]

Rendering rights contingent upon responsibilities can also mediate between traditional and non-traditional paradigms governing free speech. For example, dignitarians well might accept that the targets of hate speech have a distinctly moral interest in not being subject to unmitigated degradation. Critics of this dignitarian paradigm might concede that the diligent protection of free speech has communal value. Both might take cognizance of the fact that freedom of expression is best protected in light of the identity, integrity, and self-esteem of speaker *and* listener, not one at the expense of the other.

This transformation of the rights discourse also might lead to innovative *and* equitable results. For example, in the famous *Skokie* case,[140] the court upheld the rights claim of neo-Nazis to march through a predominantly Jewish

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[137] It should be noted that the listener has other means by which to redress racist speech, varying from civil suit to adverse speech. For example, the target's resort could range from response in the proverbial market-place-in-ideas, to defamation or group libel suit. These other means might apply in place of, or in addition to, constitutional litigation. *See also supra* note 106.

[138] For a telling account of the pain that racism, including racist speech, has caused and continues to cause ethnic minorities, see Lawrence, *supra* note 66; Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991); Toni M. Massaro, *Legal Storytelling: Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2100 (1989); Matsuda, *supra* note 66.

[139] On such constraints in the famous *Skokie* case, see *infra* notes 140–42 and accompanying text.

[140] Village of Skokie v. National Socialist Party of America, 366 N.E.2d 347 (Ill. 1977), *aff'd in part and rev'd in part*, 373 N.E.2d 21 (Ill. 1978). The Village of Skokie's ordinance was challenged seperately in federal court. Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

neighborhood.[141] Under a reconstituted rights discourse, the court still could preserve their rights as the embodiment of their freedom of expression. However, given their plan to march through a predominantly Jewish neighborhood and the likelihood of conflict arising there between KKK and militant Jewish groups, the court could subject the exercise of their rights to appropriate responsibilities. For example, it could stipulate that demonstrators, supporting or opposed to the KKK, comply with regulations governing orderly conduct. Or the court could order that the march take place in another neighborhood where conflict is less likely to arise.[142] Important in this scenario is that the right to march, viewed in light of responsibilities for its exercise, remains a right. Responsibilities are owed both by those who wish to march and those who oppose it; and the state is responsible to mediate among opposing rights claims in the interests of a free and democratic society.

This reformulation of legal relations gives rise to a modified conception of rights that includes socially relevant remedies. It displaces ideological extremes in which speech is sanctified or nullified dogmatically. It denies that speech *invariably* promotes the democratic *good*; and it insists that speech is best protected when it is evaluated in light of the communal conditions under which it is exercised.

VI. AN ILLUSTRATION

Under a reconstituted schema of rights and responsibilities, public institutions, like universities, also assume responsibilities for speech.[143] For example, universities are responsible to foster a constructive and humane dialogue among diverse peoples on the basis, *inter alia*, of free speech.[144]

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[141] On the *Skokie* case, see also Brandenburg v. Ohio, 395 U.S. 444 (1969).

[142] On the activities of neo-Nazis in the United States, see DONALD A. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY AND THE FIRST AMENDMENT (1985); DAVID HAMLIN, THE NAZI SKOKIE CONFLICT (1980); Donald A. Downs, Skokie *Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985); GERALD GUNTHER, *The* Skokie *Controversy: First Amendment Problems in Efforts to Restrain Nazi Demonstrations*, *in* INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 903 (4th ed. 1986).

[143] In some respects, the responsibility of the university to regulate abuse of speech parallels the responsibility of the state. Just as the state "may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace," the university is similarly responsible to maintain the "public peace" on campus. Brown v. Hartlage, 456 U.S. 45, 51 (1982) (quoting 16A AM. JUR. 2D *Constitutional Law* §§ 405, 507 (1979)). *But see* Yates v. United States, 354 U.S. 298 (1957).

[144] The argument, here, is that publicly funded universities are an integral part of any democratic environment. They are institutions in which the free exchange of ideas is

Proactive in nature, *that* responsibility includes preserving the freedom *to* speak. It also encompasses the freedom *from* speech and the freedom *to* reply.[145] Whether a university education is a right or a privilege, it gives rise to collective responsibilities. Most important among these is the shared responsibility of teachers, students, and administrators to respect the rights and privileges of those who interact within it. This shared responsibility is implicit in the expectation that teaching and learning take place within an atmosphere of understanding and tolerance; and that behavior which threatens that atmosphere disrupts the mission of the university itself.[146]

Speech responsibilities are implicit in the mission statement of universities that ground their programs in social and human development.[147] For example,

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expected to occur. They are also endowed with a public trust to encourage open dialogue among their membership. They fulfill that trust when they accept their responsibility to monitor speech that crosses the threshold between a protected and a hateful act. They derogate from that trust when they dispense with the public welfare in the image of a false academic freedom.

[145] For an ambitious hate speech code that encompasses, among other action, the reprimand of students, see Huff, *supra* note 48, at 192. Arguably, combining gentle and harsh remedies for hate speech allows for a graduated treatment of the problem on campuses.

[146] I make three assumptions here. First, the university has a historical obligation to mitigate disruptions in the educational process. *See infra* text accompanying note 147. Second, the regulation of racist hate speech promotes, rather than undermines, free speech. *See supra* note 144. Third, the regulation of racist speech, properly administered, is constitutional.

[147] On an "educative" value of responsibilities for hate speech set out in hate speech codes, see text accompanying note 48; Huff, *supra* note 48, at 192. Huff suggests that university regulations on hate speech should include three elements:

> [F]irst, the restricted epithets must be directed at individuals in traditionally subordinated groups . . . second, the restricted hate messages must come in the form of a hate epithet which intentionally demeans or threatens a target individual's membership in the traditionally subordinated group . . . third, the epithet must occur in the classroom . . . or . . . must occur in either a dorm or at a university sponsored activity where the target individual is vulnerable.

Id. at 192–93. Huff adds

> [t]hree other features of a university hate epithet regulation . . . . First, a preface should be included which states the harm of hate messages and expresses the purposes of the regulation in terms of the university's mission . . . . Second . . . a first hate epithet violation should place the perpetrator on probation . . . . Finally, the university should

Harvard College, a private institution, maintains that students need some guidance in achieving this goal—learning through education—and that the faculty has an obligation to direct them toward the knowledge, intellectual skills, and habits of thought of educated men and women.[148]

Similarly, the prospectus for Yale University provides: "Although educated men and women may never agree about everything that a liberal education should include, nearly all do agree [that] the propositions below . . . are intended to serve students as guides in their choice of studies."[149]

In fulfilling their educative mission, universities also enact hate speech codes that seek to preserve speech rights and speech responsibilities.[150] They strive to promote tolerance through education, notably by sensitizing the university community to ethnic, religious, and cultural diversity.[151] They also try to redress the pain and misery that hatefulness, including hate speech,

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> make clear that it is establishing . . . substantial new courses and public programs addressing the nature and injuries of these pernicious practices."

Id. at 193–94.

[148] HARVARD COLLEGE, *Information*, *in* 1993–94 CATALOG at 1 (1993). Interestingly, Harvard Law School's catalog of Rights and Responsibilities, explains:

> By accepting membership in the University, an individual joins a community ideally characterized by free expression, free inquiry, intellectual honesty, respect for the dignity of others, and openness to constructive change . . . . [I]t is the responsibility of all members of the academic community to maintain an atmosphere in which violations of rights are unlikely to occur and to develop processes by which these rights are fully assured.

HARVARD LAW SCHOOL, *Rights and Responsibilities*, *in* 1992–93 CATALOG at 182 (1992).

[149] YALE UNIVERSITY, *supra* note 1, at 15.

[150] Universities fulfill these responsibilities by disciplining students and faculty who distort, disrupt, or otherwise interfere with the educative mission of the institution. For example, Emory University stipulates that it is "not acceptable" to use "coercion, threats, demands, obscenity, vulgarity, obstructionism, and violence." EMORY UNIVERSITY SCHOOL OF LAW, *University Student Relationships*, *in* 1988–89 CATALOG at 85 (1988). The University of Richmond provides: "In a community of learning, individual or group conduct that is unlawful, that disrupts or interferes with the educational process, that causes destruction of property or otherwise infringes upon the rights of other members of the University community or of the University itself, cannot be tolerated." UNIVERSITY OF RICHMOND LAW SCHOOL, *Standards of Conduct*, *in* CATALOG at 30–31 (1986).

[151] As the Yale College Programs of Study stresses: "Educated men and women need a historical perspective on their own times, and that can come only from studying other civilizations and cultures, either those from which their own culture has developed, or those different from their own." YALE UNIVERSITY, *supra* note 1, at 16.

causes.[152] They are motivated by four considerations: education is a function of learning; learning is acquired dialectically through the exchange of ideas and opinions; regulating conduct is necessary so as not to undermine the process of learning; and regulation is essential to preserve the well-being of the university as a community.[153]

A transformative rights discourse could assist universities to develop a vital distinction between speech and *responsible* speech. For example, universities could insist that the responsibility of the racist speaker varies according to the extent to which the words used are intended to cause, or have the effect of

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[152] On the multitude of hate speech codes that arose on university campuses across the continent in the late 1980s, see BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, *University of Wisconsin Hate Speech Policy*, *in* PROPOSED ORDER OF THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM ADOPTING, AMENDING AND RENUMBERING RULES at 12 (June 14, 1989); STANFORD UNIVERSITY STUDENT CONDUCT LEGISLATIVE COUNCIL, FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT (Apr. 19, 1989), *reprinted in* Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Harassment*, 63 J. HIGHER EDUC. 485 app. at 515–16 (1992); UNIVERSITY OF MICHIGAN, DISCRIMINATION AND DISCRIMINATORY HARASSMENT BY STUDENTS IN THE UNIVERSITY ENVIRONMENT (Apr. 14, 1988). For more on the Stanford hate speech code, see Grey, *supra*. On the judicial treatment of such policies, see UWM Post v. Board of Regents of the Univ. of Wis. System, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). *See generally* Katharine T. Bartlett & Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech Debate"*, 1990 DUKE L.J. 574; Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991); 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 (1991); Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295 (1990); Jens B. Koepke, Note, *The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb*, 12 HASTINGS COMM. & INT. L.J. 599 (1990); Evan G.S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351 (1990).

[153] These four assertions are appropriately captured in "Proposed Policy on Discriminatory Harassment," developed at Dalhousie University, Canada:

> Freedom of inquiry and of expression are essential freedoms in a university, and conflicting ideas are a vital feature of university life. These freedoms must not, however, be exercised in ways which simultaneously deny similar freedom to others or make their exercise more difficult by creating a hostile environment for work, study or participation in campus life.

COMMITTEE TO DEVELOP A POLICY ON RACISM AND SEXISM, PROPOSED POLICY ON DISCRIMINATORY HARASSMENT, *reprinted in* DALHOUSIE NEWS, Jan. 5, 1994, at 5.

causing, indignity.[154] This could also induce universities to devise graduated degrees of responsibility for hate speech. For example, universities could require the racist speaker to submit to counseling, to take a course in multiculturalism, to perform community service, or to resort to some combination of the above.[155] Only in the case of persistent, unremitting, and unapologetic speech, might they insist that the racist speaker quit the university.[156] In this way, debate could shift from whether or not the student or

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[154] This variable relationship between hate speech and social harm is implicit in the common law. For example, words of assault "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Roth v. United States, 354 U.S. 476, 484–85 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)). It is noteworthy that Canada employs a strict liability standard in its criminal code to regulate hate propaganda. *See* Criminal Code, R.S.C., ch. C-46, § 319 (1985) (Can.). Similarly, the American Law Institute used a similar strict liability standard in the Model Penal Code section on harassment. *See* MODEL PENAL CODE § 250.4 (1975).

[155] These proposals in favor of multicultural education are premised upon the assumption that we live in a culturally, ethnically, and racially diverse society; that diversity improves the quality of public life; while education about tolerance and mutual respect are worthy attributes of that life. As one commentator poignantly suggested, multicultural programs are part of

> [t]he conscious effort to be sensitive, both in teacher preparation and in curriculum construction, to the cultural, religious, linguistic, ethnic, and racial variety in our national life, in order to (1) produce an educational environment responsive to the needs of students from different backgrounds, and (2) instill in students mutual understanding and respect.

Robert K. Fullinwider, *Multicultural Education*, 1991 U. CHI. LEGAL F. 75, 77. *See generally* RICHARD E. DAWSON ET AL., POLITICAL SOCIALIZATION: AN ANALYTIC STUDY 141–45 (2d ed. 1977); Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties After* R.A.V. v. City of St. Paul*: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, 1992 UTAH L. REV. 1205, 1221–31.

[156] The purpose is to demonstrate the virtue of educating about racism in the first instance; and to invoke disciplinary measures only in the last resort. The rationale is that hate speech crosses the threshold between speech that is protected regardless of its content and speech that is not protected because it is offensive and becomes harmful. Mary Rouse, Dean of Students at the University of Wisconsin, refers to education about racism as the "two percent solution." She allocates the following percentages to efforts toward changing the educational climate on a campus: setting community standards, 30%; education about diversity, 68%; and discipline, 2%. Mary K. Rouse, *The Two Percent Solution*, THE WOMEN'S REVIEW OF BOOKS, Feb. 1992, at 17.

faculty member had a right to utter racist words, to a debate over the degree of responsibility that should accompany that right including the responsibility not to exercise the right in the *manner* chosen by the speaker.

This approach towards free speech is likely both to clarify and develop the equitable nature of rights. First, the university could insist that, the more basic the right of speech is agreed to be, the less ought to be the responsibility that arises from it. For example, it might maintain that a student who critiques patronage appointments to government constitutes free speech *par excellence*, unless that speech constitutes treason. In contrast, it could insist that a student who uses speech to degrade African or Native Americans in general ought to be subject to a standard of responsibility that is commensurate with the racist intent and effect of the speech used.

Second, the university could evaluate the nature of the speaker's responsibility in light of his particular intent, including the extent to which he intended to cause a harmful consequence. For example, it might hold that unintended racism, loosely referred to as "unconscious" racism, leading to only minor harm should give rise to only minor responsibility.[157] It might impose heavy penalties when speech is used intentionally or recklessly to malign and incite violence.[158]

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[157] The intention behind, and effect of racist speech is most relevant in relation to the unconscious use of such speech. First, unconscious expressions of hate, however lacking in deliberateness, can have devastating effects. Second, those effects can have negative social consequences, namely, they can lead to communal hurt. *See* Lawrence, *supra* note 66. Arguably, most forms of racist speech fall into the category of reckless speech, as distinct from intentionally harmful speech. *See* Tanya K. Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845, 846 (1990); *see also* Joseph M. Fernandez, *Bringing Hate Crime into Focus—The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261 (1991). On different manifestations of racism, see Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1985); David O. Sears, *Symbolic Racism, in* ELIMINATING RACISM 53–84 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1988).

[158] While it is difficult to identify the precise nature of harm arising from racist speech, it is clear that racist speech often is accompanied by racial violence. Interestingly, the Anti-Defamation League of the B'nai B'rith reported 1,685 anti-Semitic incidents, including speech related conduct, for forty states and the District of Columbia in 1990. This is the largest number reported over a twelve year audit period. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, 1990 AUDIT OF ANTI-SEMITIC INCIDENTS 1 (1990). The federal government, concerned about spiralling racist incidents, has enacted legislation directed at gathering statistics on such hate crimes. *See* Hate Crime Statistics Act, Pub. L. No. 101–275, 1990 U.S.C.C.A.N. (104 Stat.) 140; *see also* Massaro, *supra* note 138. Nor has hate speech led to violence *only* against racial and ethnic minorities. For example, the National Gay and Lesbian Task Force (NGLTF) reported alarming statistics of bias-related violence

Third, the university could count an abdication of responsibility by a right-holder against him in accordance with the degree of that abdication. For example, it could insist that a student who persistently uses speech to degrade racial minorities renounces the benefit of the classroom in which to exchange ideas. A student who utters a racist comment unconsciously might justifiably be counseled by a dean of students, without being penalized further.[159]

VII. CONCLUSION

Speech is an instrument of social solidarity. In its most perfect form, it promotes the free and untrammeled exchange in ideas. In its least perfect form, it suppresses ideas; it stifles social discourse; it provokes violence.

This Article has sought to establish that, to protect speech is to acknowledge the interdependence that exists between the right to speak and the responsibility for it. This responsibility is implicit in natural law. It is necessary to preserve the dignity of the target of speech. It is a central means towards communal discourse within a democracy. In ignoring this relationship between the right to speak and the responsibility for it, the traditional doctrine applied to free speech denies its own roots. In insisting that speech preserves the dignity of the speaker, it ignores the indignity that racist speech inflicts upon its victims. In subscribing to a marketplace in hate, it threatens to undermine the *free* marketplace in ideas.

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against gay and lesbians often commencing with violent language. The Task Force reported 7,031 incidents of anti-gay violence in 1989. *See* NATIONAL GAY AND LESBIAN TASK FORCE ANTI-VIOLENCE PROJECT, *Anti-Gay Violence, Victimization and Defamation in 1989, in* ANTI-VIOLENCE PROJECT (1990); *see also* Note, *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1541 (1989). Courts have expressed alarm at racist outbursts, including violent ones, on university campuses. *See* UWM Post v. Board of Regents of the Univ. of Wis. System, 774 F. Supp. 1163, 1167–68 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). Academics have highlighted the correlation between racism and violence on university campuses across the continent. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 369–71 (1991); *see also supra* note 152.

[159] Interestingly, in developing this Article, the author spoke to a number of Assistant or Associate Deans for Student Affairs at universities in the United States and Canada. While a number were opposed to hate speech codes, not one found any problems with requesting a student accused of racist speech to come to his or her office for a "discussion." The argument, here, is that such a "request" most certainly *is* regulatory. Whether couched as a request or not, the effect is an assertion of hierarchy. The inference is that the conduct might be the subject of official disapproval. This regulation revolves around the relationship of authority that exists between the student and Dean. The fact that the Dean might be disempowered to impose formal penalties does not deny that regulatory status.

A transformative conception of free speech evaluates the liberty *to* speak in light of the liberty *from* speech. It appreciates that both conceptions of liberty are necessary to the development of a democratic society.[160] It knows that, absent either, society is not likely to be free.

[160] This communal nature of liberty as it applies to free speech, also helps to break down the private/public divide. Just as individuals are responsible *privately* for using words of hate that slander, libel, and defame others, they are also responsible *publicly* for the *communal* impact of their words. *See supra* text accompanying notes 128–30.