RETHEORIZING ACTIONS FOR TARGETED HATE SPEECH: A COMMENT ON PROFESSOR BROWN

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I. INTRODUCTION: ALEXANDER BROWN'S *RETHEORIZING ACTIONABLE INJURIES* AND THE VALUE OF PRECISION

"Define your terms!"

Who among us has not had a teacher scold us for failure to do just that? But what did she mean by "define?"[1] And what did she mean by "terms?" Surely not every word in our paper, but which ones?[2] Or perhaps we had a debate coach who taught us to use this strategy against an opponent to watch him struggle to come up with a definition while we gathered our thoughts and prepared our next line of attack.[3] The demand to define one's terms, then, can serve as a useful temporizing strategy for when we think we are probably not going to like what the other person is planning to say. It slows him down. It makes us look rigorous. And it gives us time to think and frame an answer.[4]

Other times, however, it can be an entirely legitimate task.[5] With deductive argument, for example, one is engaged in trying to find out what is entailed in a term or proposition.[6] If you plan to do a lot of work with prime numbers, it's a good idea to start by making sure that you, and any other members of your team, have a clear idea of what a prime number is.[7]

With legal terms, the situation tends to fall somewhere in between these two extremes: the demand for a specific definition is sometimes in order, and

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1. Should one include, in addition to some synonyms and a dictionary-type explication of the meaning, some examples? Set out the etymology of the term and how it developed over time, its original meanings, and so forth? Any divergence between its popular understanding and any technical application? *See, e.g.*, *Oxford English Dictionary Online* (defining the term "definition").

2. Just the main ones, one might think. But which ones are "main?" What does "main" mean? That way lies an infinite regress in which one can easily get lost in a forest of words with no exit in sight.

3. *See, e.g.*, Jeffrey Feldman, *Framing the Debate*, N.Y. TIMES (April 7, 2008) (noting the advisability of defining one's terms); TIM SONNREICH, GUIDE TO DEBATING 8 (2010), http://www.monashdebaters.com/downloads/Schools%20Training%20Guide.pdf.

4. SONNREICH, *supra* note 3 (noting that providing definitions can be an important preliminary step in any encounter).

5. I.e, not a tactical ploy at all.

6. *Deductive, Inductive, and Abductive Reasoning*, BUTTE COLLEGE, http://www.butte.edu/departments/cas/tipsheets/thinking/reasoning.html.

7. *See, e.g.*, BERTRAND RUSSELL, WISDOM OF THE WEST 238–39 (1959) (discussing analytical mode of argument in which one reasons from given or "a priori" premises, as in mathematics or formal logic, to a conclusion and distinguishing this approach from the scientific method, which seeks empirical truth from observation and experience).

sometimes not. For example, when legislation is concerned, experienced drafters know to provide definitions for any new or unfamiliar terms, particularly if they are key to a new law one is hoping to enact. For example, when drafting a rule regulating the amount of exhaust a diesel truck can emit, one had better provide a definition of what he or she means by a diesel engine, as well as by a truck.[8] The reason lies in common sense: not every highway patrol officer, PUC official, or state licensing officer is likely to know what such an engine is and how to tell one from an ordinary gasoline engine on quick inspection. Much less are they likely to know how to tell whether a large vehicle is what you mean be a "truck."

With criminal statutes, precision is even more necessary than it is with industrial regulations, because more rides on it, including liberty.[9] Thus, one should not pass a new law criminalizing selling harmful inhalants to juveniles without specifying what you mean by an inhalant and who you consider to be a child.

With private law, especially torts, things are a little different. Here, it is customary to define concepts in general terms, even important ones like negligence ("what a reasonably prudent man would do in that situation")[10] or assault (putting another person in reasonable fear of an offensive touching).[11] And no one really minds because we are content to let a jury make decisions under a judge's instructions and rely on them to do their best.

Earlier, the judge may have had to make rulings, for example, on a motion to dismiss or for summary judgment, some of which may turn on a definition of a legal term like the abovementioned two.[12] But any such ruling will come informed by centuries of case law that have found particular acts negligent or to constitute an assault. Is it a case of assault if an obnoxious individual knocks the hat off another person's head in a fit of pique?[13] Is it

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8. Especially the latter: Is a large delivery van a truck? A tractor trailer? A large tow rig?

9. U.S. CONST. amend. XIV, cl. 1; Morrissey v. Brewer, 408 U.S. 471, 481 (1982) (describing the broad range of interests protected by the Due Process Clause).

10. *See* Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 41 (1915) ("[N]egligence is doing what a reasonable and prudent man would not have done or not doing what such a man would have done."); W. PAGE KEATON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164 (5th ed. 1984).

11. KEATON ET AL., *supra* note 10, § 10, at 43.

12. To wit, negligence or defamation.

13. *See* WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS, § 20, at 36 (4th ed. 1971).

defamation if you call a lawyer a shyster?[14] Is it a case of consumer fraud if a merchant advertises used cars for sale with a full warranty, but it turns out that the warranty, in small print, only covers the engine and drive shaft?[15] In none of these cases do we expect the judge or juror to proceed inductively, deriving a decision from premises in the same manner in which a mathematician computes the area of an irregular polygon with sides of known lengths. As Wittgenstein said, the meaning is the use.[16]

Administrative rules occupy a middle ground between torts and legislative enactments. They require a degree of precision, thus counseling definitions whenever possible.[17] But life or death generally does not ride on them, so that the degree of precision necessary for, say, a campus administrative rule—don't plagiarize your term paper, return library books on time or pay a fine—is less than that which we require for a criminal statute but somewhat higher than that which we insist upon in connection with most civil torts.[18]

All these generalizations are commonsensical and are subject to some exceptions and the ubiquitous sliding scale.

Which brings us to the subject of this Comment: how helpful is it to define very carefully, as Alexander Brown has done, a tort action for racist

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14. Jack F. Kuhlman, *Libel and Libel Per Se*, 45 CHI. KENT. L. REV. 24, 25–29, 32 & n.n.43-44 (1966).

15. *See* Kenneth Chapman & Michael J. Meurer, *Efficient Remedies for Breach of Warranty Cases*, 57 L. & CONTEMP. PROBS. 109 (1987).

16. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS sec. 43 (1953) (equating the meaning of a word with its use in language); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1982) (showing how communities of meaning determine how we assign significance to words and sentences). In legal discourse, a judge consults precedent (the most nearly analogous case) aided by her informed intuitions about justice and fair play.

17. *See What Must Be Adopted Pursuant to the APA*, at https://www.oal.ca.gov/wp-content/uploads/sites/28/2017/05/What_Is_a_Regulation.pdf (explaining procedure for determining meaning and intention of a measure and using the example of one requiring adequate space between hospital beds) (last visited Oct. 21, 2017).

18. In the law of torts, we feel comfortable defining terms like negligence broadly and in general language. *See supra* text and accompanying notes 8-15. But with university regulation, we know that we had better provide at least basic guidance for terms like "adjunct professor," "full course load," and "within the course of duties." A third category, not considered here, is the growing body of hostile-workplace decisions that find employment discrimination when a worker is subjected to harassing or racist language on the job. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

hate speech?[19] As the reader will see, our answer is "somewhat" and that the reason for this has to do with countervailing policies that rise up and weigh, consciously or unconsciously, formally or informally, on paper or in our minds, against recognizing such a tort or giving it a wide scope.

The forms of resistance we have in mind are those emanating from the idea that punishing racist speech[20] collides with the idea that speech generally should be free.[21] Thus, if one of us feels like insulting, castigating, upbraiding, or administering a tongue-lashing to you, a white reader, a Jewish reader, or a reader of minority race or sexual orientation, we should be free to do so.[22] Unless we really overdo it, overstep our authority,[23] or make you really, really mad, scared, or downcast.[24] And especially if a lot of other people are doing it, too,[25] or you are a captive audience.[26] And even more so if one of us is your superior at work or in the classroom.[27]

Since weighing free-speech concerns against those of a victim of hate speech requires a degree of care, one can only admire Alexander Brown's guidance through the thickets we encounter both in general and in particular

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19. *See* Alexander Brown, *Retheorizing Actionable Injuries in Civil Lawsuits Involving Targeted Hate Speech: Hate Speech as Degradation and Humiliation*, 9 ALA. C.R. & C.L. L. REV. 1, 2 (2018) (noting that "My focus in this article is on how civil lawsuits might provide legal redress for . . . targeted hate speech . . . an opaque idiom with multiple meanings covering a heterogeneous collection of expressive phenomena.")

20. More accurately, deeming it actionable.

21. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 345 (1991).

22. *E.g.,* Marjorie Heins, *Banning Words: A Comment on "Words that Wound,"* 18 Harv. C.R.-C.L. L. Rev. 585 (1983) (arguing that speech, especially on college campuses, should be as free as possible); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L. J. 484, 540–41 (same). *See also* Brown, *supra* note 19, at 51 (noting this countervailing value). *See also* Delgado, *Campus Antiracism Rules, supra* note 21, at 345.

23. Brown, *supra* note 19, at 32–34, 39–40, 48 (mentioning abuse of authority as a component of the harm).

24. Id. at 32–34 (mentioning abuse of authority as a component of the offense and discussing intentional infliction of emotional distress and "psychological impact").

25. See Delgado, Campus Antiracism Rules, *supra* note 21, at 383–86 (discussing concerted action).

26. Brown, *supra* note 19, at 48.

27. *Id.* at 32–34.

cases. [28] Brown shows convincingly how protecting against *offense* is less important than protecting against *degradation*.[29] *Humiliation*, by contrast is socially and psychologically reprehensible and generally calls for redress.[30] Ill-natured *sarcasm* ("you lazy lout, what's wrong with you") ordinarily does not.[31] In the course of his long, carefully crafted paper, there emerge the contours of a well drafted tort for racist, sexist, or religious hate speech.

Even more helpful is his discussion of the nature of the harms that can accompany hate speech, including silencing,[32] shock,[33] feeling dehumanized,[34] internalized anger,[35] "complex dysphoria,"[36] and loss of self-esteem.[37] Brown's careful consideration of these harms reminds readers, including administrators, judges, jurors, and others, of what can be at stake in these cases.[38] Brown also reviews some of the physical reactions to hate speech, especially for one who is helpless to retort, including increased blood pressure, blushing, trembling,[39] headaches, loss of sleep, and inability to go about daily tasks.[40] Getting clear on the nature of the harm, in turn, helps with defining the actions he wishes to delineate. If the harm is minimal or is non-compensable for some reason, there is little point in including the behavior within one's definition of hate speech.[41]

The remainder of this Comment proceeds as follows. Part I reviews the case law and scholarship having to do with hate speech, concentrating on

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28. *Id.* at 3 (emphasizing the need to be clear on the "precise way in which dignity is infringed or impaired."). *See also id.* at 15 passim (Part III, Human Dignity).

29. *See id.* at 7 (citing RESTATEMENT OF TORTS (SECOND) noting that the tort does not cover petty indignities).

30. *Id.* (noting that the author will concentrate on humiliation and degradation).

31. *Id.* (noting that the tort system does not provide recompense for petty insults or annoyances).

32. I*d.* at 34 (noting that some victims will silently walk away).

33. *Id.* at 28 (like being hit by "a bolt of lightning").

34. *Id.* at 29–30.

35. *Id.* at 34–35.

36. *Id.* at 37–38.

37. *Id.* at 18 (noting that a core feature of dignity is a feeling of self-worth and that injury to this feeling often accompanies hate speech).

38. *See id.* at 6 (noting that courts have adopted overly soft or imprecise standards for reviewing hate speech cases with the result that they "are at risk of summarily discounting the injuries caused by (it)").

39. *Id.* at 36 (noting these among other "physiological reactions").

40. *Id.* at 40.

41. As they say, *de minimis non curat lex* (the law does not concern itself with trifles).

redress through tort actions and university regulation. Many foreign legal regimes deem hate speech a crime.[42] But the United States seems far from adopting such an approach, so we limit this section to torts and university conduct codes.

Part II proposes an approach to balancing the two main policies—minority protection and free speech—at play in these cases. They very often come into conflict—protecting the minority person means punishing the hate speaker; and, conversely, permitting the hate speaker to say whatever is on her mind comes at the expense of his or her victim. We urge that policymakers strike the balance with a view to the times and society's needs, in a manner that we explain and defend. [43] We then consider our own times and conclude, in Part III, that they urge a somewhat more minority-protective approach than that called for during other periods, and explain why this is so.[44]

II. HATE SPEECH LAW AND SCHOLARSHIP

Professor Brown himself discusses the history of hate-speech law and regulations, although this history appears dispersed throughout his paper.[45] We therefore provide for the reader interested in the subject a brief synopsis, beginning with the early case law and literature and focusing on the two areas—torts and campus regulation—mentioned above.[46] As will be seen, both judges and legal writers[47] are sharply divided about what should be done. Indeed, we recently addressed this divide between the two camps and the reasons why it persists.[48] Part II offers a way out of the impasse by weighing the competing considerations in light of changing social needs.

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42. *See, e.g.,* Regina v. Keegstra, 3 S.C.R. 697 (1990) (Canadian case where a high school teacher was prosecuted for racist statements against the Jewish community).

43. *See infra* Section I. A.

44. *See infra* Section I. B.

45. *See, e.g*., Brown, *supra* note 19, at 6–12, 15–20, 22–25, 38–39, 42–44.

46. *See supra* text and accompanying notes 7-11.

47. To wit, scholarship and case law.

48. *See* Richard Delgado & Jean Stefancic, *Four Ironies of Campus Climate*, 101 MINN. L. REV. 1919, 1922-1932 (2017).

A. Tort Law and Scholarship About Hate Speech: A Brief History

Upon noticing that the emerging case law having to do with racial insults and invective was sharply divided, Richard Delgado wrote the first law review article specifically addressing this subject.[49] Published in 1987 in the *Harvard Civil Rights-Civil Liberties Law Review*, his article reviewed the early cases, including *Contreras v. Crown Zellerbach*, [50] *Collins v. Smith (City of Skokie)*,[51] and *Beauharnais v. Illinois*.[52] He reviewed the harms of hate speech,[53] discussed the values at stake,[54] examined the extent to which current case law was already protecting minority victims,[55] and proposed a new, freestanding civil remedy for racial castigation.[56]

A few years later, Charles Lawrence and Mari Matsuda addressed the same subject, adding to Delgado's analysis.[57] Lawrence posited that much of racism is unconscious and that racists rarely intend to injure their victims.[58] He analyzed how cultural exposure inclines most of us to devalue members of groups other than our own[59] and concluded that formal rules and reminders are useful means of decreasing the burden of racism that minorities suffer.[60] Matsuda provided a number of new reasons calling for a hate-speech remedy, including that sympathetic readers consider how that form of utterance sounds to the victim, that is, when viewed "from the bottom."[61] She posited that if the average person were to consider the appropriate response to hate

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49. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV 133 (1982).

50. Contreras v. Crown Zellerbach, 88 Wash.2d 735, 565 P.2d 1173 (1977) (en banc).

51. Collins v. Smith (City of Skokie), 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

52. Beauharnais v. Illinois, 342 U.S. 250 (1952).

53. Delgado, *supra* note 49, at 135-49.

54. *Id.* at 140–41, 173–74.

55. *Id.* at 149–65.

56. *Id.* at 179–81.

57. Charles Lawrence, *The Ego, the Id, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317–388; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2320–2381 (1989).

58. Lawrence, *supra* note 57, at 324, 330–44.

59. *Id.*

60. *Id.* at 356-81 (putting forward a cultural-meaning test for racism). *See also* Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 475–76 (expressly addressing campus hate speech).

61. Matsuda, *supra* note 57, at 2322, 2359–61, 2371–72. When viewed from this perspective, hate speech causes real, undeniable harm, *id*. at 2340.

speech from the perspective of John Rawls' veil of ignorance, they would condemn it.[62] Going further than Delgado and Lawrence, she suggested that the American legal system consider making hate speech a crime.[63] A few years later, these three authors, together with Kimberlé Crenshaw, published *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*,[64] which contained a lengthy introduction reviewing critical race theory, showed how hate speech law figured into that body of scholarship,[65] and discussed the need for legal protection from racist hate speech.[66] Crenshaw contributed a chapter devoted to a controversy that arose when a rap group, Two Live Crew, performed a song that appeared to demean women.[67]

B. Campus Hate Speech Codes—Case Law and Legal Scholarship

The discussion of hate speech soon broadened to include college and university hate speech codes,[68] which sought to protect the same interest but did so through campus conduct rules. The above authors and others weighed in support of such measures,[69] while First Amendment absolutists such as Nadine Strossen and Donald Lively offered countervailing arguments. [70] Across the country, many colleges and universities enacted hate speech codes,[71] a number of which came in for judicial review.

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62. *Id.* at 2322–24, 2371–72.

63. *E.g., id.* at 2321–22.

64. Mari Matsuda et al., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

65. *Id.* at 1–15.

66. *Id.* at 17–25.

67. *Id.* at 111–32.

68. *See* Delgado, *supra* note 22, at 343–87.

69. *See, e.g.*, Lawrence, Hollers, *supra* note 57; Delgado, *supra* note 21. *See also* Brown, *supra* note 19, at 6.

70. Strossen, *supra* note 22; Richard Delgado, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1807–25 (1994) (discussing Donald Lively and others who write in the same vein).

71. JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE-SPEECH REGULATION (2005).

For example, in *UWM Post v. Regents, University of Wisconsin*,[72] a federal district court considered a hate speech rule that had been enacted by the university system of Wisconsin.[73] Reasoning that the university's rule did not meet the requirement of "fighting words"[74]—since it did not require a violent reaction—and was overly broad and vague,[75] the judge struck down the rule as a violation of the First Amendment. [76] A short time later, a federal district court in Michigan reached the same conclusion in a case challenging that university's student conduct code punishing hate speech.[77] A third, highly publicized but unpublished opinion arising from a student conduct code at Stanford University reached the same result, leaving advocates of restraints reeling.[78] At about this point Jon B. Gould, a law professor at George Mason University, wrote a book entitled *Speak No Evil: The Triumph of Hate-Speech Regulation*,[79] which noted a major irony. Over 200 campuses and universities had enacted hate speech or student conduct rules forbidding hate speech, yet practically every court that considered one of them struck it down.[80] It seemed that the judicial system and campus administrators operated in different universes.[81]

C. Campus Climate Activism

Despite (or perhaps because of) this impasse, a vigorous faction of student activists and faculty sympathizers have recently been demanding broad changes in the way universities operate.[82] These "campus climate" activists have been demanding an end to hate speech and micro-aggressions.[83] They are insisting on more courses of interest to minorities as well as more minority professors.[84] They also have been accusing colleges of concealing their histories of complicity with slavery and naming buildings

72. UWM Post v. Regents, University of Wisconsin, 774 F. Supp. 1163 (E.D. Wis. 1991).
73. *See id.* at 1164.
74. *Id.* at 1167.
75. *Id.* at 1166, 1169.
76. *Id.* at 1176.
77. Doe v. University of Michigan, 721 F. Supp. 852, 854–57 (E.D. Mich. 1989).
78. *See* Corry v. Stanford University, No. 740309 (Cal. Super. Ct. Feb. 27, 1995).
79. Gould, *supra* note 71.
80. *Id.*
81. *See* Delgado & Stefancic, *supra* note 48 (noting the same incongruity).
82. *See id.* at 1919.
83. *Id.*
84. *Id.* at 1920.

after alumni with disreputable pasts.[85] The opposition includes legal heavyweights Robert O'Neil[86] and Geoffrey Stone,[87] organizations like the ACLU[88] and FIRE,[89] and a majority of the writers who have addressed this subject in the pages of the *Chronicle of Higher Education*.[90] A recent symposium issue of *Minnesota Law Review* included articles defending the student position,[91] challenging their objectives or the form in which they present them,[92] or proposing middle-ground solutions.[93] Others, however, took the position that the two approaches were essentially irreconcilable.[94]

85. *Id.*

86. Robert O'Neil, *Academic Freedom to Deny the Truth: Beyond the Holocaust*, 101 MINN. L. REV. 2065 (2017). *See also* Vikram David Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943 (2017) (noting that these rights are more severely limited than is commonly understood).

87. Law School Communications, *Professor Geoffrey Stone Discusses Fee Speech on Campus at the Amer. Law Institute*, UNIV. CHI. L. SCH., (June 6, 2016), http://www.law.uchicago.edu/news/prof-geoffrey-stone-discusses-free-speech-campus-american-law-institute.

88. *Speech on Campus*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/other/speech-campus (last visited Oct. 21, 2017).

89. *See What are Speech Codes?*, FOUND. INDIVIDUAL R. EDUC., https://www.thefire.org/spotlight/what-are-speech-codes/ (last visited Oct. 21, 2017).

90. *E.g*, Susan Dodge, *Campus Codes that Ban Hate Speech are Rarely Used to Penalize Students*, CHRON. HIGHER ED., (Feb. 12, 1992), http://www.chronicle.com/article/Campus-Codes-That-Ban-Hate/81110 (depicting codes as passe and rarely used).

91. *E.g.*, Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863 (2017).

92. *E.g.*, Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987, 2036–41 (2017).

93. *See, e.g.*, Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1836–39, 1857–60 (2017) (urging limitations on universities' abilities to censor offensive speech and promoting a policy of condemnation and education instead).

94. *See generally* Richard Delgado & Jean Stefanic, *supra* note 48, at 1924–41 (exploring the failure of discourse in the campus speech debate).

D. Controlling Hate—Competing Positions and Policy Arguments

While controversy has raged on all these fronts, legal writers and activists on both sides have been weighing in with policy reasons in favor of or against hate speech controls. For example, many opponents of hate-speech regulation have long argued that regulation will lead to new forms of control and end up in a regime of official censorship.[95] Others urge that the best response to bad speech is more speech,[96] or that suppressing hate speech is unwise because allowing it serves as a pressure valve, guarding against a more dangerous form of explosion later.[97] Still others assert that the system of free expression is like a seamless web and that any rent in it is unwise.[98] Yet others maintain that freedom of speech has served, historically, as minorities' best friend, thus they, most of all, should be slow to urge its suppression.[99] Supporters of hate-speech regulation have countered each of these arguments, including by noting that, however valuable free speech has been, in the abstract, to black and Latino liberation, hate speech is not.[100]

E. Summing Up

With the advent of campus-climate activism and street protests carried out in the name of the Black Lives Matter movement, the debate about state control of hate speech and expression took on an activist turn. Not long before, two books summed up the scholarly-analytical debate. *Understanding Words That Wound*,[101] by Richard Delgado and Jean Stefancic, reviewed the

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95. In other words, the proverbial slippery slope. *See, e.g.*, Fred Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1995). *See also* Richard Delgado and Jean Stefancic, *Hateful Speech, Loving Communities: Why our Notion of "A Just Balance" Changes So Slowly*, 82 CALIF. L. REV. 851, 852 (1994).

96. *See* Richard Delgado and David Yun, *The Neoconservative Case against Hate-Speech Regulation—Lively, D'Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1819–21 (1994) (discussing the "more speech" argument); *see also* Richard Delgado, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation*, 82 CALIF. L. REV. 871, 883–85 (1994).

97. *See* Delgado, *supra* note 96, at 878-80 (discussing the "pressure valve" argument).

98. *See id*. at 883 (discussing the "seamless web" argument).

99. *See id*. at 881–83 (discussing the "best friend" argument).

100. *See id*. at 882–83 (countering the historical argument); Lawrence, *supra* note 60, at 435 (countering the historical argument).

101. RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 21-31, 93-150 (Westview Press 2004).

various types of hate speech and settings in which they appeared.[102] They considered the careers of four special words.[103] They also summarized policy arguments weighing for or against legal redress for racial vituperation[104] and concluded with a short section on the future of First Amendment legal realism.[105] A short time later, prominent legal philosopher Jeremy Waldron in his 2009 Holmes Lecture[106] and subsequent book[107] put forward a powerful argument for norms against hate speech. He points out that practically every liberal democracy has laws against this form of utterance and that other nations consider them essential measures to safeguard equality and inclusion.[108] A few works on the other side respond along traditional lines, although the scholarly and street movements currently seem to favor restriction. Why this might be so is the subject of the final section of this Article.

III. A WAY FORWARD IDENTIFYING THE STAGE OF THE SOCIAL DIALECTIC BETWEEN EQUALITY AND LIBERTY

As mentioned earlier,[109] we believe that the best and most defensible way out of the current impasse is to take both sides seriously. Taking a leaf from Laurence Tribe,[110] we urge that courts, legislators, institutions, and ordinary citizens strike the balance between the two sets of values (equal protection and free speech) at play in the hate speech controversy in light of current social needs. Essentially, society needs free speech values when it is stuck. These values facilitate change, contestation, and challenges to

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102. *Id.* at 21-31, 93-150.

103. *Id.* at 47-92 (discussing "nigger," "wop," "spick," "chink," and "kike").

104. *Id.* at 203-17.

105. *Id.* at 217-26. *See also* Richard Delgado, *Toward a Legal Realist View of the First Amendmen*t, 113 HARV. L. REV. 778, 778-79 (2000) (reviewing another work on legal realism).

106. *See generally* Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 153 HARV. L. REV. 1596, 1596-1657 (2010).

107. *See* JEREMY WALDRON, THE HARM IN HATE SPEECH (Harv. Univ. Press 2012).

108. *Id.* at Chapter 1, at 1-18 (Approaching Hate Speech); Chapter 5, at 105-43 (Protecting Dignity or Protection from Offense).

109. *See supra* text and accompanying notes 18–19, 40–41.

110. *See* Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.C.L. L. REV. 269, 269 (1975).

orthodoxy.[111] They should preponderate during times of social stasis, when society as a whole begins to feel the need for broad systemic changes in how we live and govern ourselves. During these times, we should allow wide scope for challenging, even scathing speech. It behooves us, during these times, to balance competing values in a manner that will prioritize the ones that society most dearly needs, namely change.

At other times, however, society's foremost needs lie in the area of protecting groups that are in need of breathing space and an opportunity to consolidate gains. In times like these, the opposite needs assume highest priority. Society then must tend to equal protection and human dignity. New groups need a chance to find their places.[112] Displaced workers need time to adjust to a new economy.[113] Global forces require nations to find new relations with one another.[114] Technology demands changes in how we communicate, find information, relate to one another, and entertain ourselves.[115] These are periods of social turmoil, strain, and upset.

As the reader might guess, we believe (1) that we are now immersed in such a period;[116] and (2) during times such as these, equal protection values take precedence over the social-change values associated with the First Amendment.[117] These are times of consolidation. During them, fledgling

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111. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961). Written just as the activist Sixties were beginning, Meiklejohn's article illustrates the way First Amendment values can facilitate social change.

112. For example, immigrants to settle in and find their way, minorities to acquire an education and form coalitions, society to come to terms with changing norms, values, cuisines, and histories.

113. *See Displaced Workers Summary*, BUREAU OF LABOR STATISTICS, (Aug. 25, 2016).

114. Carmen Gonzalez, *Environmental Racism, American Exceptionalism, and Cold War Human Rights*, 26 TRANSN'L L. & CONTEMP. PROBS. 281, 314–315 (2017).

115. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (Anchor Books 1999) (explaining globalization).

116. These times present clashing interest groups, requiring measures to protect factional conflict and oppression.

117. The best-known statement in favor of these values is United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938), noting that:

> [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators . . . [and noting in footnote 4 that:] There

groups are in need of protection.[118] They need society to be predictable and the social institutions trustworthy. They need, in short, the values of equal protection more than those of social change and ferment.[119]

IV. CONCLUSION

Efforts like Professor Brown's to define the terms in which the legal system evaluates torts based on hateful expression exhibit a slightly defensive quality that is perfectly understandable in times like ours. Minorities are clamoring for recognition and defense of their rights of personhood and equal citizenship which, in turn, is appropriate given the times. Hate crimes are up,[120] conservative forces rule,[121] immigrants are under threat,[122] society threatens religious bans on who may migrate from one country to another.[123] It is time to remind everyone—indeed, each other—of the need to proceed with equality and equal personhood in mind when pondering new rules and laws. One form of that felt need for social protection for struggling groups is

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> may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

118. *Id.*

119. *Id.*

120. *E.g.*, Slate Staff, *Hate in America: An Updated List*, SLATE (July 7, 2017).

121. *E.g.*, Richard Delgado, *Rodrigo's Footnote: Multi-Group Oppression and a Theory of Judicial Review*, 51 U.C. DAVIS L. REV. ONLINE 1, 8-18 (2017).

122. *E.g.*, Caitlyn Dickerson, *Trump Administration Targets Parents in New Immigration Crackdown*, N.Y. TIMES, July 2, 2017.

123. *See* Delgado, *supra* note 121, at 1, 20.

defense of group rights against hate speech.[124] That defense, in turn, generates powerful countervailing forces emanating from the free-speech side which point to the opposite conclusion and highlight how unwise it is to move too far in that direction. And so the social dialectic proceeds, one liberty-enforcing period followed by one of civil rights activism, and so on. We should be careful to understand how the dialectic works and remember that each side's values are part of the vital course of human events.

If we are to have a legal system that serves all its citizens, we must take care to discern what is uppermost in the scale of human and societal need at a given time. This is especially so for values, such as free speech and equality which are sometimes opposed. Otherwise, we may fall into the dangerous trap of succumbing to the loudest voice when, sometimes, it is the softer one that most deserves our attention.

124. *See, e.g.*, Lindy West, *Save the First Amendment: Don't Let Internet Trolls Destroy Free Speech*, N.Y. TIMES, July 2, 2017 (noting how many cultural critics find themselves besieged by internet trolls accusing them of violating the trolls' free speech rights, namely to engage in racist or misogynist video games and chat groups with impunity).