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## FREEDOM OF SPEECH AND EQUALITY: DO WE HAVE TO CHOOSE?<sup>^</sup>

*Nadine Strossen\**

### INTRODUCTION

As a lifelong activist on behalf of both equality and free speech, I am convinced, based on actual experience, that these core values are mutually reinforcing and not, as some have argued, in tension with each other. Moreover, I am convinced that this is true even for offensive speech that affronts our most cherished beliefs, including our belief—to quote the Declaration of Independence—that we are all “created equal” and equally “endowed . . . with certain unalienable rights.”<sup>1</sup>

On campuses, polls show substantial support for suppressing offensive speech in general and hate speech in particular<sup>2</sup> because

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<sup>^</sup> This essay is based on a lecture that Nadine Strossen delivered at the University of North Carolina in Chapel Hill, North Carolina on March 24, 2016. Prof. Strossen gratefully acknowledges her Research Assistants, New York Law School students Jakub Brodowski, Julio Piccirillo, and Rachel Searle, for their assistance with converting the lecture to essay format, including by drafting most of the footnotes. For almost all footnotes, both credit and responsibility are due to these Research Assistants, as well as to the officers and editors of the *Brooklyn Journal of Law & Policy*.

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<sup>1</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>2</sup> In this essay, I will use the term “offensive speech” to refer to any speech conveying any thought that any of us hates because we consider it wrong, evil, dangerous, upsetting, or harmful in any way, including because it insults our most

so many students, to their credit, find hate speech to be offensive and intolerant.<sup>3</sup> It is important to understand that the arguments for suppressing hate speech also apply fully to other types of offensive speech, which cause the same kinds of psychic, emotional harms to people's senses of identity, dignity, and security that are cited as justifications for repressing hate speech. Therefore, if you are persuaded that these harms warrant suppressing hate speech, you will either have to accept suppression of all offensive speech, or else find some way to distinguish this particular type of offensive speech. Both of those options are problematic, due to the inescapably vague, subjective determinations as to whether speech is "offensive" or conveys "hate."

Consequently, empowering officials to punish any such expression necessarily vests the officials with enormous discretionary power, which will inevitably be wielded in ways that are arbitrary at best, and discriminatory at worst. Officials can use this power to punish their critics, and to punish members of various marginalized minority groups or advocates of their rights. Indeed, the enforcement records of hate speech laws demonstrate that these dangers are far from hypothetical. Instead, where offensive or hateful speech is concerned, more speech, not less, should be the solution. The right of free speech guaranteed by the First Amendment is indivisible and reciprocal. Restricting an individual's rights jeopardizes the rights of many, as that same censorship can eventually be turned and applied to the individual invoking the right. As one commentator put it, "verbal purity is not social change."<sup>4</sup>

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cherished beliefs, or our deepest senses of personal identity, dignity and security. I will use the term "hate speech" as it is generally used in public discourse, to refer to a specific type of offensive speech: biased or stereotyped ideas on the basis of race, religion, gender, sexual orientation, or any other aspect of social identity. Neither term has a specific legal definition precisely because the Supreme Court has steadfastly refused to exclude such speech from the First Amendment's free speech guarantee. Therefore, neither term is a constitutional law term of art that corresponds to a Court-defined carve-out from the First Amendment.

<sup>3</sup> Jeffrey M. Jones, *College Students Oppose Restrictions on Political Speech*, GALLUP (Apr. 5, 2016), [http://www.gallup.com/poll/190451/college-students-oppose-restrictions-political-speech.aspx?g\\_source=Education&g\\_medium=newsfeed&g\\_campaign=tiles](http://www.gallup.com/poll/190451/college-students-oppose-restrictions-political-speech.aspx?g_source=Education&g_medium=newsfeed&g_campaign=tiles).

<sup>4</sup> As quoted in *Hate Speech on Campus*, AM. C.L. UNION, <https://www.aclu.org/other/hate-speech-campus> (last visited Jan. 19, 2017).

## I. THE CURRENT STATE OF HATE AND FREE SPEECH

*A. There is No Categorical Free Speech Exclusion for Offensive or Hate Speech*

Contrary to much popular misunderstanding, there is no exception to the First Amendment's free speech guarantee for speech whose message is offensive or hateful. The Supreme Court has repeatedly reaffirmed that the "bedrock principle"<sup>5</sup> underlying our free speech rights is that government may never suppress speech just because officials or citizens disapprove of the ideas it conveys, even if the vast majority of us consider those ideas absolutely abhorrent. This cardinal principle is usually called "content neutrality" or "viewpoint neutrality."<sup>6</sup> The First Amendment bars government from restricting any speech just because of any negative intellectual, psychological, or emotional reaction to its message.<sup>7</sup> Instead, the government must neutrally and even-handedly protect expression for *all* ideas. This important duty belongs to all government bodies, including public universities, pursuant to the state action doctrine. In fact, the Supreme Court has held that this neutrality rule is especially important at universities, consistent with their educational mission, which is expressly to broaden students'

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<sup>5</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

<sup>6</sup> Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000) ("[T]he requirement that the government be content neutral in its regulation of speech means that the government must be both viewpoint neutral and subject-matter neutral. The viewpoint-neutral requirement means that the government cannot regulate speech based on the ideology of the message." (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); Amy Sabin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L. J. 1209, 1220 (1993))).

<sup>7</sup> See *Boos v. Barry*, 485 U.S. 312, 318–21 (1988) (finding that persons' reactions are not the type of "secondary effects" that justify regulating speech).

horizons, exposing them to diverse, difficult ideas, and challenging even their most deep-seated, cherished beliefs.<sup>8</sup>

These foregoing constitutional and educational tenets are completely contrary to the “safe space” concept that some students have advocated recently: that either the whole campus, or at least certain portions of it, should be “safe spaces” where students are shielded from ideas they consider offensive or hateful. To quote language students often use, they seek “protection” from ideas that make them “uncomfortable” or that they find “unwelcome.”<sup>9</sup>

However, this fearful approach is the exact opposite of the courageous outlook that is reflected in the First Amendment and, indeed, our whole Constitution. The self-governing power shared by “We the People,”<sup>10</sup> to quote the Constitution’s opening words, comes with some responsibilities, which include hearing ideas with which we disagree, and either taking whatever steps are required to ignore such ideas (which is usually not much effort), or taking more active steps to respond to them, by questioning and refuting them.

One of the most important Supreme Court opinions ever issued about free speech was written by the great Justice Louis Brandeis who, incidentally, was subject to vicious antisemitism as the first Jew nominated to the Supreme Court at a time when even well-educated, “polite” members of society openly expressed and practiced antisemitism.<sup>11</sup> In fact, when Brandeis finally joined the

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<sup>8</sup> See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603–04 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>9</sup> Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>; Matt Taibbi, *College Kids Aren’t the Only Ones Demanding ‘Safe Spaces’*, ROLLING STONE (Apr. 6, 2016), <http://www.rollingstone.com/politics/news/college-kids-arent-the-only-ones-demanding-safe-spaces-20160406>; Judith Shulevitz, *Opinion, In College and Hiding from Scary Ideas*, N.Y. TIMES (Mar. 21, 2015), <http://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html>.

<sup>10</sup> U.S. CONST. pmbl.

<sup>11</sup> See Paul Finkelman & Lance J. Sussman, *Antisemitism and the Brandeis Confirmation*, HUFFINGTON POST (Jan. 14, 2016), [http://www.huffingtonpost.com/paul-finkelman/antisemitism-and-the-bran\\_b\\_8975174.html](http://www.huffingtonpost.com/paul-finkelman/antisemitism-and-the-bran_b_8975174.html).

Court, after a bruising confirmation battle, one of his fellow Justices, Justice McReynolds, “refused to speak to [him], . . . sit near him during Court ceremonies, . . . or [even] sign any opinions” that he wrote.<sup>12</sup> When Brandeis urged that it is necessary to have the courage to hear and answer hate speech—recalling that the Founders believed that “the fitting remedy for evil counsels is good ones”<sup>13</sup>—he was preaching what he actually practiced. As he declared: “Those who won our independence by revolution were not cowards . . . . They did not exalt order at the cost of liberty.”<sup>14</sup> Likewise, he wrote, “[t]hey believed liberty to [be] the secret of happiness and courage to be the secret of liberty.”<sup>15</sup> Despite his first-hand experience with the harms of hate speech and discriminatory conduct, Brandeis was committed to protecting freedom even for the most hateful speech.

In the same vein, our national anthem closes by celebrating the vital interrelationships among democracy, liberty, and courage. It hails our country as “the land of the free and the home of the brave.” These themes were memorably summed up specifically in the campus context by a respected former university president, Clark Kerr of the University of California. As he said: “The University is not engaged in making ideas safe for students. It is engaged in making students safe for ideas.”<sup>16</sup>

The recent example of Zach Wood, a Williams College student who in 2016 headed a student group called “Uncomfortable Learning,” is particularly expository.<sup>17</sup> As its name indicates,

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<sup>12</sup> *Biographies of the Robes: James Clark McReynolds*, SUP. CT.: CAPITALISM & CONFLICT, [http://www.pbs.org/wnet/supremecourt/capitalism/robes\\_mcreynolds.html](http://www.pbs.org/wnet/supremecourt/capitalism/robes_mcreynolds.html) (last visited Jan. 19, 2017).

<sup>13</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>14</sup> *Id.* at 377.

<sup>15</sup> *Id.* at 375.

<sup>16</sup> Robert M. Berdahl, Chancellor, Univ. of Cal. Berkeley, Address at the Clark Kerr Memorial (Feb. 20, 2004) (transcript available at <http://chancellor.berkeley.edu/chancellors/berdahl/speeches/clark-kerr-memorial>).

<sup>17</sup> See Susan Svrluga, *Williams College Cancels a Speaker Who Was Invited to Bring in Provocative Opinions*, WASH. POST (Feb. 20, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/02/20/williams-college-cancels-a-speaker-invited-as-part-of-a-series-designed-to-bring-in-provocative-opinions/>.

students formed this group precisely to expose themselves and their campus community to speakers whose ideas made them uncomfortable,<sup>18</sup> and speakers whom the students in turn made uncomfortable through their probing questions and comments. In February 2016, the Williams College President disinvited John Derbyshire, a mathematician who wrote a blog that was widely decried as racist, whom Wood and his “Uncomfortable Learning” colleagues had invited.<sup>19</sup> A contemporaneous news article explained this situation:

Wood, who is black, a Democrat and liberal, said he strongly disagrees with much of what Derbyshire writes about. But he thinks it’s more valuable to debate and disprove ideas with which he disagrees rather than to ‘quarantine’ them and bar them from campus . . . . Wood, who grew up in [a largely black] neighborhood of Washington, [DC] said he feels a lot of sympathy for students who say it would be profoundly upsetting to hear Derbyshire talk about such ideas as his claim that black people are intellectually inferior to whites, or that people should avoid places where there are likely to be crowds of black people . . . . But [Wood said], [those students] could simply choose not to go to the talk.<sup>20</sup>

This example of censorship illustrates the problematic discretion that university administrators hold when policing free speech. Rather than welcome the students’ attempt to engage with some of these controversial ideas, and promote open, productive discourse, the school decided to paternalistically insulate students from provocative ideas.

*B. Hate Speech That Causes Certain Types of Harm May Be Punished*

Despite the content neutrality rule, much hate speech may be punished because of some specific harm that it causes beyond the

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<sup>18</sup> *See id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

psychic or emotional impact of its ideas. Therefore, it is actually misleading to say that we may not punish hate speech under traditional First Amendment principles. To be sure, we may not punish speech merely because we disagree with or dislike its ideas and the associated emotional or psychic harms from hearing those ideas. That is the content neutrality rule. However, much hate speech causes other harms that do warrant punishment. The Supreme Court has held—and civil libertarians agree—that we may punish the substantial subsets of hate speech that inflict certain harms that the Court has specifically defined: threats, harassment, incitement, and hate crimes.<sup>21</sup> First, if hate speech conveys a threat to commit violence and the targets of that threat reasonably fear that they will be subject to violence, that speech may be punished.<sup>22</sup> Second, hate speech that is directly targeted at a specific individual or small group of individuals, and is sufficiently severe and pervasive, may well constitute punishable harassment.<sup>23</sup> Third, we may punish any hate speech that intentionally incites imminent violence.<sup>24</sup> Finally, hate speech may be punished if it constitutes an element in a so-called hate crime, such as assault or vandalism.<sup>25</sup> The government may treat such a crime as more serious, and impose an increased punishment, when the perpetrator intentionally singles

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<sup>21</sup> See Brief for American Civil Liberties Union as Amicus Curiae Supporting Petitioner at 8, *Wisconsin v. Mitchell*, 508 U.S. 407 (1993) (No. 92-515), 1993 WL 13010918 (noting that the First Amendment does not bar the evidentiary use of words to prove the elements of a crime or to justify a sentence); *Hate Speech on Campus*, *supra* note 4. For examples of where the Court discusses the appropriateness of punishing subsets of hate speech, see cases cited *infra* notes 27–30 and accompanying text.

<sup>22</sup> *Virginia v. Black*, 538 U.S. 343, 359–60 (2003). For speech to be a punishable threat, the speaker need not intend to actually carry out the threat—it is enough that the target reasonably believes that the speaker will do so. See *id.* That is because such a reasonable belief is enough to cause notable harm to the target. See *id.* For example, she may well suffer concrete limits on her freedom to go out in public, avoiding certain places or avoiding being alone, in order to avoid the threatened violence. See *id.*

<sup>23</sup> See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651–52 (1999) (discussing the threshold of actionable “gender-oriented” harassment in educational settings).

<sup>24</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

<sup>25</sup> See *Wisconsin v. Mitchell*, 508 U.S. 476, 484, 489 (1993).

out the victim for discriminatory reasons, such as the victim's race or religion.<sup>26</sup> For example, in my home state of Connecticut, in February 2016, a young man pleaded guilty to a federal hate crime; in the wake of the Paris terrorist attacks, he fired a rifle at a mosque, and prosecutors cited his Facebook posts as evidence of his anti-Muslim animus.<sup>27</sup>

In sum, much hate speech is already unprotected because it causes the specific sorts of harm that many people have in mind when they advocate punishing hate speech, such as threats of violence or defamation, among others. Consequently, a new exception to free speech protection would be warranted only if we chose also to punish hate speech that causes none of these specific harms, but rather causes solely psychic or emotional harms. For the remainder of this essay, I will refer to this subset of hate speech, which is now constitutionally protected, as “psychically harmful hate speech”—speech whose biased ideas about immutable characteristics such as race or gender, and similar social identity factors are emotionally and psychically upsetting.

*C. Psychically Harmful Hate Speech is Protected Because  
the Harm From Censorship Outweighs the Speech's Harm*

To resist punishing psychically harmful hate speech is not at all to deny that such speech can indeed cause palpable psychic harms. To the contrary, we protect speech precisely because of its great power to affect our emotions and psyches both negatively and positively. In this respect, First Amendment jurisprudence disagrees with that old nursery rhyme, “sticks and stones may break my bones, but words will never hurt me.” Rather, protecting psychically harmful hate speech is preferable because, to quote another old saying, “the cure is worse than the disease.” Even worse than speech's power to wound would be empowering the government to

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<sup>26</sup> See *id.* at 487, 490 (validating a state statute that enhanced a maximum penalty for criminal conduct based on a defendant's discriminatory motive).

<sup>27</sup> Press Release, U.S. Attorney's Office, Dist. of Conn., Dep't of Justice, Meriden Man Pleads Guilty to Federal Hate Crime Offense (Feb. 11, 2016), <https://www.justice.gov/usao-ct/pr/meriden-man-pleads-guilty-federal-hate-crime-offense> (showing a Facebook conversation, in which the young man said, “All Muslims must die!!! I hate them all”).

pick and choose which among the infinite array of wounding words it will punish. This would strip individuals of the power to choose which powerful words we will utter and which we will listen to, as well as which ones we will ignore, reject, or answer back.

Empowering the government to select which words or ideas it will outlaw as psychically harmful hate speech would also undermine the essential goal of equality, which always has depended on a robust freedom of speech—sufficiently robust to extend to hated ideas—which inevitably includes ideas that challenge the status quo. By definition, such reformist ideas tend to be deemed offensive or hateful by the majority or at least the powerful elite.<sup>28</sup> Accordingly, all movements for equal rights throughout U.S. history have always engaged in speech that the government and other opponents have tried to suppress on various rationales, including that it was “offensive,” “hateful,” or “defamatory,” or that it constituted “fighting words” or incited violence, lawlessness, or breaches of the peace.<sup>29</sup>

That is exactly why Martin Luther King, Jr. wrote his historic letter from the Birmingham Jail.<sup>30</sup> King was jailed for exercising his right to condemn racial segregation and discrimination to audiences who viewed those messages as hateful and dangerous.<sup>31</sup> Therefore, throughout the whole twentieth century Civil Rights movement, the National Association for the Advancement of Colored People

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<sup>28</sup> BASTIAAN HUGO VANACKER, ONLINE HATE SPEECH REGULATION IN THE UNITED STATES AND EUROPE: ACCOMMODATING CONFLICTING LEGAL PARADIGMS 23 (July 2006).

<sup>29</sup> See, e.g., HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965) (discussing free speech during the civil rights movement); NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX AND THE FIGHT FOR WOMEN’S RIGHTS 92–97, 116–17 (1995) [hereinafter STROSSEN, DEFENDING PORNOGRAPHY] (discussing the government’s suppression of sexual expression in art, movies and other publications); SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 101–04, 115–18 (1994) (discussing antisemitic and communistic speech, as well as speech in support of African American rights and Jewish rights).

<sup>30</sup> See Martin Luther King, Jr., Letter from Birmingham Jail (Aug. 16, 1963), reprinted in 212 ATLANTIC MONTHLY 78–88 (Aug. 1963).

<sup>31</sup> See Barbara Maranzani, *King’s Letter from Birmingham Jail, 50 Years Later*, HISTORY (Apr. 16, 2013), <http://www.history.com/news/kings-letter-from-birmingham-jail-50-years-later>.

(“NAACP”) and other leaders in the struggle for racial justice strongly supported free speech and opposed censoring hate speech.<sup>32</sup>

The same has been true of the women’s movement and the movement for reproductive freedom. Throughout the nineteenth and twentieth centuries, censorship was a primary tool to stifle their messages, which were deeply offensive and hateful from the perspective of traditional religious and cultural values.<sup>33</sup> That is why Margaret Sanger, the Founding Mother of Planned Parenthood, was repeatedly imprisoned,<sup>34</sup> including not far from Brooklyn Law School.

More recently, the movement for LGBTQ rights has depended especially strongly on robust free speech. After all, for sexual orientation minorities, the very first step toward liberation and equality is literally speaking out—“coming out of the closet”—and expressly affirming one’s sexual orientation. Until recently, however, such affirmations have been widely condemned as conveying hateful, offensive ideas from the perspective of many religions, and, in some quarters, that is still the case. As longtime gay rights activist Jonathan Rauch noted: “Free speech is not only minorities’ best friend . . . [I]t’s our only reliable friend. If we can’t speak in a majority culture . . . it is so easy to oppress us.”<sup>35</sup>

Former U.S. President Barack Obama is also a strong proponent of a robust free speech doctrine. President Obama was repeatedly assailed by hate speech based on his African American race, his purported Muslim religion, his alleged non-U.S. citizenship, and his political views and actions.<sup>36</sup> Yet President Obama has strongly endorsed the classic First Amendment view that hate speech should be strongly protected, not despite his commitment to combating racial and other discrimination, but rather, precisely for that reason.

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<sup>32</sup> See WALKER, *supra* note 29, at 101–04, 115–18.

<sup>33</sup> See STROSSEN, *DEFENDING PORNOGRAPHY*, *supra* note 29, at 92–97, 116–17.

<sup>34</sup> *Working Women, 1800-1930: Margaret Sanger (1879-1966)*, HARV. U. LIBR. OPEN COLLECTIONS PROGRAM, <http://ocp.hul.harvard.edu/ww/sanger.html> (last visited Jan. 19, 2017).

<sup>35</sup> Jonathan Rauch, *Knowledge Starts as Offendedness*, YouTube (Jan. 13, 2015), <https://www.youtube.com/watch?v=XrrbBzVVmEI>.

<sup>36</sup> See Julie Hirschfeld Davis, *Obama’s Twitter Debut, @POTUS, Attracts Hate-Filled Posts*, N.Y. TIMES (May 21, 2015), <http://nyti.ms/1KmM6Rn>; Jason Easley, *Obama Hate Speech Surges on Facebook*, POLITICUS USA (July 26, 2012), <http://www.politicususa.com/2012/07/26/obama-hate-speech-surges-facebook.html>.

For example, at a 2015 town hall meeting, President Obama championed campus free speech, even for “language that is offensive to African Americans or somehow sends a demeaning signal towards women.”<sup>37</sup> After all, as campus and other activists in the Black Lives Matter and anti-sexual assault movements remind us, meaningful reform requires candid in-depth conversations about race, sex, and gender. President Obama made precisely this point in a 2015 interview:

[B]eing . . . an activist involves hearing the other side and . . . engaging in a dialogue, because that’s also how change happens. The civil rights movement happened because . . . the leadership of the movement consistently . . . sought to understand the views [of the other side,] even views that were appalling to them.<sup>38</sup>

President Obama likewise has repeatedly championed the time-honored First Amendment precept that the appropriate response to psychically harmful hate speech is not to suppress it, but rather to refute it. As he said: “[Anybody] you disagree with, you should have an argument with them, but you shouldn’t silence them by saying . . . I’m too sensitive to hear what you have to say.”<sup>39</sup> He also echoed the theme of courage versus safety. In his words:

The purpose of that kind of free speech [that protects hate speech] is to make sure that we are forced to use argument and reason . . . in making our democracy work . . . [Y]ou don’t have to be fearful of somebody spouting bad ideas. Just out-argue [th]em, beat [th]em . . . Win over adherents [to your view.] [T]hat’s how things work . . . in a democracy.<sup>40</sup>

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<sup>37</sup> Janell Ross, *Obama Says Liberal College Students Should Not be ‘Coddled.’ Are We Really Surprised?*, WASH. POST (Sept. 15, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/09/15/obama-says-liberal-college-students-should-not-be-coddled-are-we-really-surprised/>.

<sup>38</sup> Interview by George Stephanopoulos with Barack Obama, President of the United States, in Washington, D.C. (Nov. 12, 2015) [hereinafter Interview], <http://abcnews.go.com/Politics/full-interview-transcript-president-barack-obama/story?id=35203825>.

<sup>39</sup> Ross, *supra* note 37.

<sup>40</sup> Interview, *supra* note 38.

*D. The Power of Counterspeech*

Although President Obama recognized that it may be especially burdensome to minority students who are targets of psychically harmful hate speech to answer back, he also recognized that this effort is an essential step toward the social reforms these students champion. As he put it: “[Y]es, [this] . . . may put a slightly higher burden on [minority students]. But you’re not going to make the kinds of deep changes in society that those students want, without taking . . . on [their opponents] in a full and clear and courageous way.”<sup>41</sup>

Those who urge targets of psychically harmful hate speech to answer back cite the added benefit of avoiding the so-called bystander effect: if such targeted individuals instead wait for an authority figure to speak on their behalf, that reinforces their status as helpless victims and they lose the empowering experience of standing up and speaking out.<sup>42</sup>

It is also essential for others to respond to psychically harmful hate speech—not only its targets, but also other leaders in the pertinent community. On university campuses, the university president, as well as student government organizations, should speak out strongly. In response to hate speech, they should defend the right to convey even hateful, hated ideas, and they should also denounce such ideas. I like to describe this approach as cen-sur-ing speech, not cen-sor-ing it; public admonishment or rebuke for speech that may run counter to accepted appropriate behavior rather than merely suppressing speech. For instance, consider former Harvard President Derek Bok. During his presidency, some students hung Confederate flags from their dormitory windows, which prompted another student to protest by hanging a swastika from her dormitory window.<sup>43</sup> This incident illustrates the intractable problem of deciding what should count—and be censored—as

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<sup>41</sup> *Id.*

<sup>42</sup> Chris Marchese, *Best of ‘The Torch’: Achieving ‘Social Justice’ Means Embracing Free Speech*, FIRE (Aug. 5, 2016), <https://www.thefire.org/best-of-the-torch-achieving-social-justice-means-embracing-free-speech/>.

<sup>43</sup> Carlos Lozada, *When the Confederate Flag Flew at Harvard*, WASH. POST (June 13, 2015), [https://www.washingtonpost.com/news/book-party/wp/2015/06/23/when-the-confederate-flag-flew-at-harvard/?utm\\_term=.bd01839d3863](https://www.washingtonpost.com/news/book-party/wp/2015/06/23/when-the-confederate-flag-flew-at-harvard/?utm_term=.bd01839d3863).

psychically harmful hate speech, if we should choose to suppress such speech. Of course, the swastika is deeply identified with Hitler's antisemitic and other egregiously hateful ideas, not to mention actual genocide. However, the Harvard student who hung the swastika was trying to convey the opposite message, which was to condemn the racism that the Confederate flag connoted to them by equating it with the swastika. So, should these swastika displays count as hate speech or anti-hate speech?

Harvard President Bok responded to both displays by swiftly issuing a thoughtful statement that strongly criticized them, but equally strongly defended free speech principles.<sup>44</sup>

The fact that speech is protected under the First Amendment does not necessarily mean that it is right, proper, or civil . . . . [I agree with] the vast majority [in this community] . . . that hanging a Confederate flag [or a swastika] in public view . . . is insensitive and unwise because any satisfaction it gives to the students who display these symbols is far outweighed by the discomfort it causes to many others . . . . [But] no community [can] . . . become humane and caring by restricting what its members can say. The worst offenders will simply find other ways to irritate and insult . . . [And] I fear that . . . the resulting publicity [would] eventually attract more attention to the offensive material than would ever have occurred otherwise.<sup>45</sup>

Of course, many people cherish the Confederate flag as a symbol of Southern pride and a tribute to their ancestors who died in the Civil War.<sup>46</sup> For example, the Confederate flag has been featured in dueling demonstrations on the University of North Carolina's Chapel Hill campus, near the "Silent Sam" statue of a Confederate soldier. Some demonstrators seek the statue's removal because of its pro-slavery, racist connotations.<sup>47</sup> In contrast, other

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<sup>44</sup> See DEREK BOK, BOS. GLOBE, PROTECTING FREEDOM OF EXPRESSION ON THE CAMPUS (Mar. 25, 1991), <http://eg.bucknell.edu/~koutslts/FS098/Articles/DerekBok.pdf>.

<sup>45</sup> *Id.* at para. 4, 11–12.

<sup>46</sup> See *Protest Held at UNC's Silent Sam Statue*, ABC11 (Oct. 25, 2015), <http://abc11.com/news/protest-held-at-uncs-silent-sam-statue/1050287/>.

<sup>47</sup> *Id.*

demonstrators who wave Confederate flags have a more benign view of the statue, which was erected in 1913 as a memorial to UNC students who died in the Civil War.<sup>48</sup> So, yet again, both the statue and the Confederate flag illustrate the fact that one person's anti-hate speech is another person's hate speech.

Another, more recent example of campus leaders and community members combating psychically harmful hate speech, not with calls for censorship, but rather with constructive counterspeech, occurred at Yale in 2014. The incident was described in a column written by Yale Professor Zareena Grewal, who is Muslim and teaches courses about religion, ethnicity, and race. As she wrote:

Last fall, swastikas scrawled in chalk were discovered in a [campus] courtyard . . . [I]n a display of solidarity, two pro-Palestinian student activists who have differed with some Jewish students [about] the movement to boycott Israel, led an effort to erase the swastikas and cover them over with chalk messages of love.<sup>49</sup>

These examples illustrate the difficulty of determining what speech should be censored in an inescapably subjective field—what one person perceives as hate speech another may view as anti-hate speech. Therefore, instead of outright censoring hateful or offensive speech, university administrators should *censure* speech; that is, rather than limiting speech, universities should encourage thoughtful criticism and open discourse.

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<sup>48</sup> Tammy Grubb, *Confederate Rally to Defend UNC's Silent Sam Coming to Chapel Hill*, NEWS & OBSERVER (Oct. 24, 2015), <http://www.newsobserver.com/news/local/community/chapel-hill-news/article40787271.html>.

<sup>49</sup> Zareena Grewal, *Here's What My Yale Student Get: Free Expression and Anti-Racism Aren't Mutually Exclusive*, WASH. POST (Nov. 12, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/11/12/heres-what-my-yale-students-get-free-expression-and-anti-racism-arent-mutually-exclusive/>.

*E. Thinking Beyond the Initial, “Common-Sense” Appeal  
of Censoring “Bad” Ideas*

Surveys show that the more people think about these issues, the more they tend to support free speech.<sup>50</sup> After all, it is counterintuitive to support the freedom to voice ideas we deeply reject, so it is not surprising that our initial, instinctual reaction is that those ideas should be suppressed. Author Nat Hentoff captured this tendency to seek suppression of whatever idea we hate well, in the title of his book: *Freedom of Speech for Me—But Not for Thee: How the Left and Right Relentlessly Censor Each Other*.<sup>51</sup> To also quote Phil Kerby, an editorial writer for the *Los Angeles Times*: “Censorship is the strongest drive in human nature. Sex is a weak second.”<sup>52</sup>

The innate appeal of censoring hated, hateful ideas was also recognized by former Supreme Court Justice Oliver Wendell Holmes in a historic dissenting opinion that famously protected “freedom for the thought that we hate.”<sup>53</sup> In a separate opinion, Holmes recognized the natural tendency to oppose such freedom, but explained why, on reflection, we must support it:

Persecution for the expression of opinions [you loathe] seems . . . perfectly logical . . . . But when [people] have realized that time has upset many fighting faiths, they may come to believe . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .

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<sup>50</sup> See GALLUP, KNIGHT FOUND., FREE EXPRESSION ON CAMPUS: A SURVEY OF U.S. COLLEGE STUDENTS AND U.S. ADULTS (2016), [http://www.knightfoundation.org/media/uploads/publication\\_pdfs/FreeSpeech\\_campus.pdf](http://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf). See generally Nick Anderson, *Survey: College Students Seek Balance on Free Speech and Hate Speech*, WASH. POST (Apr. 4, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/04/04/survey-college-students-seek-balance-on-free-speech-and-hate-speech/> (reflecting students’ perspectives on free speech through a series of surveys).

<sup>51</sup> NAT HENTOFF, *FREEDOM OF SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* (1992).

<sup>52</sup> Myrna Oliver, *Phil Kerby; Times Editorial Writer Won Pulitzer Prize*, L.A. TIMES (Apr. 30, 1993), [http://articles.latimes.com/1993-04-30/news/mn-29265\\_1\\_phil-kerby](http://articles.latimes.com/1993-04-30/news/mn-29265_1_phil-kerby).

<sup>53</sup> See *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and [even] believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.<sup>54</sup>

As a free speech absolutist, I of course encourage my students to question any and all orthodoxies, including speech-protective Supreme Court precedents. Accordingly, I hope that I can persuade any First Amendment skeptics who are reading this essay to accept this established First Amendment jurisprudence not at all because it is established, but rather because, on reflection, you are persuaded that it is correct.

## II. WHY CENSORSHIP IS HARMFUL

### *A. Broad, Diverse Views About What Speech is Offensive or Hateful*

First, I will explain further why the Supreme Court has been right to uphold freedom for offensive expression, including psychically harmful hate speech. Most importantly, these concepts are inevitably vague and subjective. Because we are such a wonderfully diverse society, we have very different ideas, values, and tastes. One of my favorite cartoons underscores this point. It shows three people in an art museum looking at a classic nude female torso, a fragment of an ancient sculpture minus its head and limbs. Each viewer's reaction is shown in a comment bubble. The first one thinks, "Art!"; the second thinks, "Smut!"; and the third thinks, "An insult to amputees!" On a more serious note, I should add that on some college campuses, wide-ranging artwork, including nude and semi-nude works, have been denounced by some feminists as "pornography" that demeans women; they condemn it as misogynistic hate speech or as sexual harassment because they

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<sup>54</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

view it as conveying perspectives about gender or sex that make them “uncomfortable” or that they find “unwelcoming.”<sup>55</sup>

Given the divergent views about what expression is offensive or hateful, if we allowed government to regulate or punish any speech that may be considered offensive or hateful, then we would have little speech left. To illustrate this point, I will cite three types of expression that many members of the public have tried to suppress as “offensive” or “hateful.”

The first is psychically harmful hate speech. As I have previously explained, this term is generally used to denounce speech that conveys bias based on social identity.<sup>56</sup> One recent notable example is the 2015 terrorist attacks against the satiric French magazine *Charlie Hebdo* for publishing cartoons that terrorists considered to be “hate speech” against Muslims.<sup>57</sup> In the United States, fortunately, we have been spared from such murders, although there have been similar attempts.<sup>58</sup> Nevertheless, many measures in the United States do seek to limit speech on the very same rationale; and polls show widespread support for such measures, including on college campuses.<sup>59</sup>

A second major category of expression that is constantly targeted for suppression because many people find it offensive or hateful is anything to do with sexual expression or gender norms.

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<sup>55</sup> NADINE STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 29, at 90–97; see Susan Kruth, *Shibley on Wellesley’s Reaction to ‘Sleepwalker’*, FIRE (Feb. 11, 2014), <https://www.thefire.org/shibley-on-wellesleys-reaction-to-sleepwalker/>.

<sup>56</sup> For discussion regarding the definition of “psychically harmful” speech, see *supra* Section I.B; see also Wojciech Sadurski, *Harms of Hate*, in 1 LAW, JUSTICE AND THE STATE 249, 249–52 (Aleksander Peczenik & Mikael M. Karlsson eds., 1995) (defining “psychic harm” as an “injury to the sensibility, dignity, and self-respect of those who are targets of a given utterance”).

<sup>57</sup> Dan Bilefski & Maia de la Baume, *Terrorists Strike Charlie Hebdo Newspaper in Paris, Leaving 12 Dead*, N.Y. TIMES (Jan. 7, 2015), [www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html](http://www.nytimes.com/2015/01/08/world/europe/charlie-hebdo-paris-shooting.html) (quoting Micheal J. Morell, former deputy director of the C.I.A., who stated that the attackers’ motives were “absolutely clear: trying to shut down a media organization that lampooned the Prophet Muhammad”).

<sup>58</sup> See Alastair Jamieson & David Taintor, *‘Draw Muhammad’ Shooting in Texas: 5 Things to Know*, NBC NEWS (May 4, 2015), <http://www.msnbc.com/msnbc/draw-muhammad-shooting-texas-5-things-know>.

<sup>59</sup> See GALLUP, *supra* note 50, at 14.

Many examples come from colleges and universities, because too many have adopted an overly broad, distorted concept of “sexual harassment” as encompassing any expression about sex or gender that anyone finds subjectively unwelcoming.<sup>60</sup> In essence, this concept of “sexual harassment” is a specific type of psychically harmful hate speech: expression that is seen as undermining the equality, dignity, and safety of women.

The most egregious recent example of censorship of this type is the prolonged sexual harassment investigation that Northwestern University conducted against Film Professor Laura Kipnis in 2015 because of an article she published in the *Chronicle of Higher Education*.<sup>61</sup> Ironically, the article criticized the exaggerated, distorted concept of sexual harassment that is prevalent on campuses.<sup>62</sup> For months, the university subjected Kipnis to Star Chamber-style interrogations, pursuing the charge that her essay somehow constituted unlawful sexual harassment.<sup>63</sup> Though Kipnis was ultimately cleared of the charges, this example serves as a poignant example of censorship’s chilling effect on academic freedom.

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<sup>60</sup> See AM. ASS’N OF UNIV. PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE IX 69, 78 (Jun. 2016), <https://www.aaup.org/file/TitleIXreport.pdf>.

<sup>61</sup> Aaron Reese & Chris Malthy, *In Her Own Words: Laura Kipnis’ Title IX ‘Inquisition’ at Northwestern (VIDEO)*, FIRE (Apr. 6, 2016), <https://www.thefire.org/in-her-own-words-laura-kipnis-title-ix-inquisition-at-northwestern-video/>. Kipnis’ article, *Sexual Paranoia Strikes Academe*, detailed the changing reality of sex on campus and described the problems in a “post-Title IX landscape” where “sexual panic rules.” Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC (Feb. 27, 2015), <http://laurakipnis.com/wp-content/uploads/2010/08/Sexual-Paranoia-Strikes-Academe.pdf> [hereinafter Kipnis, *Sexual Paranoia*].

<sup>62</sup> See Kipnis, *Sexual Paranoia*, *supra* note 61, at 9.

<sup>63</sup> See Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <http://chronicle.com/article/My-Title-IX-Inquisition/230489/>; Erik Wemple, *Northwestern University Professor Laura Kipnis Details Title IX Investigation Over Essay*, WASH. POST (May 29, 2015), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/05/29/northwestern-university-professor-laura-kipnis-details-title-ix-investigation-over-essay/>; David French, *Laura Kipnis’s Incredible Ordeal and the Beginning of the End of PC*, NAT’L REV. (June 1, 2015), <http://www.nationalreview.com/article/419163/laura-kipnis-incredible-ordeal-and-beginning-end-pc-david-french>.

There are several other recent examples of campus punishment of allegedly offensive, hateful, sexist sexual expression:

In 2010, the Naval War College placed a professor on administrative leave and demanded he apologize because, during a lecture, he critically described Machiavelli's views about leadership by paraphrasing Machiavelli's comments about raping the goddess Fortuna.<sup>64</sup> I stress, again, he *criticized* Machiavelli's views, but as we have seen in other cases, too many members of our campus communities will not tolerate certain words or ideas being voiced at all, even for the purpose of critiquing them.<sup>65</sup>

The student newspaper at the University of Alaska Fairbanks was subjected to a ten-month investigation when a professor claimed that an article constituted sexual harassment because it described a building in the shape of a vagina.<sup>66</sup>

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<sup>64</sup> Scott Jaschik, *YouTube and Context*, INSIDE HIGHER ED (July 6, 2010), [www.insidehighered.com/news/2010/07/06/youtube](http://www.insidehighered.com/news/2010/07/06/youtube); Ariel Doctoroff, *Rape Metaphor Gone Awry: U.S. Naval War Academy Professor Punished for Controversial Speech*, HUFFINGTON POST (July 6, 2010), [http://www.huffingtonpost.com/2010/07/06/rape-metaphor-gone-awry-u\\_n\\_636609.html](http://www.huffingtonpost.com/2010/07/06/rape-metaphor-gone-awry-u_n_636609.html).

<sup>65</sup> See, e.g., Greg Lukianoff, *Brandeis University Called Out For Free Speech Abuses in its Student Newspaper*, HUFFINGTON POST (Sept. 26, 2009), [http://www.huffingtonpost.com/greg-lukianoff/brandeis-university-calle\\_b\\_269209.html](http://www.huffingtonpost.com/greg-lukianoff/brandeis-university-calle_b_269209.html) (criticizing Brandeis University's decision to sanction Professor Donald Hindley for criticizing the use of the word "wetbacks" in his Latin American politics course).

<sup>66</sup> See Susan Kruth, *At U. of Alaska Fairbanks, Months-Long Investigations of Student Newspaper Chill Speech*, FIRE (Dec. 12, 2013), <https://www.thefire.org/at-u-of-alaska-fairbanks-months-long-investigations-of-student-newspaper-chill-speech/>; see also Samantha Sunne, *University of Alaska Fairbanks Student Newspaper Under Investigation Following Sexual Harassment Claims*, STUDENT PRESS L. CTR. (Nov. 26, 2013), <http://www.splc.org/article/2013/11/university-of-alaska-fairbanks-student-newspaper-under-investigation-following-sexual-harassment-cla> (discussing the investigation of sexual harassment allegations against a student newspaper at the University of Alaska Fairbanks after the paper published a satirical article which described a building in the shape of a vagina).

A sociology professor at Appalachian State University was suspended for showing a documentary that critically examined the adult film industry.<sup>67</sup>

The University of New Hampshire evicted a student from his dormitory for posting satirical fliers joking that female students could lose “the freshman fifteen” by taking the stairs instead of the elevator.<sup>68</sup>

Since sexuality is an especially personal area, our views about it are especially subjective. Thus, it is especially wrong for the government to take away our individual right to choose in this area. We cannot delegate to any official, or to anyone else, the deeply personal choices about what sexual expression we will see, or not see, based on our own personal judgments about whether we consider it offensive, hateful, or sexist. We even have different perspectives about whether a given expression has any sexual content at all. That is captured by the old joke about the man who sees every inkblot his psychiatrist shows him as wildly erotic. When his psychiatrist says to him, “You’re obsessed with sex,” the man answers: “What do you mean I’m obsessed? You’re the one who keeps showing me all these dirty pictures!”

A third category of expression that has been widely deemed offensive or hateful is “unpatriotic” expression. The most vivid example is burning, or otherwise “desecrating,” the U.S. flag. Enforcing the core content neutrality principle, the Supreme Court repeatedly has upheld the free speech right to engage in such expression, including for purposes of protesting government policies.<sup>69</sup> However, public opinion polls have shown that a majority of the public would support some proscription on burning or

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<sup>67</sup> *Appalachian State University: Professor Suspended for Classroom Speech*, FIRE, <https://www.thefire.org/cases/appalachian-state-university-professor-suspended-for-classroom-speech/> (last visited Jan. 19, 2017).

<sup>68</sup> *University of New Hampshire: Eviction of Student for Posting Flier*, FIRE, <https://www.thefire.org/cases/university-of-new-hampshire-eviction-of-student-for-posting-flier/> (last visited Jan. 19, 2017).

<sup>69</sup> See *Texas v. Johnson*, 491 U.S. 397, 411–12 (1989) (holding that state statute prohibiting the desecration of the U.S. flag was content based and thus unconstitutional); see also *United States v. Eichman*, 496 U.S. 310, 315 (1990) (finding that the federal Flag Protection Act of 1989, which prohibited the desecration of the U.S. flag, was concerned with the content of such expression and was thus unconstitutional).

desecrating the American flag.<sup>70</sup> Indeed, many citizens and their elected officials have pushed for a constitutional amendment to overturn the Supreme Court's rulings, and to carve out an exception from the free speech guarantee specifically for flag "desecration."<sup>71</sup> In short, for many of our fellow citizens, this is the most offensive, hateful, and hated speech of all, the only such speech that has triggered a serious effort to amend the First Amendment, so that it can be outlawed.

Our differing reactions to the U.S. flag again show how irreducibly subjective it is to label some speech as "offensive" or "hate speech." Recently, some college students treated the flag itself as hate speech. In 2015, a group of student government leaders at the University of California-Irvine voted to ban the display of the U.S. flag, stating: "[T]he American flag has been flown in instances of colonialism and imperialism," and "can [therefore] be interpreted as hate speech."<sup>72</sup> Thus, they had the exact opposite view from the many Americans who so venerate the flag that they consider its "desecration" to be hate speech.

Freedom of speech is especially endangered whenever the government bans or regulates expression under such vague, subjective labels as "offensive" or "hateful." I have already cited several situations where one person's hate speech is another person's free speech.<sup>73</sup> Let me cite one additional, powerful illustration of this unavoidable problem. Many Muslims view the beliefs espoused by other Muslims as undermining their identity and equality.<sup>74</sup> This is true, for example, of some female and LGBT

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<sup>70</sup> See Joseph Carroll, *Public Support for Constitutional Amendment on Flag Burning*, GALLUP (June 29, 2006), <http://www.gallup.com/poll/23524/public-support-constitutional-amendment-flag-burning.aspx> (finding that 56 percent of Americans supported a constitutional amendment that would allow Congress and state governments to make it illegal to burn the U.S. flag).

<sup>71</sup> See Carl Hulse & John Holusha, *Amendment on Flag Burning Fails by One Vote in Senate*, N.Y. TIMES (June 27, 2006), <http://www.nytimes.com/2006/06/27/washington/27cnd-flag.html>

<sup>72</sup> MATTHEW GUEVARA, ASSOCIATED STUDENTS OF THE UNIV. OF CAL., ASUCI LEGISLATIVE COUNCIL RESOLUTION (Mar. 7, 2015), <http://www.asuci.uci.edu/legislative/legislations/R50-70.html>.

<sup>73</sup> See *supra* Section I.E.

<sup>74</sup> See DAHLIA EISSA, CONSTRUCTING THE NOTION OF MALE SUPERIORITY OVER WOMEN IN ISLAM: THE INFLUENCE OF SEX AND GENDER STEREOTYPING IN

Muslims.<sup>75</sup> For them, Muslims who deeply believe and express their beliefs that women are not fully equal to men,<sup>76</sup> and that homosexuality is a sin and crime,<sup>77</sup> are engaging in hate speech on the basis of gender and sexual orientation. On the other hand, it stands to reason that for those Muslims who cherish these beliefs as consistent with their religious identity, criticism of these beliefs could be interpreted as hate speech on the basis of religion.<sup>78</sup> In fact, some universities have treated criticism of Muslim beliefs about gender and sexual orientation as hate speech, even when such criticism comes from current or former Muslims, and university officials have barred these critics from speaking on campus.<sup>79</sup>

We cannot even single out particular words as always constituting psychically harmful hate speech. I have already made this point about symbols, citing the swastika and the Confederate flag, and stressed that you must consider the overall context in which

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THE INTERPRETATION OF THE QUR'AN AND THE IMPLICATIONS FOR A MODERNIST EXEGESIS OF RIGHTS 17–19 (Nov. 1999), <http://www.wluml.org/sites/wluml.org/files/import/english/pubs/pdf/occpaper/OCP-11.pdf>.

<sup>75</sup> *See id.*

<sup>76</sup> *See generally id.* (stating that “[t]raditional [Islamic] jurists claim that women’s agency is fettered” and that “[s]ex differentiation is therefore central to the traditional analysis of rights and responsibilities in Islam”).

<sup>77</sup> *See* JAMES BELL, PEW RESEARCH CTR., *THE WORLD’S MUSLIMS: RELIGION, POLITICS AND SOCIETY* 11, 24–25, 73, 81 (Apr. 30, 2013), <http://www.pewforum.org/files/2013/04/worlds-muslims-religion-politics-society-full-report.pdf> (stating that “Muslims around the world overwhelmingly view certain behaviors—including . . . homosexuality . . . as immoral”).

<sup>78</sup> For examples of online hate speech against Muslims and steps to take to eliminate the same, see generally MUSLIM ADVOCATES, *CLICK HERE TO END HATE: ANTI-MUSLIM BIGOTRY ONLINE & HOW TO TAKE ACTION* (May 2014), <http://www.muslimadvocates.org/wp-content/uploads/Click-Here-to-End-Hate.pdf>.

<sup>79</sup> *See* Robin Abcarian, *UC Berkley Muslim Students Are Wrong to Silence Bill Maher*, L.A. TIMES (Oct. 29, 2014), <http://www.latimes.com/local/abcarian/la-me-ra-bill-maher-berkeley-commencement-20141028-column.html> (discussing an attempt by a Muslim student organization at UC Berkley to prevent Bill Maher from speaking at the university’s winter graduation); *see also* *Statement from Brandeis University*, BRANDEISNOW (Apr. 8, 2014), <http://www.brandeis.edu/now/2014/april/commencementupdate.html> (withdrawing the name of an outspoken women’s rights advocate and Islamic critic, Ayaan Hirsi Ali, from the list of recipients for an honorary degree at Brandeis University’s 2014 commencement).

the symbol is used, not just its content.<sup>80</sup> The same is true for words. We cannot single out particular words as constituting “beyond-the-pale hate speech.” For instance, many of us would target the “n-word” as a candidate for categorical consideration as “hate speech.” However, two books that closely examine the word, one of which is titled by it, reject that conclusion. Both were written by respected African American scholars who concluded that the word should not be categorically censored from our vocabularies and that there are contexts in which it is appropriate or even “indispensable.”<sup>81</sup>

More recently, the word has been used by President Obama and another prominent African American, the longtime Chair of Harvard University’s African American Studies Department, Henry Louis Gates.<sup>82</sup> Some critics complained that Obama and Gates should not have used this word at all, in any context, for any purpose, and that it was always and inherently hate speech.<sup>83</sup> Similarly, a white female professor at the University of Kansas lost her job in 2015 for using that word in a graduate seminar, in the context of acknowledging

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<sup>80</sup> BOK, *supra* note 44.

<sup>81</sup> RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* 174–75 (2002); JABARI ASIM, *THE N WORD: WHO CAN SAY IT, WHO SHOULDN’T, AND WHY* 166 (2007). “Asim is the [E]ditor-[I]n-[C]hief of *Crisis* magazine, a preeminent journal of politics, ideas and culture published by the NAACP and founded by W.E.B. Du Bois in 1910. He spent 11 years at the *Washington Post*, where he served as deputy editor of the book review section.” Dan Nugent, *Author Jabari Asim to Speak at Leadership Institute*, SETON HALL U. (Mar. 3, 2009) (emphasis added), <https://www13.shu.edu/news/article/140224>. “[H]e concludes that, the word nigger is indispensable in certain endeavors.” *The N Word: Who Can Say It, Who Shouldn’t, and Why*, PUBLISHERS WKLY. REV., <http://www.publishersweekly.com/978-0-618-19717-0> (last visited Jan. 19, 2017).

<sup>82</sup> See Interview by Jane Slaughter with Henry Louis Gates, Jr., Professor, Harvard Univ. (1998) [hereinafter Interview by Jane Slaughter], <https://prelectur.stanford.edu/lecturers/gates/jsinterv.html>; *Episode 613—President Barack Obama*, WTF WITH MARC MARON (June 22, 2015), [http://www.wtfpod.com/podcast/episodes/episode\\_613\\_-\\_president\\_barack\\_obama](http://www.wtfpod.com/podcast/episodes/episode_613_-_president_barack_obama) [hereinafter *Episode 613*].

<sup>83</sup> See Stephen Collinson & Nia-Malika Henderson, *Why Obama’s N-word was Shocking*, CNN (June 22, 2015), <http://www.cnn.com/2015/06/22/politics/obama-n-word-race-politics/> (discussing both positive and negative responses to President’s Obama’s use of the word “nigger”).

her limited understanding of racism.<sup>84</sup> According to an open letter authored by some of her graduate students that called for her dismissal, she said: “As a white woman I just never have seen the racism . . . It’s not like I see ‘Nigger’ spray painted on walls.”<sup>85</sup> She responded that she was comparing the University of Kansas to the University of Missouri, where many students reported having seen and heard that word, and cited this as an example of the discrimination they faced.<sup>86</sup>

The point is that none of us can possibly agree on which words or ideas should be banned and in which circumstances. For example, the Asian American members of “The Slants” deliberately chose this racist slur as their band’s name, not to spread racist ideas, but rather to reclaim the word and assert their own freedom, dignity, and equality.<sup>87</sup> Similarly, many in the LGBTQ community have reclaimed and reframed terms that were originally used as slurs

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<sup>84</sup> Peter Bonilla, *What’s at Stake in KU’s Investigation of Professor’s In-Class Comments? Only Academic Freedom as Faculty Know It*, FIRE (Feb. 17, 2016), <https://www.thefire.org/whats-at-stake-in-kus-investigation-of-professors-in-class-comments-only-academic-freedom-as-faculty-know-it/>.

<sup>85</sup> David French, *Kansas Professor on Leave Because Her ‘Discourse’ Is Allegedly ‘Uncomfortable, Unhelpful, and Blatantly Discriminatory’*, NAT’L REV. (Nov. 23, 2015), <http://www.nationalreview.com/corner/427524/kansas-professor-leave-because-her-discourse-allegedly-uncomfortable-unhelpful-and>.

<sup>86</sup> Sara Shepherd, *KU Professor Who Used N-Word in Class Discussion Is Placed on Leave*, LAWRENCE J.-WORLD (Nov. 20, 2015), <http://www2.ljworld.com/news/2015/nov/20/ku-communications-prof-who-used-n-word-class-discu/>.

<sup>87</sup> See Luke O’Neil, *Asian American Band The Slants Can Trademark Name No Matter How Offensive It Might Be*, COURT RULES, VICE (Dec. 22, 2015), [https://noisy.vice.com/en\\_uk/article/the-slants-court-ruling-explainer](https://noisy.vice.com/en_uk/article/the-slants-court-ruling-explainer) (stating that using the words “The Slants” as their band name allowed band leader to “claim[] and identity, shift[] the meaning and stereotype around”). The Supreme Court may soon weigh in on these important issues after recently granting review in “The Slants” case to decide whether denying protection to racially disparaging trademarks is permitted under the First Amendment. See *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), cert. granted sub nom *Lee v. Tam*, 2016 U.S. LEXIS 4462 (2016); see also Adam Liptak, *Law on Disparaging Trademarks Gets Supreme Court Review*, N.Y. TIMES (Sept. 29, 2016), <https://nyti.ms/2jDf5sQ> (stating that the Supreme Court has decided to rule on whether a federal law denying protection to disparaging trademarks violates the First Amendment).

against them, including “queer” and “dyke.”<sup>88</sup> In contrast, other Asian Americans and LGBTQ individuals, among others, repudiate these efforts and maintain that these words should always be viewed as hate speech, regardless of who uses them and for what purpose.<sup>89</sup> These diverse views were illustrated by a recent controversy at the University of Chicago, when a prominent transgender activist spoke at a seminar about the empowering potential of slurs, like the word “tranny,” which some students protested as hate speech and accordingly called for various censorial measures.<sup>90</sup>

In sum, a seemingly limitless range of speech can be deemed hateful or offensive to some people. There are no objective guidelines for deciding which speech should be deemed sufficiently hateful or offensive to warrant punishment or suppression by government officials. Therefore, officials must exercise their discretion according to their own subjective personal values or those of politically powerful community members. This discretion opens the door for enforcement patterns that are arbitrary at best and discriminatory at worst. This will cause what the courts have called a “chilling effect,”<sup>91</sup> because no one wants to run the risk of investigation and prosecution, let alone punishment. Therefore,

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<sup>88</sup> See Zachary Zane, *6 Reasons You Need to Use The Word “Queer”*, PRIDE (Aug. 4, 2015, 1:44 PM), <http://www.pride.com/queer/2015/8/04/6-reasons-you-need-use-word-queer> (“There is great power in taking a word [“queer”] that once was hurtful and making it our own. It’s a feat of the LGBT community, and one in which we should take great pride.”); Curtis M. Wong, *Why Jillian Michaels Is Reclaiming ‘Fag’ and ‘Dyke’*, HUFFINGTON POST (Jan. 18, 2016), [http://www.huffingtonpost.com/entry/how-jillian-michaels-is-reclaiming-fag-and-dyke\\_us\\_569d1303e4b0ce4964253749](http://www.huffingtonpost.com/entry/how-jillian-michaels-is-reclaiming-fag-and-dyke_us_569d1303e4b0ce4964253749) (“What we’ve tried to do is take some of the venom out of the terms [‘fag’ and ‘dyke’] by reclaiming them.”).

<sup>89</sup> See Susan Donaldson James, *Gay Man Says Millennial Term ‘Queer’ Is Like the ‘N’ Word*, ABC NEWS (Nov. 12, 2013), <http://abcnews.go.com/Health/gay-man-millennial-term-queer-word/story?id=20855582> (discussing how some gay men still view the word “queer” as offensive).

<sup>90</sup> Ari Cohn, *University of Chicago Students Disregard Context, Call for Ban on ‘Hate Speech’ After Dan Savage Lecture*, FIRE: FOUND. FOR INDIVIDUAL RTS. EDUC. (June 6, 2014) (“During the seminar, [Dan] Savage spoke about the reclamation of slurs and their empowering potential, using the word ‘tranny’ as an example . . . A student in the audience interrupted . . . and requested that Savage and Cox use the phrase ‘T-slur’ rather than actually saying ‘tranny.’”).

<sup>91</sup> See *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 556–57 (1963) (noting that the principal result of a chilling effect is deterrence).

people self-censor. They refrain from engaging in expression that might possibly be deemed offensive or hateful by the powers that be.

The unfettered discretion that is required to enforce such vague concepts as “offensive” or “hateful” is also likely to be exercised in a discriminatory way, by singling out expression that is produced by, or appeals to, individuals or groups who are relatively unpopular, powerless, or marginalized. Indeed, recent efforts to suppress “offensive,” “hateful,” or “sexist” sexual expression have targeted expression of lesbian and gay sexuality,<sup>92</sup> rap music by young African American men,<sup>93</sup> and feminist anthems.<sup>94</sup> Likewise, as this essay details below,<sup>95</sup> campus hate speech codes have been enforced disproportionately against the very racial minorities who are their intended beneficiaries. We should not be surprised about these enforcement patterns. As the Black Lives Matter movement has forcefully reminded us, this is the general pattern for all laws:

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<sup>92</sup> For examples, see generally STROSSEN, DEFENDING PORNOGRAPHY, *supra* note 29; see also Mark Joseph Stern, *A Lawsuit Challenges Utah’s Ban on Students and Teachers Saying Nice Things About Gay People*, SLATE (Oct. 26 2016, 4:51 PM), [http://www.slate.com/blogs/outward/2016/10/26/utah\\_law\\_prohibiting\\_advocacy\\_of\\_homosexuality\\_in\\_schools\\_is\\_challenged.html](http://www.slate.com/blogs/outward/2016/10/26/utah_law_prohibiting_advocacy_of_homosexuality_in_schools_is_challenged.html) (discussing Utah’s law prohibiting the “advocacy of homosexuality” in public and charter schools)

<sup>93</sup> See Graham Rayman & Stephen Rex Brown, *NYPD Top Cop Calls Rappers ‘Thugs’ After T.I. Concert Shooting*, DAILY NEWS: NEW YORK (May 26, 2016), <http://www.nydailynews.com/new-york/manhattan/bratton-calls-rappers-thugs-irving-plaza-shooting-article-1.2651325> (quoting NYPD Commissioner William Bratton who said: “The crazy world of these so-called rap artists who are basically thugs, that basically celebrate violence they did all their lives . . . ”); Horace Holloman III, *‘Obscene’ Ban in Place*, DAILY IBERIAN (Feb. 12, 2015), [http://www.iberianet.com/news/obscene-ban-in-place/article\\_c3476460-b2d3-11e4-90d7-a3c84be4ef99.html](http://www.iberianet.com/news/obscene-ban-in-place/article_c3476460-b2d3-11e4-90d7-a3c84be4ef99.html) (discussing St. Martinville Police Department’s plans to ban the playing of “obscene” rap music during the Newcomer’s Parade); Sara Rimer, *Obsenity or Art? Trial on Rap Lyrics Opens*, N.Y. TIMES (Oct. 17, 1990), <http://www.nytimes.com/1990/10/17/us/obsenity-or-art-trial-on-rap-lyrics-opens.html?pagewanted=all> (referring to the obscenity trial of the rap music group 2 Live Crew).

<sup>94</sup> See Marjorie Heins, *The Strange Case of Sarah Jones*, NAT’L COALITION AGAINST CENSORSHIP (Apr. 21, 2003), <http://ncac.org/censorship-article/the-strange-case-of-sarah-jones> (discussing Sarah Jones’ lawsuit against the FCC for banning her poem, *Your Revolution*, from the airwaves for two years).

<sup>95</sup> See *infra* Section III.B.

they are enforced disproportionately against African Americans and other minority groups.<sup>96</sup>

### III. PSYCHICALLY HARMFUL HATE SPEECH SHOULD BE PROTECTED

#### A. *Censoring Psychically Harmful Hate Speech Will Have Negative Impacts on Free Speech and Equality*

The remainder of this essay will focus specifically on “psychically harmful hate speech” because polls show that many college students do not understand why such speech should be constitutionally protected.<sup>97</sup> Two points are worth remembering. First, much hate speech may be prohibited and punished because it causes certain harms beyond emotional and psychic harms, namely, threats, harassment, incitement, and hate crimes. Therefore, the debate only concerns whether we should also punish hate speech that causes none of these specific harms. This is what I call “psychically harmful hate speech,” speech not otherwise included in these prohibited categories, but that’s biased ideas about race, gender, and similar social identity factors are emotionally and psychically upsetting.

Second, as I noted above, I fully understand the appeal of suppressing such odious ideas. We deeply oppose and fight against

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<sup>96</sup> See generally NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INJUSTICE IN THE CRIMINAL JUSTICE SYSTEM 17 (Feb. 3, 2015), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf> (outlining the basics of the Black Lives matter movement, and specifically explaining that “a variety of ostensibly race-neutral criminal justice policies in fact have a disparate racial impact” and “implicit racial bias leads criminal justice practitioners to punish people of color more severely than whites”). For discussion about systemic institutional racism, see *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/>.

<sup>97</sup> See GALLUP, *supra* note 50, at 13–14 (providing poll results showing that 27 percent of college students would be fine with campuses restricting “political views that are upsetting or offensive to certain groups,” 69 percent would of college students support restricting “slurs and other language on campus that is intentionally offensive to certain groups,” and that 63 percent of students would support campuses restricting “wearing costumes that stereotype certain racial or ethnic groups”).

bias and discrimination, so why should we allow speech that reflects it, and potentially perpetuates it? My bottom-line answer is that censoring psychically harmful hate speech will actually do more harm than good to the urgently important goals that I wholeheartedly share with proponents of such censorship: the eradication of biased attitudes and discriminatory actions. The most important reasons for this conclusion are:

(1) Censoring such speech increases attention to, and sympathy for, bigots.<sup>98</sup>

(2) Censorship drives bigoted expression and ideas underground, making it harder to identify who holds them, and harder to refute them.<sup>99</sup>

(3) Such a censorship regime necessarily deals with only the crudest, most vulgar expressions of discrimination, leaving untouched the more subtle, insidious, and influential ones. As Henry Louis Gates pointed out, it is wrong to “spend more time worrying about speech codes than coded speech.”<sup>100</sup>

(4) Laws against psychically harmful hate speech are inevitably enforced disproportionately against speech by, and on behalf of, members of whatever groups are relatively disempowered and marginalized in the particular community. Such dissident, minority perspectives should always be heard in our democracy, not only because of the speakers’ free speech rights, but also so the rest of us can be aware of their views and respond to them. Moreover, in some communities, the marginalized and, hence, silenced voices will include the very racial and other minority groups who are the intended beneficiaries of the regulations.<sup>101</sup>

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<sup>98</sup> Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 559 [hereinafter Strossen, *Regulating Racist Speech*].

<sup>99</sup> *Id.* at 560.

<sup>100</sup> Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 17, 47 (1994).

<sup>101</sup> Strossen, *Regulating Racist Speech*, *supra* note 98, at 556–57.

(5) This type of censorship reinforces paternalistic stereotypes about members of minority groups, suggesting that they need special protection from offensive, hateful speech.<sup>102</sup>

(6) This censorship undermines a mainstay of equal rights movements, which have always been especially dependent on a robust concept of free speech.<sup>103</sup>

(7) Censorship will create the so-called “bystander effect,”<sup>104</sup> whereby those who are subject to psychically harmful hate speech will be conditioned to expect a higher authority to respond to it, rather than experience the empowerment that comes from responding themselves.

(8) Censoring psychically harmful hate speech curbs “candid intergroup dialogue concerning racism and other forms of bias,” which is “an essential precondition for reducing discrimination.”<sup>105</sup>

(9) Positive intergroup relations are more likely to result from education and discussions about misunderstandings and insensitivity. By contrast, laws that target psychically harmful hate speech will continue to generate controversy and litigation, and increase intergroup tensions.<sup>106</sup>

(10) Finally, censorship is counter-productive and diversionary because it “makes it easier for communities to avoid coming to grips

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<sup>102</sup> *Id.* at 561. Alan Keyes, former assistant Secretary of State and President of Citizens Against Government Waste, once stated that, “The basic problem with all of these regimes to protect various people is that the protection incapacitates . . . . To think that I [as a black man] will . . . be told that white folks have the moral character to shrug off insults, and I do not . . . . That is the most insidious, the most insulting, the most racist statement of all!” *Id.* at 486, 561; see also Chloé Valdary, *Dear White People: Well-Meaning Paternalism is Still Racist*, DAILY BEAST (Dec. 9, 2014), <http://www.thedailybeast.com/articles/2014/12/09/dear-white-people-well-meaning-paternalism-is-still-racist.html> (“At the same time, I feel it prudent to rest this fanciful notion that some of those same white people have, namely that treating us with kid gloves is somehow noble or desirable. It is not. It is racist.”).

<sup>103</sup> See Strossen, *Regulating Racist Speech*, *supra* note 98, at 567–69.

<sup>104</sup> See generally *Bystander Effect: What is the Bystander Effect?*, PSYCHOL. TODAY, <https://www.psychologytoday.com/basics/bystander-effect> (last visited Jan. 19, 2017) (“The bystander effect occurs when the presence of others discourages an individual from intervening in an emergency situation.”).

<sup>105</sup> Strossen, *Regulating Racist Speech*, *supra* note 98, at 561.

<sup>106</sup> *Id.*

with less convenient and more expensive, but ultimately more meaningful, approaches for combatting racial discrimination.”<sup>107</sup>

I will now elaborate on several of the foregoing points.

*B. Censorship is Especially Dangerous for the Speech of Minority Groups and Causes*

First, just as free speech has always been the strongest weapon to advance equal rights causes, censorship has always been the strongest weapon to thwart them. Ironically, the explanation for this pattern lies in the very analysis of those who wish to curb psychically harmful hate speech. They contend that racial and other minorities, including women, are relatively disempowered and marginalized.<sup>108</sup> I agree. However, it is precisely for that reason that censorship is not a solution. To the contrary, the government is likely to wield this tool, along with others, to the particular disadvantage of already disempowered groups.

Laws that censor psychically harmful hate speech are inevitably enforced disproportionately against speech by, and on behalf of, groups who lack political power, including government critics, and even members of the very minority groups who are the laws' intended beneficiaries. For example, Canada adopted a law punishing psychically harmful hate speech, and in one of their first enforcement actions, Canadian customs officials seized 1,500 copies of a book that various Canadian universities had tried to import from the United States.<sup>109</sup> What was this dangerous racist,

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<sup>107</sup> *Id.*

<sup>108</sup> See Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV., 865, 868–70 (1998) (positing that “[c]ontrolling hate speech differs radically from controlling the speech of a political dissident” when it is “on behalf of persons who are disempowered vis-à-vis their tormentors”); ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY & CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY* 13–18 (1998), <http://www.feministes-radicales.org/wp-content/uploads/2012/05/Catharine-A.-MacKinnon-Andrea-Dworkin-Pornography-and-Civil-Rights-A-New-Day-for-Women%E2%80%99s-Equality-1988.pdf>.

<sup>109</sup> Gates, Jr., *supra* note 100, at 43; *Black Looks: Race and Representation By Bell Hooks (1992)*, FREEDOM TO READ: CHALLENGED WORKS, <http://www.freetoread.ca/challenged-works/black-looks-race-and-representation/#.WEXEpKIrJE4> (last visited Jan. 19, 2017) [hereinafter

sexist book? It was none other than *Black Looks: Race and Representation* by the African American feminist scholar, Bell Hooks,<sup>110</sup> a professor at Oberlin.<sup>111</sup> This was typical. A Canadian Supreme Court opinion, which argued that Canada's law against psychically harmful hate speech undermines both equality and free speech rights, noted:

The record amply demonstrates that intemperate statements about identifiable groups, particularly if they represent an unpopular viewpoint, may attract state involvements or calls for police action. Novels such as Leon Uris' pro-Zionist novel, *The Haj*, face calls for banning . . . . Other works, such as Salman Rushdie's *Satanic Verses*, are stopped at the border . . . . Films may be temporarily kept out, [including one] entitled *Nelson Mandela*, ordered as an educational film by Ryerson Polytechnical Institute . . . . Arrests are even made for distributing pamphlets containing the words "Yankee Go Home."<sup>112</sup>

This general pattern also holds true on university and college campuses that have punished psychically harmful hate speech. Beginning in May 1988, the University of Michigan adopted a "hate speech code."<sup>113</sup> After the ACLU successfully challenged the constitutionality of the overbroad code, the University was forced to

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*Challenged Works*]; see FREEDOM TO READ, CHALLENGED BOOKS AND MAGAZINE LIST 29, <http://www.freedomtoread.ca/wordpress/wp-content/uploads/2011/11/Challenged-Books-and-Magazines-January-2013.pdf> (last visited Jan. 19, 2017).

<sup>110</sup> BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* (1992) [hereinafter HOOKS, *BLACK LOOKS*]. Hooks pointed out the irony that "this book, which opens with a chapter urging everyone to learn to "love blackness," would be accused of encouraging racial hatred. I doubt that anyone at the Canadian border read this book: the target for repression and censorship was the radical bookstore, not me." BELL HOOKS, *OUTLAW CULTURE: RESISTING REPRESENTATIONS* 73 (2012).

<sup>111</sup> HOOKS, *BLACK LOOKS*, *supra* note 110; see also *Challenged Works*, *supra* note 109 (providing information on challenges against this book under the Canadian hate speech law).

<sup>112</sup> *R. v. Keegstra*, 21118, [1990] 3 S.C.R. 697 (Can.) (McLachlin, J., dissenting).

<sup>113</sup> *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 855–56 (E.D. Mich. 1989).

disclose information about how the code had been enforced.<sup>114</sup> Usually, campuses are able to maintain this information as confidential.<sup>115</sup> However, thanks to discovery during the litigation, we at the ACLU were able to see how dramatically the code's actual enforcement departed from its advocates' aspirations. Even during the short time that the "rule was in effect, there were more than twenty cases of whites charging blacks with racist speech."<sup>116</sup> More importantly, there were "only two instances in which the rule . . . punish[ed] . . . speech" on the ground that it was racist, rather than conveying some other type of bias, and both involved the punishment of speech by or on behalf of black students.<sup>117</sup> In other words, one hundred percent of the speech that was punished as racist was speech conveyed by or on behalf of African Americans.

The details of the latter two incidents underscore the elastic and subjective nature of the concepts of "hate speech" and "racist hate speech." In one case, a black student used the term "white trash" in conversation with a white student.<sup>118</sup> The second situation arose at the start of a preclinical dentistry course during a faculty led discussion designed to "identify concerns of students."<sup>119</sup> One dental student said that he had heard, from his African American roommate, that minorities have a difficult time in the course and

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<sup>114</sup> See *id.* at 852 n.1, 861 (discussing how Doe was represented by the ACLU and how the court ruled the code was overbroad). The ACLU also successfully challenged a hate speech code at the University of Wisconsin. See *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (holding "that a declaratory judgment be entered that the UW Rule on its face violates the overbreadth doctrine and is unduly vague").

<sup>115</sup> See Greg Lukianoff, *Campus Speech Codes: Absurd, Tenacious, and Everywhere*, FIRE (May 28, 2008), <https://www.thefire.org/campus-speech-codes-absurd-tenacious-and-everywhere/>.

<sup>116</sup> Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality*, 46 CASE W. RES. L. REV. 449, 469 (1995) [hereinafter Strossen, *Hate Speech and Pornography*] (citing Jeff Gottlieb, *Banning Bigoted Speech: Stanford Weighs Rules*, SAN JOSE MERCURY-NEWS, Jan. 7, 1990, at 1B, 3B).

<sup>117</sup> *Id.* (citing Plaintiff's Exhibit Submitted in Support of Motion for Preliminary Injunction at 1, *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (No. 89-CV-71683) [hereinafter Plaintiff's Exhibit]).

<sup>118</sup> *Id.* at 469 n.103.

<sup>119</sup> *Id.*

were not treated fairly. The faculty member, who was black, complained that the “student was accusing her of racism.”<sup>120</sup>

Yet one more detail about the University of Michigan’s enforcement record further demonstrates that minority students may well bear the brunt of hate speech laws. An African American student accused of homophobic and sexist speech was the only student subjected to a full disciplinary hearing under Michigan’s hate speech code.<sup>121</sup> He complained that he had been singled out because of his race and his political views.<sup>122</sup> Others who were punished at the University of Michigan included several Jewish students accused of engaging in antisemitic expression by writing graffiti, including a swastika, on a classroom blackboard and saying that they intended it as a practical joke,<sup>123</sup> and an Asian American student who was disciplined for asking why the black students in his dormitory tended to socialize together, making him feel isolated, which was seen as a hateful anti-black remark.<sup>124</sup>

Other campus hate speech codes also, predictably, have been enforced against speech by, and on behalf of, minority students. For example, “the student who challenged the University of Connecticut’s hate speech” policy, under which she “had been penalized for an allegedly homophobic remark, was Asian American. She claimed that other students had engaged in similar expression[,] but that she had been singled out for punishment because of her ethnic background.”<sup>125</sup> Similarly, the first complaint filed under Trinity College’s policy prohibiting racial harassment was against an African American speaker who had been sponsored by a black student organization, “Black-Power Serves Itself.”<sup>126</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 469.

<sup>122</sup> *Id.* at 469 n.105; see Plaintiff’s Exhibit, *supra* note 117, at 6.

<sup>123</sup> Strossen, *Hate Speech and Pornography*, *supra* note 116, at 469–70 (citing Plaintiff’s Exhibit, *supra* note 117, at 1–2).

<sup>124</sup> *Id.* at 470; see Plaintiff’s Exhibit, *supra* note 117, at 2–3.

<sup>125</sup> Strossen, *Hate Speech and Pornography*, *supra* note 116, at 470 (citing *Wu v. Uni. of Conn.* (D. Conn. 1989) (No. Civ. H89-649)); see BRUCE M. STAVE ET AL., *RED BRICK IN THE LAND OF STEADY HABITS: CREATING THE UNIVERSITY OF CONNECTICUT, 1881–2006*, at 196 (2006).

<sup>126</sup> David Copeland, *Campus Life: Trinity College; Black Talks Prompt Protest and Complaint*, N.Y. TIMES (Dec. 10, 1989),

Unfortunately, these incidents are not mere aberrations. To the contrary, they flow from the very premises of those who seek to punish psychically harmful hate speech. Discrimination and prejudice are, unfortunately, endemic in our society, including on campuses and in our legal system. Therefore, for those of us who are committed to eradicating discrimination, the last thing we should want to do is hand over to biased officials and institutions the power to enforce necessarily vague hate speech codes, with their inevitable licensing of subjective, discretionary decisions.

*C. Censorship is Paternalistic; Counterspeech is Empowering*

Laws that punish psychically harmful hate speech also undermine the equality rights of minority group members by treating them paternalistically, as helpless victims who need the intervention of higher authorities on their behalf. Conversely, although counterspeech does certainly take courage and strength, it is empowering, and hence, a meaningful step toward equality. For example, let me cite an incident at Arizona State University (“ASU”) involving psychically harmful hate speech in the form of a racially derogatory poster.<sup>127</sup> At the time, Rossie Turman, an African American student, was the Chairman of the African American Coalition at ASU.<sup>128</sup> According to one press account:

Turman and other campus minority group leaders handled their anger [about the hate speech] by calling a press conference and rally to voice their concerns and allow students and administrators to speak . . . . Within days, the ASU Faculty Senate passed a previously-proposed domestic diversity course requirement. Turman said: “When you get a chance to swing at racism, and you do, you feel more confident about doing it the next time. It was a personal feeling of empowerment, that I don’t have

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<http://www.nytimes.com/1989/12/10/style/campus-life-trinity-college-black-talks-prompt-protest-and-complaint.html>.

<sup>127</sup> See Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?*, 25 S. ILL. U. L.J. 243, 255–56 (2001).

<sup>128</sup> *Id.* at 257.

to take that kind of stupidity . . . . The sickest thing would have been if the racists had been kicked out, the university sued, and people were forced to defend these folks. It would have been a momentary victory, but we would have lost the war.”<sup>129</sup>

After this incident, Rossie Turman was elected ASU’s student body President, the first African American to hold that position, on a campus with an African American student population of only 2.3 percent.<sup>130</sup> After his college graduation, he went to Columbia Law School.<sup>131</sup> This incident is a powerful example of the merits of counterspeech. Indeed, “what could have been a . . . victimizing experience with hate speech became, [for him,] an empowering, leadership-development experience, not despite the absence of censorship, but . . . because of it.”<sup>132</sup>

*D. Censorship Diverts From More Promising Approaches  
for Fostering Equality*

Another reason why censoring psychically harmful hate speech may well undermine, rather than advance, equality is its diversionary nature.<sup>133</sup> The track record of campus hate speech codes highlights this, leading some former advocates of such codes to become disillusioned.<sup>134</sup>

Those of us who champion equality on campus have a special responsibility to promote other effective, non-censorial, approaches. The ACLU has consistently done that.<sup>135</sup> When the ACLU adopted its policy opposing censorship of psychically harmful hate speech

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Strossen, *Regulating Racist Speech*, *supra* note 98, at 561.

<sup>134</sup> *U. of Wisconsin Repeals Ban on ‘Hate Speech’*, N.Y. Times (Sept. 14, 1992), <http://www.nytimes.com/1992/09/14/us/u-of-wisconsin-repeals-ban-on-hate-speech.html> (noting that Victor DeJesus, co-President of the Wisconsin Student Association, changed his mind about supporting a hate speech rule because it diverted from the “real problems of minority students,” namely “financial aid, student awareness, and recruitment retention”).

<sup>135</sup> See *Hate Speech on Campus*, *supra* note 4.

on campus back in 1990, it stressed alternative methods for countering discrimination and promoting equality.<sup>136</sup> That list is still pertinent more than a quarter century later because, sadly, we still have so much work to do on these fronts.

Notably, Shaun Harper, an African American professor at the University of Pennsylvania and Executive Director of the University's Center for the Study of Race and Equity in Education, recently endorsed the importance of these alternative, speech-respectful strategies.<sup>137</sup> He wrote an op-ed in the *Washington Post* stressing that most Black Lives Matter campus activists are demanding precisely these kinds of measures, and that almost none are seeking suppression of racist or other hate speech.<sup>138</sup> He wrote:

When [my institute asks] students of color . . . what corrective actions they want administrators to take on their campuses, they say nothing about . . . campus speech codes . . . . They tell us they want to be heard, understood and taken seriously. They want white people to recognize the harmful effects of their words and actions. They want greater inclusion of culturally diverse perspectives in the curriculum, more resources for ethnic studies programs and cultural centers, more people of color in professorships and senior administrative roles. They want educators on their campuses to be more highly skilled at teaching diverse student populations and fostering inclusive learning environments where every student feels respected. They want names of slave owners removed from buildings and statues of white supremacists taken down.<sup>139</sup>

Due to its diversionary nature, censorship often overlooks more meaningful attempts to foster understanding and eradicate bigotry.

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<sup>136</sup> Nadine Strossen, *Thoughts on the Controversy Over Politically Correct Speech*, 46 SMU L. REV. 119 app. at 143–44 (1992).

<sup>137</sup> Shaun R. Harper, Opinion, *No, Protesters Who Point Out Campus Racism Aren't Silencing Anyone*, WASH. POST (Mar. 10, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/03/10/protests-against-campus-racism-dont-threaten-free-speech-they-embrace-it/>.

<sup>138</sup> *See id.*

<sup>139</sup> *Id.*

It is important for administrations to encourage more free speech and expression, not less. Ultimately, the First Amendment protects speech no matter how hateful or offensive it may be, and rather than censor student speech, universities should strive to preserve this constitutional integrity.

*E. Summary of Gains and Losses from Censoring Psychically Harmful Hate Speech*

It is quite clear that the perceived benefits of censoring psychically harmful hate speech are far outweighed by the costs of such suppression. The plus side, from the perspective of those who seek speech suppression, is quite limited. That is because the new suppression would extend to only a subset of hate speech, since we already punish hate speech that causes specific tangible harms: threats, harassment, incitement, and hate crimes. Of that newly suppressible subset—psychically harmful hate speech—we would only punish yet another subset, consisting of the most blatant expression. In contrast, even advocates of restricting psychically harmful hate speech acknowledge that free speech principles would nonetheless protect more subtle expressions of racism, sexism, and other bias. Yet, it is likely that these more subtle expressions may well be the most damaging precisely because they cannot as easily be dismissed as biased.<sup>140</sup> On the cost side, permitting the government to punish psychically harmful hate speech would undermine equality and exert an incalculable chilling effect on any speech that challenges the prevailing orthodoxy in any community. The net loss for both speech and equality was well summarized by Henry Louis Gates:

Speech codes are symbolic acts. They let a group of people say, “[W]e . . . are not the sort of community where we would tolerate someone saying . . . ’rigger [sic].’ Well, big deal. But there are other . . . consequences, like . . . the effect on freedom

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<sup>140</sup> See, e.g., Darryl Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 309–10 (1990) (noting that most antidiscrimination laws “conceptualize[] racism as a discrete and specific act” and neglect that race is “structural and interstitial, that it can be the root of injury even when not traceable to a specific intention or action”).

of inquiry. I think we're all bigger and more secure than that. I think we have to allow people to say even unpopular . . . and nasty things in order to protect [our] right to attack our government and say whatever's on our minds."<sup>141</sup>

President Obama echoed this same point during an interview for the podcast "WTF with Marc Maron" in 2015. President Obama said: "[W]e are not cured of racism [and] . . . it's not just a matter of it not being polite to say nigger in public . . . . It's not just a matter of overt discrimination."<sup>142</sup>

## CONCLUSION

In conclusion, I would like to quote my favorite ACLU t-shirt. Thanks to movies and television, we all are familiar with the famous right to remain silent. This ACLU t-shirt reminds us of another right that is not as well-known, but is even more important, especially when seeking to advance equality and counter discrimination, including through the all-important tool of counterspeech. The t-shirt proclaims: "You have the right NOT to remain silent!" If all of us who are committed to equal justice for all would exercise this precious right, we would wield more positive power for more positive change than any censorship. Rather than university censorship of troubling or offensive speech, administrators should reaffirm their commitment to free speech principles, empower students to speak out and promote an open dialogue on issues of race, gender, sexual orientation or other social identification features, and simultaneously admonish narrow-minded bias and bigotry. As Dr. Martin Luther King memorably put it: "In the end, we will remember not the words of our enemies, but the silence of our friends."<sup>143</sup>

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<sup>141</sup> Interview by Jane Slaughter, *supra* note 82.

<sup>142</sup> *Episode 613*, *supra* note 83.

<sup>143</sup> Martin Luther King, Jr., *Steeler Lecture*, in CONSCIENCE FOR CHANGE (1967), reprinted in THE TRUMPET OF CONSCIENCE (2011).

## APPENDIX: ACLU POLICY STATEMENT

FREE SPEECH AND BIAS ON COLLEGE CAMPUSES<sup>144</sup>

## Preamble

The significant increase in reported incidents of racism and other forms of bias at colleges and universities is a matter of profound concern to the ACLU. Some have proposed that racism, sexism, homophobia and other such biases on campus must be addressed in whole or in part by restrictions on speech. The alternative to such restrictions, it is said, is to permit such bias to go unremedied and to subject the targets of such bias to a loss of equal educational opportunity. The ACLU rejects both these alternatives and reaffirms its traditional and unequivocal commitment both to free speech and to equal opportunity.

## Policy

1. Freedom of thought and expression are indispensable to the pursuit of knowledge and the dialogue and dispute that characterize meaningful education. All members of the academic community have the right to hold and to express views that others may find repugnant, offensive, or emotionally distressing. The ACLU opposes all campus regulations which interfere with the freedom of professors, students and administrators to teach, learn, discuss and debate or to express ideas, opinions or feelings in classroom, public or private discourse.

2. The ACLU has opposed and will continue to oppose and challenge disciplinary codes that reach beyond permissible boundaries into the realm of protected speech, even when those codes are directed at the problem of bias on campus.

3. This policy does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy. The fact that words may be used in connection with otherwise actionable conduct does not

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<sup>144</sup> Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L. J. 484 app. (1990).

immunize such conduct from appropriate regulation. As always, however, great care must be taken to avoid applying such provisions overbroadly to protected expression. The ACLU will continue to review such college codes and their application in specific situations on a case-by-case basis under the principles set forth in this policy and in Policy 72.

4. All students have the right to participate fully in the educational process on a nondiscriminatory basis. Colleges and universities have an affirmative obligation to combat racism, sexism, homophobia, and other forms of bias, and a responsibility to provide equal opportunities through education. To address these responsibilities and obligations, the ACLU advocates the following actions by colleges and universities:

- (a) to utilize every opportunity to communicate through its administrators, faculty, and students its commitment to the elimination of all forms of bigotry on campus;
- (b) to develop comprehensive plans aimed at reducing prejudice, responding promptly to incidents of bigotry and discriminatory harassment, and protecting students from any such further incidents;
- (c) to pursue vigorously efforts to attract enough minorities, women and members of other historically disadvantaged groups as students, faculty members and administrators to alleviate isolation and to ensure real integration and diversity in academic life;
- (d) to offer and consider whether to require all students to take courses in the history and meaning of prejudice, including racism, sexism, and other forms of invidious discrimination;
- (e) to establish new-student orientation programs and continuing counseling programs that enable students of different races, sexes, religions, and sexual orientations to learn to live with each other outside the classroom;
- (f) to review and, where appropriate, revise course offerings as well as extracurricular programs in order to recognize the contributions of those whose art, music, literature and learning have been

insufficiently reflected in the curriculum of many American colleges and universities;

(g) to address the question of defacto segregation in dormitories and other university facilities; and

(h) to take such other steps as are consistent with the goal of ensuring that all students have an equal opportunity to do their best work and to participate fully in campus life.

This policy is issued in connection with, and is intended as an interpretation and enhancement of, the binding resolution on racist speech adopted at the 1989 Biennial Conference. That resolution provides:

The ACLU should undertake educational activities to counter incidents of racist, sexist, anti-semitic, and homophobic behavior (including speech) on school campuses and should encourage school administrators to speak out vigorously against such incidents. At the same time the ACLU should undertake educational activities to counter efforts to limit or punish speech on university campuses.