BANNING HATE SPEECH AND THE STICKS AND STONES DEFENSE

*Larry Alexander**

Black college students are the targets of racial epithets from fellow students. Members of the American Nazi Party march through the heavily Jewish Chicago suburb of Skokie, wearing brownshirts and swastikas. Female employees encounter various expressions of misogynistic or otherwise female-degrading views from fellow employees or supervisors in the workplace. What these events have in common is that in all of them, the targets of the speech claim that the speech is harmful to them. Moreover, in all of them, the targets have sought to have the hateful speech legally suppressed through injunction (in Skokie),[1] campus hate speech codes,[2] or Title VII's ban on various types of job discrimination.[3] Finally, in all of them, the speakers have raised a first amendment defense against the attempts at legal suppression.

A lot of recent scholarly attention has been focused on these and similar events, most of it concerned with whether and when the first amendment should bar suppression of this "hate speech."[4] In addressing this issue, I, like most of the scholars, shall take "hate speech" to mean epithets conventionally understood to be insulting references to characteristics such as race, gender, nationality, ethnicity, religion, and sexual preference. Such epithets are the central targets of most campus speech codes; and speech codes are unlikely to be drafted or interpreted to apply to more measured expressions of views about race and

* Warren Distinguished Professor of Law, University of San Diego School of Law. Visiting Professor of Law, University of Pennsylvania Law School, Fall, 1995.

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1. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978).
2. See, e.g., *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).
3. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1991).
4. Mari J. Matsuda, et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993); Henry Louis Gates, Jr., *Let Them Talk*, New Republic 37 (Sept. 20 and 27, 1993); Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481 (1991).

the like, even if the expressed views are quite odious, because of the obvious first amendment problems raised by any code banning more than epithets. Henry Louis Gates, Jr., has nicely illustrated the crucial distinction I wish to draw:

> Contrast the following two statements addressed to a black freshman at Stanford: (A) LeVon, if you find yourself struggling in your classes here, you should realize it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well-intentioned, but given the fact that aptitude tests place African Americans almost a full standard deviation below the mean, even controlling for socioeconomic disparities, they are also profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long downhill slide. (B) Out of my face, jungle bunny.[5]

The concern with hate speech is a concern with statements like Gates's statement (B). Statement (A) is generally assumed to be within the bounds of protected expression.[6]

It is generally accepted by those on both sides of this issue that hate speech is harmful. The only question is whether, notwithstanding its harmfulness, hate speech should be considered constitutionally protected free speech. It is my aim in this brief essay to examine more closely the claim of harm. Exactly how does hate speech harm its targets in paradigmatic contexts? Among the questions I shall ask are whether it is really the speech that is harmful, rather than what the speech reveals, and whether, when it *is* the speech and not the revealed knowledge that is harmful, the speech is harmful precisely for reasons that should make it constitutionally protected. Finally, I shall ask whether those who seek suppression of hate speech are really seeking to be free of the harm it imposes or are instead more ominously seeking suppression as an end in itself.

Before turning to the claim that hate speech is harmful, I should say something about the contours of the constitutional protection of speech that provides an essential background for my analysis of the issue. Although there are several general theories put forward by scholars and jurists to justify freedom of

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5. Gates, *New Republic* (Sept 20 and 27, 1993) at 45 (cited in note 4).

6. I say "generally assumed" because there are several reported instances of legal action taken against statements like statement (A) on the ground that such statements constituted harassment. See Eugene Volokh, *Freedom of Speech and Harassment*, 39 UCLA L. Rev. 1791, 1800-07 (1992).

speech and its constitutional embodiment in the first amendment, these theories generally converge on one central proposition. More importantly perhaps, this proposition has been endorsed by the Supreme Court and represents settled first amendment law. Put very simply, this proposition is that government may not impose criminal or civil sanctions on speech because of its content, particularly because the content is, in the government's view, wrong, dangerous, offensive, or disturbing. As put by constitutional scholar Laurence Tribe, "[I]f the [first amendment] guarantee means anything, it means that, ordinarily at least, 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .' "[7] The general view reflected in both the theories of freedom of speech and the Supreme Court's first amendment jurisprudence is that it is better to let false or pernicious ideas compete in the marketplace of ideas, where they are unlikely to prevail in the long run, than to trust government to distinguish the false from the true and the pernicious from the beneficial.

There are, of course, several exceptions to the first amendment's proscription of governmental control of the content of speech. Whether or not these exceptions are well-justified, what is important for my purposes is that none of these exceptions is relevant to the hate speech issue. For example, hate speech is not usually an incitement to crime, a disclosure of a protected secret or confidence, a violation of copyright, a defamatory injury to reputation, the commission of fraud or perjury, or a misleading commercial claim.[8] What I intend to show is that paradigmatic hate speech, if harmful, is harmful only in ways that cannot justify its prohibition without gutting our constitutional conception of freedom of speech. Whatever controversies surround first amendment jurisprudence and its theoretical rationale do not concern me, for here I operate squarely within the first amendment's settled core. My interest lies with hate speech and the harms attributed to it, not with the first amendment.

I. THE CLAIMS OF HARM

Hate speech is alleged to be harmful in several different ways. First, it is insulting, and insults are psychologically wound-

7. Laurence H. Tribe, *American Constitutional Law* 790 (The Foundation Press, Inc., 2d ed. 1988), 790 (quoting *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972)).

8. I discuss the relevance of the "fighting words" exception at notes 26-27, infra. And I discuss speech by public employees, including teachers, at notes 74-79 infra.

ing and cause emotional distress.[9] Second, it creates unequal opportunity in the school and workplace environments.[10] Third, it silences those who are its targets, depriving them of their freedom of speech.[11] Fourth, it offends by flouting social norms regarding proper verbal behavior.[12] And, fifth, its expression is a speech act that shows disrespect for or even subordinates its targets.[13]

There is no gainsaying the first type of harm hate speech causes, the harm of psychological pain. What is interesting about this type of harm is not its existence but its connection to the hate speech that causes it. I shall examine this connection in the next section.

The next two types of harm—unequal opportunity and loss of freedom of speech—are much more problematic. They would be unproblematic if the claim on their behalf were merely that those who suffer insults are less likely than others to perform up to their potential or to participate in the public exchange of ideas. That claim may well be true, but it would add little to the claim that we should protect people from the harm of insult. All of the discussion of unequal opportunity and "silencing" of speech would just be portentous ways of talking about and cashing out the psychological harm caused by insults.

Perhaps, however, there is something more to the claims of unequal opportunity and silencing of speech. At least sometimes, the claim is that the speech will cause others who hear it or hear of it to lower their opinions of the targets and become more dismissive of their ideas, their accomplishments, and their needs. The claims of unequal opportunity and silencing translate into the claim that an insult of the target, even if only an epithet, carries a propositional content for an audience—for example, "the target and those like her are unworthy of respect"—which propositional content might be accepted as true by the audience to the detriment of the target's status as a student, an employee, and a participant in public dialogue.

This last claim regarding the harm of hate speech is insufficient to justify withholding first amendment protection and, indeed, standing alone, helps to make the case *for* first amendment

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9. Matsuda, *Words that Wound* at 67-68, 90-96 (cited in note 4).

10. See, e.g., 29 C.F.R. § 1604.11(a)(3) (1995).

11. Matsuda, *Words that Wound* at 78-79 (cited in note 4).

12. Joel Feinberg, 2 *Moral Limits of the Criminal Law, Offense to Others* 16-18 (Oxford U. Press, 1985).

13. Andrew Altman, *Liberalism and Campus Hate Speech: A Philosophical Examination*, 103 Ethics 302, 309-12 (1993).

protection. The fact that an opinion about others (1) is wrong and (2) might persuade others cannot in general be grounds for withholding first amendment protection without turning the first amendment on its head.[14] So I shall ignore this claim and focus on the claim that hate speech is directly harmful to its targets rather than indirectly harmful through its effects on others' attitudes and beliefs about the targets. That is, I shall deal with the alleged harms of emotional distress, offense, and subordination.

My approach to this subject is organized as follows. In Part II, I focus on the various kinds of painful knowledge that hate speech conveys, both denotatively and connotatively, and the various ways such knowledge can be painful. My conclusion, however, is that hate speech conveys nothing that cannot be conveyed equally or more painfully by other speech, speech that clearly is and should be constitutionally protected. Insofar as painful knowledge is concerned, there is nothing distinctive about hate speech.

In Part III, I turn my attention to the interplay between hate speech and social norms, norms that determine what gives offense and what counts as the performance of various types of speech acts, such as acts of subordination and disrespect. I conclude that such social norms should not limit freedom of speech, and that civility in public discourse, however desirable, should not be legislated.

In Part IV, I take up some possible responses to my analysis, in particular, arguments for carving out an exception from first amendment protection either for epithets or for the ideas expressed by epithets. In responding to those arguments I offer some general observations about the difficulty of making out a case for freedom of speech protection on non-deontological grounds.

In Part V, I make a concession to those who would ban hate speech, namely, that the Constitution probably permits them to do so in state colleges and universities. Finally, in Part VI, I speculate about what lies behind the recent moves to ban hate speech.

14. See text at note 7 supra.

II. INTRINSICALLY HARMFUL SPEECH AND PROTECTING IGNORANCE

Michael Sandel recently characterized hate speech of the type I am considering as intrinsically harmful.[15] If the harm to which Sandel is referring is the psychological distress of having been insulted, then it surely cannot be correct that the speech is intrinsically harmful *qua hate speech.* Let me illustrate why with an example that should work well for all the contexts of hate speech that we are considering.

Suppose a white employee mutters "damn nigger" whenever he encounters a black employee, loudly enough to be heard by the black employee. Black employees complain to the supervisor, who fails to take any action against the white employee, perhaps because the supervisor shares the white employee's sentiments. The black employees sue under Title VII alleging a racially hostile work environment and thus illegal racial discrimination.

Now the hate speech in question might well be quite psychologically painful, but is it intrinsically harmful qua hate speech? Are the words uttered "words which by their very utterance inflict injury"?

I say no. What is psychologically painful in this case is *knowledge*, specifically knowledge of the white employee's (and perhaps the supervisor's) attitudes and beliefs.[16] The hate speech

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15. Remarks at the annual meeting of the American Association of Law Schools, Section on Jurisprudence, January, 1993.

16. Gates makes a similar point in response to the contention that epithets harm in some way other than by conveying harmful ideas:

> Nor, finally, does the *Chaplinsky*-derived description of assaultive speech as being devoid of political or other ideational content—"experienced as a blow, not a proffered idea," in [Charles] Lawrence's compelling formulation—survive closer inspection. Consider the incident that, Lawrence tells us, moved him to take up the hate speech cause in the first place. Two white Stanford freshmen had an argument with a black student about Beethoven's ancestry: he claimed, and they denied, that the Flemish-German composer was really of African descent. The next evening, apparently as a satirical commentary, the white students acquired a poster of Beethoven, colored it in with Sambo-like features, and posted it on the door of the student's dorm room at Ujamaa, Stanford's black theme house. Lawrence "experienced the defacement as representative of the university community's racism and not as an exceptional incident in a community in which the absence of racism is the rule"—and the rest is critical-race-theory history.
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> Now then, is Lawrence's paradigm example of racist hate speech in fact devoid of ideational or political content, as his analysis would suggest? Evidently not, for in their jointly written manifesto for critical race theory, the authors of *Words That Wound* spell out what they believe its message to have been: "The message said, 'This is you. This is you and all of your African-American brothers and sisters. You are all Sambos. It's a joke to think that you could ever be a Beethoven. It's ridiculous to believe that you could ever be anything other

is quite good evidence of those attitudes and beliefs, but knowledge of those attitudes and beliefs might have been obtained many other ways. Some of those ways might not involve the supervisor's speech but rather his actions (which, of course, do "speak" in the sense of communicating information about his attitudes and beliefs). The black employee might notice Ku Klux Klan literature on the white employee's desk. Or the white employee might be observed after work wearing a Ku Klux Klan tie clasp.

Moreover, even if the white employee's speech is the source of the black employee's knowledge of the former's hateful attitudes and beliefs, the speech might be speech that (almost) everyone, and surely the Supreme Court, would treat as protected by the first amendment. The white employee might take out an ad in the newspaper stating, "Were it not for Title VII, I would utter racial epithets to black employees." That ad would convey exactly the same painful knowledge to the black employee as the racial epithets in the initial example. So, too, would a sign over the white employee's desk that said the same thing.[17]

Moreover, if one already possesses the painful knowledge that another thinks ill of members of one's race—so ill that he would hurl racial epithets at them—his actually doing so would not itself be additionally painful to any great degree. After a black observer listens for an hour to hate-mongering speeches at a Ku Klux Klan rally, all of which speeches are protected by the

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than a caricature of real genius.' " The defaced poster would also inspire a lengthy and passionate essay by the legal theorist Patricia J. Williams, an essay that extracts an even more elaborated account of its meaning. This was one picture, clearly, that really was worth a thousand words.

The same paradox surfaces in Richard Delgado's ground-breaking proposal for a tort action to redress racist speech. . . . Delgado argues that a racial insult ". . . is not political speech; its perpetrator intends not to discover truth or advocate social action, but to injure the victim." It's a curious disjunction, this, between advocacy and injury. For if Delgado and his fellow contributors have a central message to impart, it's that racial insults are profoundly political, part of a larger mechanism of social subordination, and thus in contravention of the spirit of the "equal protection" clause of the Fourteenth Amendment. And the most harmful forms of racist speech are precisely those that combine injury with advocacy —those that are, in short, the most "political."

"Are racial insults ideas?" Lawrence asks. "Do they encourage wide-open debate?" He means the question to be rhetorical, but after reading his work and those of his fellow critical race theorists, who could possibly doubt it?

Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in Henry Louis Gates, Jr., et al, *Speaking of Race, Speaking of Sex* 17, 25-27 (New York U. Press, 1994).

17. Although my assumption is that most courts would treat such indicators of employee beliefs as constitutionally protected expression—as they should—not all courts have done so. See Volokh, 39 UCLA L. Rev. at 1800-07 (cited in note 6).

first amendment, would he be additionally pained if one of the Klan, upon seeing him, uttered a racial epithet?[18]

There is, admittedly, a common intuition that there is something special—and especially painful—about hate speech, and this intuition is widespread enough to require explanation. Hate speech seems different from other denotatively comparable speech because it carries a particular affective tone, a tone that adds vehemence to the insult it conveys. For this reason, hate speech may inflict a special sort of pain: the hearer learns not only that the speaker is biased against persons of his type, but also that the speaker's dislike is so intense that he has chosen to express it in terms conventionally associated with insult.

Does this difference in affective tone identify a distinction between hate speech and other negative expressions about race and similar characteristics? The pain it causes still is a product of the hearer's knowledge of the speaker's views, though the knowledge may differ somewhat from that conveyed by another form of expression. Moreover, this new increment of knowledge—beyond or different from that conveyed by more "civil" expressions—hardly explains the indignation with which opponents of hate speech have pursued the cause of banning it. One suspects that they are reacting, not to the extra vehemence attached to epithets, but to the underlying racial, sexual, or other bias.

More importantly, the same sort of pure and vehement disdain conveyed by hate speech can be achieved easily enough in a different form. Just as the affective tone that epithets usually carry can be absent in some uses of them, so too can that same affective tone be conveyed as or more efficiently through superficially polite speech. Consider the examples offered by Gates.[19] Surely Statement (A), the polite putdown, can be much more devastating than Statement (B), the use of a racial epithet. That is Gates's point, and he is correct. Banning epithets, but not skillful rhetorical skewerings, would essentially and unjustifiably discriminate against low-brow forms of expression. Hate speech may convey painful knowledge in a particularly painful way, but it is not unique in that ability.

My conclusion is that what people may wish to avoid when they seek to ban hate speech in contexts like Skokie, campuses,

18. I am assuming that the utterance does not occur in a context that would bring it within the special classes of fighting words or assaults, or that would cause in the listener some seriously distracting urge to reply. See text accompanying notes 26-29 and text at pp. 81-82 infra.

19. See text at notes 5-6 supra.

and the workplace is *knowledge*: knowledge that the hate speech is sufficient but often unnecessary to convey. The knowledge opponents wish to avoid is undoubtedly painful. But should people be given legal entitlements to be left in ignorance of others' attitudes towards and beliefs about them when those entitlements entail legal prohibitions of expression?

One might disagree with my hypothesis that knowledge of others' attitudes and beliefs is what is at issue by arguing that it is really the hateful attitudes and beliefs themselves, not knowledge of them, that people wish to be spared. But if that were true, it would surely destroy the case for banning hate speech: if there is anything the first amendment precludes, it is attempts at thought control.[20] (Additionally, banning hate speech often leaves the hateful attitudes and beliefs intact and just creates the illusion that they have disappeared.)

Similarly, if one argues that the harm of hate speech is not the painful knowledge it gives its target but rather the persuasive effect it may have on the audience beyond the target, then, as I said in the first section, that is a conclusive reason under the first amendment for its protection, not its suppression.[21]

So knowledge, and the desire not to have it, appears to be a plausible target of the move to ban hate speech. Can a case be made that, notwithstanding the first amendment, the state can punish or impose liability on speakers because others do not wish to know the speakers' attitudes and beliefs?

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20. One of the earliest academic calls for sanctions against epithets in fact rests its case as much on a thought-control rationale as on the claim that epithets are directly injurious. See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. Civ. Rts.-Civ. Lib. L. Rev. 133 (1982):

> The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted. . . . Not only does the listener learn and internalize the messages contained in racial insults, these messages color our society's institutions and are transmitted to succeeding generations.

Id. at 135-36 (footnotes omitted).

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> The establishment of a legal norm "creates a public conscience and a standard for expected behavior that check overt signs of prejudice." Legislation aims first at controlling only the acts that express undesired attitudes. But "when expression changes, thoughts too in the long run are likely to fall into line."

Id. at 149 (footnotes omitted).

21. I am obviously assuming that such a ban could not survive invalidation under the very narrow exception the Supreme Court has carved out for proscription of libel. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). But see *Beauharnais v. Illinois*, 343 U.S. 250 (1952). Henry Louis Gates, Jr. argues effectively that racial invective is completely disanalogous to individual libel: "You cannot libel someone by saying 'I despise you,' which seems to be the essential message common to most racial epithets." Gates, *Speaking of Race* at 30 (cited in note 16).

There are some easy cases where the answer is surely yes, and others where the answer is surely no. For example, we have zones of privacy, such as inside our homes, where we can demand that certain ideas not be communicated to us and enlist the aid of the state in excluding them (for example, commercial or charitable solicitations, or obscenity).[22] On the other hand, a public speech urging a willing audience to vote Libertarian, delivered in a public forum or in a newspaper, cannot be legally suppressed even if the attitudes and beliefs conveyed are psychologically painful to bystanders.

The contexts in which the attempts to ban hate speech arise are contexts that are not private, even if they are not always paradigmatic public fora. Skokie did involve a paradigmatic public forum.[23] And campus hate speech codes frequently cover and are applied to epithets uttered anywhere on campus. The workplace is not a traditional public forum because the employer can limit speech there to prevent disruption of production and perhaps even to further the employer's own ideological ends.[24] Yet the hate speech issue arises just when the employer has *not* banned speech in the workplace and is allowing speech that is not incompatible with the assigned tasks, and then it is the employee, not the employer, who is seeking to ban the speech. Put differently, in all the contexts with which I am dealing, one must look at the issue as one of public forum speech in the sense that the fora are surely not within the target's conceded zone of privacy.[25]

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22. *Rowan v. United States Post Office*, 397 U.S. 728 (1970).

23. The Skokie case involved denial of permission to march on city streets. *Collin*, 578 F.2d at 1197.

24. See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 Tex. L. Rev. 1 (1990).

25. Kingsley Browne makes what I believe is an effective response to the claim that the workplace is not a public forum in situations where the employer is not restricting employee speech:

> Robert Post has suggested a somewhat different justification for limiting speech in the workplace. Although he argues that limitations on racist speech in "public discourse" are highly suspect, he asserts that speech in the workplace does not generally constitute public discourse. Post defines "public discourse" as "encompassing the communicative processes necessary for the formation of public opinion, whether or not that opinion is directed toward specific governmental personnel, decisions, or policies. However, asserts Post, "within the workplace . . . an image of dialogue among autonomous self-governing citizens would be patently out of place."
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> Post's argument seems to presuppose that the communication contributing to public opinion is largely limited to the press, handbillers on public streets, and fiery orators in the parks. Yet, for most citizens—who are not political activists—the great bulk of their discussion of political and social issues probably occur [sic] in the home and the workplace. For example, there are probably very few workers in the United States who did not discuss the Gulf War while at

If one assumes, then, no zone of privacy rationale that would support a ban on any speech to which those protected by that zone objects, one must ask whether there are any other grounds supporting bans on hate speech because of the psychological pain it inflicts.

I shall leave aside the "fighting words" doctrine.[26] That doctrine has been given little scope by the Supreme Court,[27] and in any event it covers only a limited number of the instances of hate speech at issue. Moreover, my inquiry is whether the interests of the targets of hate speech support its suppression, for it is primarily they who are urging this. The fighting words exception to freedom of speech is designed primarily to allow the public to protect against breaches of the peace and not out of concern for those provoked to illegal violence.

I shall also leave aside those rare instances in which uttering epithets constitutes a criminal assault—a threat to commit an imminent battery. Epithets may be employed to threaten, but again

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work. Presumably, Post would argue for protection of those discussions under the first amendment, and I would hope he would do so even if the discussions offended workers having Iraqi citizenship. If he would protect those discussions, it is difficult to understand why he would withdraw similar protection for speech that conveys ideas offensive to women and minorities.

Post's suggestion that workplace speech is not public discourse places too much emphasis on where the speech takes place and too little emphasis on the content of the speech. As Post acknowledges, "[s]peech that can be said to be about matters of 'public concern' is ordinarily classified as public discourse." It should not lose the protection of the first amendment simply because someone chose to express it on private property.

In sum, the term "workplace" is not a talisman that extinguishes first amendment protections. Just as school children "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," workers do not shed theirs at the factory gate. The Supreme Court has narrowly limited the circumstances in which expression in the workplace may be regulated, and those circumstances have no relevance to hostile-environment harassment cases.

Browne, 52 Ohio St. L.J. at 515-16 (cited in note 4) (footnotes omitted).

Richard Fallon also suggests that epithets in the workplace are uniquely harmful, even if they do no more than convey painful knowledge of others' attitudes. Unfortunately, Fallon gives no argument for why this is so. Moreover, the argument he constructs against his position—that one should in general have no right to be protected from knowledge of others' opinions—seems to me persuasive. See Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 Stan. L. Rev. 875, 897-98 n.138 (1994).

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

27. *City of Houston v. Hill*, 482 U.S. 451 (1987); *Eaton v. City of Tulsa*, 415 U.S. 697 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972). Many commentators believe that the fighting words doctrine has disappeared as a separate exception to the general constitutional proscription of content regulation, and that only those fighting words which also count as incitements to imminent lawless action remain punishable. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Tribe, *American Constitutional Law* at 850-51 (cited in note 7); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484, 510-11. See also Gates, *Speaking of Race* at 25 (cited in note 16).

they are not unique in this regard. A ban on hate speech qua epithets is redundant of existing criminal statutes if its object is criminal asssaults; and as a special proscription of one form of criminal assault, a hate speech ban is probably unconstitutionally discriminatory.[28] In any event, my interest lies with bans on epithets that do not meet the stringent criteria for criminal assaults unprotected by the first amendment.[29]

Having excluded these recognized but narrow categories of unprotected speech and narrowed the focus, let me return to the principal question regarding hate speech, namely, whether and when speech can be suppressed to protect others from knowledge that they find painful.

One situation in which the claimed right to be spared painful knowledge surely cannot override freedom of speech is the situation in which the speech is directed at an audience other than those who are pained by it. If an employee (E) overhears speech between fellow employees or bosses that reveals negative attitudes towards and beliefs about E or those of E's race or gender, E should have no right to have the speech legally suppressed or punished or made the basis of civil liability.[30] It does not make any difference where the speech occurs—in a newspaper, on a talk show, at a political rally, or in the workplace—so long as it does not occur within E's zone of privacy. Nor does it matter whether the speech is scholarly or consists primarily of epithets. It is the knowledge about beliefs and attitudes that is paining E, and the words are just evidence of the beliefs and attitudes.

What about speech that is directed, not at another audience, but at the target of hostility, that is, at E himself? E's concern here is, I am assuming, avoiding painful knowledge, not keeping others who might overhear the speech or learn of it from being persuaded themselves to hold similar attitudes and beliefs. And to strengthen E's case even further, I shall assume that E has in no way indicated that he seeks the knowledge in question.

In these circumstances—no other audience and no solicitation of the speech—can government suppress speech to protect E from information E finds painful? What would support such a power beyond the mere fact that the information is painful?

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28. See *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

29. See generally Kent Greenawalt, *Speech, Crime, and the Uses of Language* 90-91 (Oxford U. Press, 1989).

30. But see Delgado, 17 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 135-36, 149 (cited in note 20).

First, E might claim that the speech is purely malicious. If there is no other audience for it, and he himself has not sought it and instead wishes to avoid it, then it can serve no purpose except to inflict pain on him. Surely the first amendment should not protect speech of that sort.[31]

One problem with this line of attack on hate speech is that although a lot of hate speech is undoubtedly motivated by the desire to inflict pain, a lot of it is entirely or partially the product of other motives. For instance, a fellow employee might wish to tell E how much he hates E and those like E in order to ward off E's attempts to befriend him, to share confidences with him, and so forth.[32]

Moreover, it is hard to see how a right against malicious painful speech could be limited to epithets. Once one understands that epithets are painful, not intrinsically, but because of the beliefs and attitudes they reveal, which beliefs and attitudes can be revealed by all sorts of speech and actions, then a right against painful malicious speech translates into a right not to be told in any form about unwelcome beliefs and attitudes if the speaker intends to inflict psychological pain. In short, racial and sexual epithets just become instances within a broad category of malicious infliction of emotional distress.[33]

Although there is a generally recognized tort of infliction of emotional distress, which, if constitutionally valid, might support criminal or civil penalties for speech inflicting emotional distress,[34] the Supreme Court has indicated that it regards that tort as constitutionally suspect when applied to speech, or at least speech that does not consist of false statements of fact. In *Hustler Magazine v. Falwell*,[35] the Reverend Jerry Falwell sued Hustler Magazine for printing a particularly tasteless spoof ad in which Falwell admits, among other things, to having sex with his mother. One of Falwell's claims against Hustler was for inten-

31. See Browne, 52 Ohio St. L.J. at 546 (cited in note 4).

32. See Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults*, 3 Wm. & Mary Bill of Rights J. 179, 204-5 (1994); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 Rutgers L. Rev. 287, 298 (1990) (separating intent to harm from an honest but hurtful statement is difficult).

33. See Greenawalt, 42 Rutgers L. Rev. at 300 (cited in note 32) (noting the line-drawing problems with a cause of action for intentional infliction of emotional distress based on epithets).

34. See American Law Institute, Restatement (Second) of Torts § 46 at 71 (American Law Institute Publishers, 1965): "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . ."

35. 485 U.S. 46 (1988).

tional infliction of emotional distress. The Supreme Court reversed the jury's verdict for Falwell on first amendment grounds and held that Falwell could not recover damages for infliction of emotional distress without showing that the defendant had made a false statement of fact with knowledge or reckless disregard of its falsity.[36] Robert Post interprets the Court's opinion in *Falwell* as granting first amendment protection to outrageous expressions that are part of public discourse, no matter how painful, and no matter the motivation.[37] Because the Supreme Court is unlikely to deem hate speech to lie outside public discourse or to be false statements of fact,[38] it is unlikely to find either outright bans of hate speech or tort claims based on hate speech to be constitutionally valid methods of protecting against emotional distress.[39] Moreover, as I have already shown, there is no emotional distress that hate speech can inflict that cannot be inflicted as well or better by "polite" discourse.[40]

Second, E might claim, not that the speech is purely malicious, but that the speech is injuriously distracting. How might hate speech be so? Well, some speech reveals information that remains in the forefront of the mind even when tasks at hand require that the information be relegated to the subconscious so that the mind can concentrate on other things. This can, of course, be true of hate speech, especially if it is frequent or, as in, for example, the case of a permanent sign, constant. The knowledge hate speech brings about will be not only painful but also distracting. And the distraction might in turn interfere with performance as an employee or as a student.

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36. Falwell, 485 U.S. at 56.

37. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 603, 612-14 (1990).

38. See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267 (1991).

39. See American Law Institute, Restatement (Second) of Torts § 46 comment d (American Law Institute Publishers, 1965). Comment d states in part:

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

40. Of course, where the speech is directed at E, and there is no other audience for it, the speech is arguably not part of "public discourse." In such a situation, however, the speech is unlikely to be severely emotionally distressing. Jerry Falwell would undoubtedly have been much less distressed by being insulted privately by Hustler's publisher.

There is another way that hate speech might be distracting, and that is by provoking responses. For example, E might not even be pained or distracted by the knowledge that the supervisor despises E's race or gender, or E might have gained that knowledge by means other than the supervisor's epithets. But epithets, when directed at E, might, in conjunction with social conventions (or perhaps even biological hardwiring), create in E a felt need to respond to the supervisor. And responding—or resisting the urge to respond—could be sufficiently distracting to interfere with E's performance.

Again, both arguments from distraction are applicable to much more than hate speech primarily and narrowly conceived as racial, sexual, and other group-regarding epithets. A lot of speech reveals information that is difficult to banish from consciousness and that, if it remains in the forefront of the mind, might interfere with job or educational performance. And a lot of speech might create an urge to respond, including speech averring propositions that the listener regards to be in error, even if the speech is not in any way about the listener. A right to ban speech that is distracting because of its content could be very broad indeed, even if limited to cases where there is no third party audience.

III. SOCIAL NORMS AND SPEECH ACTS: THE HARMS OF OFFENSE, SUBORDINATION, AND DISRESPECT

Thus far I have dismissed the claims that hate speech by its very nature creates unequal opportunity or "silences" its targets. I have focussed at some length on the claim that hate speech causes psychological harm, a claim that I accept. The problems with banning hate speech for this reason are that such a ban would rest on the dubious ground that speech can be banned to protect others from unwanted knowledge—a ground that is acceptable at most only within certain zones of privacy—and that a ban so justified extends logically far beyond the sort of epithets normally thought of as hate speech.

There are two other possible harms hate speech might cause. Hate speech—or more specifically, the epithets it characteristically employs—may violate social norms against using such epithets, which in turn may give rise to offense. And hate speech might be viewed as a speech act that counts as disrespecting or even socially subordinating its targets.

A. Hate Speech and Offense

I shall not quarrel with the contention that the epithets of hate speech flout social conventions and thereby give rise to offense. My quarrel is with allowing offense to suffice as a ground for suppressing speech. Some philosophers, such as Judith Thomson, deny that one has any rights against infliction of belief-mediated harms.[41] Thus, Thomson would object to using the psychological distress of insult that I discussed in the previous section as a reason for banning speech (or any other behavior), even when the speech is malicious. Likewise, she would object to any putative right not to be offended. Even if one does not go as far as Thomson in rejecting rights not to be subject to belief-mediated distress—and I do not—one should be very wary of using offense as a ground for restricting freedom of speech.

Moreover, the Supreme Court itself has been quite adamant that offense is not a legitimate reason for suppressing speech except when the privacy of the home is invaded.[42] For example, in *Cohen v. California*,[43] the Court reversed Cohen's conviction for breach of the peace despite the fact that Cohen had surely flouted norms in an offense-generating way by parading in public wearing a jacket emblazoned with "Fuck the draft." Similarly, in *Erznoznik v. City of Jacksonville*,[44] the Court refused to allow the city to ban movies with nude scenes in drive-in theaters with screens visible to passing motorists.

One does not have to deny the reality or the desirability of the social norms whose flouting causes offense to maintain that potential offense should not bar speech in the public domain. As the Supreme Court has recognized, the line between an offensive word and an offensive idea is a line too difficult to draw to be serviceable to the first amendment.[45]

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41. Judith Jarvis Thomson, *The Realm of Rights* 253-59 (Harvard U. Press, 1990).

42. See *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

43. 403 U.S. 15 (1971).

44. 422 U.S. 205 (1975).

45. See Greenawalt, 42 Rutgers L. Rev. at 300 (cited in note 32) (presenting general offensiveness as a basis for restricting hate speech); Strossen, 1990 Duke L.J. at 549 (cited in note 27) (arguing that racial insults convey racial ideas). But see Delgado, 17 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 175 (cited in note 20) (attempting to distinguish *Cohen*).

The phenomenology of offense is complex. Sometimes, the expression that causes the offense does so by focusing one's attention on unpleasant or disgusting ideas. In such cases, offense is similar to unwanted distraction.

At other times, offensive expressions cause embarrassment, as, for example, when they are uttered in one's presence when one is accompanied by another (say, one's spouse, parent, or child). In such cases, what is embarrassing is being forced to think about something that you also know your companion, present when the offensive comment is made, knows you are now thinking about. Epithets cause a similar psychological

B. Hate Speech as a Subordinating Speech Act

Andrew Altman in a recent article appears to agree with the points I have made thus far.[46] He points out with respect to the various psychological harms that hate speech inflicts that banning hate speech because of these harms "sweeps too broadly for a liberal to countenance it. Forms of racist, sexist, or homophobic speech that the liberal is committed to protecting may cause precisely the kinds of harms that the proposed justification invokes."[47] Altman identifies "racist, sexist, or homophobic speech couched in a scientific, religious, philosophical, or political mode of discourse" as speech that causes those kinds of harms but that surely must be protected.[48]

Altman nonetheless supports banning some hate speech, that which counts as subordinating speech acts. Altman distinguishes between hate speech's perlocutionary effects—its causal effects on the audience, which in the case of hate speech do not support its suppression—and hate speech's illocutionary force, which Altman contends amounts to the wrong of treating a person as having inferior moral standing. "[H]ate speech involves the performance of a certain kind of illocutionary act, namely, the act of treating someone as a moral subordinate."[49]

Altman contends that the conventional rules of language distinguish between, for example, arguing that blacks are genetically inferior to whites, which is not itself the performance of an act treating blacks as moral inferiors, and calling blacks "nig-

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discomfort because, when directed at one, one must struggle with resisting the distraction of a reply, a struggle that those who uttered the epithet are aware is taking place. (A similar phenomenon explains the painfulness of unwanted sexual remarks directed at women in public places. See Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 Harv. L. Rev. 517 (1993).)

As with offensive expression, epithets not only inflict unpleasant thoughts, embarrassment, and the urge to reply, but also in so doing flout social norms of civility, giving rise to feelings of indignation. And as with offensive comments, epithets frequently carry an affective tone different from other expressions with which they are literally synonymous.

Nonetheless, forbidding specific words because they are offensive epithets cannot prevent any of these harms from occurring. As I have pointed out, a very skillful rhetorical skewering of someone can outdo epithets in causing unpleasant, embarrassing, or distracting thoughts, in giving rise to indignation by flouting norms of civility, and in evoking a visceral response through its affective tone. See, e.g., the text at note 19 supra. And as I have also previously argued, banning epithets, but not the skillful rhetorical skewerings, essentially discriminates against low brow forms of expression.

For an excellent account of the phenomenology of offense, see Feinberg, *Offense to Others* at 10-22 (cited in note 12).

46. Altman, 103 Ethics 302 (cited in note 13).

47. Id. at 306.

48. Id.

49. Id. at 309-10.

gers," which is.[50] And speech acts—performatives—can be regulated without offending the first amendment even if speech with similar perlocutionary effects but with different illocutionary force cannot be so regulated.

Altman, however, does not demonstrate that hate speech "subordinates"; rather, he merely asserts that it does. Typically, speech acts that can be regulated without violating the first amendment are those that invoke well-established conventions through which legal and moral rights and duties can be altered—conventions about promising, agreeing, consenting, waiving, giving (and accepting), swearing (an oath), and marrying, just to name some of the more prominent. All of these conventions for altering rights and duties are salutary, for it is a widely shared belief that people are morally entitled to alter their rights and duties in the respects these conventions facilitate.

Now for Altman's argument to work, there must be change in legal or moral relationships that is effected by hate speech. As Altman recognizes, when hate speech's illocutionary force is that of an insult or a put-down, it fails to effect a change in legal or moral rights and duties and inflicts only psychological harm, harm that Altman finds insufficient to outweigh first amendment concerns.[51] Specifically, hate speech must effect a change in legal or moral relations that can be characterized as a subordinating change.[52]

There is, however, no recognized convention through which people can be subordinated through speech acts. For one to be legally subordinated, he must have his legal rights and duties altered in a way that brings about a subordinate legal status. Hate speech does not effect such an alteration. Nor does it alter moral rights and duties. It leaves the target's moral status as it was. Of course, those who engage in hate speech may often believe that the targets are moral subordinates. However, they do not believe that uttering epithets is what makes them moral subordinates.

Altman suggests at one point that the subordinating quality of hate speech is not its ability to alter legal or moral relations

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50. Id. at 310-11.

51. Id. at 310.

52. The same problem attends the argument that pornography has the illocutionary effect of "silencing" women. See Rae Langton, *Speech Acts and Unspeakable Acts*, 22 Phil. & Pub. Aff. 293 (1993) (analyzing Catharine MacKinnon's position on pornography). The examples Langton gives of subordinating speech acts—such as, "Blacks are not permitted to vote."—all involve recognized conventions for altering legal rights. See, e.g., id. at 302, 304.

but is rather its consistency with regarding its targets as moral subordinates.[53] Thus, if one regards blacks as moral inferiors, it makes sense to call them "niggers" and not "moral inferiors": the latter term invites a reasoned argument in reply, implying actual moral equality, whereas the former is consistent with the moral inequality asserted. The problem with this argument is that it sweeps much too broadly. There are many ways of treating people as if one regarded them as moral inferiors—failing to listen to their arguments, failing to give them reasons, snubbing them socially, avoiding them on the street, and so on. Acts premised on a mistaken belief in moral inferiority may be morally wrong, but surely we need more than moral wrongness to justify prohibiting them, particularly when speech is involved. Hate speech does amount to treating its targets as if they were moral inferiors, but so too does lots of speech that we constitutionally protect.

In sum, hate speech cannot in fact subordinate. And although it can be an apt way of expressing the mistaken moral belief that another is morally inferior, so too can lots of speech and conduct that are constitutionally protected.

C. Hate Speech as an Act of Disrespect

If Altman fails to show that hate speech counts as a speech act of subordination, perhaps speech act theory can be employed against hate speech some other way. For example, one might argue that hate speech not only expresses hatred or contempt but also counts as the *act* of "treating another as hateful or contemptible." Moreover, hate speech, because it violates social norms regarding civility and respectfulness, counts as an *act* of incivility and disrespect. Therefore, the argument might continue, when we ban hate speech we are not banning ideas but banning particular kinds of socially harmful acts. Or, to use Kent Greenawalt's felicitous phrase, when we ban hate speech, just as when we ban perjury or criminal conspiracy, we are banning "situation altering" speech acts.[54]

There is no question that hate speech is a performative, and that often its illocutionary force is that of acting disrespectfully. In other words, hate speech not only expresses the speaker's disrespect of his target but also counts as treating the target disrespectfully. Social conventions establish the ways of demonstrating respect and disrespect, civility and incivility, just

53. No changes in legal or moral rights and duties are effected unless the speaker has the authority to effect subordinating changes. See id. at 311.

54. Greenawalt, *Speech, Crime, and the Uses of Language* at 57-63 (cited in note 29).

as social conventions establish how speech is to count as various other kinds of performances.

Nevertheless, it would be both unwise and inimical to a regime of free expression to allow social conventions such as those governing respect to limit public discourse. First, a speech act exception to freedom of speech essentially has no bounds. Almost any unwelcome expression could count as an act of disrespect, and would be characterized correctly as such whenever the social norms such a characterization implicitly relies upon in fact do exist. Thus, if there are social norms in Biloxi to the effect that advocating interracial dating shows disrespect to people over sixty, advocating interracial dating in Biloxi *is* a showing of disrespect, at least if the speaker does indeed disrespect those the norm protects. Likewise, there is nothing to prevent Gates's statement (A) from being deemed an act of disrespect by social norms.

Second, as I said with respect to norms of offense, the line between proscribing disrespectful ideas and proscribing disrespectful acts is one that is difficult and dangerous to draw. Indeed, whatever other ways there are of being disrespectful, *expressing* disrespect—*through whatever words one chooses to do so*—would appear to be a clear case of *being* disrespectful. Therefore, a ban on verbal acts of disrespect translates quite naturally into a ban on expressions of disrespect.[55] And such a limitation on what can be expressed in public discourse is inconsistent with the first amendment, which is not restricted to expression that is civil or respectful.[56]

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55. Consider the remarks of Robert Post on this point:

> If communication could be [restricted] . . . because it embodies social relations of which we disapprove, public discourse could no longer perform [its] function [of promoting democratic self-governance]. There is no difference between excluding speech from public discourse because we condemn the social relationships it embodies and excluding speech from public discourse because we condemn the ideas by which those social relationships are embodied.

Post, 32 Wm. & Mary L. Rev. at 299-300 (cited in note 38).

56. See David A.J. Richards, *Free Speech as Toleration*, in W.J. Waluchow, ed., *Free Expression: Essays in Law and Philosophy* 31, 47 (Clarendon Press, 1994); Post, 32 Wm. & Mary L. Rev. at 303-04, 326-28 (cited in note 38). See also *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949): "[Free speech] may indeed best serve its high purpose when it . . . stirs people to anger."

The contrary view—that the law does not violate the first amendment when it forbids disrespectful expression—is held by Delgado. See Delgado, 17 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 172-78 (cited in note 20).

IV. THE HATE SPEECH CONTROVERSY AND FIRST AMENDMENT THEORY: OF STICKS AND STONES AND SLIPPERY SLOPES

Thus far I have attempted to show that although hate speech qua epithets can cause harm by conveying painful or distracting knowledge, hate speech is not in any way unique in its ability to do so. Moreover, although epithets may flout conventions of offense and respect, free speech cannot be subordinated to such potentially farreaching conventions without jeopardizing its status as an important liberty.

My basic thesis is that reflected in the childhood countertaunt, "Sticks and stones may break my bones, but words will never hurt me." Although most first amendment scholars appear to take issue with this,[57] in reality all they wish to point out is that the *ideas* conveyed by words can be harmful, not that the words themselves—the symbols that are the wrappers in which the ideas are conveyed—are harmful. Yet once we focus on this distinction between word as idea and word as symbol, however banal it appears, we can see that attempts to expunge harmful ideas by expunging words are both pernicious[58] and doomed to failure.

In addition to attempting to locate precisely the harm in hate speech, I have been employing a particular form of first amendment argumentation. I have taken as a premise that government may not in general ban speech because the speech expresses ideas that are harmful in ways X, Y, and Z. I have then argued that the various reasons offered for banning hate speech represent attempts to ban it because it expresses ideas that are harmful in ways X, Y, and Z.

For someone who wishes to challenge my argument, three possible strategies are available. First, one could argue that current first amendment jurisprudence, with its core injunction of content neutrality and its limited exceptions thereto, is wrongheaded. Perhaps freedom of speech does or should rest on values that would dictate a quite different jurisprudence, perhaps one much more sensitive to the content of speech.

I do not believe that a more content-sensitive free speech jurisprudence is very plausible. The very point of free speech

57. See generally Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 Ethics 635 (1993). See also Frederick Schauer, *Uncoupling Free Speech*, 92 Colum. L. Rev. 1321, 1321 (1992).

58. See George Orwell, *Nineteen Eighty-Four* (Harcourt Brace Jovanovich, Inc., 1949).

seems to be some sort of content neutrality. And to me the most plausible revisions of first amendment jurisprudence appear to be those permitting fewer, not more, content-based distinctions than does current first amendment doctrine.[59] In any event, my interest in this Article lies not with this more ambitious revisionist strategy, but with two other more modest ones.

One such strategy would be to argue for a specific exception (from first amendment protection) for epithets—the specific words themselves. The other would be to argue for a specific exception for the ideas that epithets express, whether or not expressed by epithets or by other words or symbols. The former is not particularly threatening to first amendment values, but is both unprincipled and likely to have little if any positive value. The latter could achieve some positive results, but at the cost of seriously undermining freedom of speech.

A first amendment exception for epithets can be dealt with rather quickly. What would be lost in terms of positive value if words such as "nigger," "kike," "spic," "cunt," and "faggot" were outlawed and if the first amendment were read to permit such a ban? Surely, not much. Anything worthwhile saying could still be expressed in a variety of ways. The first amendment has survived the carving out of some exceptions and could survive an additional one like this.

The real question, however, is, what would be gained? If the same ideas that these epithets convey can be conveyed as painfully, offensively, and disrespectfully in other wrappers, what is the point of banning only epithets? Perhaps some will see a gain in making it more difficult for the less clever and creative to spew their venom, but I doubt that many will applaud such a discriminatory free speech exception. High brow bigotry should have no legal advantage over low brow bigotry.[60]

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59. See, e.g., Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 Hastings L.J. 921, 955-57 (1993); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334 (1991); Lawrence Alexander and Paul Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U. L. Rev. 1319, 1350-52, 1356-57 (1983); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972). See also Thomas Nagel, *Personal Rights and Public Space*, 24 Phil. & Pub. Aff. 83 (1995).

60. See Gates, *Speaking of Race* at 47 (cited in note 16):

> If you really want to penalize . . . wounding words, it makes no sense to single out gutter epithets—which, on many college campuses, to be candid, are more likely to stigmatize the speaker than their intended victim—and leave the far more painful ["polite"] disquisition alone . . . . A rule of thumb: in American society today, the real power commanded by the racist is likely to vary inversely with the vulgarity with which it is expressed. . . . [T]he socially disenfranchised . . . are more likely to hail [blacks] . . . as "niggers."

Moreover, if a list of specific words is banned, undoubtedly new words will begin functioning as epithets. The law would either have to be revised continually to keep up with changing word meanings,[61] or else a ban on "epithets" will have to be substituted for the ban on specific words; and a ban on "epithets" will be both exceedingly vague and potentially quite broad.[62] More importantly, a ban on "epithets" will shade naturally into a ban on the ideas of subhuman, contemptible status that epithets express.

That brings me to the final strategy, an exception from first amendment protection, not for specific epithets or epithets generally, but for the ideas expressed through epithets. Why not read the first amendment to permit government to place the ideas that some groups of humans are moral inferiors and unworthy off the table of permitted public discourse? If the expression of these ideas, through epithets or by other means, causes psychologically painful knowledge, offense, and humiliation—and if these ideas have no countervailing positive value—why should they be protected by the first amendment?[63]

Ultimately, it is this question that lies at the core of the debate over hate speech. Epithets—the words themselves, the symbolic wrappers in which ideas are conveyed—are not really the issue. Rather, the issue is the ideas themselves. If the ideas are wrongheaded and dangerous, what possible good can come of granting them the exalted status of being constitutionally protected? Do they not demean the first amendment itself by claiming its protection?

This attack on first amendment protection of hate speech reveals a general difficulty with arguing for first amendment protection for any speech, particularly if the speech expresses ideas thought to rest on misconceptions of fact or value and to be potentially harmful. (The free speech defense that assumes the ideas reflect correct conceptions of fact and value and/or are socially valuable presumably has lost out in the proper forum for the assessment of truth and value, the legislature.) What justifies constitutional insulation of such ideas from legislative control?

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61. See Richard Abel, *Speech and Respect* 98-107 (Stevens & Sons, Ltd., 1994) (giving several examples of how speech but not its message is altered to evade regulation). See also Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 S.M.U. L. Rev. 297, 325-26 (1995) (showing how the meaning of epithets varies with the context); Strossen, 1990 Duke L.J. at 538-39 (cited in note 27) (same).

62. See Gates, *Speaking of Race* at 32-33 (cited in note 16).

63. This is essentially the question Delgado raises. See Delgado, 17 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 140 (cited in note 20) (arguing that racial slurs are harmful and serve no societal purpose).

One tack for defending free speech in such instances is to trot out Mill's four arguments for protecting the expression of falsehoods.[64] Another is to cite to some strong deontological principle, such as Scanlon's Millian principle, which denies government the authority to interdict expression out of fear of how it will affect the audience's beliefs and actions,[65] or Thomson's principle denying that there can be rights against belief-mediated harms.[66]

If one is not convinced by Mill, Scanlon, or Thomson, or finds their arguments generally convincing but inapplicable to the case at hand—here, the ideas expressed by hate speech[67]—the most familiar form of free speech defense is the slippery slope argument.[68] That argument goes like this: If we permit, as a first amendment exception, bans on hate speech, our doing so can plausibly be read as our adopting the maxim that there is no first amendment protection for speech expressing ideas that cause harm and rest on incorrect facts or values. Because almost all speech that government bans is believed by government to cause some harm and to rest on incorrect facts or values,[69] a general first amendment exception of this type would eviscerate if not completely swallow the first amendment. A first amendment that protects only what is in government's eyes the true and valuable or the harmless is no constitutional protection worth having.

Well, then, it might be asked, if protecting the untrue, the valueless, and the harmful is what is central to the first amendment, what is so valuable about the first amendment? What do we lose if we lose it?

Assuming the first amendment skeptic is unconvinced by Mill, Scanlon, or Thomson, the response is that we have no reason to trust in the government's competence authoritatively to

64. See John Stuart Mill, *On Liberty* Ch. 2 at 19, 21-67 (Bobbs-Merrill Co., 1956).

65. See Scanlon, 1 Phil. & Pub. Aff. 204 (cited in note 59). See also Nagel, 24 Phil. & Pub. Aff. at 96-99 (cited in note 59); Strauss, 91 Colum. L. Rev. at 355-57 (cited in note 59).

66. See Thomson, *The Realm of Rights* at 253-59 (cited in note 41).

67. I believe that bans of epithets do run afoul of the deontological principles of Scanlon, Thomson, and others (see the autorities cited in note 59), as well as the consequentialist principles of Mill, for ultimately what offends and is disrespectful is the belief in inferiority that lies behind the expression of the epithet, and what harms the target are either the belief-mediated harms of offense and indignation or the tangible harm caused by others acting on their belief in the target's inferiority.

68. See, e.g., Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985). For a discussion of a related concept, see Frederick Schauer, *Exceptions*, 58 U. Chi. L. Rev. 871, 880-91 (1991). See also Strossen, 1990 Duke L.J. at 537 (cited in note 27).

69. Sometimes government bans speech, not because it believes the speech to rest on incorrect facts or values, but because the speech invades privacy or infringes a property right (i.e., copyright).

distinguish the true from the false and the valuable from the valueless in the realm of ideas. This distrust of government—which applies to all governmental officials, including the courts— can never be fully vindicated, even by citing to the multitude of particular instances when government has banned the true and useful under the guise of banning the false and dangerous. The future is always a new day, and it may bring us more intelligent and honest governmental officials than those who have come before. And the free marketplace of ideas cannot, despite the rhetoric to the contrary, guarantee that the true and valuable will triumph, no matter how long the long run. Nevertheless, the first amendment of content-neutrality—which *is* the first amendment at its core—rests, if not upon broad deontological principles, then upon the hunch that legislatures and courts should not be trusted to distinguish true and valuable ideas from false and pernicious ones.[70]

The skeptic may reply that although government should not be trusted to make content distinctions generally, it *can* be trusted in the case of the ideas expressed by hate speech. We *know* that races, ethnic groups, religious groups, and genders are not of unequal moral worth and that homosexuals are not subhuman creatures.[71] Indeed, we have enshrined many of these judgments of equal moral worth in the Constitution itself. Surely here is a case where government officials have got it right when they conclude nothing valuable will be lost if hate speech is banned.

To strengthen this argument, let me grant not only that the idea of moral inferiority expressed by hate speech is wrong and thus valueless in that respect, but also that expressing that idea is offensive and dangerous. It is dangerous because hate speech might persuade others and lead them to act on false beliefs, to the detriment of all concerned. Ultimately, racism and sexism and the other similar views that hate speech expresses can never serve as the predicates of legitimate governmental action. And because epithets convey racist ideas in their most offensive packaging, surely the case for excepting them from first amendment protection is compelling.[72]

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70. See Delgado, 17 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 51 (cited in note 20); Browne, 52 Ohio St. L.J. at 550 (cited in note 4); Gates, *Speaking of Race* at 37 (cited in note 16); Strossen, 1990 Duke L.J. at 539 (cited in note 27).

71. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. Pa. L. Rev. 149, 158-63 (1992).

72. Such an argument as is set forth in this paragraph is forcefully pressed by Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*,

This argument, however, puts us right back on the slippery slope. *We* know the ideas expressed by hate speech are vile and potentially dangerous, *you* know it, and so do would-be governmental banners. Yet there will be many other we's, many other you's, and many other officials, all just as certain about some other speech as we are now about hate speech, and many of these other we's, you's, and officials will be tragically mistaken. The operative hunch is that it is more prudent to disable our officials even when we are certain they are right than to license them to back up their certitude with bans on speech. It is in the end a gamble based on nothing more than this hunch, but that may be all that supports the first amendment and all the support it requires.[73]

V. A CONSTITUTIONAL CONCESSION TO THE PROPONENTS OF HATE SPEECH CODES

Thus far the tenor of my arguments has been one of opposition to hate speech prohibitions. I have argued that not words but ideas cause psychological pain and sometimes concrete harm, that therefore proscriptions of words are misdirected, but that suppression of painful and even harmful ideas usually runs afoul of the First Amendment.

Nonetheless, I must disappoint thoroughgoing opponents of hate speech codes in one crucial respect. According to orthodox constitutional doctrine, the government does not violate the First Amendment by running schools and universities. That is, the government does not violate the First Amendment by establishing curricula and requiring its employees—public school teachers and public university professors—to adhere to those officially established curricula.[74] This First Amendment exception to the general principle against official orthodoxies[75] is highly problem-

65 S. Cal. L. Rev. 1887 (1992). For a response to Harel, see Alexander, 44 Hastings L.J. at 950-53 (cited in note 59).

73. Perhaps the best discussion of the general argument against entrusting governmental officials with the power to ban speech based on its content is found in the works of Fred Schauer. Schauer asks why we should be more concerned with governmental pathologies than with speaker pathologies, and why we should be more concerned with governmental pathologies in the regulation of speech than with governmental pathologies in the regulation of other conduct. See, e.g., Frederick Schauer, *Free Speech in a World of Private Power*, in Tom Campbell and Wajciech Sadurski, eds., *Freedom of Communication* 1, 10-13 (Dartmouth Publishing Co., 1994). His answer, albeit tentative, is similar to mine: We do so based on a hunch born of our particular historical and political context. Id. at 13-15.

74. See, e.g., *Board of Educ. v. Pico*, 457 U.S. 853 (1982).

75. See *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

atic in theory[76] but nonetheless quite firmly entrenched in our jurisprudence, despite the difficulties it causes in adjudicating its margins.[77]

If the government may control the ideas presented in its classrooms, then it may ban epithets in its classrooms. The harm from epithets is still harm that comes from the ideas the epithets express, most of which the teacher may express in other fora with constitutionally-mandated impunity.[78] (There are some special harms that accompany classroom expression of certain ideas, primarily those associated with the humiliation of being referred to disparagingly in front of others or with the fear of unfair evaluation.) Regardless whether the ideas the government wishes to regulate in its classrooms and other teacher-student exchanges are or are not specially harmful in those contexts, the government may apparently regulate them to the full extent of its control over its own schools and universities.[79] Therefore, one hotly controverted arena of hate speech proscription—teacher to student speech in public schools and public universities—is not touched by the principal arguments in this Article invoking the Constitution.

VI. A MORE CYNICAL VIEW OF THE URGE TO BAN HATE SPEECH

I have acknowledged that hate speech can be harmful beyond its influence on third party audiences, an influence the first amendment clearly protects. It is harmful when it conveys information about attitudes and beliefs that is painful and not previously known, or is known but was previously subconscious and not distracting, or known but not through a means that required

76. See S. Arons, *The Separation of School and State: Pierce Reconsidered* (Institute for Humane Studies, 1977); Alexander, 44 Hastings L.J. at 953-54 (cited in note 59); Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 San Diego L. Rev. 175 (1989); Stanley Ingber, *Socialization, Indoctrination, and the 'Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. Ill. L. Rev. 15.

77. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding content restrictions on government funded speech); *Board of Educ. v. Pico*, supra note 74 (striking down content-based removal of books from public school libraries but approving a large measure of content-based control of curriculum and of library book acquisitions); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (striking down content-based refusal to allow play in publicly-owned theater). See generally, Alexander, 26 San Diego L. Rev. (cited in note 76).

78. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); Larry A. Alexander, 44 Hastings L.J. at 953-54 n.113 (cited in note 59).

79. Limits were alluded to in *Pico*, supra note 74, but not fleshed out. See generally Mark G. Yudof, *When Government Speaks: Politics, Law, and Government Expression in America* (U. of California Press, 1983); Ingber, 1987 U. Ill. L. Rev. (cited in note 76); Cass R. Sunstein, *Government Control of Information*, 74 Cal. L. Rev. 889 (1986).

a distracting response. But hate speech is surely not unique in its ability to inflict these harms. Lots of speech can do so.

Although hate speech can be harmful in the ways described, it would be unwarranted to conclude that such harmfulness is the primary or even an important motivation for the efforts to ban it. Indeed, it is quite possible that while hate speech *can* be harmful, its actual harmfulness has been greatly exaggerated by those who wish to ban it. In fact, I do not think that the bans on hate speech are motivated by the desire to remain in ignorance of others' attitudes and beliefs. Nor are those who advocate such bans typically people who are easily and greatly offended by the flouting of social norms, or who place a high premium on displays of civility and respect.

Nor is it likely that the principal impetus behind the moves to ban hate speech is instead a desire to interdict possible persuasion of others. No doubt some do have such a concern, but hate speech is rarely an effective means of persuading bystanders to hold similar attitudes and beliefs.

What I would suggest regarding the movement to ban hate speech is even more ominous. I believe it is motivated primarily by hatred of those with bigoted attitudes and a desire to exercise power over them. If the targets of hate speech succeed in getting it banned, that demonstrates their own power relative to the speakers. If they cannot get it banned, then they feel the frustration of impotence vis-a-vis those whose views they hate.[80]

The *Skokie* case is perhaps a good example. All right-thinking people have good reason to feel hatred toward those with Nazi views, but perhaps none in this country have more reason to

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80. See also Gates, *New Republic* (Sept 20 and 27, 1993) at 46-47 (cited in note 4) (discussing the views of Richard Delgado and Mari Matsuda found in Matsuda, *Words that Wound* (cited in note 4)):

> [I]n the Republic of Self-Esteem, we are invited to conceive of the lawsuit as therapy. "When victimized by racist language," Delgado explains, "victims must be able to threaten and institute legal action, thereby relieving the sense of helplessness that leads to psychological harm."
>
> A similar therapeutic function could be played by criminal proceedings, in Matsuda's view. When the government does nothing about racist speech, she argues, it actually causes a second injury. "The second injury is the pain of knowing that the government provides no remedy and offers no recognition of the dehumanizing experience that victims of hate propaganda are subjected to." In fact, "The government's denial of personhood through its denial of legal recourse may even be more painful than the initial act of hatred." Of course, what this grievance presupposes is that the state is there, *in loco parentis*, to confer personhood in the first place. Finally Matsuda must repair not to an instrumental conception of the state, but to a conception of it as the "official embodiment of the society we live in," which is rather remote and abstracted from the realities of our heterogeneous populace, with its conflicting norms and jostling values.

feel this way than the Holocaust survivors, their relatives, and the other Jews who make up a large percentage of Skokie's population. But it is doubtful that, at least after the Nazis announced their intention to march in Skokie, many of these people were ignorant of the fact that there were still Nazis and that those Nazis felt sufficient hatred of Jews to want to parade through Skokie in Nazi regalia. Nor were many residents of Skokie particularly concerned that a Nazi parade would distract them from other tasks. Indeed, the effort to block the Nazis' march was probably much more distracting. What seems much more likely is that stopping the march would frustrate the hated Nazis, who could not otherwise be punished just for being Nazis, and that allowing them to march would frustrate the quite natural urge to strike out at those whose ideas one hates. In other words, hate speech situations like Skokie are frequently perceived by the targets of hate speech as zero sum games in which the only question is which of the antagonistic groups will prevail. If the hate speech is allowed, the speakers will have prevailed. Therefore, the targets, to prevail, must suppress the speech.[81]

I admit that I am engaged in the worst kind of armchair psychoanalysis, and that I have nothing more solid to back me up than hunches.[82] Nevertheless, if my hypothesis is correct, then

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81. Compelling a showing of "respect" from those who do not in fact respect one is a way of punishing the latter for their beliefs and perhaps for eliciting respect for one's power if not one's humanity.

82. Those hunches, however, are shared by others. Gates notes:

> In fact, the main appeal of speech codes usually turns out to be primarily expressive or symbolic rather than consequential in nature. That is, their advocates do not depend on the claim that the statute will spare victim groups some foreseeable amount of psychic trauma. They say, rather, that by adopting such a statute, the university *expresses* its opposition to hate speech and bigotry. More positively, the statute *symbolizes* our commitment to tolerance, to the creation of an educational environment where mutual colloquy and comity are preserved. . . .
>
> And yet once we have admitted that the regulation of racist speech is, in part or whole, a symbolic act, we must register the force of the other symbolic considerations that may come into play. So, even if you think that the notion of free speech contains logical inconsistencies, you need to register the symbolic force of its further abridgement. And it is this level of scrutiny that may tip the balance in the other direction. The controversy over flag burning is a good illustration of the two-edged nature of symbolic arguments. Perhaps safeguarding the flag symbolized something nice, but for many of us, safeguarding our freedom to burn the flag symbolized something nicer.
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> Note, too, the contradiction in the expressivist position I just reviewed: a university administration that merely condemns hate speech, without mobilizing punitive sanctions, is held to have done little, offering "mere words." Yet this skepticism about the potency of "mere words" comports oddly with the attempt to regulate "mere words" that, since they are spoken by those not in a position of authority, would seem to have even less symbolic force. Why is it "mere words" when a university condemns racist speech, but not when the student ut-

banning hate speech will be only a small, appetite-whetting victory for forces of censorship. For as I have pointed out, lots of speech beyond hate speech reveals hateful attitudes and identifies those whom others will now hate in return.

All of this is quite human and natural, if regrettable. The First Amendment is in the Constitution to check what is quite natural, particularly the urge to punish those with whom you disagree because you hate or fear those whose thoughts you find hateful or dangerous. Knowledge of hateful attitudes and beliefs can be painful and thus harmful in that sense, but I think it is unlikely that this pain explains the present movement to censor. The desire to punish, embarrass, and bend to one's will those who hate you is the most plausible explanation.[83] Aversive thought control and retaliation are, however, unlikely candidates for the status of legitimate reasons for suppressing speech.[84]

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ters the abusive words in the first place? Whose words are "only words"? Why are racist words deeds, but anti-racist words just lip service?

Further, is the verbal situation as asymmetric as it first appears? Does the rebuke "racist" have no power to wound on a college campus?

Gates, *Speaking of Race* at 38-39 (cited in note 16).

83. See Abel, *Speech and Respect* at 22-29 (cited in note 61); James B. Jacobs, *The Emergence and Implications of American Hate Crime Jurisprudence*, 22 Israel Yearbook on Human Rights, 113, 136 (1993).

84. But see Delgado, 17 Harv. Civ. Rts.-Civ. Lib. L. Rev. at 149 (cited in note 20) (arguing that if the government can change expression it can change thoughts, and that this is a justification for suppressing speech).