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# ESSAY

## The Neoconservative Case Against Hate-Speech Regulation—Lively, D’Souza, Gates, Carter, and the Toughlove Crowd

*Richard Delgado\**  
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I. INTRODUCTION: CONSERVATIVES AND HATE SPEECH—THE RHETORIC OF RACE AND RIGHTS .....	1808
II. BRIEF HISTORY OF THE HATE SPEECH CONTROVERSY.....	1810
III. THE TOUGHLOVE POSITION ON HATE SPEECH: SIX NEOCONSERVATIVE ARGUMENTS AGAINST REGULATION...	1812
A. <i>The Deflection (or Waste-of-Time) Argument</i> .....	1812
B. <i>The Quixotic Argument</i> .....	1815
C. <i>The Bellwether Argument</i> .....	1816
D. <i>The Victimization Argument: Do Hate Speech         Rules Encourage Passive, Dependent Behavior?...</i>	1818
E. <i>The “Classist” Argument</i> .....	1819
F. <i>The “Two Wrongs” Argument</i> .....	1821
IV. WHAT UNDERLIES THE NEOCONSERVATIVE POSITION ON HATE SPEECH: ANATHEMA, OR, THE FEAR THAT THE FIRST AMENDMENT PLAYING FIELD WILL TURN OUT NOT TO BE LEVEL .....	1822
V. CONCLUSION .....	1824

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I. INTRODUCTION: CONSERVATIVES AND HATE SPEECH—  
THE RHETORIC OF RACE AND RIGHTS

In *Babette's Feast*,<sup>1</sup> the French housekeeper for two dour Protestant sisters living in a remote Danish village where life is hard decides to mark her fourteenth year of working in this repressed environment by preparing a huge feast. Using money she has just won from the French lottery, she imports turtles, quail, and the finest wines, and serves them at a long table to the sisters and their congregation. But she has not counted on the experience's novelty: Until now, the God-fearing folks gathered at her table have not touched a drop of liquor or eaten anything other than dried fish and other plain foods in their entire lives. During the dinner, they refuse to acknowledge the delectable dishes they are eating, talking exclusively about the weather, the crops, and God's will.

The response of some neoconservatives<sup>2</sup> to the campus hate-speech controversy reminds us in some ways of Babette's feast. Lacking a ready category for what is taking place under their noses, neoconservatives fail to notice what everyone else sees, or maintain that it is really something else. As with the villagers, ideology plays its part, as well. When something happens that conservative thought does not predict, it is forthrightly denied, leading to some strange alliances, as when Babette ends up playing to the returned General, the one diner who allowed himself to appreciate and enjoy the meal.<sup>3</sup>

This Essay is about neoconservatives, the hate-speech controversy, and the politics of denial. It is about mindset and the rhetorical structures and strategies we choose, often unconsciously, to deal with an uncomfortable reality and a changing legal environment. As many, including the two of us, have written, the rhetorical and logical structure of the hate-speech debate has been undergoing a slow but

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1. Isak Dinesen, *Babette's Feast* (Vintage Books, 1988).

2. By the term, we mean those of centrist or inoderately right-leaning persuasion who disavow liberalism or radical politics in search of change. See generally Gary Dorrien, *The Neoconservative Mind: Politics, Culture and the War of Ideology* (Temple U., 1993) (discussing the rise of the new conservatives). In this Essay, we focus on four authors—Donald Lively, Henry Louis Gates, Stephen Carter, and Dinesh D'Souza—who have written extensively about the hate-speech controversy. Although we take issue with the general positions these authors take, we intend the term "neoconservative" in no disrespectful sense. Moreover, we write fully aware that social and political positions are not fixed or unitary, and that a person who is conservative or neoconservative on one issue may be progressive on another. See Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 Georgetown L. J. 1929, 1931-45 (1990) (urging coalition with conservatives).

3. See Delgado, 78 Georgetown L. J. at 1932, 1940-45, 1947-48 (noting the incipient alliance between civil rights activists and progressive Republicans).

inexorable shift.<sup>4</sup> As First Amendment formalism, with its various mechanistic doctrines, models, and "tests," has begun giving way to First Amendment legal realism, both the moderate left and the moderate right, who much preferred things the old way, have changed their ground slightly. Realizing, perhaps, that mechanical jurisprudence and case law laid down in an earlier era will not hold the line much longer, they have been urging that even if First Amendment doctrine permits regulating hate speech, wisdom and good policy counsel against it.<sup>5</sup>

In a recent article, we showed that the moderate left's response (typified by that of the national ACLU) has taken the form of arguing that hate-speech rules would injure the cause of their intended beneficiaries, minorities. We critiqued four such paternalistic arguments, which we termed the "pressure valve," "best friend," "reverse enforcement," and "talk back" arguments.<sup>6</sup>

In this Essay, we examine a group of arguments associated with what we call the "toughlove" or neoconservative position:<sup>7</sup> (1) that pressing for hate-speech regulation is a waste of time and resources;<sup>8</sup> (2) that white society will never tolerate speech codes, so that the effort to have them enacted is quixotic, symbolic, or disingenuous;<sup>9</sup> (3) that racist expression is a useful bellwether that should not be driven underground;<sup>10</sup> (4) that encouraging minorities to focus on slights and insults is harmful because it causes them to see themselves as victims;<sup>11</sup> (5) that the campaign is classist, since it singles out the transgressions of the blue-collar racist while leaving the more genteel versions of the upper classes untouched;<sup>12</sup> and (6) that the cure is worse than the disease, because it institutionalizes censorship, and "two wrongs don't make a right."<sup>13</sup> What unites these argu-

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4. See generally Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 Harv. C.R.-C.L. L. Rev. 169 (1994); Mari Matsuda, et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview, 1993); Richard Delgado and David Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation*, 82 Cal. L. Rev. \_\_\_\_ (forthcoming 1994).

5. For the moderate left's response, see Delgado, 29 Harv. C.R.-C.L. L. Rev. at 169-70.

6. See generally Delgado and Yun, 82 Cal. L. Rev. (cited in note 4).

7. "Toughlove" is the title of a parents' group that sought to solve teenage problems with unyielding rules and discipline. Ron Roberts applies the term to neoconservatives in an upcoming book, *Clarence Thomas and the Tough Love Crowd: Counterfeit Heroes & Unhappy Truths* (forthcoming N.Y.U., 1994).

8. See notes 29-42 and accompanying text.

9. See notes 43-55 and accompanying text.

10. See notes 56-63 and accompanying text.

11. See notes 64-68 and accompanying text.

12. See notes 69-74 and accompanying text.

13. See notes 75-83 and accompanying text.

ments—which we call the “deflection,” “quixotic,” “bellwether,” “victimization,” “classist,” and “two wrongs” arguments, respectively—are two themes. The first is that struggling against hate speech is a digression (“the real problem is . . .”), and the second is that the effort reinforces the idea of oneself as a victim, rather than an active agent in charge of one’s destiny.

Part II of this Essay reviews the history of the campus hate-speech controversy. Part III sets out and evaluates the six neoconservative arguments against regulation. Part IV offers an explanation for why neoconservatives take the positions they do on the hate-speech controversy. We believe that the toughlove crowd opposes hate-speech regulations because vituperative speech aimed at minorities forces them to confront the intuition that slurs directed against people of color are simply more serious than ones directed against whites. This intuition, in turn, threatens a prime conservative tenet, the level playing field. We explain why the First Amendment version of that field—namely, the marketplace of ideas—is not level but slanted against people of color, and why talking back to the aggressor is rarely a satisfactory option for the victim of hate speech.

## II. BRIEF HISTORY OF THE HATE SPEECH CONTROVERSY

Beginning a few years ago, many colleges and universities began noticing an upsurge of racist incidents taking place on their campuses.<sup>14</sup> Some took verbal forms, such as graffiti, anonymous leaflets, defacement of posters, and insults hurled late at night at black undergraduates walking home from the library.<sup>15</sup> Others assumed more serious guises, such as physical attacks or arson.<sup>16</sup> At some campuses, the number of African American and other minority students began to drop as parents opted to send their sons and daughters elsewhere.<sup>17</sup>

Many campuses responded by adopting student conduct rules that penalized racist threats or insults. Some were patterned after tort doctrines such as intentional infliction of emotional distress,

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14. For a brief history of some of these incidents, see Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. Rev. 343, 349-53 (1991).

15. *Id.* at 349-50, 352-53, 357.

16. *Id.* at 349, 351, 353, 357.

17. Isabel Wilkerson, *Racial Harassment Altering Blacks' Choices on Colleges*, N.Y. Times A1 (May 9, 1990); Nancy Gibbs, *Bigots in the Ivory Tower*, Time 104 (May 7, 1990).

others upon First Amendment exceptions such as group libel or fighting words.<sup>18</sup> The codes quickly came under attack by both the left and the right. Conservatives found speech codes outrageous, deeming them violations of the right of free speech and further evidence that campuses were falling under the spell of radical multiculturalists and politically correct thought police.<sup>19</sup> The moderate left responded almost equally strongly, but in slightly different terms. The national ACLU declared its intention to challenge every such code, while at the same time maintaining its commitment to racial justice.<sup>20</sup> Two federal court decisions striking down hate-speech codes at the Universities of Michigan and Wisconsin for overbreadth<sup>21</sup> as well as the "cross burning" case, *R.A.V. v. City of St. Paul*,<sup>22</sup> slowed the movement somewhat. But a more recent decision affirming sentencing enhancement for racially motivated crimes,<sup>23</sup> coming on the heels of two Canadian Supreme Court decisions upholding national antipornography<sup>24</sup> and hate-speech legislation,<sup>25</sup> have spurred a new round of activity. As we write, there is no sign that the wave of campus racism is abating;<sup>26</sup> campuses are taking advantage of the changing judicial and scholarly climate to resume exploring ways to confine and punish campus racism;<sup>27</sup> and the forces, both on the left and the right, who oppose hate-speech regulation are beginning to hedge their bets. While they earlier argued that hate-speech rules were flatly unconstitutional, now they are beginning to argue in the alternative: Even if the rules are constitutional, they are a bad idea,

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18. See Delgado and Yun, 82 Cal. L. Rev. (cited in note 4) (categorizing the types of rules on college campuses).

19. See, for example, Chester E. Finn, Jr., *The Campus: An Island of Repression in a Sea of Freedom*, Commentary 17 (Sept. 1989); Alan Charles Kors, *It's Speech, Not Sex, the Dean Bans Now*, Wall St. J. A16 (Oct. 12, 1989); Thomas Sowell, *Campuses Attempting to Mask Truth by Closing Mouths*, Rocky Mt. News B22 (April 16, 1990).

20. ACLU Policy Statement: Free Speech and Bias on College Campuses (Oct. 13, 1990), reprinted in Nadine Strossen, *Regulating Free Speech on Campus: A Modest Proposal?*, 1990 Duke L. J. 484, 571.

21. See generally *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); *U.W.M. Post, Inc. v. Board of Regents of Univ. of Wisconsin*, 774 F. Supp. 1163 (E.D. Wis. 1991).

22. 112 S. Ct. 2538 (1992).

23. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993).

24. *R. v. Butler*, 89 D.L.R.4th (Can.) 449 (1992).

25. *R. v. Keegstra*, 3 S.C.R. (Can.) 697 (1990).

26. See Howard Ehrlich, et al., *The Traumatic Impact of Ethnviolence*, in Laura Lederer and Richard Delgado, eds., *The Price We Pay: The Case Against Hate Speech and Pornography* (forthcoming Farrar, Straus & Giroux, 1994).

27. For a discussion of this shift, see generally Delgado and Yun, 82 Cal. L. Rev. (cited in note 4); Delgado, 29 Harv. C.R.-C.L. L. Rev. at 170-74 (cited in note 4).

and campuses and other institutions should not enact them even if they legally can do so.<sup>28</sup>

### III. THE TOUGHLOVE POSITION ON HATE SPEECH: SIX NEOCONSERVATIVE ARGUMENTS AGAINST REGULATION

As we have seen, the debate about campus hate-speech rules has moved from the arena of doctrine to one of policy. The Supreme Court's recent rulings presage such a shift, and the commentaries indicate that First Amendment realism is about to replace formalism. Conservatives, who generally do not like regulation, accordingly have turned their attention to policy-based reasons why campuses should abjure hate-speech regulation. In this Part, we analyze six such arguments, showing their strengths and weaknesses, and the way they are variants of a small number of basic themes.

#### A. *The Deflection (or Waste-of-Time) Argument*

Many neoconservative writers who have taken a position against regulation argue that mobilizing against hate speech is a waste of precious time and resources. Donald Lively, for example, writes that civil rights activists ought to have better things to do, and that concentrating on hate-speech reform is myopic and calculated to benefit only a small number of blacks and other minority persons.<sup>29</sup> Instead of "picking relatively small fights of their own convenience,"<sup>30</sup> racial reformers should be examining "the obstacles that truly impede" racial progress, namely bad laws and too little money.<sup>31</sup>

Other toughlove writers echo Lively's conclusions. Dinesh D'Souza writes that campus radicals espouse hate-speech regulation because it is easier than studying hard and getting a first-rate education.<sup>32</sup> Stephen Carter also has little good to say about the hate-speech crusade, describing it as a digression and a distraction.<sup>33</sup> Henry Louis Gates expresses perhaps the sharpest disdain for anti-

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28. Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 Vand. L. Rev. 865, 888, 891-93 (1994).

29. *Id.* at 892.

30. *Id.* See also *id.* at 875, 880.

31. See *id.* at 892.

32. Dinesh D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus* 140-55, 230-42 (Free, 1991).

33. Stephen Carter, *Reflections of an Affirmative Action Baby* 177, 180-81 (Basic Books, 1992).

hate-speech activism, wondering why this ephemeral subject attracts the attention of so many academics and thinkers when so much more serious work remains to be done.<sup>34</sup> In a cover story in the *New Republic* reviewing *Words That Wound*, Gates, chair of the department of African American studies at Harvard, writes that addressing racist speech does lip service to civil rights without dealing with the material reality of economic subordination.<sup>35</sup>

But is it so clear that efforts to control hate speech are a waste of time and resources, at least compared to other problems that the campaigners could be addressing? What neoconservative writers may fail to realize is that eliminating hate speech goes hand in hand with reducing what they term "real racism." Certainly, being the victim of hate speech is a less serious affront than being denied a job, a house, or an education. It is, however, equally true that a society that speaks and thinks of minorities derisively is fostering an environment in which such discrimination will occur frequently. This is so for two reasons. First, hate speech, in combination with an entire panoply of media imagery, constructs and reinforces a picture of minorities in the public mind.<sup>36</sup> This picture or stereotype varies from era to era, but is rarely positive: persons of color are happy and carefree, lascivious, criminal, devious, treacherous, untrustworthy, immoral, of lower intelligence than whites, and so on.<sup>37</sup>

This stereotype guides action, accounting for much misery in the lives of persons of color. Examples include motorists who fail to stop to aid a stranded black driver, police officers who hassle African-American youths innocently walking or speaking to each other on the streets, or landlords who act on hunches or unarticulated feelings in renting an apartment to a white over an equally or more qualified black or Mexican. Once the stage is set—once persons of color are rendered one-down in the minds of hundreds of actors—the selection of minorities as victims of what even the toughlove crowd would recognize as real discrimination increases in frequency and severity. It also acquires its capacity to sting. A white motorist who suffers an

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34. Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, *New Republic* 37, 43, 47-49 (Sept. 22 & 27, 1993) (reviewing Matsuda, et al., *Words That Wound* (cited in note 4)).

35. *Id.* at 42-43.

36. See generally Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *Harv. C.R.-C.L. L. Rev.* 133 (1982); Richard Delgado and Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *Cornell L. Rev.* 1258 (1992).

37. Delgado and Stefancic, 77 *Cornell L. Rev.* at 1261-77 (discussing media stereotypes of minorities in different eras).



epithet ("goddam college kid!") may be momentarily stunned. But the epithet does not call upon an entire cultural legacy the way a racial epithet does, nor deny the victim her status and personhood.<sup>38</sup>

A second reason why even neoconservatives ought to pause before throwing their weight against hate-speech rules has to do with the nature of latter-day racism.<sup>39</sup> Most neoconservatives, like many white people, think that acts of out-and-out discrimination are rare today. The racism that remains is subtle, "institutional," or "latter-day."<sup>40</sup> It lies in the arena of unarticulated feelings, practices, and patterns of behavior (like promotions policy) on the part of institutions as well as individuals. A forthright focus on speech and language may be one of the few means of addressing and curing this kind of racism. Thought and language are inextricably connected.<sup>41</sup> A speaker who is asked to reconsider his or her use of language may begin to reflect on the way he or she thinks about a subject. Words, external manifestations of thought, supply a window into the unconscious. Our choice of word, metaphor, or image gives signs of the attitudes we have about a person or subject.<sup>42</sup> No readier or more effective tool than a focus on language exists to deal with subtle or latter-day racism. Since neoconservatives are among the prime proponents of the notion that this form of racism is the only (or the main) one that remains, they should think carefully before taking a stand in opposition to measures that might make inroads into it. Of course, speech codes would not reach *every* form of demeaning speech or depiction. But a tool's unsuitability to redress every aspect of a problem is surely no reason for refusing to employ it where it is effective.

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38. For a discussion of this stage-setting function and the efficacy of the background considerations—the stories, narratives, and assumptions against which legal rules are applied and construed—see generally Delgado and Stefancic, 77 *Coruell L. Rev.* 1258; Richard Delgado, *Shadowboxing: An Essay on Power*, 77 *Cornell L. Rev.* 813 (1992).

39. See Delgado, 85 *Nw. U. L. Rev.* at 345-48 (cited in note 14); Delgado and Stefancic, 77 *Cornell L. Rev.* at 1261-88 (tracing this history and showing its implications for First Amendment theory).

40. On this form of racism, see generally Thomas F. Pettigrew, *New Patterns of Racism: Different Worlds of 1984 and 1964*, 37 *Rutgers L. Rev.* 673 (1985); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 *Coruell L. Rev.* 1016 (1988); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987).

41. On some of the connections between legal language and law in action, see generally *Symposium: Legal Storytelling*, 87 *Mich. L. Rev.* 2073 (1989) (containing articles by Milner Ball, Derrick Bell, Richard Delgado, Mari Matsuda, Steven Winter, and others).

42. See generally *id.*; Richard Delgado, *Mindset and Metaphor*, 103 *Harv. L. Rev.* 1872 (1990) (addressing the role of metaphors in revealing and shaping our perceptions of a thing or event). Consider also the way feminism's demand for sex-neutral language has changed the way we think and speak of women.

*B. The Quixotic Argument*

Neoconservatives also argue against hate-speech regulation on the ground, similar to the deflection argument, that the effort is quixotic or disingenuous. White people will never accede to such rules. Proponents of hate-speech regulation surely must know this, they reason, hence their objectives are probably symbolic, tactical, or at any rate something other than what they say. Lively, for example, writes that the U.S. Supreme Court has consistently rejected laws regulating speech, finding them vague and overbroad.<sup>43</sup> He also writes that the campaign lacks vision and a sense of “marketability”—it simply cannot be sold to the American people.<sup>44</sup> Gates asks how hate-speech activists can possibly believe that campus regulations, even if enacted, will prove effective. If campuses are the seething arenas of racism that activists believe, how will campus administrators and hearing officials provide nondiscriminatory hearings on charges brought under the codes?<sup>45</sup> Elsewhere he accuses the hate-speech activists of pressing their claims for merely “symbolic” reasons,<sup>46</sup> while ignoring that the free-speech side has a legitimate concern over symbolism, too. Carter is less negative about the motivations of hate-speech reformers, but does question whether their campaign is not “unwinnable.”<sup>47</sup>

But is the effort to curb hate speech doomed, quixotic, or disingenuous? It might be seen in this way if indeed the gains to be reaped were potentially only slight. But, as we argued earlier, they are not: The stakes are large, indeed our entire panoply of civil rights laws and rules depends for its efficacy on controlling the background of harmful depiction against which the rules and practices operate.<sup>48</sup> In a society where minorities are thought and spoken of respectfully, few acts of out-and-out discrimination would take place. In one that harries and demeans them at every turn, even a determined judiciary will not be able to enforce equality and racial justice.<sup>49</sup>

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43. Lively, 46 Vand. L. Rev. at 875-81 (cited in note 28).

44. Id. at 869, 884, 895-96.

45. Gates, New Republic at 44 (cited in note 34).

46. Id. at 42, 48-49.

47. Carter, *Affirmative Action Baby* at 180-81 (cited in note 33).

48. See notes 36-38 and accompanying text.

49. See generally *Symposium: Legal Storytelling*, 87 Mich. L. Rev. 2073 (cited in note 41) (focusing on the relation between stories and narratives and the law's treatment of disempowered groups throughout U.S. history); Delgado and Stefancic, 77 Cornell L. Rev. at 1275-88 (cited in note 36) (noting that the law is unlikely to be able to redress systemic social ills such as racism).

Moreover, success is more possible than the toughlove crowd would like to acknowledge. A host of Western industrialized democracies have instituted laws against hate speech and hate crime, often in the face of initial resistance.<sup>50</sup> Some, like Canada, Great Britain, and Sweden, have traditions of respect for free speech and inquiry rivaling ours.<sup>51</sup> Determined advocacy might well accomplish the same here. In recent years, many—perhaps several hundred—college campuses have seen fit to institute student conduct codes penalizing face-to-face insults of an ethnic or similar nature, many in order to advance interests that the campus straightforwardly identified as necessary to its function, such as protecting diversity or providing an environment conducive to education.<sup>52</sup> Moreover, powerful actors like government agencies, the writers' lobby, industries, and so on have generally been quite successful at coining free speech "exceptions" to suit their interest—libel, defamation, false advertising, copyright, plagiarism, words of threat, and words of monopoly, just to name a few.<sup>53</sup> Each of these seems natural and justified, because time-honored, and perhaps each is. But the magnitude of the interest underlying these exceptions seems no less than that of a young black undergraduate subject to hateful verbal abuse while walking late at night on campus.<sup>54</sup> New regulation is of course subject to searching scrutiny in our laissez-faire age. But the history of free speech doctrine, especially the landscape of "exceptions," shows that need and policy have a way of being translated into law.<sup>55</sup> The same may well continue to happen with the hate-speech movement.

### C. *The Bellwether Argument*

A further argument one hears from the anti-rule camp is that hate speech should not be driven underground, but rather allowed to remain out in the open. The racist who one does not know is far more dangerous than the one who one does. Moreover, on a college campus,

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50. Delgado, 85 Nw. U. L. Rev. at 361-71 (cited in note 14).

51. *Id.*

52. See generally Howard J. Ehrlich, *Campus Ethnoviolence: A Research Review* (National Inst. Against Prejudice and Violence, 1992); National Inst. Against Prejudice and Violence, *Community Response to Bias-Crimes and Ethnoviolent Incidents* (1993) (discussing campuses that have adopted speech codes); Delgado, 85 Nw. U. L. Rev. at 343-58 & n.121.

53. Delgado, 85 Nw. U. L. Rev. at 377-78.

54. Personal security and dignity, in other words, seem at least as important as the interests that support exceptions we currently recognize, most of which are only reputational or pecuniary in nature.

55. See note 53 and accompanying text (describing the way powerful groups have succeeded in having exceptions recognized to protect their interests).

incidents of overt racism or sexism can serve as useful spurs for discussion and institutional self-examination. Carter, for example, writes that regulating racist speech will leave minorities no better off than they are now, while screening out "hard truths about the way many white people look at . . . us."<sup>56</sup> D'Souza echoes this argument, but with a reverse twist, when he points out that the hate-speech crusaders are missing a valuable opportunity. When racist graffiti or hateful fraternity parties proliferate, minorities should reflect on the possibility that this may signal something basically wrong with affirmative action.<sup>57</sup> Instead of tinkering futilely with the outward signs of malaise, we ought to deal directly with the problem itself.<sup>58</sup> An editor of *Southern California Law Review* argues that antiracism rules are tantamount to "[s]weeping the problem under the rug," whereas "[k]eeping the problem in the public spotlight . . . enables members [of the university community] to attack it when it surfaces."<sup>59</sup>

How should we see the bellwether argument? In one respect, the argument does make a valid point. All other things being equal, the racist who is known is less dangerous than the one who is not.<sup>60</sup> What the argument ignores is that there is a third alternative, namely the racist who is cured, or at least deterred by rules, policies, and official statements so as to no longer exhibit the behavior he or she once did. Since most conservatives believe that rules and penalties change conduct (indeed they are among the strongest proponents of heavy penalties for crime), the possibility that campus guidelines against hate speech and assault would decrease those behaviors ought to be conceded.<sup>61</sup> Of course, the conservative may argue that regulation has costs of its own—something even the two of us would concede—but this is a different argument from the bellwether one.<sup>62</sup>

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56. Carter, *Affirmative Action Baby* at 179 (cited in note 33).

57. D'Souza, *Illiberal Education* at 231-42 (cited in note 32) (suggesting that special programs and codes are necessary because affirmative action has failed or has been overly ambitious).

58. *Id.* at 155, 231-42.

59. Vince Herron, Note, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. Cal. L. Rev. 407, 424 (1994).

60. One may sometimes avoid, steel, or prepare oneself for the onslaught of the racist who is known, but not, of course, the one who is unknown.

61. See Gordon Allport, *The Nature of Prejudice* 62, 252, 460-61, 467-72 (Addison Wesley, 1979) (suggesting that laws create and reinforce a common conscience and sense that racism and prejudice are wrong).

62. The costs include: the physical and pecuniary burdens of holding hearings; the bureaucratization of university life; and the possibility that false or exaggerated charges may be filed. On the whole, these charges seem no greater than for other campus offenses, for example, cheating or plagiarism.

A further neoconservative objection is that silencing the racist through legislation might deprive the campus community of the "town hall" opportunity it has to discuss and analyze issues of race when incidents of racism come to light.<sup>63</sup> But campuses could hold those meetings and discussions anyway. The rules are not likely to suppress hate speech entirely; even with them in place, there will continue to be some number of incidents of racist speech and behavior. The difference is that now there will be the possibility of campus disciplinary hearings, which are even more likely to instigate the "town hall" discussions the argument assumes are desirable. Because the bellwether argument ignores that rules will have at least some edifying effect and that there are other ways of having campuswide discussions short of allowing racial confrontation to flourish, the argument appears to deserve little weight.

*D. The Victimization Argument: Do Hate Speech Rules Encourage Passive, Dependent Behavior?*

A fourth argument many neoconservative critics of hate-speech regulations make is that prohibitions against verbal abuse are unwise because they encourage minorities to see themselves as victims. Instead of rushing to the authorities every time they hear something that wounds their feelings, persons from minority groups ought to learn to speak back or ignore the offending behavior. A system of rules and complaints reinforces in their minds that they are weak and in need of protection, that their lot in life is to be victimized rather than to make use of those opportunities that are available to them. Carter, for example, writes that anti-hate speech rules cater to "those whose backgrounds of oppression make them especially sensitive to the threatening nuances that lurk behind racist sentiment."<sup>64</sup> Lively warns that the rules reinforce a system of "supplication and self-abasement";<sup>65</sup> D'Souza that they distort and prevent interracial friendships and encourage a "crybaby" attitude;<sup>66</sup> Gates that they reinforce a "therapeutic" mentality and an unhealthy preoccupation with feelings.<sup>67</sup>

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63. See D'Souza, *Illiberal Education* at 153 (cited in note 32) (pointing out John Stuart Mill's argument that even offensive speech serves the purpose of illustrating error); Carter, *Affirmative Action Baby* at 175 (cited in note 33) (stating that "on a university campus, perhaps more than any place else, unfettered debate is essential").

64. Carter, *Affirmative Action Baby* at 177.

65. Lively, 46 *Vand. L. Rev.* at 898 (cited in note 28).

66. D'Souza, *Illiberal Education* at 128, 239 (cited in note 32).

67. Gates, *New Republic* at 46-48 (cited in note 34).

Would putting into place hate-speech rules induce passivity and a victim mentality among minority populations? This seems unlikely, among other reasons because other alternatives will remain as before. No African American or lesbian student is required to make a complaint when targeted by vicious verbal abuse. He or she can talk back or ignore it if he or she sees fit. Hate-speech rules simply provide an additional avenue of recourse to those who wish to take advantage of them. Indeed, one could argue that filing a complaint constitutes one way of taking charge of one's destiny: One is active, instead of passively "lumping it" when verbal abuse strikes. It is worth noting that we do not make the "victimization" charge in connection with other offenses that we suffer, such as having a car stolen or a house burglarized, nor do we encourage those victimized in this fashion to "rise above it" or talk back to their victimizer. If we see recourse differently in the two sets of situations it may be because we secretly believe that a black who is called "nigger" by a group of whites is in reality not a victim. If so, it would make sense to encourage him not to dwell on or sulk over the event. But this is different from saying that filing a complaint deepens victimization; moreover, many studies have shown it simply is untrue.<sup>68</sup> Racist speech is the harm. Filing a complaint is not. There is no empirical evidence that filing a civil rights complaint causes otherwise innocuous behavior to acquire the capacity to harm the complainant.

#### *E. The "Classist" Argument*

A further argument some neoconservatives make is that the effort to limit hate-speech through enactment of campus rules is classist. The rules will end up punishing only what naive or blue-collar students do and say. The more refined, indirect, but more devastating expressions of contempt of the more highly educated classes will pass unpunished. Henry Louis Gates offers the following comparison:

(A) LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well-intentioned, but given the fact that aptitude tests place African Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they

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68. See generally Matsuda, et al., *Words that Wound* at 135-49 (cited in note 4) (detailing the harms of racism and racist vilification); Ehrlich, et al., *The Traumatic Impact of Ethnviolence* (cited in note 26).

are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide.

(B) Out of my face, jungle bunny.<sup>69</sup>

Lively and D'Souza make versions of the same argument, Lively urging that the codes reach only blue-collar racism and are backed only by academic elites;<sup>70</sup> D'Souza that the rules aim to enforce a "social etiquette among students, while ignoring the higher-echelon racism of meaningful glances and rolling of eyes of university higher-ups."<sup>71</sup>

In one respect, the classist argument is plainly off target. Both blue-collar and upper-class people will be prohibited from uttering specified slurs and epithets. Many hate-speech codes penalize serious face-to-face insults based on race, ethnicity, and a few other factors.<sup>72</sup> Such rules would penalize the same harmful speech—for example, "Nigger, go back to Africa; you don't belong at this university"—whether spoken by the millionaire's son or the coal miner's daughter. If, in fact, the prep school product is less likely to utter words of this kind, or to utter only intellectualized versions like the one in Gates' example,<sup>73</sup> this may be because he is less racist in a raw sense. If, as many social scientists believe, prejudice tends to be inversely correlated with educational level and social position, the wealthy and well educated may well violate hate-speech rules less often than others.<sup>74</sup> And, to return to Gates' example, there is a difference between his two illustrations, although it is not in the direction he seems to suggest. "Out of my face, jungle bunny" is a more serious example of hate speech because it (1) is not open to argument or a more-speech response; and (2) has overtones of a direct physical threat. The other version, while deplorable, is unlikely to be coupled with a physical threat, and is answerable by more speech.

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69. Gates, *New Republic* at 45 (cited in note 34).

70. Lively, 46 *Vand. L. Rev.* at 893-94 (cited in note 28).

71. D'Souza, *Illiberal Education* at 241 (cited in note 32).

72. On the wording of some of the more common variants of the codes, see generally Delgado, 85 *Nw. U. L. Rev.* at 344 & n.4, 358-59 n.121 (cited in note 14); Delgado and Yun, 82 *Cal. L. Rev.* (cited in note 4).

73. See text accompanying note 69.

74. For discussion of this "socioeconomic competition" theory of racism, see Delgado, 85 *Nw. U. L. Rev.* at 373 & nn.254-57 (cited in note 14) (citing numerous texts that explore the topic).

*F. The "Two Wrongs" Argument*

The "two wrongs" argument, which holds that hate speech may be wrong but prohibition is not the way to deal with it, is one of the relatively few arguments that both the moderate right and the moderate left put forward, although they do so in slightly different forms and for different reasons. The moderate left opposes hate speech restrictions in part because although it detests racism it loves free speech even more.<sup>75</sup> Neoconservatives oppose regulation because it is government (in most cases) that would be doing the regulating, and especially because in the area of speech, governing to them is synonymous with censorship. Gates, for example, writes that "[t]here is also a practical reason to worry about the impoverishment of the national discourse on free speech. If we keep losing the arguments, then we may slowly lose the liberties that they were meant to defend."<sup>76</sup> He also warns that two wrongs don't make a right and laments that our society and legal system have fallen away from Henry Kalven's ideal of civil rights and civil liberties as perfectly compatible goods for all.<sup>77</sup> Lively writes that history teaches that campaigns to limit speech always end up backfiring against minorities, because free speech is a vital civic good and even more essential for minorities than others.<sup>78</sup> Virtually all the authors of the moderate right persuasion (and some of the moderate left, as well) cite the fear of censorship or governmental aggrandizement. If we allow an arm of the state to decide what is harmful speech, soon little freedom will survive.<sup>79</sup>

Our response to the two wrongs argument is elaborated in greater detail in the next section, but one aspect of it is worth mentioning now. The term "censorship" is appropriately attached to regulation by which the heavy hand of government falls on weaker, unpopular private speakers, or else on political dissidents who are attempting to criticize or change government itself.<sup>80</sup> But with hate-speech regulation, few of the concerns that underlie our aversion to censorship are present. Hate-speakers are not criticizing government,

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75. For the ACLU position, see Strossen, 1990 Duke L. J. at 571-73 (cited in note 20). See generally Delgado and Yun, 82 Cal. L. Rev. (cited in note 4) (evaluating this position).

76. Gates, New Republic at 38 (cited in note 34).

77. Id. at 37-38.

78. Lively, 46 Vand. L. Rev. at 879, 884, 897 (cited in note 28).

79. On the fear of governmental abuse and censorship, see Strossen, 1990 Duke L. J. at 489-92, 520-22, 533-38; Carter, *Affirmative Action Baby* at 176-78 (cited in note 33); Lively, 46 Vand. L. Rev. at 884; Gates, New Republic at 38 (cited in note 34).

80. On the fear of governmental censorship as animating much of First Amendment law, see Zachariah Chafee, *Free Speech in the United States* 19-21 (Harvard U., 1941). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964).



but someone weaker than themselves. In prohibiting it, universities are not attempting to insulate themselves from criticism; the political-process concerns over governmental self-perpetuation are not present. The speech being punished is far from the core of political expression—it carries few ideas at all except “I hate and reject your personhood.”<sup>81</sup> Indeed, hate speech silences the victim and drives him away.<sup>82</sup> Thus, when the government regulates hate speech, it enhances and adds to the potential social dialogue, rather than subtracts from it.<sup>83</sup>

The next section explains how neoconservatives shrink from differences such as these, even though they are relatively obvious, in large part because they threaten a key element of the conservative faith, the level playing field.

#### IV. WHAT UNDERLIES THE NEOCONSERVATIVE POSITION ON HATE SPEECH: ANATHEMA, OR, THE FEAR THAT THE FIRST AMENDMENT PLAYING FIELD WILL TURN OUT NOT TO BE LEVEL

Why does the toughlove crowd embrace the six arguments that we examined in the last section and found wanting? We believe the reason has to do with the way hate speech casts doubt on a principal tenet of the conservative faith: the level playing field. In First Amendment theory, the name of that playing field is the “marketplace” of ideas, in which messages and communications of all sorts supposedly vie on equal terms to establish themselves, and out of which, in theory, truth—the best idea of all—will emerge.<sup>84</sup>

The core difficulty which hate speech poses for the conservative mind is, simply, that there is no correlate—no analog—for hate speech directed toward whites, no countering message which cancels out the harm of “Nigger, you don’t belong on this campus—go back to Africa.” Vituperation aimed at blacks wounds;<sup>85</sup> there is nothing com-

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81. See Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L. J. 431, 452 (positing that racist speech is not intended to invite discussion, but is more like a slap in the face).

82. On the silencing argument, see *id.* at 452-56. For a general discussion of the topic, see Cass Sunstein, *Words, Conduct, Caste*, 60 U. Chi. L. Rev. 795 (1993).

83. See Lawrence, 1990 Duke L. J. at 452, 456; Sunstein, 60 U. Chi. L. Rev. at 813-16, 830-33.

84. On the marketplace theory of the First Amendment, see *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting). For a critique of that theory, see generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L. J. 1.

85. See generally Ehrlich, et al., *The Traumatic Impact of Ethnoviolence* (cited in note 26); Delgado, 17 Harv. C.R.-C.L. L. Rev. at 136-49 (cited in note 36).

parably damaging that whites have to undergo. The word "honky" is more a hodge of respect than a put down. "Cracker," although disrespectful, still implies power, as does "redneck." The fact is that terms like "nigger," "spick," "faggot," and "kike" evoke and reinforce entire cultural histories of oppression and subordination.<sup>86</sup> They remind the target that his or her group has always been and remains unequal in status to the majority group. Even the most highly educated, professional class African American or Latino knows that he or she is vulnerable to the slur, the muttered expression, the fishy glance on boarding the bus, knows that his degree, his accomplishments, his well-tailored suit are no armor against mistreatment at the hands of the least educated white.<sup>87</sup>

But not only is there no correlate, no hate speech aimed at whites, there is no means by which persons of color and others can respond effectively to this form of speech within the current paradigm. Our culture has developed a host of narratives, mottoes, and presuppositions that render it difficult for the minority victim to talk back in individual cases, and to mobilize effectively against hate speech in general. These include: feelings are minor; words only hurt if you let them; rise above it; don't be so sensitive; don't be so humorless; talk back—show some backbone. Stated or unstated narratives like these form part of the linguistic and narrative field on which minority victims have to play in responding to taunts and epithets, and of course limit the efficacy of any such response.

And when campus minorities mobilize for measures that would curb hate speech in general, they encounter additional obstacles. Although our system of free speech has carved out or tolerated dozens of "exceptions" and special doctrines, opponents conveniently forget this, treating the demand for even narrowly tailored anti-hate speech rules as a shocking request calculated to endanger the entire edifice of First Amendment protection.<sup>88</sup>

Hate speech, then, is individually wounding in a way that finds no analog with respect to whites; there is no effective way for a victim to speak back or counter it, even when it is physically safe to do so;<sup>89</sup> and the most frequently targeted groups evoke little sympathy

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86. On the way this happens, see Delgado, 17 Harv. C.R.-C.L. L. Rev. at 135-48; Delgado, 85 Nw. U. L. Rev. at 383-84 (cited in note 14).

87. See generally Ellis Cose, *The Rage of a Privileged Class* (Harper Collins, 1993); Carter, *Affirmative Action Baby* (cited in note 33).

88. See notes 53-54 and accompanying text (discussing the role of these exceptions).

89. It often is not. Hate speech is often uttered in many-on-one situations where a response is foolhardy. Indeed many reported cases of hate crimes apparently began this way: a group of whites taunted a gay or black, who spoke back and was beaten or killed for his pains.

from society or the legal system when they ask for protection. In other settings, the combination of the three features just enumerated would cause us to conclude that the playing field is not level, but sharply slanted. Imagine, for example, an athletic competition in which one side is denied a powerful weapon (say, the forward pass); in which the other side is permitted to deploy this weapon freely, because the rules prevent the first from doing anything to counter it when it is used (such as knocking down the ball); and changes in the rules are not permitted because this is said to violate the charter that established the game in the first place.

Surely, we would say that such a competition is unfair. Yet, something like that characterizes the predicament of minority victims of hate speech. Conservatives cannot allow themselves to see this, however, since it goes against some of their most basic assumptions, including free competition and merit. We believe this accounts for the contortions and maneuverings among neoconservatives, including many of color who ought to know better. But the problem of hate speech will not go away by merely insisting on ideologically based truths that "must be so," nor by responses that ought to work, much less by blaming the victim or telling him that the problem is all in his head. Hate speech renders campuses uncomfortable and threatening to substantial numbers of students at vulnerable points in their lives.<sup>90</sup> It helps construct and maintain a social reality in which some are constantly one-down in encounters that everyone agrees matter.<sup>91</sup> And it tolerates and creates culture at odds with our deepest national values and commitments.<sup>92</sup>

## V. CONCLUSION

Coming to grips with hate speech does pose serious problems for a society committed both to equality and to individual freedom and autonomy. But resorting to facile arguments like those discussed in this Essay does little to advance the discussion. Neoconservatives should allow themselves to see what everyone else sees—that hateful slurs and invectives are a virulent form of inequality reinforce-

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See generally Laderer and Delgado, eds., *The Price We Pay* (cited in note 26) (detailing and documenting the connection between hate speech and incidents of hate-motivated crime).

90. See notes 14-17, 26 and accompanying text.

91. See notes 36-42 and accompanying text.

92. Lawrence, 1990 Duke L. J. at 452 (cited in note 81).

ment—and join the serious search now beginning for cures to this national disease.

