RACIST SPEECH, DEMOCRACY, AND THE FIRST AMENDMENT

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The curse of racism continues to haunt the Nation. Everywhere we face its devastation, the bitter legacy of, in William Lloyd Garrison's prophetic words, our "covenant with death and . . . agreement with Hell."[1] This is the living consequence of the history that has produced us. We cannot overcome that history without changing ourselves and therefore also our legal order. Since *Brown v. Board of Education*[2] vast stretches of our law have passed through the flame of this challenge.[3] The question is always what to preserve, what to alter.

Now it is the turn of the first amendment. Largely inspired by Richard Delgado's article, *Words That Wound*,[4] the past few years have witnessed an extraordinary spate of articles analyzing the constitutionality of restrictions on racist speech.[5] This anal-

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1. D. DUMOND, ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA 273 (1961) (quoting William Lloyd Garrison).

2. 347 U.S. 483 (1954).

3. For a representative discussion, see Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

4. Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words That Wound*]; *see* Heins, *Banning Words: A Comment on "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585 (1983); Delgado, *Professor Delgado Replies*, 18 HARV. C.R.-C.L. L. REV. 593 (1983).

5. Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343 (1990); Gale, *On Curbing Racial Speech*, RESPONSIVE COMMUNITY, Winter 1990-91, at 47; Glass, *Anti-Racism and Unlimited Freedom of Speech: An Untenable Dualism*, 8 CAN. J. PHIL. 559 (1978); Grano, *Free Speech v. the University of Michigan*, ACADEMIC QUESTIONS, Spring 1990, at 7; Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1991); Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, SOC. PHIL. & POL'Y, Spring 1991, at 81; Hughes, *Prohibiting Incitement to Racial Discrimination*, 16 U. TORONTO L.J. 361 (1966); Jones, *Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment*, 23 HOW. L.J. 429 (1980); Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFFALO L.

ysis is not merely academic. Motivated by an alarming increase in racist incidents,[6] universities throughout the Nation have turned toward the task of restraining racist expression.[7] The justification for these restraints, and their relationship to first amendment values, has become a matter of intense controversy.[8]

One approach has been to attempt to use legal regulation to eradicate all visible signs of that "racist sentiment" which, in the view of some, our history has caused to "pervade[ ] the life of virtually all white Americans."[9] The rules of the University of

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REV. 337 (1989) [hereinafter *Language as Violence*]; Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11 (1985) [hereinafter Lasson, *Racial Defamation*]; Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77 (1984) [hereinafter Lasson, *Group Libel*]; Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Minow, *On Neutrality, Equality, & Tolerance: New Norms for a Decade of Distinction*, CHANGE, Jan.-Feb. 1990, at 17; Partlett, *From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech*, 22 VAND. J. TRANSNAT'L L. 431 (1989); Richardson, *Racism: A Tort of Outrage*, 61 OR. L. REV. 267 (1982); Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171 (1990); Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484; Wedgwood, *Freedom of Expression and Racial Speech*, 8 TEL AVIV U. STUD. L. 325 (1988); Wright, *Racist Speech and the First Amendment*, 9 MISS. C. L. REV. 1 (1988); Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988); Note, *The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb*, 12 J. COMM. & ENT. L. 593 (1990); Comment, *Freedom From Fear*, 15 LINCOLN L. REV. 45 (1984) (authored by Kammy Au); Edelman, *Punishing Perpetrators of Racist Speech*, Legal Times, May 15, 1989, at 20.

6. *See, e.g.*, H. EHRLICH, CAMPUS ETHNOVIOLENCE AND THE POLICY OPTIONS 41-72 (1990); Gibbs, *Bigots in the Ivory Tower: An Alarming Rise in Hatred Roils U.S. Campuses*, TIME, May 7, 1990, at 104.

7. David Rieff writes that 137 American universities "have in the past two years passed proscriptions on hate speech." Rieff, *The Case Against Sensitivity*, 114 ESQUIRE 120, 124 (1990). *See Lessons From Bigotry 101*, NEWSWEEK, Sept. 25, 1989, at 48; Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues*, Chronicle of Higher Educ., Oct. 4, 1989, at A1; Fields, *Colleges Advised to Develop Strong Procedures to Deal With Incidents of Racial Harassment*, Chronicle of Higher Educ., July 20, 1988, at A11.

8. For a chronicle of the effect of this controversy on the American Civil Liberties Union (ACLU), see Hentoff, *The Colleges: Fear, Loathing, and Suppression*, Village Voice, May 8, 1990, at 20; Hentoff, *What's Happening to the ACLU?*, Village Voice, May 15, 1990, at 20; Hentoff, *Putting the First Amendment on Trial*, Village Voice, May 22, 1990, at 24; Hentoff, *A Dissonant First Amendment Fugue*, Village Voice, June 5, 1990, at 16; Hentoff, *An Endangered Species: A First Amendment Absolutist*, Village Voice, June 12, 1990, at 24; Hentoff, *The Civil Liberties Shootout*, Village Voice, June 19, 1990, at 26; *Policy Concerning Racist and Other Group-Based Harassment on College Campuses*, ACLU NEWSL., Aug.-Sept. 1990, at 2.

9. J. KOVEL, WHITE RACISM: A PSYCHOHISTORY 34 (1970); *see* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321-26 (1987).

Connecticut, for example, plainly evince this remarkable ambition. These rules prohibit "[b]ehavior that denigrates others because of their race [or] ethnicity."[10] They provide that the "use of derogatory names, inappropriately directed laughter, inconsiderate jokes, anonymous notes or phone calls, and conspicuous exclusion from conversations and/or classroom discussions are examples of harassing behaviors that are prohibited."[11] The rules list the "signs" of proscribed "Harassment, Discrimination and Intolerance," some of which are

> Stereotyping the experiences, background, and skills of individuals
> Treating people differently solely because they are in some way different from the majority
> Responding to behaviors or situations negatively because of the background of the participants . . .
> Imitating stereotypes in speech or mannerisms . . .
> Attributing objections to any of the above actions to "hypersensitivity" of the targeted individual or group.[12]

These rules are plainly not designed to regulate specific forms of behavior or expression, but rather to encompass and to forbid all exterior "signs" of an interior frame of mind. One can readily understand the logic of this purpose. If our "common historical and cultural heritage" has made us "all racists,"[13] then racism must be seen as an unredeemed form of identity, whose every manifestation ought to be challenged and sanctioned. Punitive legal regulations are thus faced with the task of attempting to imagine and specify every possible indication of racism. But because the racist personality can express itself in an infinite

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10. Department of Student Affairs, University of Connecticut, Protect Campus Pluralism (available from the Dean of Students Office, University of Connecticut). The regulations provide that "[e]very member of the University is obligated to refrain from actions that intimidate, humiliate, or demean persons or groups or that undermine their security or self-esteem." They define "harassment" as "abusive behavior directed toward an individual or group because of race, ethnicity, ancestry, national origin, religion, gender, sexual preference, age, physical or mental disabilities," and they prohibit "harassment that has the effect of interfering with an individual's performance or creating an intimidating, hostile or offensive environment." *Id.*

11. *Id.* The regulations continue: "All members of the University community are responsible for the maintenance of a positive environment in which everyone feels comfortable working and learning." *Id.*

12. *Id.* The regulations instruct a student to inform the "Discrimination and Intolerance Response Network" if "[y]ou have experienced or witnessed any of the signs" and to "[k]now that the University will not tolerate such behavior." *Id.*

13. Lawrence, *supra* note 9, at 322.

variety of ways, the task is intrinsically elusive. The University of Connecticut rules are clearly caught up in the frustrating spiral of this logic, a logic that, when carried to its conclusion, can end only in the complete legal subjugation of the individual.[14]

The incompatibility of this logic with even the most elementary standards of freedom of speech is obvious. Any communication can potentially express the racist self, and thus no communication can ever be safe from legal sanction. It is therefore no surprise that the University of Connecticut was forced to withdraw its regulations, although apparently with reluctance and distress, because of a threatened lawsuit.[15] If the ambition of legal regulation is to suppress manifestations of racist personality, the necessary consequence will be the wholesale abandonment of all principles of freedom of expression.

To the extent that we care about first amendment values, therefore, we must make do with more modest aspirations.[16] The possibility of effecting a reconciliation between principles of freedom of expression and restraints on racist speech depends upon deflecting our focus away from its spontaneous target, which is the racism of our cultural inheritance, and toward the redress of particular and distinct harms caused by racist expression. The specification of these harms will lead to the definition of discrete forms of speech, the legal regulation of which can then be assessed in light of relevant first amendment values.

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14. One is reminded of the escalating efforts of the Inquisition in sixteenth-century Spain to discover and punish all external signs of inward backsliding on the part of Moors and Jews who had outwardly converted to Catholicism in order to avoid expulsion. These efforts eventually led the Inquisition to conclude that eating couscous or disliking pork were themselves punishable as heresy. *See* Root, *Speaking Christian: Orthodoxy and Difference in Sixteenth-Century Spain*, REPRESENTATIONS, Summer 1988, at 118, 126, 129.

15. Ravo, *Campus Slur Alters a Code Against Bias*, N.Y. Times, Dec. 11, 1989, at B1, B3.

16. Modest aspirations, however, will not be easy in the highly charged atmosphere of many universities. *See* Detlefsen, *White Like Me*, NEW REPUB., Apr. 10, 1989, at 18. The University of Connecticut is hardly unique in its use of punitive legal regulation to block all manifestations of racism. The Board of Regents of Higher Education of the Commonwealth of Massachusetts, for example, adopted on June 13, 1989 a "Policy Against Racism" that "prohibits all forms of racism." Board of Regents of Higher Education, Commonwealth of Massachusetts, Policy Against Racism and Guidelines for Campus Policies Against Racism 1 (June 13, 1989). This prohibition includes:

> all conditions and all actions or omissions including all acts of verbal harassment or abuse which deny or have the effect of denying to anyone his or her rights to equality, dignity, and security on the basis of his or her race, color, ethnicity, culture, or religion. . . .
>
> Racism in any form, expressed or implied, intentional or inadvertent, individual or institutional, constitutes an egregious offense to the tenets of human dignity and to the accords of civility guaranteed by law.

Id. at 2.

Such, in any event, will be the strategy of this essay. Its ambition is to be illustrative rather than comprehensive: the general issue of racist speech simply has too many facets to be encompassed by the small scope of this study. Although Part I attempts to isolate and describe five specific kinds of harm said to be caused by racist speech, Part II offers an account of only one of several possible relevant and important first amendment values, that of democratic self-governance. In my view this value is primarily responsible for the constitutional safeguards that currently protect public discourse. The major part of this essay, Part III, therefore addresses the narrow issue of the constitutionality of regulating public discourse to ameliorate specific harms caused by racist speech. Part IV then briefly compares the quite different constitutional issues posed by the regulation of racist speech within public institutions of higher learning.

One significant drawback of this analytic structure is that it renders the term "racist speech" into something of a cipher. As the University of Connecticut regulations illustrate, the term is inherently labile and ambiguous. It probably has as many different definitions as there are commentators, and it would be pointless to pursue its endlessly variegated shades of meaning. I have decided, therefore, to focus instead on the constitutional implications of specific justifications for restraining racist expression, and to let the term "racist speech" absorb the content implied by these various justifications.

I should add that writing this essay has been difficult and painful. I am committed both to principles of freedom of expression and to the fight against racism. The topic under consideration has forced me to set one aspiration against the other, which I can do only with reluctance and a heavy heart.

I. THE HARMS OF RACIST SPEECH

Even a brief survey of the contemporary debate reveals it to be rich with textured and complex characterizations of the harms of racist expression. It would be impossible within the limited scope of this essay to disentangle and evaluate each of the many harms suggested in this literature. It will therefore be necessary to group these harms into five rough categories that represent the most prominent lines of analysis and that are at the same time convenient for first amendment analysis.[17]

17. These categories by no means exhaust the field. The European literature, for

A. The Intrinsic Harm of Racist Speech

A recurring theme in the contemporary literature is that racist expression ought to be regulated because it creates what has been termed "deontic" harm.[18] The basic point is that there is an "elemental wrongness"[19] to racist expression, regardless of the presence or absence of particular empirical consequences such as "grievous, severe psychological injury."[20] It is argued that toleration for racist expression is inconsistent with respect for "the principle of equality"[21] that is at the heart of the fourteenth amendment.[22]

> The thrust of this argument is that a society committed to ideals of social and political equality cannot remain passive: it must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals. Laws prohibiting racist speech must be regarded as important components of such expressions and statements.[23]

If the basic harm of racist expression lies in its intrinsic and symbolic incompatibility with egalitarian ideals, then the distinct class of communications subject to legal regulation will be defined by reference to those ideals. If the fourteenth amendment is thought to enshrine an antidiscrimination principle, then "any speech (in its widest sense) which supports racial prejudice or discrimination"[24] ought to be subject to regulation. If the relevant ideals are thought to embody substantive racial equality, then the relevant class of communications should be defined as speech containing a "message . . . of racial inferiority."[25]

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example, contains a well-developed jurisprudence of regulating racist speech based upon the harm of potential violence. *See* Cotterrell, *Prosecuting Incitement to Racial Hatred*, 1982 PUB. L. 378; Kretzmer, *supra* note 5, at 456; Leopold, *Incitement to Hatred—The History of a Controversial Criminal Offense*, 1977 PUB. L. 389, 391-93. I do not discuss this category of harm because it is relatively unimportant in the American setting. I suspect that this is largely because of the accepted dominion of the *Brandenburg* version of the clear and present danger test. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).

18. Wright, *supra* note 5, at 14-22.
19. *Id.* at 10.
20. *Id.* at 9.
21. Hughes, *supra* note 5, at 364.
22. Lawrence, *supra* note 5, at 438-49.
23. Kretzmer, *supra* note 5, at 456.
24. *Id.* at 454.
25. Matsuda, *supra* note 5, at 2357.

B. Harm to Identifiable Groups

A second theme in the current debate is that racist expression ought to be regulated because it harms those groups that are the target. There are two basic variations on this theme. One draws its inspiration from the tradition of group libel[26] and the decision of the Supreme Court in *Beauharnais v. Illinois*.[27] On this view speech likely to cast contempt or ridicule on identifiable groups ought to be regulated to prevent injury to the status and prospects of the members of those groups. A second variation derives from the more contemporary understanding of racism as "the structural subordination of a group based on an idea of racial inferiority."[28] Racist expression is viewed as especially unacceptable because it locks in the oppression of already marginalized groups: "Racist speech is particularly harmful because it is a mechanism of subordination, reinforcing a historical vertical relationship."[29]

If the prevention of group harm is the basis for the regulation of communication, the definition of legally proscribed speech will depend upon one's understanding of the nature of the group harm at issue and the way in which communication is seen as causing that harm. Regulation that derives from a theory of group defamation, for example, would tend to safeguard all groups,[30] whereas regulation that derives from a theory of subordinate groups would sanction only speech "directed against a historically oppressed group."[31]

C. Harm to Individuals

A third prominent theme in the contemporary literature is that racist expression harms individuals. This theme essentially analogizes racist expression to forms of communication that are regulated by the dignitary torts of defamation, invasion of privacy, and intentional infliction of emotional distress. The law

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26. Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942).

27. 343 U.S. 250 (1952). For work in this vein, see Lasson, *Group Libel*, *supra* note 5; Lasson, *Racial Defamation*, *supra* note 5; Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

28. Matsuda, *supra* note 5, at 2358.

29. *Id.*

30. *See, e.g.*, Lasson, *Racial Defamation*, *supra* note 5, at 48.

31. Matsuda, *supra* note 5, at 2357.

compensates persons for dignitary and emotional injuries caused by such communication, and it is argued that racist expression ought to be subject to regulation because it causes similar injuries. These injuries include "feelings of humiliation, isolation, and self-hatred,"[32] as well as "dignitary affront."[33] The injuries are particularly powerful because "racial insults . . . conjure up the entire history of racial discrimination in this country."[34] In Patricia Williams' striking phrase, racist expression is a form of "spirit-murder."[35]

Regulating racist expression because of its negative impact on particular persons would suggest that the class of communications subject to legal sanction be narrowed to those that are addressed to specific individuals or that in some other way can be demonstrated to have adversely affected specific individuals. The nature of that class would vary, however, depending upon the particular kind of harm sought to be redressed. If the focus is on preventing "dignitary harm,"[36] the injury might be understood to inhere in the very utterance of certain kinds of racist communications;[37] if the focus is instead on emotional damage, independent proof of distress might be required to sustain recovery.[38] Regulation will also vary depending upon whether harm to individuals is understood to flow from the ideational content of racist expression, or instead from its abusive nature.[39]

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32. Delgado, *Words That Wound*, *supra* note 4, at 137.

33. *Id.* at 143.

34. *Id.* at 157.

35. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1987).

36. Love, *supra* note 5, at 158.

37. Richard Delgado, for example, proposes that courts create a tort for racial insult whenever a plaintiff can prove that "[l]anguage was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult." Delgado, *Words That Wound*, *supra* note 4, at 179.

38. See, for example, the proposed regulation of The University of Texas at Austin, which prohibits racial harassment and which defines racial harassment "as extreme or outrageous acts or communications that are intended to harass, intimidate or humiliate a student or students on account of race, color, or national origin and that reasonably cause them to suffer severe emotional distress." President's Ad Hoc Committee on Racial Harassment, The University of Texas at Austin, Report of President's Ad Hoc Committee on Racial Harassment 4-5 (Nov. 27, 1989). The drafters of the proposed regulation state that it is "much preferable for a racial harassment policy to focus on the real injury of severe emotional distress." *Id.* at 20.

39. Compare, for example, the regulations of the University of Wisconsin, which reach "racist or discriminatory comments, epithets or other expressive behavior directed at an

D. Harm to the Marketplace of Ideas

A fourth theme in the current debate is that racist expression harms the very marketplace of ideas that the first amendment is designed to foster. A variety of different arguments have been brought forward to support this position. It is argued that racist expression ought to be "proscribed . . . as a form of assault, as conduct" inconsistent with the conditions of respect and noncoercion prerequisite to rational deliberation.[40] It is argued that racist expression is inconsistent with rational deliberation because it "infects, skews, and disables the operation of the market . . . . Racism is irrational and often unconscious."[41] Finally, it is argued that racism "systematically" silences "whole segments of the population,"[42] either through the "visceral" shock and "preemptive effect on further speech" of racist words,[43] or through the distortion of "the marketplace of ideas by muting or devaluing the speech of blacks and other non-whites."[44]

The class of communications subject to legal sanction would depend upon which of these various arguments is accepted. Depending upon exactly how racist expression is understood to damage the marketplace of ideas, the class might be confined to communication experienced as coercive and shocking, or it might be expanded to include communication perceived as unconsciously and irrationally racist, or it might be expanded still further to encompass speech explicitly devaluing and stigmatizing victim groups.

E. Harm to Educational Environment

Each of the four categories of harm so far discussed can be caused by racist expression within public discourse. There is,

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individual," Board of Regents of the University of Wisconsin System, Wis. Admin. Code UWS § 17.06(2)(a) (Aug. 1989) (currently being challenged as a violation of the first amendment in UWM Post, Inc. v. Board of the Univ. of Wis. Sys., No. 90-C-0328 (E.D. Wis. filed Mar. 29, 1990)), with that of Stanford University, which reaches only racist speech that is "addressed directly to the individual or individuals whom it insults or stigmatizes" and that consists of "insulting or 'fighting' words." Stanford University, Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment 2 (draft, Mar. 15, 1990).

40. Lasson, *Group Libel*, *supra* note 5, at 123. "The speech clause protects the marketplace of ideas, not the battleground." *Id.*

41. Lawrence, *supra* note 5, at 468.

42. *Id.* at 447 n.66 (quoting MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 340 (1984)).

43. *Id.* at 452.

44. *Id.* at 470.

however, yet a fifth kind of harm which is quite important to the contemporary controversy, but which is relevant only to the specific educational environment of institutions of higher learning. This is the harm that racist expression is understood to cause to the educational mission of universities or colleges. The prevention of this harm is central to the definition of a great number of campus regulations.

Universities and colleges characteristically seek to regulate racist communications that "directly create a substantial and immediate interference with the educational processes of the University," without articulating exactly how racist expression can cause that interference.[45] Some campus regulations are more specific, focusing on the damage that racist expression is understood to cause to particular individuals or groups. For example, some regulations only proscribe racist expression that "will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities."[46] Presumably this interference will occur for reasons similar to those that we have already canvassed.

In a number of instances, however, college or university regulations enunciate special educational goals that are understood to be inherently incompatible with racist expression. For example, Mount Holyoke seeks to inculcate the value of diversity, which it views as plainly inconsistent with racist expression. Accordingly Mount Holyoke's regulations provide:

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45. Office of Student Life Policy and Service, Rutgers University at New Brunswick, University Student Life Policy Against Insult, Defamation, and Harassment 1 (May 31, 1989) (revised); *see also* Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989); Oberlin College, Policy on Race Relations and Informal Procedures for Racial Grievances; Office of the Dean for Student Affairs and the Special Assistants to the President, Massachusetts Institute of Technology, Information on Harassment (Sept. 1989); State University of New York College at Brockport, Discriminatory Harassment § 285.02; University of Pennsylvania, Harassment Policy (Almanac Supp., Sept. 29, 1987) (as published originally in the Almanac of June 2, 1987).

46. University of California, Universitywide Student Conduct: Harassment Policy (Sept. 21, 1989) (available from Office of the President). For an example of a regulation based upon group harm, see Clark University's Code of General Conduct: "Harassment includes any verbal or physical conduct which has the intent or effect of unreasonably interfering with any individual's or group's work or study, or creating an intimidating, hostile, or offensive environment." Clark University, Code of General Conduct and University Judicial Procedures 1 (Fall Semester 1988). For other examples of similar kinds of regulations, see Emory University, Policy Statement on Discriminatory Harassment; Marquette University, Racial Abuse and Harassment Policy (May 5, 1989); Office of University News and Information of Kent State University, Policy to Combat Harassment, For the Record, Vol. 5, No. 5 (Feb. 6, 1989).

> To enter Mount Holyoke College is to become a member of a community. . . .
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> . . . .
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> Our community is committed to maintaining an environment in which diversity is not only tolerated, but is celebrated. Towards this end, each member of the Mount Holyoke community is expected to treat all individuals with a common standard of decency.[47]

Marquette University defines itself "as a Christian and Catholic institution . . . dedicated to the proposition that all human beings possess an inherent dignity in the eyes of their Creator and equality as children of God."[48] Accordingly Marquette's regulations seek to maintain "an environment in which the dignity and worth of each member of its community is respected" and in which "racial abuse or harassment . . . will not be tolerated."[49] Mary Washington College sets forth what appears to be a secular version of this same educational mission; its regulations provide that the "goal of the College is to help all students achieve academic success in an environment that nurtures, encourages growth, and develops sensitivity and appreciation for all people."[50] Accordingly "any activity or conduct that detracts from this goal—such as racial or sexual harassment—is inconsistent with the purposes of the college community."[51]

In such instances, racist expression interferes with education not merely because of general harms that it may inflict on groups or individuals or the marketplace of ideas,[52] but also, and more intrinsically, because racist expression exemplifies conduct that is contrary to the particular educational values that specific colleges or universities seek to instill.[53]

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47. Mount Holyoke College, The Honor Code: Academic and Community Responsibility § III, Community Responsibility, Introduction (reprinted from the Student Handbook).

48. Marquette University, Racial Abuse and Harassment Policy 1 (May 5, 1989).

49. *Id.*

50. Mary Washington College, Mary Washington College Student Handbook 20 (1990-91) (available from Office of the Dean of Students).

51. *Id.*

52. "If the university stands for anything, it stands for freedom in the search for truth. . . . [But] [c]an truth have its day in court when the courtroom is made into a mud-wrestling pit where vicious epithets are flung?" Laney, *Why Tolerate Campus Bigots?*, N.Y. Times, Apr. 6, 1990, at A35.

53. Thus James T. Laney, the President of Emory University, stated:

> Educators are by definition professors of value. Through education we pass on to the next generation not merely information but the habits and manners of our civil society. The university differs from society at large in its insistence on not only free expression but also an environment conducive to mutual engagement.

Id.

II. The Values of the First Amendment

As any constitutional lawyer knows, first amendment doctrine is neither clear nor logical. It is a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions, predilections. It requires determined interpretive effort to derive a useful set of constitutional principles by which to evaluate regulations of expression. In recent years there has been an unfortunate tendency, by no means limited to the controversy surrounding racist speech, to avoid this difficult work by relying instead on formulaic invocations of first amendment "interests" which can be captured in such conclusory labels as "individual self-fulfillment," "truth," "democracy," and so forth.[54] These formulas cast an illusion of stability and order over first amendment jurisprudence, an illusion that can turn dangerous when it substitutes for serious engagement with the question of why we really care about protecting freedom of expression.

What is most disappointing about the expanding literature proposing restrictions on racist speech is the palpable absence of that engagement. The most original and significant articles in the genre concentrate on uncovering and displaying the manifold harms of racist communications; the harms of regulating expression are on the whole perfunctorily dismissed. Of course this emphasis is readily understandable. It is a formidable task to attempt to carve out a new exception to the general protection of speech afforded by the armor of first amendment doctrine. Even so staunch a defender of minority rights as Justice William Brennan might seem unsympathetic, given his recent observation in *United States v. Eichman*[55] that "virulent ethnic and religious epithets"[56] ought to receive constitutional protection because of the "'bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.'"[57] In the face of such daunting obstacles, it is natural for

54. *See, e.g.*, Delgado, *Words That Wound*, *supra* note 4, at 175-79; Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 Case W. Res. 733 (1989-90).

55. 110 S. Ct. 2404 (1990).

56. *Id.* at 2410.

57. *Id.* (quoting Texas v. Johnson, 109 S. Ct. 2533, 2544 (1989)). See Brennan's remark in *Texas v. Johnson* to the same effect: "The First Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the

proponents of restraints on racist speech to emphasize their affirmative case and to minimize countervailing considerations.

I agree, of course, that the question of regulating racist speech ought not to be settled simply by reference to present doctrine. But it is equally important that the question ought not to be settled without serious engagement with the values embodied in that doctrine. Regulations like those promulgated by the University of Connecticut and many other universities suggest that this lack of engagement is a real and practical problem.[58] Although earnest inquiry into the first amendment values involved in the restraint of racist speech cannot by itself definitively solve the difficult constitutional issues we face, it can at least illuminate what is most deeply at stake for us in this controversy, and to that extent clarify the choices we must make.

A. Democracy, Public Discourse, and the First Amendment

This essay concentrates on the relevance for the regulation of racist speech of only one strand of first amendment values. It is, however, an extraordinarily important strand, one which in my view accounts for a good deal of the shape of contemporary first amendment doctrine. It concerns the relationship between freedom of expression and democratic self-governance. Its basic thrust is to provide certain kinds of protection to communication deemed necessary for the processes of democracy, communication that the Court has labelled "public discourse."[59]

In protecting public discourse the first amendment serves the purposes of democracy, and the question at hand is what we believe those purposes to be. This is not a simple question. Even so powerful a first amendment theorist as Frederick Schauer can argue that "[a]ny distinct restraint on majority power, such as a

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marketplace of ideas." *Johnson*, 109 S. Ct. at 2546. Brennan supported this remark by citing Brandenburg v. Ohio, 395 U.S. 444 (1969), in which the Court extended first amendment protection to a Ku Klux Klan rally featuring such revolting comments as: "Bury the n——s"; "A dirty n——r"; and "Send the Jews back to Israel." *Id.* at 446 n.1.

58. Charles Lawrence, for example, writes that the University of Michigan regulations recently invalidated by a federal court, see *supra* note 45, were so patently unconstitutional that "it is difficult to believe that anyone at the University of Michigan Law School was consulted" in their drafting. Lawrence, *supra* note 5, at 477 n.161. "It is almost as if the university purposefully wrote an unconstitutional regulation so that they could say to the black students, 'We tried to help but the courts just won't let us do it.'" *Id.* A great many contemporary university regulations are similar to those of the University of Michigan.

59. Hustler Magazine v. Falwell, 485 U.S. 46, 54 (1988).

principle of freedom of speech, is by its nature anti-democratic, anti-majoritarian."[60] If democracy means no more to us than that in each instance the majority ought to have its way, then of course Schauer is quite correct that speech comprising public discourse ought not for that reason to have any special exemption from majoritarian regulation.[61] But the underlying equation of democracy with the simple exercise of majority will is radically inadequate not only as an explanation of contours of contemporary doctrine, but also as an account of the normative attraction of democracy.[62]

A far more persuasive account is one that begins with

> the distinction between autonomy and heteronomy: democratic forms of government are those in which the laws are made by the same people to whom they apply (and for that reason they are autonomous norms), while in autocratic forms of government the law-makers are different from those to whom the laws are addressed (and are therefore heteronomous norms).[63]

This distinction between autonomy and heteronomy formed the basis of Hans Kelsen's definition of "democracy," which he viewed as a form of government resting on "the principle of self-determination."[64] The distinction is manifestly at the root of the Court's repudiation of seditious libel in *New York Times Co. v. Sullivan*,[65] which turned on Madison's differentiation of American and English forms of government: in England "the Crown was sovereign and the people were subjects," whereas in America "'[t]he people,

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60. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 40 (1982). On the equation of democracy with majoritarianism, see A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 254 (F. Bowen trans. 1945): "The very essence of democratic government consists in the absolute sovereignty of the majority. . . ."

61. Schauer writes:

> The more we accept the premise of the argument from democracy, the less can we impinge on the right of self-government by restricting the power of the majority. If the argument from democracy would allow to be said things that the "people" do not want to hear, it is not so much an argument based on popular will as it is an argument against it.

F. SCHAUER, *supra* note 60, at 41.

62. The equation is nevertheless quite commonplace. *See, e.g.*, Partlett, *supra* note 5, at 458 (footnote omitted) ("I take it that a central tenet of democracy is majority rule. If the majority decides to suppress free speech, how can it be defended upon democratic lines?").

63. N. BOBBIO, DEMOCRACY AND DICTATORSHIP 137 (P. Kennealy trans. 1989).

64. H. KELSEN, GENERAL THEORY OF LAW AND STATE 284-86 (A. Wedberg trans. 1961).

65. 376 U.S. 254 (1964).

not the government, possess absolute sovereignty.'"[66] For this reason in America "'the censorial power is in the people over the Government, and not in the Government over the people.'"[67]

If democracy as a form of government is important to us because it embodies the value of self-determination, we must ask what it means for a collection of persons to decide governmental policy in a way that facilitates that value.[68] Kelsen answers the question in a way that begins with Rousseau's formulation in *The Social Contract*,[69] but that moves rapidly to a distinctively modern perspective:

> A subject is politically free insofar as his individual will is in harmony with the "collective" (or "general") will expressed in the social order. Such harmony of the "collective" and the individual will is guaranteed only if the social order is created by the individuals whose behavior it regulates. Social order means determination of the will of the individual. Political freedom, that is, freedom under social order, is self-determination of the individual by participating in the creation of the social order.[70]

Because it is unconvincing to imagine that the will of individuals can be "in harmony" with the general will in all matters of political moment, Kelsen ultimately locates the value of self-determination in the ability of persons to participate in the process by which the social order is created. He conceives that process as preeminently one of communication:

> The will of the community, in a democracy, is always created through a running discussion between majority and minority, through free consideration of arguments for and against a certain regulation of a subject matter. This discussion takes place not only in parliament, but also, and foremost, at political meetings, in newspapers, books, and other vehicles of public opinion. A democracy without public opinion is a contradiction in terms.[71]

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66. *Id.* at 274 (quoting 4 ELLIOT'S DEBATES 569 (1876)) (citation omitted in original).

67. *Id.* at 275 (quoting 4 ANNALS OF CONGRESS 934 (1794)).

68. This is the central problematic of Alexander Meiklejohn's work. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 11 (1948). Meiklejohn was concerned to analyze "the difference between a political system in which men do govern themselves and a political system in which men, without their consent, are governed by others." *Id.*

69. J. ROUSSEAU, THE SOCIAL CONTRACT (C. Frankel trans. 1947).

70. H. KELSEN, *supra* note 64, at 285.

71. *Id.* at 287-88.

For Kelsen, then, democracy serves the principle of self-determination because it subjects the political and social order to public opinion, which is the product of a dialogic communicative exchange open to all. The normative essence of democracy is thus located in the communicative processes necessary to instill a sense of self-determination,[72] and in the subordination of political decisionmaking to those processes.

This logic is widely shared. It leads Benjamin Barber, for example, to conclude that "there can be no strong democratic legitimacy without ongoing talk."[73] It leads John Dewey to remark that "[d]emocracy begins in conversation."[74] It leads Durkheim to observe that "[t]he more that deliberation and reflection and a critical spirit play a considerable part in the course of public affairs, the more democratic the nation."[75] It leads Claude Lefort to claim that

> modern democracy invites us to replace the notion of a regime governed by laws, of a legitimate power, by the notion of a regime founded upon *the legitimacy of a debate as to what is legitimate and what is illegitimate*—a debate which is necessarily without any guarantor and without any end.[76]

In fact the notion that self-determination requires the maintenance of a structure of communication open to all commands a wide consensus. Jürgen Habermas characterizes that structure as determined by the effort to attain "a common will, communicatively shaped and discursively clarified in the political public sphere."[77] John Rawls views it as a process of "reconciliation through public reason."[78] Frank Michelman regards it as the practice of "jurisgenerative politics" through the "dialogic 'modulation' of participants' pre-political understandings."[79] For all three thinkers the goal of the structure is to facilitate the

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72. For a good discussion of this point, see Freeman, *Reason and Agreement in Social Contract Views*, 19 PHIL. & PUB. AFF. 122, 154-57 (1990).

73. B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 136 (1984); *see* Pitkin & Shumer, *On Participation*, DEMOCRACY, Fall 1982, at 43, 43-54.

74. DIALOGUE ON JOHN DEWEY 58 (C. Lamont ed. 1959).

75. E. DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 89 (C. Brookfield trans. 1958).

76. C. LEFORT, DEMOCRACY AND POLITICAL THEORY 39 (D. Macey trans. 1988).

77. 2 J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 81 (T. McCarthy trans. 1987).

78. Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 230 (1985).

79. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1526-27 (1988).

attainment of "agreement" that is "uncoerced, and reached by citizens in ways consistent with their being viewed as free and equal persons."[80]

Coercion is precluded from public debate because the very purpose of that debate is the practice of self-determination. The goal is "agreement" (or the attainment of "a common will") because in such circumstances the individual will is by hypothesis completely reconciled with the general will. It is important to understand, however, that this goal is purely aspirational. In fact, it is precisely because absolute agreement can never actually be reached that the debate which constitutes democracy is necessarily "without any end," and hence must be independently maintained as an ongoing structure of communication.

Without this structure, the simple kind of majoritarian rule Schauer equates with democracy loses its grounding in the principle of self-determination and merely represents the heteronomous submission of a minority to the forceful command of a majority. With such a structure in place, on the other hand, both majority and minority can each be understood to have had the opportunity freely to participate within a "system"[81] of communication upon which the legitimacy of all political arrangements depends. Whether that opportunity will actually establish the value of autonomous self-determination for both majority and minority is a complex and contingent question, dependent upon specific historical circumstances. But, in the absence of that opportunity, realization of the value of autonomous self-determination will be precluded under conditions characteristic of the modern state.[82]

The first amendment principles that this essay considers are those that function to safeguard from majoritarian interference this structure of public discourse, so that our democracy will be able to serve the end of collective self-determination. Four aspects of that structure require emphasis, for they will be of importance when we subsequently examine in detail the regulation of racist speech.

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80. Rawls, *supra* note 78, at 229-30; *see* 1 J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 25-26 (T. McCarthy trans. 1984); Michelman, *supra* note 79, at 1526-27.

81. Fiss, *supra* note 3, at 38.

82. I do not mean to foreclose the possibility that, under special conditions of charismatic leadership or identification with traditional authority, the value of self-determination can be achieved in the absence of a communicative structure of public discourse. I mean only to imply that such conditions will not ordinarily obtain in the modern rational and bureaucratic state.

First, the function of public discourse is to reconcile, to the extent possible, the will of individuals with the general will. Public discourse is thus ultimately grounded upon a respect for individuals seen as "free and equal persons."[83] In the words of Jean Piaget,

> The essence of democracy resides in its attitude towards law as a product of the collective will, and not as something emanating from a transcendent will or from the authority established by divine right. It is therefore the essence of democracy to replace the unilateral respect of authority by the mutual respect of autonomous wills.[84]

The individualism so characteristic of first amendment doctrine[85] thus flows directly from the central project of democracy.[86]

Second, some form of public/private distinction is necessarily implied by democracy understood as a project of self-determination. This is because the state undermines the *raison d'être* of its own enterprise to the extent that it itself coercively forms the "autonomous wills" that democracy seeks to reconcile into public opinion.[87] If the adjective "private" is understood to designate that which is beyond the coercive formation of the state, public discourse must be conceptualized as a process through which "private" perspectives are transformed into public power.

Third, democracy is on this account inherently incomplete. This is because the "autonomous wills" postulated by democratic the-

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83. Rawls, *supra* note 78, at 230.

84. J. PIAGET, THE MORAL JUDGMENT OF THE CHILD 366 (M. Gabain trans. 1948).

85. *See* Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 314-24 (1988).

86. See, for example, Kateb, *Democratic Individuality and the Claims of Politics*, 12 POL. THEORY 331, 332 (1984):

> To speak, therefore, of individualism is to speak of the most characteristically democratic political and moral commitment. It would be a sign of defection from modern democracy to posit some other entity as the necessary or desirable center of life. There is therefore nothing special (much less, arbitrary) in assuming that the doctrine of the individual has the preeminent place in the theory of democracy.

87. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 205-06 (1986) (Blackmun, J., dissenting). Such a public/private distinction must, of course, be understood as inherently unstable and problematic, for all government regulation influences, to one degree or another, the formation of individual identity. *See, e.g.*, Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1138-39 (1986). For this reason, the distinction should be regarded as a pragmatic instrument for distinguishing those aspects of the self considered indispensable for the exercise of political and moral autonomy, and hence as beyond the coercive formation of the state.

ory do not and cannot appear *ex nihilo*. The only reason that a person possesses a personality capable of autonomous choice is because the person has internalized "the institutions of [the] community into his own conduct."[88] This process of socialization, which is prerequisite for personal identity, is not itself a matter of independent election, but rather is attributable to accidents of birth and acculturation. Democracy thus necessarily presupposes important (not to say foundational) aspects of the social world organized along nondemocratic lines. For this reason public discourse must always exist in tension with other forms of communication ("nonpublic speech").

Fourth, democracy, like all forms of government, must ultimately be capable of accomplishing the tasks of governance. As Alexander Meiklejohn notes, "Self-government is nonsense unless the 'self' which governs is able and determined to make its will effective."[89] Democratic governments must therefore have the power to regulate behavior. But because public discourse is understood as the communicative medium through which the democratic "self" is itself constituted, public discourse must in important respects remain exempt from democratic regulation. We use the speech/action distinction to mark the boundaries of this exemption. Because all "[w]ords are deeds,"[90] this distinction is purely pragmatic. We designate the communicative processes necessary to sustain the principle of collective self-determination "speech" and thus insulate it from majoritarian interference.

B. Community, Civility Rules, and Public Discourse

Restraints on racist speech characteristically involve certain general first amendment issues that I briefly review in this Section in light of the functional concerns of public discourse. In so doing I confine myself to summarizing conclusions, the detailed arguments for which I have developed elsewhere.[91]

If democratic self-governance presupposes a social world in which "autonomous wills" are to be coordinated and reconciled,

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88. G. MEAD, MIND, SELF & SOCIETY 162 (C. Morris ed. 1934).

89. A. MEIKLEJOHN, *supra* note 68, at 14.

90. L. WITTGENSTEIN, CULTURE AND VALUE 46e (P. Winch trans. 1980).

91. *See generally* Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990) [hereinafter Post, *The Constitutional Concept*]; Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986) [hereinafter Post, *Defamation Law*]; Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989) [hereinafter Post, *Privacy*].

there is an important form of social organization, which I call "community," that rests on exactly the opposite presupposition. Building on the work of Michael Sandel,[92] I define a "community" as a social formation that inculcates norms into the very identities of its members. So far from being considered autonomous, persons within a community are understood to depend, for the very integrity and dignity of their personalities, upon the observance of these norms.

For hundreds of years an important function of the common law has been to safeguard the most important of these norms, which I call "civility rules." These rules apply to communication as well as to action, and their enforcement lies at the foundation of such communicative torts as defamation,[93] invasion of privacy,[94] and intentional infliction of emotional distress.[95] Through these torts the common law not only protects the integrity of the personality of individual community members, but it also serves authoritatively to articulate a community's norms and hence to define a community's identity.

There is an obvious tension between community and democracy. Public discourse within a democracy is legally conceived as the communicative medium through which individuals choose the forms of their communal life; public discourse within a community is legally conceived as a medium through which the values of a particular life are displayed and enacted.[96] Democracy seeks to open the space of public discourse for collective self-constitution; community seeks to bound that space through the enforcement of civility rules. In the inevitable negotiation between democracy and community, the first amendment has, since the 1940's, generally served the purposes of democracy by suspending the enforcement of civility rules in such landmark cases as *Cantwell v. Connecticut*,[97] *New York Times Co. v. Sullivan*,[98] *Cohen v. California*,[99] and *Hustler Magazine v. Falwell*.[100]

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92. *See* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).
93. *See* Post, *Defamation Law*, *supra* note 91, at 699-719.
94. *See* Post, *Privacy*, *supra* note 91, at 959-87.
95. *See* Post, *The Constitutional Concept*, *supra* note 91, at 616-46.
96. *See, e.g.*, *id.* at 627-33.
97. 310 U.S. 296 (1940).
98. 376 U.S. 254 (1964).
99. 403 U.S. 15 (1971).
100. 485 U.S. 46 (1988). The American first amendment is unique in thus separating democracy from community. I suspect that the origins of this separation lie both in our tradition of individualism and in the fact of our cultural diversity. For instructive

There is, however, a complex and reciprocal relationship between democracy and community. Democracy necessarily presupposes some form of social institution, like community, through which the concrete identities of "autonomous" democratic citizens can be defined and instantiated. The paradigmatic examples of such institutions are the family and the elementary school. In these settings a child's identity is created in the first instance through decidedly undemocratic means; it "comes to be by way of the internalization of sanctions that are de facto threatened and carried out."[101]

This fact has important consequences for the practice of public discourse. The specific purpose of that discourse is the achievement of some form of "reconciliation through public reason,"[102] yet because the identity of democratic citizens will have been formed by reference to community norms, speech in violation of civility rules will characteristically be perceived as both irrational and coercive.[103] This creates what I have elsewhere termed the "paradox of public discourse": the first amendment, in the name of democracy, suspends legal enforcement of the very civility rules that make rational deliberation possible.[104] The upshot of the paradox is that the separation of public discourse from community depends in some measure upon the spontaneous persistence of civility. In the absence of such persistence, the use of legal regulation to enforce community standards of civility may be required as an unfortunate but necessary option of last resort. A paradigmatic example of this use may be found in the "fighting words" doctrine of *Chaplinsky v. New Hampshire*.[105]

If community norms thus infiltrate and make possible the practice of democracy, so the ethical imperatives of democracy can be expected to reshape the terms of community life. A stable and successful democratic state will regulate the lives of its citizens in ways consistent with the underlying principle of "their being viewed as free and equal persons."[106] Such regulation will influence community institutions, moving them closer toward the

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contrasts, see Jacobsohn, *Alternative Pluralisms: Israeli and American Constitutionalism in Comparative Perspective*, REV. POL., Spring 1989, at 159; Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657 (1980).

101. 2 J. HABERMAS, *supra* note 77, at 38.

102. Rawls, *supra* note 78, at 230.

103. Post, *The Constitutional Concept*, *supra* note 91, at 641-44.

104. *Id.*

105. 315 U.S. 568 (1942).

106. Rawls, *supra* note 78, at 230.

realization of specifically democratic principles. The only intrinsic limitation on the ability of the democratic state to regulate community institutions in this manner is the public/private distinction, which requires that at some point the coercive formation of the identity of individuals remain beyond the purview of the state.

C. The Domain of Public Discourse

This essay primarily concerns the regulation of racist expression within public discourse. "Public discourse" may be defined as encompassing the communicative processes necessary for the formation of public opinion, whether or not that opinion is directed toward specific government personnel, decisions, or policies. Democratic self-governance requires that public opinion be broadly conceived as a process of "collective self-definition"[107] that will necessarily precede and inform any specific government action or inaction. Public discourse cannot encompass all communication within a democracy, however, because both the public/private distinction and the paradox of public discourse imply that the processes of democratic self-governance depend upon the persistence of other nondemocratic forms of social organization, such as community.

Because the first amendment extends extraordinary protection to public discourse, it is important to demarcate the boundary between such discourse and other speech. I have discussed this issue in detail elsewhere[108] and will not repeat that analysis here. Suffice it to say that the boundary is inherently uncertain and subject to perennial reevaluation. Factors that the Supreme Court has used to delineate the boundary include the content of speech and the manner of its dissemination.[109] Speech that can be said to be about matters of "public concern" is ordinarily classified as public discourse,[110] as is speech that is widely distributed to the public at large through the mass media. There are exceptions, however, like commercial speech, which flow from the influence of traditional conventions that define for us a recognizable "genre" of public speech.[111]

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107. Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 346 (1981).
108. *See* Post, *The Constitutional Concept*, *supra* note 91, at 667-84.
109. *Id.* at 667.
110. *Id.*
111. *Id.* at 680.

It is difficult to discuss profitably the abstract question of setting the boundaries of public discourse. At the most general level, these boundaries mark the point at which our commitment to the dialogue of autonomous self-governing citizens shifts to other values, as for example to that of the socially implicated self characteristic of community. The particular points at which our commitments alter is a highly specific and contextual inquiry requiring case-by-case assessment.

I confine myself, therefore, to two preliminary observations. First, the constitutional protections extended to public discourse differ importantly from those extended to nonpublic speech. Thus even if the first amendment were to immunize from legal regulation the circulation of certain racist ideas in newspapers, it would not follow that the expression of those same ideas could not be restrained by the government within the workplace, where an image of dialogue among autonomous self-governing citizens would be patently out of place.[112] The first amendment values at stake in the regulation of nonpublic speech are complex and diverse,[113] and I will not be able to review them within the limited span of this essay.

Second, the category of racist expression cannot be excluded as such from the domain of public discourse. The racist content of a particular communication is only one of many factors relevant to the determination of whether the communication lies within or without of that domain. Thus the leaflet at issue in *Beauharnais v. Illinois*,[114] which was an effort "to petition the mayor and council of Chicago to pass laws for segregation,"[115] was plainly

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112. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 237-38 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 385 (D. Minn. 1980); *cf.* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986) (holding that speech that constitutes sexual harassment may be regulated). I do not mean to imply, however, that *all* speech within the workplace is excluded from public discourse. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 149 (1983); Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 415-16 (1979).

113. It should be emphasized that in text I am using the adjective "public" in a discrete and stipulative sense to refer to that speech necessary for democratic self-governance. Thus I do not mean to imply that speech within the workplace is "nonpublic" in the sense that it is unimportant, or that it is "private" in the sense of being intrinsically insulated from governmental control or regulation. *See* Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1, 10-11; *supra* text accompanying notes 106-11. My point is instead that if the regulation of nonpublic speech is in fact protected by the first amendment, it will be on the basis of constitutional values other than democratic self-governance.

114. 343 U.S. 250 (1952). The leaflet is reproduced in Justice Black's dissenting opinion. *Id.* at 276 (Black, J., dissenting).

115. *Id.* at 267 (Black, J., dissenting).

an effort to engage in public discourse, despite its overt and virulent racism. Similarly, the infamous Nazi march in Skokie was also an attempt to participate in public discourse, notwithstanding its repulsive political symbolism.[116] In both cases racists used well-recognized media for the communication of ideas in order to address and affect public opinion.[117]

III. Racist Speech and Public Discourse

We are now in a position to assess the justifications for the regulation of racist expression in light of the first amendment values associated with public discourse. In some cases this assessment allows us to reach definite conclusions; in others it simply helps to clarify the issues raised by particular forms of regulation. In each case I use the term "racist speech" to encompass the class of communications that would have to be regulated in order to ameliorate the specific harm under consideration.

A. Public Discourse and the Intrinsic Harm of Racist Ideas

It is of course a commonplace of first amendment jurisprudence "that the government must remain neutral in the marketplace of ideas."[118] The justification for this principle as applied to public discourse is straightforward. Democracy serves the value of self-determination by establishing a communicative structure within which the varying perspectives of individuals can be reconciled through reason. If the state were to forbid the expression of a particular idea, the government would become, with respect to individuals holding that idea, heteronomous and nondemocratic. This is incompatible with a form of government predicated upon treating its citizens "in ways consistent with their being viewed as free and equal persons."[119]

For this reason the value of self-determination requires that public discourse be open to the opinions of all. "[S]ilence coerced by law—the argument of force in its worst form"[120] is constitu-

116. *See* 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).

117. To exclude from public discourse the category of racist speech as such would be equivalent to establishing a per se exclusion of racist ideas from public discourse, a form of regulation whose constitutionality is assessed in Section III(A), *infra*.

118. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (quoting FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978)).

119. Rawls, *supra* note 78, at 230.

120. Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

tionally forbidden. In a democracy, as Piaget notes, "there are no more crimes of opinion, but only breaches of procedure. All opinions are tolerated so long as their protagonists urge their acceptance by legal methods."[121] The notion that racist ideas ought to be forbidden within public discourse because of their "elemental wrongness"[122] is thus fundamentally irreconcilable with the rationale for first amendment freedoms.

The contemporary debate nevertheless contains three distinct arguments that racist ideas ought to be proscribed because of their "deontic" harm. The first is that the idea of racism is "*sui generis*" because it is "universally condemned."[123] The same authors who make this claim, however, also stress "the structural reality of racism in America," a reality manifested not merely in an "epidemic of racist incidents," but also in the widespread racist beliefs characteristic of "upper-class whites" and important social "institutions."[124] In fact it is probably fair to characterize these authors as proponents of regulating racist speech precisely because of their urgent sense of the *prevalence* of racist practices. Although the nightmare of these practices ought to occasion strong public response, their prevalence substantially undermines the conclusion that racism is "universally condemned"[125] in any sense relevant for first amendment analysis. Such practices can be understood only as manifestations of strongly held but otherwise unarticulated racist ideas.[126]

A second argument is that the failure to regulate racist ideas amounts to a symbolic endorsement of racist speech, which is intolerable in "a society committed to ideals of social and political equality."[127] In essence this argument rejects the public/private

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121. J. PIAGET, *supra* note 84, at 57; *see id.* at 63.

122. Wright, *supra* note 5, at 10.

123. Matsuda, *supra* note 5, at 2359; *see* Kretzmer, *supra* note 5, at 458.

124. Matsuda, *supra* note 5, at 2332-34. "Racist hate messages are rapidly increasing and are widely distributed in this country using a variety of low and high technologies." *Id.* at 2336. Kretzmer is also concerned with the potential spread of racist ideas. *See* Kretzmer, *supra* note 5, at 464-65.

125. *See supra* note 123 and accompanying text.

126. I thus do not reach the theoretically more fundamental question of why it should make a constitutional difference that racist ideas are "universally condemned." See, for example, the Court's rejection in United States v. Eichman, 110 S. Ct. 2404, 2409 (1990), of the Solicitor General's invitation to overrule Texas v. Johnson, 109 S. Ct. 2533 (1989), on the grounds of "Congress' recent recognition of a purported 'national consensus' favoring a prohibition on flag-burning. . . . Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *Eichman*, 110 S. Ct. at 2409.

127. Kretzmer, *supra* note 5, at 456; *see* Matsuda, *supra* note 5, at 2338:

distinction required by democratic self-governance.[128] But if responsibility for ideas advanced by individuals in public discourse were to be attributed to government, the government could not then also be deemed *responsive* to those ideas in the way required by the principle of self-determination. Just as a library could not function if it were understood as endorsing the views of the authors whose books it collects and displays, so also in a democracy the government could not serve the value of autonomy if it were understood as endorsing the ideas expressed by private persons in public discourse.[129]

A third argument is that the free expression of racist ideas is inconsistent with our commitment to the egalitarian ideals of the fourteenth amendment. At root this argument rejects autonomy as the principal value of democracy and substitutes instead what Kenneth Karst has eloquently argued is "the substantive center of the fourteenth amendment: the principle of equal citizenship."[130] Although some political theorists have endorsed this position,[131] it runs against the overwhelming American commitment to the importance of "self-rule," to the fundamental belief "that the American people are politically free insomuch as they are governed by themselves collectively."[132]

Of course the principle of self-rule contains its own commitment to the value of equal citizenship, to the notion that, as a formal matter, citizens must be "viewed as free and equal persons."[133] But the meaning of this commitment is measured by the purpose of enabling the processes of self-determination. The appeal to the fourteenth amendment, on the other hand, is meant to signify

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> However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, . . . the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.

128. Matsuda, *supra* note 5, at 2378.

129. *See* Greenawalt, *supra* note 5, at 304-05.

130. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 1 (1988).

131. *See, e.g.*, N. BOBBIO, *supra* note 63, at 157-58; C. GOULD, RETHINKING DEMOCRACY: FREEDOM AND COOPERATION IN POLITICS, ECONOMY, AND SOCIETY 90 (1988); J. PENNOCK, DEMOCRATIC POLITICAL THEORY 3-161 (1979).

132. Michelman, *supra* note 79, at 1500-01. Michelman notes that "no earnest, nondisruptive participant in American constitutional debate is quite free to reject" this "belief." *Id.* at 1500.

133. Rawls, *supra* note 78, at 230.

commitment to a substantive value of equality that is not defined by reference to this purpose, so that the implementation of the value may adversely affect processes of self-determination.[134] The argument thus envisions the possibility of "balancing" fourteenth amendment values against first amendment principles.

In balancing the value of equal citizenship against the principle of self-determination, however, we must ask who is empowered to interpret the meaning of the highly contestable value of equal citizenship. To the extent that the value of equal citizenship is used to justify limiting public discourse, the interpreter of the value cannot be the people, because the very function of the appeal to the fourteenth amendment is to truncate the communicative processes by which the people clarify their collective will.[135] In such circumstances the Ultimate Interpreter, whoever or whatever it may finally turn out to be, must impose its will without popular accountability. Our government currently contains no such Interpreter, not even the Supreme Court, whose constitutional decisions are always shadowed by the potential of constitutional amendment or political reconstruction through subsequent appointments. The impossibility of locating such an Interpreter suggests the difficulties that attend the argument from the fourteenth amendment.[136]

B. Public Discourse and Harm to Identifiable Groups

The purpose of public discourse is to reconcile through reason the differences occasioned by a collection of "autonomous wills." Groups neither reason nor have an autonomous will; only persons do. This is the source of the profound individualism that characterizes first amendment doctrine. The question is whether that

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134. See, for example, *Language as Violence*, *supra* note 5, at 360 (remarks of Mari Matsuda):

> I use the principle of equality as a starting point. . . . [I]f I were to give primacy to any one right, and if I were to create a hierarchy, I would put equality first, because the right of speech is meaningless to people who do not have equality. I mean substantive as well as procedural equality.

135. That members of minority groups are now embraced within the circle of the people and afforded the formal equality required by first amendment processes of self-determination is not, of course, due to any principle of the first amendment, but rather to the principle of equal citizenship embodied in the fourteenth amendment. In this fundamental sense, therefore, no hierarchical relationship between the first and fourteenth amendments can exist.

136. For fuller consideration of a sophisticated argument for "balancing" the values of the fourteenth amendment against those of the first, see *infra* text accompanying notes 210-19.

individualism is compatible with the regulation of public discourse in order to prevent harm to groups.

It is rather common for the laws of other countries to restrain speech deemed harmful to groups, speech that, in the words of the Illinois statute at issue in *Beauharnais*, casts "contempt, derision, or obloquy" on a particular group.[137] Such laws subordinate individual expression to the protection of group status and dignity, typically on the theory that group membership is an essential ingredient of personal identity. Hence, as Gary Jacobsohn notes in his description of Israeli law, groups are seen "as units whose corporate identity carries with it . . . claim[s] upon the state for specific entitlement."[138] Thus the law will in certain situations give "greater priority to fraternal and communal attachments over the subjective choices of individuals."[139]

In American law, by contrast, there is a tendency to view groups as mere "collections of individuals,"[140] whose claims are no greater than those of their constituent members.[141] This tendency is virtually fixed by the individualist presuppositions of public discourse. Thus in *Cantwell v. Connecticut*[142] the Court extended first amendment protection to an anti-Catholic diatribe so violent that it "would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows."[143] The Court reasoned that this constitutional immunity was necessary so that "many types of life, character, opinion and belief can develop unmolested and unobstructed."[144] This reasoning presupposes that groups evolve through the informed choices of individuals.[145] The Court subordinated the sen-

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137. Beauharnais v. Illinois, 343 U.S. 250, 251 (1952) (citing ILL. REV. STAT. ch. 38, ¶ 471 (1949)). Antiblasphemy regulations are a common example of such laws. *See* Post, *supra* note 85, at 305-17; THE LAW COMMISSION, OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP 39-53 (Working Paper No. 79, 1981). Many countries also have laws prohibiting group defamation. *See, e.g.*, E. BARENDT, FREEDOM OF SPEECH 161-67 (1985); Lasson, *Group Libel*, *supra* note 5, at 88-89; Matsuda, *supra* note 5, at 2341-48.

138. Jacobsohn, *supra* note 100, at 175.

139. *Id.* at 170.

140. *Id.* at 175.

141. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

142. 310 U.S. 296 (1940).

143. *Id.* at 309.

144. *Id.* at 310.

145. For an excellent study of the efforts of contemporary Americans to forge new communities, like the Castro district in San Francisco, and hence to "reinvent themselves" by constructing "new lives, new families, even new societies," see F. FITZGERALD, CITIES ON A HILL: A JOURNAL THROUGH CONTEMPORARY AMERICAN CULTURES 23 (1986). FitzGerald views such efforts as "quintessentially American"; try to imagine, she suggests, "Parisians

sibilities of members of established groups, such as Catholics, to the communicative structure necessary for these choices.[146] It thus refused to allow unattractive and highly offensive representations of the Church to be excluded from public discourse.

Cantwell makes special sense because American religious groups have since the nineteenth century been organized on the principle of "voluntarism,"[147] on the notion that "religion is . . . a matter of individual choice."[148] It might be argued, however, that race is quite another matter, one in which a certain kind of group identity is inescapably imposed upon a person by accident of birth. For this reason group identity might be seen as primary with respect to race, and the individualist foundations of public discourse—the assumption that racial groups are determined by processes of individual decisionmaking—repudiated as unrealistic.

This argument is powerful and requires close attention. In analyzing it, we can draw on the distinction that has emerged in feminist writings between "sex," which refers to biological facts, and "gender," which refers to socially constructed roles.[149] To confuse the two, to predicate the social content of gender upon the biological fact of sex, is to fall into "the determinist or essentialist trap."[150] The political point of the distinction is to keep perpetually open for discussion and analysis the social meaning of being born female and included within the group "women."[151] Even if one is not free to opt out of the group, the possibility ought nevertheless to be preserved that the identity of the group be ultimately determined, in the language of Nancy Fraser, "through dialogue and collective struggle."[152] Fraser writes that "[i]n a society as complex as ours, it does not seem to me wise or even possible to extrapolate" the outcome of that dialogue

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creating a gay colony or a town for grandparents." *Id.* If in Europe or Canada group identity precedes the attempt to ask "the essential questions of who we . . . are, and how we ought to live," *id.* at 20, 389-90, FitzGerald's work illustrates the extent to which group identity in America tends to follow on that attempt, and hence ultimately to rest on individualist premises.

146. For a more detailed discussion, see Post, *supra* note 85, at 319-35.

147. *See* P. MILLER, THE LIFE OF THE MIND IN AMERICA 40-43 (1965).

148. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER, & S. TIPTON, HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 225 (1985).

149. *See, e.g.*, D. RHODE, JUSTICE AND GENDER 5 (1989); Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55, 55-63 (1987).

150. Marcus, *supra* note 149, at 61; *see* Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

151. *See* Harris, *supra* note 150, at 615-16.

152. Fraser, *Toward a Discourse Ethic of Solidarity*, 5 PRAXIS INT'L 425, 429 (1986).

"from the current, prepoliticized experiences and idiolects of women, especially since it is likely, in my view, that these will turn out to be the current prepoliticized experiences and idiolects only of *some* women."[153]

Fraser's point is that regardless of the biological basis of sex, the social meaning of gender is a political issue whose outcome, like that of all political issues, must be regarded as indeterminate. She thus applies the structure of democratic self-determination to the constitution of group identity. The individualist assumptions of that structure create a form of communication in which political indeterminacy is preserved; they guarantee that the dialogue envisioned by Fraser will remain open to the perspectives of *all* women. If the identity of the group "women" were understood to have a content determinate enough to employ the force of law to silence dissenting views, the law would hegemonically impose the perspective of only *some* women.

The same logic, I believe, holds true for racial groups. We must distinguish race as a biological category from race as a social category. Even if unfortunately "the attempt to establish a *biological* basis of race has not been swept into the dustbin of history,"[154] it would nevertheless be deplorable to construct first amendment principles on the basis of a biological view of race. What is most saliently at issue is rather "race as a social concept": "The effort must be made to understand race as *an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle.*"[155] To the extent that the social meaning of race is thus profoundly controversial[156]—and it is controversial not merely for members of minority groups but also for the entire Nation[157]—the individualist premises of public

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153. *Id.*

154. M. OMI & H. WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1980s 59 (1986). For an example of the persistence of a biological model of race, see Herrnstein, *Still an American Dilemma*, PUB. INTEREST, Winter 1990, at 3.

155. M. OMI & H. WINANT, *supra* note 154, at 60, 68. Omi and Winant write of the "continuous temptation to think of race as an *essence*, as something fixed, concrete and objective." *Id.* at 68; *see* Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, in H. GATES, "RACE," WRITING AND DIFFERENCE 36 (1986): "Talk of 'race' is particularly distressing for those of us who take culture seriously. . . . What exists 'out there' in the world—communities of meaning, shading variously into each other in the rich structure of the social world—is the province not of biology but of hermeneutic understanding."

156. For a good example, see Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

157. For a brief history of the interdependence of understandings of national identity

discourse will ensure that it remains open to democratic constitution.

This lack of closure may of course be threatening, for it casts the creation of group identity upon the uncertain currents of public discourse. The safe harbor of legal regulation may, by contrast, appear to promise members of minority groups more secure control over the meaning of their social experience. But that promise is illusory, for it is profoundly inconsistent with the analysis of racism prevalent in the contemporary literature. To the extent that racism is viewed as pervasive among whites, and to the extent that whites, as a dominant group, can be expected to hold the levers of legal power, there would seem little reason to trust the law to establish socially acceptable meanings for race. Such meanings cannot be determined by reference to easy or bright-line distinctions, as for example those between positive or negative ascriptions of group identity. The work of figures as diverse as William Julius Wilson,[158] Shelby Steele,[159] and Louis Farrakhan[160] illustrates how highly critical characterizations of racial groups can nevertheless serve constructive social purposes. To vest in an essentially white legal establishment the power to discriminate authoritatively among such characterizations and purposes would seem certain to be disempowering.[161]

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and understandings of race, see Gleason, *American Identity and Americanization*, in W. PETERSEN, M. NOVAK, & P. GLEASON, CONCEPTS OF ETHNICITY 57 (1982). A small but I suspect paradigmatic example of this interdependence may be found in the following passage from a student letter to *The Daily Californian*:

> Advertising, television, schools and government are areas of society where racism is largely promoted. Its existence is not easily eradicated. Phrases like "blackmail," "black ball" and "black mood" are common ways "blackness" is communicated in negative terms. . . . One of my professors frequently employs terms like "black lie" to mean the worst of all lies. It takes a conscious effort to disregard these statements and prevent such negative influence on one's psyche. But we must understand that daily use of this terminology reinforces the attack on African-American identity and value.

Broughton, *Promote Afro-American Culture*, The Daily Californian, Sept. 12, 1989, at 4. The writer's point is relevant to the perspectives of members of *both* minority and majority groups; in fact the point effectively demonstrates the essential reciprocity of these perspectives.

158. Wilson, *Social Research and the Underclass Debate*, BULL. AM. ACAD. ARTS & SCI., Nov. 1989, at 30.

159. S. STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990).

160. See *Black Power, Foul and Fragrant*, ECONOMIST, Oct. 12, 1985, at 25, for a summary of Farrakhan's critical assessment of the condition of many African-Americans.

161. Note, in this regard, Nadine Strossen's evidence that regulations of racist speech have historically proved to be "particularly threatening to the speech of racial and political minorities." Strossen, *supra* note 5, at 556-59.

The conclusion that group harm ought not to justify legal regulation is reflected in technical first amendment doctrine in the fact that virtually all communications likely to provoke a claim of group harm will be privileged as assertions of evaluative opinion.[162] The following language, for example, gave rise to legal liability in *Beauharnais*: "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, SURELY WILL."[163] Justice Frankfurter interpreted this language as a false factual assertion: "No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana."[164] This interpretation, however, seems plainly incorrect. To accuse an individual of using marijuana is to assert that she has committed certain specific acts, but to accuse the group "blacks" of using marijuana is not to make an analogous assertion. Some blacks will have used marijuana, and most will not have. The question is thus not the existence of certain specific acts, but rather whether those acts can appropriately be used to characterize the group. The fundamental issue is the nature of the group's identity, an issue that almost certainly ought to be characterized as one of evaluative opinion.

Because the social meaning of race is inherently controversial, most statements likely to give rise to actions for group harm will be negative assessments of the identity of racial groups, and hence statements of evaluative opinion. No serious commentator would advocate a trial to determine the truth or falsity of such statements; the point is rather that such statements should not be made at all because of the deep injury they cause. But in a context in which group identity is a matter for determination through political struggle and disagreement, the hypostatized injury of a group cannot, consistent with the processes that instantiate the principle of self-determination, be grounds to legally silence characterizations of group identity within public discourse.

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162. Or, in the language that the Court recently proposed in Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990), claims of group harm will most likely be privileged as nonfactual assertions of "ideas." For a discussion of the first amendment distinction between fact and ideas, see Post, *The Constitutional Concept*, *supra* note 91, at 649-61. For a discussion of the close relationship between group defamation and nonfactual ideas, see D. RICHARDS, TOLERATION AND THE CONSTITUTION 190-93 (1986); Greenawalt, *supra* note 5, at 305-06.

163. Beauharnais v. Illinois, 343 U.S. 250, 276 (1952) (ellipsis in original).

164. *Id.* at 257-58.

Commentators who stress the theme of group harm vigorously emphasize the fact that racist speech does not injure random groups; it damages precisely those groups who have historically suffered egregious oppression and subordination.[165] But although the tragedy of this fact is obvious, its constitutional implications are not. Our history certainly warrants the assumption that racist speech will inflict terrible injuries on victim groups. But the question is whether these injuries are so unspeakable as to justify suspending the democratic constitution of group identities. One approach might be to avoid this tension by characterizing the injuries of racist speech in such a way that their legal redress would actually be required by the principles of public discourse. Thus it can be argued that the stigmatizing and disabling effects of racist speech effectively exclude its victims from participation in public discourse. This approach suggests an important line of analysis, but I wish to defer consideration of it until Section III(D), *infra*, when it can be placed in the context of other justifications for restraints on racist speech that turn on harms to the marketplace of ideas.

Another method of avoiding the tension between group harm and democratic principles would be to claim that racist speech ought to be characterized as a "mechanism of subordination" within a larger system of suppression, rather than as a form of communication.[166] This claim requires us to determine the criteria by which speech can be designated as action and hence excluded from public discourse. The standard implicitly advanced by the claim is that if communication is intimately connected to larger social relationships that are deeply undesirable, the communication can for that reason be characterized as action.

The difficulty with this standard is that all communication grows out of and embodies social relationships; for this reason all communication is both speech and action. The function of public discourse is to create a protected space within which communication, even if embodying social relationships, can be protected as speech if formulated and disseminated in ways relevant for democratic self-governance. Such a space opens up the possibility of subjecting social relationships to rational reflection, dialogue, and (hence) *self*-control. It thus enables "self-rule" to be reconciled with rule "by laws."[167] If communication

165. *See, e.g.*, Matsuda, *supra* note 5, at 2358.
166. *Id.*
167. Michelman, *supra* note 79, at 1501.

could be excluded from this space because it embodies social relations of which we disapprove, public discourse could no longer perform this function. There is no difference between excluding speech from public discourse because we condemn the social relationships it embodies and excluding speech from public discourse because we condemn the ideas by which those social relationships are embodied. In the end, therefore, the argument that racist speech is a form of action reduces to the claim, which we have already considered, that racist speech ought to be restrained because of its inconsistency with the egalitarian ideals of the fourteenth amendment.

C. Public Discourse and Harm to Individuals

There appear at first blush to be important differences between claims of group harm and claims of individual harm. To the extent group identity is understood to be a matter of political struggle (and hence dialogic interaction), speech containing negative ascriptions of that identity cannot be censored without undermining the democratic nature of that struggle. But individual identity does not seem to rest on political struggle and dialogue in this way. Indeed, one's spontaneous image is of fully formed individuals entering the realm of public discourse to reach agreement on issues that concern their collective, rather than personal, lives. Speech damaging personal life can thus be restricted without undercutting the very purposes of public discourse.

This perspective, however, rests on a rather sharp distinction between individual and collective identity, a distinction that simply cannot be maintained. The very reason that racist speech harms individual persons is because it so violently ruptures the forms of social respect that are necessary for the maintenance of individual personality. These forms of respect, when taken together, constitute a collective, community identity. Hence the state can prevent the individual harm caused by racist speech only by enforcing pertinent standards of community identity. The interdependence of individual and collective identity is thus presupposed in the very concept of individual harm.

This interdependence lies behind well-established constitutional prohibitions on restricting public discourse because it is "offensive"[168] or "outrageous,"[169] or because it affronts "dignity"

168. Cohen v. California, 403 U.S. 15, 16 (1971).
169. Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988).

or is "insulting" or causes "public odium" or "public disrepute."[170] Such speech causes intense individual suffering because it violates community norms, yet the Court has required its toleration in order to prevent the state from using the authority of law to enforce particular conceptions of collective life.[171]

Questions of personal identity are in fact always at stake in discussions of collective self-definition. For this reason effective political dialogue requires that participants be constantly willing to be transformed. As Frank Michelman points out, public discourse is impossible so long as "the participants' pre-political self-understandings and social perspectives must axiomatically be regarded as completely impervious to the persuasion of the process itself."[172] As our collective aspirations change, so will our respective personal identities. Thus restrictions on public discourse designed to protect those identities from harm will necessarily also restrict self-determination as to our collective life. If group harm is an inevitable price of the political constitution of group identity, individual injury is an unavoidable cost of the political constitution of community identity.

It is important to emphasize the narrowness of this conclusion. In recent years an important theme of our national life has been the opposition to racism. We have enacted that opposition by legally regulating racist behavior like discrimination. Because action both creates and manifests identity, this regulation inhibits the formation and expression of racist identities. So also does regulation prohibiting certain kinds of racist speech in nonpublic speech, as for example in the workplace.[173] In effect we have determined to use government force to reshape community institutions in order to combat racism. This is an appropriate and laudable use of democratic power.[174] But it is legitimate precisely

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170. Boos v. Barry, 485 U.S. 312, 316, 322 (1988). "[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space to the freedoms protected by the First Amendment.' " *Id.* at 322 (quoting *Hustler Magazine*, 485 U.S. at 56); *see* Texas v. Johnson, 109 S. Ct. 2533, 2543-47 (1989).

171. I elaborate on this argument in Post, *The Constitutional Concept*, *supra* note 91, at 626-46. The cases cited in notes 168-70 *supra* thus stand foursquare against the application to public discourse of the tort of racial insult as proposed by Delgado, *supra* note 4, Love, *supra* note 5, and Wright, *supra* note 5.

172. Michelman, *supra* note 79, at 1526; *see* F. CUNNINGHAM, DEMOCRATIC THEORY AND SOCIALISM 188-91 (1987).

173. *See supra* notes 112-13 and accompanying text.

174. It should be noted, however, that the public/private distinction necessary for democratic governance will require that at some point limitations be placed on the ability of the state coercively to form citizens with nonracist identities. *See supra* note 87.

because we have adopted it in a manner consistent with the principle of self-determination; it reflects a national identity that we have freely chosen.

This legitimacy is possible because of public discourse, which serves the value of self-determination because it is so structured that every call for national identity has the opportunity to make its case. There is a significant difference, therefore, between proscribing racial insults directed toward individuals in the workplace[175] and proscribing them in a political discussion or debate.[176] The harm to the individual victim may be the same, but for public discourse to enable *self*-government, racist speech within that discourse must be repudiated on the merits, rather than be silenced by force of law.

D. Public Discourse and Harm to the Marketplace of Ideas

The most effective arguments for regulating racist speech are those that double back on the concept of public discourse itself and contend that such regulation is necessary for public discourse truly to instantiate the principle of self-determination. On the surface there appear to be two distinct lines of analysis. The first stresses the irrational and coercive qualities of racist speech; the second the untoward effects of racist speech in silencing victim groups. In the end these lines of argumentation cross and depend upon each other.

1. Racist Speech as Irrational and Coercive

Public discourse must be more than simply a register of private preferences in order to serve as a medium for the enactment of collective autonomy. If persons communicated in public discourse merely through polling organizations to make known their "votes" on public issues, democracy would degenerate into the heteronomous system of majoritarian rule described by Schauer. The purposes of collective self-determination require instead that public action be founded upon a public opinion formed through open and interactive processes of rational deliberation. The argument that racist speech is irrational and coercive, that it is

175. *See, e.g.*, Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977); Alcorn v. Anbro Eng'g, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Love, *supra* note 5, at 128-33.

176. *Cf.* Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (1981) (penalizing racist speech in political speech).

nothing more than a kind of "linguistic abuse (verbal abuse on an unwilling target),"[177] thus cuts to the very root of public discourse.

The argument, however, points to a more general problem, for all communication that violates civility rules is perceived as both irrational and coercive.[178] Because civility rules embody the norms of respect and reason we are accustomed to receive from members of our community, communication inconsistent with those rules is experienced as an instrument "of aggression and personal assault."[179] The argument from coercion and irrationality thus poses a generic dilemma for first amendment doctrine. If the state were permitted to enforce civility rules, it would in effect exclude from public discourse those whose speech advocated and exemplified unfamiliar and marginalized forms of life. But if the state were to suspend the enforcement of civility rules, it would endanger the possibility of rational deliberation by permitting the dissemination of abusive and coercive speech. This tension between the requirement that self-government respect all of its citizens "as free and equal persons," and the requirement that self-government proceed through processes of rational deliberation, creates the paradox of public discourse.[180]

It might be thought that the specific case of racist speech dissolves this paradox, for such speech by hypothesis violates norms of both equality and civility and hence appears to be suppressible without harm to public discourse. But this conclusion is not accurate. The principle of equality at issue in the paradox of public discourse is purely formal; its extension to all persons

177. Lasson, *Group Libel*, *supra* note 5, at 122.

178. Thus "fighting words" are understood to be those that "by their very utterance inflict injury." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Outrageous words intentionally inflicting emotional distress are "nothing more than a surrogate" for a "punch or kick." Wright, Hustler Magazine v. Falwell *and the Role of the First Amendment*, 19 CUMB. L. REV. 19, 23 (1988). "Ridicule" is experienced as a form of "intimidation." Dewey, *Creative Democracy—The Task Before Us*, in CLASSIC AMERICAN PHILOSOPHERS 389, 393 (M. Fisch ed. 1951). Pornography is received not as "expression depicting the subordination of women, but [as] the *practice of subordination* itself." Brest & Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 659 (1987). And blasphemous communications are nothing more than a form of "brawls." F. HOLT, THE LAW OF LIBEL 70-71 (1816).

179. Time, Inc. v. Hill, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting). Alexander Bickel once remarked that such communication "amounts to almost physical aggression." A. BICKEL, THE MORALITY OF CONSENT 72 (1975); *see also* Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (characterizing Cohen's actions as being more like conduct than speech).

180. *See supra* text accompanying notes 91-105.

is the fundamental precondition of the possibility of self-government. To the extent that the principle is circumscribed, so also is the reach of self-determination. The norm of equality violated by racist speech, on the other hand, is substantive; it reflects a particular understanding of how we ought to live. It is the kind of norm that ought to emerge from processes of public deliberation. Although the censorship of racist speech is consistent with this substantive norm of equality, it is inconsistent with the formal principle of equality, because such censorship would exclude from the medium of public discourse those who disagree with a particular substantive norm of equality. Such persons would thus be cut off from participation in the processes of collective self-determination.

First amendment doctrine has tended to resolve the paradox of public discourse in favor of the principle of formal equality, largely because violations of that principle limit pro tanto the domain of self-government, whereas protecting uncivil speech does not automatically destroy the possibility of rational deliberation. The visceral shock of uncivil speech can sometimes actually serve constructive purposes, as when it causes individuals to question the community standards into which they have been socialized and hence enables them, perhaps for the first time, to acknowledge the claims of others from radically different cultural backgrounds.[181] There is in fact a long tradition of oppressed and marginalized groups using uncivil speech to force recognition of the intensity and urgency of their needs.[182]

Tolerating uncivil speech, moreover, does not necessarily undermine the process of rational deliberation, so long as the extent of such speech is confined and does not infect the process as a

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181. Thus in *Terminiello v. Chicago*:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

337 U.S. 1, 4-5 (1949) (citations omitted).

182. For an excellent discussion, see Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95.

whole. The judgment that rational deliberation can continue in spite of the presence of uncivil speech is exactly the point of Harlan's opinion in *Cohen v. California*,[183] in which the Court refused to permit the state to use the force of law "to maintain . . . a suitable level of discourse within the body politic":[184]

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . .
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.[185]

It is of course a matter of judgment whether "open debate" within "the arena of public discussion" is indeed achieving "broader enduring values." How one makes that judgment will depend very much on one's circumstances. The call in recent literature to attend more carefully to "the victim's perspective"[186] is well taken in this regard. Members of dominant groups may be satisfied with the overall quality of public deliberation, but members of victim groups, at whom racist speech is systematically targeted, may feel quite otherwise.

It is at this point that the line of analysis stressing the irrational, coercive quality of racist speech crosses and depends upon the line of analysis stressing the silencing of victim groups. For when pressed the point is not that public discourse is pervasively disabled by racist speech, but rather that the concentrated effect of such speech on members of victim groups is to foreclose public discourse as an effective avenue of collective

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183. 403 U.S. 15.
184. *Id.* at 23.
185. *Id.* at 24-25.
186. Matsuda, *supra* note 5, at 2340; *see* Lawrence, *supra* note 5, at 436.

self-determination. In the contemporary debate this effect has been addressed under the rubric of "silencing."

2. Racist Speech as Silencing Minority Groups

The literature on silencing has burgeoned. So far as I can make out the literature presents three distinct arguments to support the concept of silencing:[187] victim groups are silenced because their perspectives are systematically excluded from the dominant discourse;[188] victim groups are silenced because the pervasive stigma of racism systematically undermines and devalues their speech; and victim groups are silenced because the visceral "fear, rage, [and] shock" of racist speech systematically preempts response.[189] This Section analyzes each of these arguments separately; the following Section weaves them together into a more complex indictment of racist speech.

The first argument, more developed in the context of recent feminist literature than in that of racist speech, is that the language of public discourse, although seemingly neutral and objective, has a built-in bias that prevents the articulation of minority positions.[190] Thus racism in the dominant discourse is compressed into "the neutralized word 'discrimination,' " in which "the role of power, domination, and oppression as the source of the evil" is effaced, and "[m]uch of the political, historical, and moral content of 'equality' has been dropped."[191] Similarly, the understanding of whites that racism is an "intentional belief in white supremacy"—the perpetrators' perspective—has been folded into the very language of public debate, whereas the understanding of minorities that racism " 'refers *solely* to minority subordination' "—the victims' perspective—is banished from the language.[192]

Although the premise of this argument seems to me true, it does not by itself support the conclusion that racist speech ought

187. I omit discussion of speech that silences through outright intimidation and threats. The regulation of such speech is not problematic under any theory.

188. For a good introduction to the concept of "discourse," see Bové, *Discourse*, in CRITICAL TERMS FOR LITERARY STUDY 50 (F. Lentricchia & T. McLaughlin eds. 1990).

189. Lawrence, *supra* note 5, at 452.

190. *Id.* at 474-75; *see* Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370-81 (1988).

191. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 889 (1989).

192. Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 304 n.32 (1990) (quoting Brooks, *Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets*, 5 J.L. & INEQUALITY 1, 8-11 (1987)).

to be regulated. All communication rests on foundations of unarticulated assumptions. The very function of dialogue is often to move toward enlightenment by uncovering and exposing these assumptions. Enlightenment can be gradual and progressive, or it can result from the shock of intense political struggle. That our language always encompasses both more and less than our intentions is thus not an argument for the suppression of racist speech, but rather for the encouragement of further public debate.

The point might be made, however, that public debate fails to achieve such enlightenment because the pervasive racism of American society devalues and stigmatizes minority contributions to this debate. The voice of the victims goes unheard. There is thus a call for an "outsider jurisprudence"[193] which will legitimate that voice and enable "[l]egal insiders . . . [to] imagine a life disabled in a significant way by hate propaganda."[194]

Once again, the premise of this argument appears sound, but its conclusion does not. Audiences always evaluate communication on the basis of their understanding of its social context.[195] This is not a deformity of public discourse, but one of its generic characteristics.[196] It poses the question of how an audience's prepolitical understanding of social context may be altered, a question that confronts all participants in public dialogue. The urgency of the question does not justify restricting public discourse; it is rather a call for more articulate and persuasive speech, for more intense and effective political engagement.

Taken together, the argument from the inherent bias of accepted discourse and the argument from the stigmatic devaluation of minority speech fuse into a single indictment of public discourse as irrational. The systematic derogation of the specific perspectives of victim groups is said to be caused by the Nation's particular history of racial oppression, rather than by concerns that would properly affect a legitimately rational public dialogue. Both arguments thus ultimately appeal to the concept of false consciousness,[197] to the notion that there is an ideal vantage from

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193. Matsuda, *supra* note 5, at 2323-26.

194. *Id.* at 2375; *see* Lawrence, *supra* note 5, at 458-61.

195. Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1306-07 (1942).

196. *See* P. CHEVIGNY, MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY 53-72 (1988); Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 313 (1989).

197. For a general discussion of the concept of "false consciousness," see R. GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL (1981).

which the rationality of discourse can be "objectively" assessed.

But it is one thing to use the idea of false consciousness as a weapon *within* public discourse to convince others of the need to break with the prejudices of the past, and it is quite another to use the idea as a justification to limit public discourse itself. The first is a familiar rhetorical strategy. It is consistent with the processes of public discourse because its effectiveness ultimately depends upon its persuasive power. The second, however, presupposes an intimacy with truth so vital as to foreclose opposing positions. The very point of using the idea of false consciousness to limit public discourse is to justify legally disregarding certain perspectives, on the grounds that these perspectives could not possibly be respected as true expressions of autonomous individuality. Circumscribing public discourse to ameliorate false consciousness thus does not protect public discourse from harm, but rather contradicts its very purpose of providing a medium for the reconciliation of autonomous wills.

The third argument for restraining racist speech does not turn on the characterization of public discourse as irrational, but rather as coercive. Recent literature contains searing documentation of the profound personal injury of racist speech, and this injury may in particular circumstances be so shocking as to literally preempt responsive speech. Although the analogous harm of uncivil speech is randomly scattered throughout the population, the disabilities attendant upon racist speech are concentrated upon members of victim groups. Hence, where members of dominant groups perceive "isolated incidents,"[198] members of victim groups perceive instead a suffocating and inescapable "racism that is a persistent and constituent part of the social order, woven into the fabric of society and everyday life."[199]

Under such conditions it is to be expected that members of dominant and victim groups may well come to conflicting judgments about whether racist speech shocks significant segments of victim group population into silence. The recent literature proposing restraints on racist speech is eloquent on the need to "listen[ ] to the real victims" of such speech and to display "empathy or understanding for their injury."[200] And of course any fair and just determination about the regulation of public discourse would require exactly this kind of sensitivity. But there

198. Matsuda, *supra* note 5, at 2331.
199. Note, *supra* note 192, at 295.
200. Lawrence, *supra* note 5, at 436.

is also a tendency in recent literature to move from the proposition that a fair determination cannot be made unless "the victims of racist speech are heard,"[201] to the very different proposition that such a determination ought to use "the experience of victim-group members [as] a guide."[202] The latter proposition seems to me plainly false.

The issue on the table is whether irrationality and coercion have so tainted the medium of public discourse as to require shrinking the scope of self-government. That issue significantly affects every citizen, and its resolution therefore cannot be ceded to the control of any particular group. In fact I do not see how the issue can be adequately resolved at all unless some notion of civic membership is invoked that transcends mere group identification. Unless we can strive to deliberate together as citizens, distancing ourselves from (but not abandoning) our specific cultural backgrounds, the issue can be resolved only through the exercise of naked group power, a solution not at all advantageous to the marginalized and oppressed.[203]

Paradoxically, therefore, the question of whether public discourse is irretrievably damaged by racist speech must itself ultimately be addressed through the medium of public discourse. Because those participating in public discourse will not themselves have been silenced (almost by definition), a heavy, frus-

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201. *Id.* at 481.

202. Matsuda, *supra* note 5, at 2369. This tendency is explicitly thematized in Iris Marion Young's artless proposal that "a democratic public" should cede to "constituent groups that are oppressed or disadvantaged" a "veto power regarding specific policies that affect a group directly." Young, *Polity and Group Difference*, 99 ETHICS 250, 261-62 (1989).

203. The "grand tradition" of republican participation, the notion that "we can lift our public life above the fallen and compromised realm of factional politics," thus does not seem to me so easily abandoned as would appear from recent literature stressing fidelity to the particular cultural "tradition" of minority groups. *See* Lopez, *The Idea of a Constitution in the Chicano Tradition*, 37 J. LEGAL EDUC. 162, 163-64 (1987). Even Young notes that a "heterogeneous public . . . is a *public*, where participants discuss together the issues before them and are supposed to come to a decision that they determine as best or most just." Young, *supra* note 202, at 267.

> It is possible for persons to maintain their group identity and to be influenced by their perceptions of social events derived from their group-specific experience, and at the same time to be public spirited, in the sense of being open to listening to the claims of others and not being concerned for their own gain alone. It is possible and necessary for people to take a critical distance from their own immediate desires and gut reactions in order to discuss public proposals. Doing so, however, cannot require that citizens abandon their particular affiliations, experiences, and social location.

Id. at 257-58.

trating burden is de facto placed on those who would truncate public discourse in order to save it. They must represent themselves as "speaking for" those who have been deprived of their voice. But the negative space of that silence reigns inscrutable, neither confirming nor denying this claim. And the more eloquent the appeal, the less compelling the claim, for the more accessible public discourse will then appear to exactly the perspectives racist speech is said to repress.

Even if this burden is lifted, however, and it is simply accepted that members of victim groups are intimidated into silence, it would still not follow that restraints on racist speech within public discourse are justified. One might believe, for example, that such silencing occurs chiefly through the structural conditions of racism, rather than specifically through the shock of racist speech. "The problem," as the Chairman of the Black Studies Department of New York's City College recently remarked apropos of the racist comments of an academic colleague, does not lie with specific communicative acts, but rather with "racism" itself, "insidious in our society and built into our culture."[204] If that were true, restraints on racist speech would impair public discourse without at the same time repairing the silence of victim groups.

Alternatively, one might believe that racist speech silences victim groups primarily because of its "ideas," because of its messages of racial inferiority, rather than because of its incivility. The distinction is important for the following reason: although it is consistent with the internal logic of public discourse to excise in extreme circumstances certain kinds of uncivil speech that are experienced as coercive,[205] it is fundamentally incompatible with public discourse to excise specific ideas because they are "analogously" deemed to be coercive. Public discourse is the medium within which our society assesses the democratic acceptability of ideas; to exclude certain ideas as prima facie "coercive" and hence destructive of public discourse is to contradict precisely this function. Therefore "harm" to public discourse cannot justify restraints on racist ideas on the grounds that such ideas are perceived to be threatening or coercive.[206]

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204. Berger, *Professors' Theories on Race Stir Turmoil at City College*, N.Y. Times, Apr. 20, 1990, at B1, col. 2.

205. *See supra* text accompanying notes 178-80.

206. Note that the argument in text does not hold against the contention that certain ideas should be excluded from public discourse because they cause extensive harm to

There are also other possibilities. One might believe, for example, that because it is difficult to distinguish ideas from incivility, and because it is vitally important to collective self-determination to protect all ideas, the law will as a practical matter be able to restrain only a small category of blatant racist epithets, which, although deeply offensive and lacking in ideational content, have relatively little to do with the more widespread phenomenon of silencing. Or one might believe that racist speech silences primarily when shocking racist epithets are used in the face-to-face confrontations characteristic of the "fighting words" doctrine of *Chaplinsky*,[207] so that the essential insight of the argument from silencing is already reflected within first amendment doctrine.

My own conclusion, in light of these alternative considerations, is that the case has not yet been made for circumscribing public discourse to prevent the kind of preemptive silencing that occurs when members of victim groups experience "fear, rage, [and] shock." I say this with some hesitation, and with considerable ambivalence. But even if the empirical claim of systematic preemptive silencing were accepted (and I am not sure that I do accept it), it is in my view most directly the result of the social and structural conditions of racism, rather than specifically of racist speech. Because the logic of the argument from preemptive silencing does not impeach the necessity of preserving the free expression of ideas,[208] public discourse could at most be regulated in a largely symbolic manner so as to purge it of outrageous racist epithets and names. It seems to me highly implausible to claim that such symbolic regulation will eliminate the preemptive silencing that is said to justify restraints on public discourse.

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individuals or victim groups. Such harm is extrinsic to the function of public discourse. To evaluate the contention that public discourse ought to be limited because of harm to individuals or groups, therefore, we must assess the importance of democratic self-governance in light of our commitment to protecting stable personal and group identities. *See supra* Sections III(B) & (C).

The argument considered in text that certain ideas ought to be excluded from public discourse because they are intrinsically coercive, on the other hand, turns upon harm to the function of public discourse itself. The argument is unsatisfactory because the concept of "coercion" must itself be defined by reference to a "moral baseline" determined by the practice in question. *See* A. WERTHEIMER, COERCION 217 (1987). Within the practice of public discourse, no idea can be deemed intrinsically coercive because the very function of public discourse presupposes a formal equality of persons and hence of ideas.

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

208. *See supra* note 206.

3. Racist Speech as Symbolic Cultural Oppression

When distinguished and parsed in this analytic manner, therefore, the various arguments for restraining racist speech in order to preserve the integrity of public discourse do not in my judgment support their desired conclusion. But the arguments can be braided together to fund an accusation more powerful than its separate strands.

In ordinary life, members of victim groups do not experience a string of distinct disadvantages. Rather, if representations in the current literature are accepted as true, these groups confront in public discourse an undifferentiated complex of circumstances in which they are systematically demeaned, stigmatized, ignored; in which the very language of debate resists the articulation of their claims; in which they are harassed, abused, intimidated, and systematically and egregiously injured both individually and collectively. The question is not whether these liabilities, when taken individually and singly, justify restraining racist speech within public discourse, but rather whether, when taken together as a complex whole, they render public discourse unfit as an instrument of collective self-determination for members of victim groups, and whether this unacceptable situation would be cured by restraints on racist speech.

What makes this question so very formidable is that it turns on the nexus between public discourse and the value of collective self-determination. Although the formal preconditions of that nexus can be described, its actual substantive realization must remain contingent upon conditions of history, culture, and social structure. Thus when members of victim groups claim that public discourse no longer serves for them the value of self-government, it is no answer to reply that they have been embraced within its formal preconditions. If members of victim groups in fact perceive themselves to be systematically excluded from public dialogue, that dialogue can scarcely achieve for them those "broader enduring values" that are its democratic justification. The very legitimacy of democratic self-governance is thus called into question.

The dependence of the value of public discourse upon matters of social perception poses complex and delicate questions, but the difficulty of these questions is profoundly magnified in the context of the controversy over racist speech. First, the truth of the claim that members of victim groups are cut off from meaningful participation within public discourse cannot be directly

experienced and hence evaluated by members of dominant groups. Its resolution must therefore depend, to one degree or another, upon acceptance of the representations of members of victim groups. As a practical political matter, therefore, what is called into question is not merely the truth of these representations, but also the trust and respect with which they are received by members of dominant groups.[209] Second, the focus on trust and respect is reinforced by the remedial claim that racist speech ought to be censored so as to open up public discourse to victim groups. Essentially this claim requires that self-determination be denied to some so that it may be made available to others. Thus society's willingness to circumscribe public discourse is transformed into a touchstone of the esteem with which it regards victim groups.

In fact it is this transformation that most precisely supports the argument. The argument turns on the interpretive meaning that members of victim groups ascribe to their place in American life; the contention is that this meaning is one of exclusion. Such an interpretation cannot be reduced to any specific empirical claims or conditions. Instead the need of those who feel alienated is most exactly met by a gesture of social esteem. By conveying in the strongest possible terms messages of respect and welcome, the censorship of racist speech might go a long way toward allowing members of victim groups to reinterpret their experience as one of inclusion within the dialogue of public discourse. The objection we noted earlier, that the regulation of racist speech within public discourse could at most restrict the publication of highly offensive racist epithets and names, and that such regulation could only serve symbolic purposes, is thus no longer pertinent. For the argument now turns squarely on the politics of cultural symbolism.

The most salient characteristic of such politics is that the particular content of government regulation is less important than its perceived meaning. We have already noted how claims like those of individual injury or preemptive silencing define concrete classes of communications that are said empirically to cause a particular harm. But the claim of cultural exclusion is fundamentally different, for it implies no such specific referent.

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209. *See* Lawrence, *supra* note 5, at 474-75. That this is a general characteristic of group claims can be seen by the development of an analogous dynamic among those who support the regulation of pornography. *See, e.g.*, C. MACKINNON, *On Collaboration*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 198 (1987).

The claim, when pressed, is not that any specific class of communications actually causes members of victim groups to feel excluded, but rather that a particular regulatory gesture will be the occasion for members of victim groups to feel included.[210]

This suggests, however, that restraints on public discourse are only one of a wide variety of strategies that government can pursue to ameliorate the sense of cultural exclusion experienced by victim groups. Other alternatives might include antidiscrimination laws, affirmative action programs, redistribution of economic resources, restraints on racist forms of nonpublic speech, and so forth. All these modifications of community life could be interpreted as significant gestures of respect and inclusion. It is a matter of political choice and characterization to reject these alternatives as insufficient and to deem the limitation of public discourse as necessary to overcome the alienation of victim groups.

At root, therefore, the argument from cultural exclusion seeks to subordinate public discourse, whose very purpose is to serve as the framework for all possible forms of politics, to a particular political perspective. The argument begins with the sound premise that a cultural sense of participation is necessary for public discourse to serve the value of collective self-determination. But instead of conceiving public discourse as a means of rousing the Nation's political will to actions designed to facilitate that sense of participation, the argument instead turns on public discourse itself, and, as a matter of political perception and assertion, deems the limitation of that discourse to be prerequisite for the elimination of disabling alienation. The argument therefore does not ultimately rest on the importance of protecting public discourse from harm, but rather on the need to sacrifice public discourse in order to recuperate profound social dislocations.

Bluntly expressed, the argument requires us to balance the integrity of public discourse as a general structure of communication against the importance of enhancing the experience of political participation by members of victim groups. The argument thus reiterates the position that public discourse ought to be subordinated to the egalitarian ideals of the fourteenth amend-

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210. The success or failure of the gesture will depend entirely on the perception of members of victim groups. There is thus no guarantee that any particular regulatory scheme will in fact actually cause members of victim groups to reinterpret their position within public discourse. This inherent gap between regulatory design and the achievement of regulatory purpose, coupled with the fact that only members of victim groups can experience and evaluate the claim of cultural exclusion, creates disturbing possibilities for strategic manipulation.

ment. It adopts a sophisticated version of that position, however, for it is able to contend that public discourse need be impaired in only slight and symbolic ways. Even so minimal a gesture as purging outrageous and shocking racist epithets could be sufficient to make members of victim groups feel welcome within the arena of public discourse, and thus to enable public discourse to serve for them the value of self-determination.[211] In this form the argument is analogous to that advanced in the controversy over prohibiting flag burning, in which it is also urged that public discourse ought to be minimally impaired for highly important symbolic reasons.[212] Just as it has been contended that any idea can be expressed without burning a flag,[213] so it can be asserted that any idea can be expressed without recourse to vile racist epithets.[214] In both cases, therefore, it can be argued that the de minimis effects on public discourse are outweighed by the significance of the interests at stake.[215]

I believe, however, that this invitation to balance ought to be declined. This is not because balancing can be ruled out in advance by some "absolutist" algorithm; the attraction of a purely formal democracy may itself in extreme circumstances no longer command limitless conviction. It is rather because, in the American context, the temptation to balance rests on what might be termed the fallacy of immaculate isolation.[216] The effect on public

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211. Of course so minimal a gesture might not be sufficient to achieve this purpose. The intrinsically speculative quality of the argument must be taken into account in its evaluation.

212. According to the Solicitor General, the state's interest in prohibiting flag burning turns on the importance of "safeguard[ing] the flag's identity 'as the unique and unalloyed symbol of the Nation.'" United States v. Eichman, 110 S. Ct. 2404, 2408 (1990) (quoting Brief for United States at 28, 29).

213. Texas v. Johnson, 109 S. Ct. 2533, 2553-54 (1989) (Rehnquist, C.J., dissenting).

214. I should be plain that I myself reject the premise of this argument and do not believe that the rhetorical meaning of speech can be disentangled from the manner of its presentation. Style and substance are always interdependent, for, in the words of Georg Lukács, "[c]ontent determines form." G. LUKÁCS, REALISM IN OUR TIME: LITERATURE AND THE CLASS STRUGGLE 19 (J. & N. Mander trans. 1962). For a discussion, see Post, *The Constitutional Concept*, *supra* note 91, at 663 n.314. I therefore do not think that the impact on public discourse of prohibiting certain kinds of words can ever properly be said to be de minimis. I nevertheless want to evaluate the case for balancing on the strong assumption of this kind of de minimis impact.

215. For a discussion of this argument in the context of flag burning, see *Eichman*, 110 S. Ct. at 2410-12 (Stevens, J., dissenting).

216. In evaluating this balance, I do not mean to call into question the holding of *Chaplinsky*, which in my view attempts to distinguish private fracases from political debate. *See* Post, *The Constitutional Concept*, *supra* note 91, at 679-81. It is clear enough that racial epithets, when uttered in certain face-to-face situations, would constitute

discourse is acceptable only if it is de minimis, and it is arguably de minimis only when a specific claim is evaluated in isolation from other, similar claims. But no claim is in practice immaculately isolated in this manner. As the flag burning example suggests, there is no shortage of powerful groups contending that uncivil speech within public discourse ought to be "minimally" regulated for highly pressing symbolic reasons.[217]

This is evident even if the focus of analysis is narrowly limited to the structure of the claim at issue in the debate over racist speech. In a large heterogeneous country populated by assertive and conflicting groups, the logic of circumscribing public discourse to reduce political estrangement is virtually unstoppable. The Nation is filled with those who feel displaced and who would feel less so if given the chance symbolically to truncate public discourse. This is already plain in the regulations that have proliferated on college campuses, which commonly proscribe not merely speech that degrades persons on the basis of their race, but also, to pick a typical list, speech that demeans persons on the basis of their "color, national origin, religion, sex, sexual orientation, age, handicap, or veteran's status."[218] The claim of de minimis impact loses credibility as the list of claimants to special protection grows longer.

"fighting words" and hence not form part of public discourse. *See* Greenawalt, *supra* note 5, at 306. The point of the argument in text, however, is to evaluate restraints on racist epithets in what would otherwise clearly be deemed public discourse, as for example in political debates, newspapers, pamphlets, magazines, novels, movies, records, and so forth.

217. Anyone inclined to doubt this proposition should review again the current controversy over funding for the National Endowment for the Arts, or the recent prosecutions occasioned by the Mapplethorpe exhibition or the recordings of 2 Live Crew. *See Rap Band Members Found Not Guilty in Obscenity Trial*, N.Y. Times, Oct. 21, 1990, § 1, at 1, col. 1 (discussing 2 Live Crew's acquittal after being charged with giving obscene performance and record store owner's conviction after being charged with selling obscene 2 Live Crew album); *Cincinnati Jury Acquits Museum in* Mapplethorpe *Obscenity Case*, N.Y. Times, Oct. 6, 1990, § 1, at 1, col. 1; *Reverend Wildman's War on the Arts*, N.Y. Times, Sept. 2, 1990, § 6 (Magazine), at 22, col. 1.

218. Emory University, Policy Statement on Discriminatory Harassment (1988); *see* Doe v. University of Mich., 721 F. Supp. 852, 856 (E.D. Mich. 1989) (concerning sanctions for speech victimizing an individual "on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status"). The regulations of Michigan State University include the prohibited category of "political persuasion." Michigan State University, Your Ticket to an Adventure in Understanding (1988) (available from University Housing Programs). The regulations of West Chester University include the category of "lifestyle." West Chester University, Ram's Eye View: Every Student's Guide to West Chester University 61 (1990) (available from Student Development Office). The regulations of Hampshire College include that of "socio-economic class." Hampshire College, College Policies: Updates and Revisions (1988-89).

The point I want to press does not depend upon the intellectual difficulty of drawing lines to separate similar claims. It is rather that the remedial and political logic of equal participation applies with analogous force to a broad and growing spectrum of group claims. One might, of course, devise arguments, perhaps based on the specific history of the fourteenth amendment, to distinguish racial epithets from blasphemous imprecations, or from degrading and pornographic characterizations of women, or from vicious antigay slurs, or from gross ethnic insults. But the question is whether such arguments can withstand the compelling egalitarian logic that unites these various situations. My strong intuition is that they cannot, and hence that the claim of de minimis impact on public discourse is implausible.[219]

In the specific context of the argument from cultural exclusion, moreover, a refusal to balance is far less harsh than it might superficially appear. The fundamental challenge is to enable members of victim groups to reinterpret their experience within the American political and cultural order as one of genuine participation. There are a host of ways to address this challenge short of truncating public discourse. The most obvious and potentially effective strategy would be to dismantle systematically and forcefully the structural conditions of racism. If we were so blessed as to be able to accomplish that feat—if we were truly able to eliminate such conditions as chronic unemployment, inadequate health care, segregated housing, or disproportionately low incomes—then we would no doubt also have succeeded in ameliorating the experience of cultural exclusion.

IV. The First Amendment and Harm to the Educational Environment

If public discourse is bounded on one side by the necessary structures of community life, it is bounded on the other by the need of the state to create organizations to achieve explicit public objectives. These organizations, which are nonpublic forums, regulate speech in ways that are fundamentally incompatible with the requirements of public discourse.[220] Public discourse is the

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219. This claim is also implausible, as I noted earlier, because of its vulnerable assumption that style can be sharply distinguished from substance. *See supra* note 214.

220. The argument in this and the following two paragraphs is developed in detail in Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713 (1987) [hereinafter Post, *Between Governance*]. *See also* Post, *The Constitutional Concept*, *supra* note 91, at 684-85.

medium through which our democracy determines its purposes, and for this reason the legal structure of public discourse requires that all such purposes be kept open to question and reevaluation. Within nonpublic forums, on the other hand, government objectives are taken as established, and communication is regulated as necessary to achieve those objectives.

Although the Supreme Court has often held that "the First Amendment rights of speech and association extend to the campuses of state universities," and even that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum,"[221] in fact state institutions of higher learning are public organizations established for the express purpose of education. The Court has always held that "a university's mission is education" and has never construed the first amendment to deny a university's "authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."[222] The Court has explicitly recognized "a university's right to exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of other students to obtain an education."[223] Thus student speech incompatible with classroom processes may be censored; faculty publications inconsistent with academic standards may be evaluated and judged; and so forth.

The regulation of racist speech within public institutions of higher learning, therefore, does not turn on the value of democratic self-governance and its realization in public discourse. Instead the constitutionality of such regulation depends upon the logic of instrumental rationality, and specifically upon three factors: (1) the nature of the educational mission of the university; (2) the instrumental connection of the regulation to the attainment of that mission; and (3) the deference that courts ought to display toward the instrumental judgment of institutional authorities.[224] The current controversy regarding the constitutionality of regulating racist speech on university and college campuses may most helpfully be interpreted as a debate about the first of these factors, the constitutionally permissible educational objectives of public institutions of higher learning.[225]

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221. Widmar v. Vincent, 454 U.S. 263, 267 n.5, 268-69 (1981).

222. *Id.* at 268 n.5.

223. *Id.* at 277 (citing Healy v. James, 408 U.S. 169, 189 (1972)).

224. Judicial application of these factors in nonpublic fora like universities is discussed in greater detail in Post, *Between Governance*, *supra* note 220, at 1765-1824.

225. This short discussion considers only issues pertaining to the *constitutionality* of

Courts have advanced at least three different concepts of those objectives. The most traditional concept, which I refer to as "civic education," views public education as an instrument of community life, and holds "that respect for constituted authority and obedience thereto is an essential lesson to qualify one for the duties of citizenship, and that the schoolroom is an appropriate place to teach that lesson."[226] Civic education conceptualizes instruction as a process of cultural reproduction, whereby community values are authoritatively handed down to the young. The validity of those values is largely taken for granted, and there is a strong tendency to use them as a basis for the regulation of speech in the manner of the traditional common law.

The concept of civic education held sway in the years before the Warren Court and has recently been forcefully resurrected with regard to the regulation of speech within high schools. Thus in *Bethel School District No. 403 v. Fraser*[227] the Court upheld the punishment of a high school student for having delivered an "offensive" and "indecent" student-government speech.[228] The Court reasoned that "the objectives of public education" included "the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.' "[229] Among these values were "the habits and manners of civility as . . . indispensable to the practice of self-government."[230]

> The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. . . .
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> . . . [S]chools must teach by example the shared values of a civilized social order. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.[231]

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the regulation of racist speech. It does not consider the *educational* issues raised by such regulation. These issues are, however, profound and revolve around the question of whether legal restraint is the heuristically most effective response to racist speech.

226. Pugsley v. Sellmeyer, 158 Ark. 247, 253, 250 S.W. 538, 539 (1923).

227. 478 U.S. 675 (1986).

228. *Id.* at 678.

229. *Id.* at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

230. *Id.* (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

231. *Id.* at 681, 683. For a more recent example of the same kind of reasoning, see Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 271-72 (1988).

That the concept of civic education would lead to similar conclusions if applied to institutions of higher learning is evidenced by Chief Justice Burger's 1973 dissent in *Papish v. University of Missouri Curators*:[232]

> In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable.[233]

Because racist speech is both deeply uncivil and contrary to "the shared values of [our] civilized social order,"[234] its restraint would be relatively unproblematic if civic education were understood to constitute a constitutionally acceptable purpose of public institutions of higher learning.[235] A number of public universities have fashioned their regulations on exactly this understanding. For example, the Policy Against Racism of the Board of Regents of Higher Education of the Commonwealth of Massachusetts argues that "institutions must vigorously strive to achieve diversity in race, ethnicity, and culture sufficiently reflective of our society. However, diversity alone will not suffice":

> There must be a unity and cohesion in the diversity which we seek to achieve, thereby creating an environment of pluralism. Racism in any form, expressed or implied, intentional or inadvertent, individual or institutional, constitutes an egregious offense to the tenets of human dignity and to the accords of civility guaranteed by law. Consequently, racism undermines the establishment of a social and academic environment of genuine racial pluralism.[236]

The policy clearly postulates the fundamental task of the university to be the inculcation of the value of "genuine racial plural-

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232. 410 U.S. 667 (1973).

233. *Id.* at 672 (Burger, C.J., dissenting).

234. Bethel v. School Dist. No. 403 v. Frazer, 478 U.S. 675, 681 (1986).

235. For the development of this logic at the pre-university level, see, for example, Clarke v. Board of Educ., 215 Neb. 250, 338 N.W.2d 272 (1983).

236. Commonwealth of Massachusetts Board of Regents of Higher Education, Policy Against Racism and Guidelines for Campus Policies Against Racism 2 (June 13, 1989).

ism," and it proscribes racist speech because of its incompatibility with that value.

A second concept of the mission of public education, which I refer to as "democratic education," begins with the very different premise that the "public school" is "in most respects the cradle of our democracy,"[237] and it therefore understands the purpose of public education to be the creation of autonomous citizens, capable of fully participating in the rough and tumble world of public discourse.[238] Democratic education strives to introduce that world into the generically more sheltered environment of the school.

The concept of democratic education was most fully expressed during the era of the Warren Court in *Tinker v. Des Moines School District*,[239] in which the Court held that the purpose of public education is to prepare students for the "sort of hazardous freedom . . . 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."[240] The majority in *Tinker* explicitly rejected the premise of civic education that the purpose of public schooling is the transmission of canonical values. It concluded instead that "[i]n our system, state-operated schools may not be enclaves of totalitarianism. . . . [S]tudents may not be regarded as closed-circuit recipients of only that which the [s]tate chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[241] According to *Tinker* the object of public education is to lead students to think for themselves.

The chief characteristic of democratic education is its tendency to assimilate speech within public educational institutions to a model of public discourse. Recognizing that this ambition is "not without its costs in terms of the risk to the maintenance of civility and an ordered society," the Court nevertheless strongly advanced the concept of democratic education during the late

237. Adler v. Board of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). For a fully developed statement of this position, see Abington School Dist. v. Schempp, 374 U.S. 203, 241-42 (1963) (Brennan, J., concurring).

238. The tension between the concepts of democratic and civic education closely recapitulates the informative debate between Piaget and Durkheim over the question of how to teach moral values. Durkheim stressed the importance of discipline, authority, and constraint, whereas Piaget emphasized cooperation, agreement, and autonomy. *See* J. PIAGET, *supra* note 84, at 341-71.

239. 393 U.S. 503 (1969).

240. *Id.* at 508-09.

241. *Id.* at 511.

1960's and early 1970's, in part because it believed the concept essential to the maintenance of "our vigorous and free society."[242] If, as I have argued, racist speech is and ought to be immune from regulation within public discourse, we can expect courts guided by the concept of democratic education to be quite hostile to the regulation of racist speech within universities, preferring instead to see students realistically prepared for participation in the harsh but inevitable world of public discourse.

There is yet a third concept of public education, one most often specifically associated with institutions of higher learning. This concept, which I refer to as "critical education," views the university as an institution whose distinctive "primary function" is "to discover and disseminate knowledge by means of research and teaching."[243] Critical education locates the principal prerequisite for university life in "the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable."[244]

> [I]f a university is a place for knowledge, it is also a special kind of small society. Yet it is not primarily a fellowship, a club, a circle of friends, a replica of the civil society outside it. Without sacrificing its central purpose, it cannot make its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect. To be sure, these are important values; other institutions may properly assign them the highest, and not merely a subordinate priority; and a good university will seek and in some significant measure attain these ends. But it will never let these values, important as they are, override its central purpose. We value freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox. Free speech is a barrier to the tyranny of authoritarian or even majority opinion as to the rightness or wrongness of particular doctrines or thoughts.[245]

The university as the purveyor of critical education serves important social purposes. These include not only the disciplined

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242. Healy v. James, 408 U.S. 169, 194 (1972).

243. *Report of the Committee on Freedom of Expression at Yale*, 4 HUM. RTS. 357, 357 (1975) [hereinafter *Report of the Committee*]. This function is not one that we ordinarily attribute to high schools, much less elementary schools.

244. *Id.*

245. *Id.* at 357-58; *see* Schmidt, *Freedom of Thought: A Principle in Peril?*, YALE ALUMNI MAG., Oct. 1989, at 65, 65-66.

pursuit of truth, but also the exemplary enactment of a "model of expression that is meaningful as well as free, coherent yet diverse, critical and inspirational."[246] The concept of critical education has strong affinities to the traditional "marketplace of ideas" theory of the first amendment, and it is not uncommon for courts who use the concept to speak of the "classroom" as "peculiarly the 'marketplace of ideas,' " deserving of protection because the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "[247]

The concept of critical education differs significantly from both civic and democratic education. In contrast to civic education, it rejects the notion of canonical values that are to be reproduced in the young. Hence public universities committed to critical education are not free to posit certain values (apart from the value of critical education itself) and to punish those who disagree. The logic of critical education would constitutionally require that a public university "not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent."[248] This stands in stark contrast to the educational project of institutions like the University of Massachusetts, Mount Holyoke, Marquette, or Mary Washington,[249] which are committed to the mission of civic education.

The concept of critical education would also sharply limit the ability of universities to censor uncivil speech. Speech can be uncivil for many reasons, including the assertion of ideas that are perceived to be offensive, revolting, demeaning, and stigmatizing. Critical education, however, would require the toleration

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246. Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 261 (1989). The presence of such a model

> contributes profoundly to society at large. We employ the expositors of academic speech to train nearly everyone who exercises leadership within our society. Beyond whatever specialized learning our graduates assimilate, they ought to be persuaded that careful, honest expression demands an answer in kind. The experience of academic freedom helps secure broader, positive liberties of expression.

Id.

247. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); *see* Healy v. James, 408 U.S. 169, 180-81 (1972).

248. *Healy*, 408 U.S. at 187-88.

249. *See supra* notes 47-51 and accompanying text.

of all ideas, however uncivil.[250] This toleration would be consistent with the Court's 1973 holding that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' "[251]

Critical education also differs in important respects from democratic education. The telos of critical education lies in the pursuit of truth, rather than in the instantiation of the responsible autonomy of the citizen. The pursuit of truth requires not only an unfettered freedom of ideas, but also honesty, fidelity to reason, and respect for method and procedures. Reason, as we have seen, carries its own special requirements of civility, which preclude coercion and abuse.[252] Although enforcement of these requirements and values would be inconsistent with democratic education, it may well be required by critical education. Moreover critical education requires freedom of ideas only with respect to that speech which forms part of the truth-seeking dialogue of the university. Thus, for example, nothing in the concept of critical education would prevent a university from penalizing malicious racist speech communicated *solely for the purpose* of harassing, humiliating, or degrading a victim.[253] The trick, of course, would be to distinguish such speech in a manner that does not chill communication intended to form part of a truth-seeking exchange.[254] This represents a formidable technical challenge, for it is all too easy to permit revulsion with the content of speech to infect regulation ostensibly justified by other reasons.[255]

Although there is not space in this short essay to engage in a full-scale exploration of the purposes of higher education, some conclusions are clear enough. The Constitution would not permit a public university, in the name of civic education, to prohibit

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250. "If the university's overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument." *Report of the Committee*, *supra* note 243, at 360.

251. Papish v. University of Mo. Curators, 410 U.S. 667, 670 (1973).

252. *See supra* Section III(D)(1).

253. As a matter of policy, however, it is always dangerous to make the legality of speech depend primarily upon an assessment of a speaker's intent, for there is a powerful tendency to attribute bad motives to those with whom we fundamentally disagree.

254. The inability to make this distinction contributed to a court's recent decision to strike down as unconstitutional the regulations of the University of Michigan. *See* Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); Grano, *supra* note 5, at 7.

255. For an admirable attempt to meet this challenge, see Grey, *supra* note 5, and the regulations that Professor Grey drafted for Stanford University.

the teaching of communism because of its conflict with community values. Nor would the Constitution, in the name of democratic education, preclude a public university from enforcing regulations against highly offensive racial epithets within a classroom.

Examples like these incline me toward the concept of critical education, yet the extent to which state universities ought constitutionally to be *required* to pursue one or the other of these educational missions does not seem to me without difficulties.[256] The analysis is complicated by the possibility that public universities may have various educational functions with constitutionally distinct characteristics. Thus it is conceivable that public universities may be permitted to pursue the mission of civic education within their dormitories, but be required to follow the requirements of democratic education with regard to their open spaces.[257] These are matters that require further and careful consideration.

I conclude, therefore, by stressing two brief points. First, the constitutionality of restraints on racist speech within public universities does not depend upon the constitutionality of such regulation within public discourse. Second, the constitutionality of restraints on racist speech within public universities will depend to a very great extent upon the educational purposes that we constitutionally attribute to public institutions of higher learning, and upon the various modalities through which such institutions are understood to pursue those purposes. We ought to see debate turn toward the achievement of a fuller and more reflective comprehension of these questions.

V. Conclusion: The Question of Formal Democracy

This account of the constitutionality of university restrictions on racist speech suggests that a principal flaw of the contemporary debate has been its pervasive assumption that the relationship of racist speech to the first amendment can be assessed

256. Cases like *Tinker* and *Healy* make clear, however, that the Supreme Court's first amendment jurisprudence has rested on the assumption that there are constitutional limits to the freedom of public educational institutions to define their own educational mission.

257. Some universities have regulated racist speech in ways that turn on similar functional and geographic considerations. *See Doe*, 721 F. Supp. at 856; *Tufts Restores Free Speech After T-Shirt Confrontation*, San Francisco Chron., Dec. 9, 1989, at B6, col. 1; Wilson, *Colleges Take 2 Basic Approaches in Adopting Anti-Harassment Plans*, Chron. Higher Educ., Oct. 4, 1989, at A38, col. 1; Russo, *Free Speech at Tufts: Zoned Out*, N.Y. Times, Sept. 27, 1989, at A29.

independently of social context. Communication, however, does not form a constitutionally undifferentiated terrain. The standards of first amendment protection afforded to public discourse will not be the same as those applied to nonpublic speech, and these in turn will differ from those that govern the regulation of speech within instrumental governmental institutions like universities. The concrete circumstances of racist speech thus figure prominently in the constitutional equation.

Public discourse is the realm of communication we deem necessary to facilitate the process of self-determination. As that process is open-ended, reflecting the boundless possibility of social self-constitution, so we fashion public discourse to be as free from legal constraint as is feasible to sustain. But as self-determination requires the antecedent formation of a "self" through socialization into the particularity of a given community life, so public discourse must at some point be bounded by nonpublic speech, in which community values are embodied and enforced. And as the decisions of a self-determining democracy require actual implementation, so public discourse must at some other point be bounded by the instrumentally regulated speech of the nonpublic forum.

I have attempted to explain the unique protections that American first amendment jurisprudence affords to public discourse through a self-consciously formal analysis; that is, I have attempted to uncover the formal prerequisites for the instantiation of the value of democracy as self-determination. Although this kind of formal analysis has the advantage of forcing us to clearly articulate the values in whose name we purport to act, it has the disadvantage of obscuring the messy complications of the world. Formal analysis is always subject to the critique that actual, substantive conditions have undermined its very point and meaning.

From a formal perspective, democracy fulfills the purposes of autonomous self-government because we accept an image of independent citizens deliberating together to form public opinion. We therefore structure constitutional policy according to the requirements of that image. But it is an image blatantly vulnerable to the most forceful empirical attack.[258] Citizens are not autonomous; they are manipulated by the media, coerced by private corporations, immured in the toils of racism. Citizens do

258. *See, e.g.*, E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973).

not communicate together; they are passive, irrational, and voiceless. Deliberation is impossible because of the technical and economic structure of the mass media; public opinion is therefore imposed upon citizens rather than spontaneously arising from them. The very aspiration to self-determination reinforces preexisting inequalities by empowering those with the resources and competence to take advantage of democratic processes; it systematically handicaps socially marginalized groups who lack this easy and familiar access to the media of democratic deliberation. And so forth: the litany is by now depressingly familiar.

Of course these criticisms, and others like them, contain important elements of truth. They therefore force us to choose: either we decide to retain the ideal of democracy as deliberative self-determination and work to minimize the debilitating consequences of these criticisms, or we decide that these criticisms have so undermined the ideal of deliberative self-determination that it must be abandoned and a different value for democracy embraced. If we choose the second alternative, we have the responsibility of articulating and defending a new vision of democracy. But if we choose the first, we have the responsibility of working to foster the constitutional values upon which we rely. We have the obligation of doing so, however, in ways that do not themselves contravene the necessary preconditions of the ideal of deliberative self-determination.[259] The function of formal analysis is to make clear the content of that obligation.

The strict implication of this essay, then, is not that racist speech ought not to be regulated in public discourse, but rather that those who advocate its regulation in ways incompatible with the value of deliberative self-governance carry the burden of moving us to a different and more attractive vision of democracy. Or, in the alternative, they carry the burden of justifying suspensions of our fundamental democratic commitments. Neither burden is light.

259. For a striking illustration of the untoward (and in retrospect horrifying) consequences of repudiating that obligation, see Marcuse, *Repressive Tolerance*, in R. WOLFF, B. MOORE, & H. MARCUSE, A CRITIQUE OF PURE TOLERANCE 81 (1965).