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"The Thought that we Hate": Regulating Race-Related Speech on College Campuses

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“The Thought that we Hate”:
Regulating Race-Related Speech on College Campuses

by

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A thesis submitted in partial fulfillment
of the requirements for the degree of
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ABSTRACT

In this essay I explore efforts at regulating race-related speech on publicly funded colleges and universities. In the first section, I present the scope of the current debate about the topic: what speech is, contexts in which it is found, etc. In the second section, I present the case for unrestricted speech on campuses for the advancement of knowledge and social progress. The third section addresses standard problem cases for free speech like the non-scientific nature of racist epithets, existential threats to the university, and involuntary exposure to racist speech. The fourth section explores arguments for regulating speech coming from critical race theorists and those who question the cultural narrative surrounding speech these days. In the fifth section, I lay bare the irreconcilable incompatibilities of free speech proponents and advocates of speech restrictions in several areas. The conclusion points the way forward toward by calling attention to the lingering questions about the values of knowledge and social progress.

INTRODUCTION

In the summer of 2017, University of Virginia graduate, Jason Kessler, organized a “Unite the Right” event as a protest of Charlottesville’s removal of a statue of Confederate General Robert E. Lee from the city’s “Emancipation Park.” The local chapter of *Black Lives Matter* heard about the event months in advance and began planning counter protests against what they imagined would be unacceptable and immoral hate speech. Word spread, and Kessler was joined by Richard Spencer, a self-proclaimed political “identitarian” (i.e., a supporter of white identity politics) and creator of the *Alt Right*, a group the *New York Times* describes as “a coalition of old and new white supremacist groups [e.g., neo-Nazis, the Ku Klux Klan, neo-Confederates, or independent militia members] connected by social media and emboldened by the election of Donald J. Trump.”¹ On the day of the protest, violence erupted between *Alt Right* protesters and *Black Lives Matter* counterprotesters, and Spencer received some of the fallout: “As we were going in, I was sprayed with Mace... Someone jumped out of the crowd and I got it in the face.”² In one particularly disturbing moment, a young member of Spencer’s group, James Alex Fields, Jr., used a vehicle as a lethal weapon, driving a car into a group of counterprotesters. Fields killed one and injured nineteen. Reflecting later on the event, Spencer described it as “a huge moral victory in terms of the show of force.”³

¹ Richard Fausset and Alan Feuer, “Far-Right Groups Surge Into National View in Charlottesville,” in *New York Times* (August 13, 2013). Online at: <https://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html>.

² Fausset and Feuer, “Far Right Groups.”

³ Fausset and Feuer, “Far Right Groups.”

Similar events have taken place on college campuses throughout the country, sometimes involving the same people. Two months after Charlottesville, Spencer planned to visit the University of Florida, which caused such fear of violence and injury that Governor Rick Scott declared a “state of emergency.”⁴ In preparation, the University of Florida and the city of Gainesville spent well over half a million dollars on extra security for fear of a violent clash between Spencer and his cohorts on one side and two thousand protesters on the other side.⁵ When Spencer finally took the stage on October 19, 2017, his voice was drowned out by yelling protesters. The night devolved, and Spencer cut his allotted time short. Other colleges took a different approach than the University of Florida, not even permitting Spencer to speak on their campuses, like Ohio State University, which denied Spencer a platform by citing security concerns.⁶

The problem addressed by this essay is the great conceptual divide on speech issues on college campuses, especially on issues related to race. Universities do not have a unified vision of what kinds of speech are acceptable and/or should be protected, and the fact that conference papers, articles, books, and public lectures continue to argue the topic stands as evidence of the fact that the issue is neither settled nor unimportant.⁷

⁴ Lori Rozsa and Susan Syrugla, “Florida Governor Declares State of Emergency in Advance of Richard Spencer Event,” in *The Washington Post* (Oct. 16, 2017). Online at: <https://www.washingtonpost.com/news/grade-point/wp/2017/10/16/florida-governor-declares-state-of-emergency-in-advance-of-richard-spencer-event/>.

⁵ Graham Lanktree, “Richard Spencer Shouted Down in Florida, Cuts His Speech Short,” in *Newsweek* (Oct. 20, 2017). Online at: <https://www.newsweek.com/richard-spencer-shouted-down-florida-cuts-his-speech-short-689182>.

⁶ Associated Press, “Ohio State Sued over Refusal to Let White Nationalist Richard Spencer Speak,” in *ABC News Online* (Oct. 22, 2017): Online at: <http://abcnews.go.com/US/wireStory/ohio-state-sued-refusal-white-nationalist-speak-50645877>. See also Nick Roll, “Richard Spencer and a Tale of Two Publics,” in *Inside Higher Ed* (October 16, 2017), Online at: <https://www.insidehighered.com/news/2017/10/16/ohio-state-university-cincinnati-diverge-how-answer-richard-spencer>.

⁷ To note just five books that were published recently: Floyd Adams, *The Soul of the First Amendment* (New Haven, CT: Yale University Press, 2017); Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (New Haven, CT: Yale University Press, 2017); Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (New Haven, CT: Yale University Press, 2017); Sigal R. Ben-Porath, *Free Speech on*

In this essay, I will present some arguments from both sides of the free speech debate and some difficult cases to illustrate why the issue is unsettled. In laying out and comparing their disparate views, I will suggest that no progress can or will be made in discussions about speech because of intractable, fundamental disagreements about the context of the discussion and the methodology appropriate to it. That is to say, there are strong disagreements about speech restrictions because the foundations of both camps are rooted in different soils. Until those assumptions are uprooted or replaced, the disagreement will continue.

The essay is divided into five sections. The first part defines the terms and boundaries of the debate: what speech is, contexts in which it occurs, and the momentum of the conversation regarding regulation of it. In the second section, I present the liberal argument for free speech, which highlights the value of maximizing liberty for the advancement of human knowledge and promoting social progress. (Here and throughout this essay, “liberal” refers to “liberty-valuing” and “liberty-promoting,” not “politically liberal,” which I will refer to as the “left” or “far left.”) The liberal will argue that schools that suppress any idea, word, or phrase – no matter how hateful or bigoted – are forfeiting that which is their greatest asset: the free and open expression of ideas. The third section problematizes this liberal argument through some problem cases, conditions that are often mentioned to justify restrictive speech codes: the non-scientific nature of racial epithets, existential threats, and involuntary exposure to racist speech. In the fourth section, I will extend the critique of free speech to include critical race theorists and those who question the concept of a “war on free speech.” This section will demonstrate that advocates for speech restrictions contest the idea that there is “neutral” ground on which meaningful discourse can take place. In the fifth section, I lay bare the irreconcilable and entrenched poles by

Campus (Philadelphia: University of Pennsylvania Press, 2017); and Keith Wittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton: Princeton University Press, 2018).

evaluating the extent to which moderate proposals succeed in satisfying those on both sides. Finally, in the Conclusion, I offer some remarks on the nature of inquiring into race-related matters and how this, too, evidences an impasse.

THE UNIQUENESS OF SPEECH AND THE MOMENTUM OF THE DEBATE

This is a pivotal time in the history of speech debates. A recent Gallup Survey reveals that present-day college students do not see a strong need to protect free speech, and the momentum seems to be heading in the direction of more restrictions, not fewer. In that study, “when forced to choose, a majority of students said that diversity and inclusivity were more important than free speech.”⁸ Although the answers college students gave fragmented along political and/or racial lines at times, “a majority of students in every demographic drew a line for hate speech, saying that it does not deserve First Amendment protection.”⁹ Students are increasingly unwilling to countenance racial stereotypes and slurs, and believe they should be restricted. In situations where a speaker may offend with his/her words, many students support “safe spaces for those who feel upset or threatened” while having other locations that can act as “free speech zones where protests or partisan proselytizing is explicitly allowed.”¹⁰ College students blame the cause of the outrage on the media, specifically *social* media, “with about two in three saying that platforms like Facebook and Twitter should take responsibility to limit that speech.”¹¹ Finally, broader than campus speech debates, students in general “lost confidence in

⁸ Niraj Chokski, “What College Students Really Think About Free Speech,” in *The New York Times* (March 12, 2018): Online at: <https://www.nytimes.com/2018/03/12/us/college-students-free-speech.html>.

⁹ Niraj Chokski, “What College Students Really Think About Free Speech,” online.

¹⁰ Niraj Chokski, “What College Students Really Think About Free Speech,” online.

¹¹ Niraj Chokski, “What College Students Really Think About Free Speech,” online.

the security of the five rights enumerated by the First Amendment,”¹² of which free speech is one example.¹³

Proponents of free speech argue that the desire for speech restrictions displays a shortsightedness about all the kinds of speech that may be affected by such restrictions. In addition to hate speech, the category of “speech” also includes written or published work, demonstrations, arguments, counterarguments, etc. And these types of speech are found in a variety of contexts: artistic endeavors, university lectures, public demonstrations, flag burnings, picketing events, church services, community centers, etc.

However, advocates of speech restrictions compare United States policies with other countries, and they encourage a rethinking of the First Amendment in light of speech codes elsewhere. Simply put, other countries do not offer the leeway the United States does to speak one’s mind without threat of repercussions, and they balance free speech against other social goods. This point is noted by both Susan Brison and David van Mill. According to Brison, in other countries, “free speech rights are constrained by other rights, such as the rights to dignity, respect, and equality; and laws restricting hate speech, such as speech inciting racial hatred and Holocaust denial, are relatively uncontroversial.”¹⁴ Van Mill agrees, arguing that “outside of the United States of America speech does not tend to have a specially protected status and it has to compete with other rights claims for our allegiance.”¹⁵ Other countries do not grant wide protections when it comes to speech. In early 2018, for example, a man from Scotland taught his dog to imitate a Nazi salute, which he recorded and posted to YouTube. The man was

¹² Niraj Chokski, “What College Students Really Think About Free Speech,” online.

¹³ The results of this poll can be found directly at the Knight Foundation, who partnered with Gallup on this survey. See their results here: <https://www.knightfoundation.org/reports/free-expression-on-campus-what-college-students-think-about-first-amendment-issues>.

¹⁴ Susan Brison, “Hate Speech,” in *The International Encyclopedia of Ethics* (H. LaFollette, ed.; Malden, MA: Blackwell Publishing, 2013), 2332.

¹⁵ David van Mill, “Freedom of Speech,” in *Stanford Encyclopedia of Philosophy* (Winter 2017 edition; E. N. Zalta, ed.). Found online at: <https://plato.stanford.edu/archives/win2017/entries/freedom-speech/>.

subsequently convicted of a hate crime.¹⁶ In consideration of the fact that the United States has a decidedly liberal perspective on speech, “most Anglo-American philosophical writing about hate speech has discussed whether – and, if so, why – this position is justified.”¹⁷

The First Amendment to the U.S. Constitution offers U.S. citizens several expressive liberties. It reads as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the *freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Because publicly-funded colleges and universities are bound to a greater degree by the Constitution than private universities – where ideological or religious commitments give Constitutional protections against governmental intervention – courts have ruled that public universities cannot prioritize other values over and above the First Amendment protections that speech is given unless the situation demands it. Further, the U.S. Supreme Court has ruled that a public university ought not discriminate on the basis of what will be said.¹⁸ These rulings do not require that university administrators, faculty, staff, and students accept ideas that they find to be hateful and bigoted. Such pronouncements and protestations are entirely reasonable, and helpful to demonstrate that a specific individual or institution does not stand for that which is permitted under the banner of “free speech.”

Advocates of speech restrictions go further, however, than merely balancing speech against other social goods; they seek to limit speech in major ways: “Our thesis is that conventional First Amendment doctrine is most helpful in connection with small, clearly

¹⁶ Cleve R. Woosen, Jr., “For weeks he trained a dog to do a Nazi salute. The man was just convicted of a hate crime,” in *The Washington Post* (March 21, 2018). Online at: https://www.washingtonpost.com/news/the-intersect/wp/2018/03/21/for-weeks-he-trained-a-dog-to-do-a-nazi-salute-the-man-was-just-convicted-of-a-hate-crime/?utm_term=.2ff7e9f06e4d.

¹⁷ Brison, “Hate Speech,” 2332.

¹⁸ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), *Keyishian v. Board of Regents, State University of New York*, 385 U.S. 589 (1967), and *Healy v. James*, 408 U.S. 169, 180 (1972).

bounded disputes,” not large scale matters, argue Richard Delgado and Jean Stefancic.¹⁹ But speech isn’t able to deal with more substantive problems, they assert, like “systemic social ills, such as racism or sexism, that are widespread and deeply woven into the fabric of society. Free speech, in short, is least helpful where we need it most.”²⁰

If today’s college students take positions of power and responsibility in American society in the years to come and follow through with limiting what can be said, the liberal points out that such regulations could never decisively or pre-emptively thwart hate speech. This is due to the uniqueness of speech itself, as noted by Van Mill.²¹ Unlike other restrictions on liberty, governmental authorities cannot fully eradicate one’s freedom to speak. If a government were serious about speed limits on highways, for example, it could prohibit auto manufacturers from making vehicles capable of reaching speeds deemed too fast. The state could, in theory, remove the ability of a person to drive, say, ninety miles per hour on public roads by removing the ability of people to obtain vehicles capable of reaching that speed. Speech, however, is unable to be regulated in quite the same way. Only if a state were to “remove our vocal cords” could they prevent citizens from exercising this freedom, says Van Mill: “A government can limit some forms of free expression by banning books, plays, films, etc., but it cannot make it impossible to say certain things. The only thing it can do is punish people *after* they have spoken.”²²

So the argument for regulating speech based on potential harms, from the liberal’s perspective, would need to include a sufficient evidentiary basis for believing that regulations and punishments would act as a sufficient deterrent against hate speech. But proponents of

¹⁹ Richard Delgado and Jean Stefancic, “Images of the Outsider in American Law and Culture: Can Free Expression Remedy the Systemic Social Ills?” in *Critical Race Theory: The Cutting Edge*, 225.

²⁰ Richard Delgado and Jean Stefancic, “Images of the Outsider in American Law and Culture: Can Free Expression Remedy the Systemic Social Ills?” in *Critical Race Theory: The Cutting Edge*, 225.

²¹ Van Mill, “Freedom of Speech.”

²² Van Mill, “Freedom of Speech.”

extreme speech regulations on college campuses do not accept that they themselves bear the burden of proof, and some go further to suggest that a system that requires evidence and proof is already inherently racist, evidence of a white, male, heteronormative bias (more on this below).

THE CASE FOR FREE SPEECH ON CAMPUS

In this section, I will provide three arguments from those favoring liberty on speech issues: first, that maximizing liberty has inherent value; second, that maximizing liberty has instrumental value insofar as it contributes to the advancement of knowledge; and third, that the advancement of knowledge made possible by free speech contributes to social progress.

First, free speech is seen as an inherent good by some free speech proponents. Although there is some debate on the motivations of the founding fathers,²³ a general principle informing their crafting of the First Amendment is that political liberty is a higher value than nearly every other political value. Philip Pettit²⁴ provides a helpful clarification that illustrates the nature of freedom and why it is better than non-freedom. In response to those who argue that that freedom is non-interference, i.e., that people are “free” when they can act according to their own wishes without fear or threat of others interfering, Pettit suggests that this definition of freedom does not go far enough. Not only should others *not* get in one’s way, but they should not be *able* to get into one’s way. Freedom requires that “you must be able to exercise such basic or fundamental liberties, as they are usually called, without having to answer to any master or dominus in your

²³ Anthony Lewis, *Freedom for the Thought that We Hate: A Biography of the First Amendment* (New York: Basic Books, 2010). Lewis is conspicuously silent on the Founders’ “original intent” or “original understanding,” and instead argues that the meaning of the First Amendment is largely “judge-made” law of the past 100 years. See also the review by Richard Fallon, “Freeing Speech: How Judge-Made Law Gave Meaning to the First Amendment,” in *Harvard Magazine* (May/June 2008), Online at: <https://harvardmagazine.com/2008/05/freeing-speech>.

²⁴ The Pettit texts used in this essay are: Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford University Press, 1997), *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge: Polity Press, 2001), *On the People’s Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012), and *Just Freedom: A Moral Compass for a Complex World* (New York: Norton, 2014).

life.”²⁵ Freedom is a function not only of the actions of other people, but also of the powers of other people. Freedom, to put the matter simply, is *non-domination*.

With speech issues, the First Amendment can act as a check on governmental domination and provides the citizens of the United States the “right” to speak their minds. Speech is not alone in this endeavor, however. The entire Constitution can be read as a plan to disperse power widely so that no one person or branch rises to the level of a despot. Presumably, freedom of speech limits abuses of power just as much as elections, term limits, the right to bear arms, freedom of the press, and due process. The founders anticipated that people are going to use that freedom in all sorts of ways: some bad, some good. Though some will use freedom poorly, that does not make giving them the choice a bad thing. The worse thing, proponents of maximizing liberty would say, is forcing a person to do or say or believe something. Liberty and autonomy are seen as inherent goods by some who argue for unrestricted speech codes.

Free speech was seen by the founders of the United States, especially Madison, who wrote the Bill of Rights, as a *first freedom* of paramount importance; it is so important, from the liberal’s perspective, that we are willing to countenance evil remarks and offensive uses of it. We put up with offensive speech, the argument goes, because that state of affairs in which people are occasionally offended is preferable to living without freedom. This makes the First Amendment protection analogous to the “free will” theodicy in philosophy of religion, according to which God granted humans the freedom to choose their religious commitments. Giving them freedom was preferable to a state of affairs in which liberty was non-existent. Moreover, although the First Amendment protects speech against censorship, there is no such provision in the Constitution stating the opposite. There is no enumerated “right to *not* be offended.” Even since

²⁵ Pettit, *Just Freedom*, Kindle location: 73-74.

the founders, subsequent court decisions have agreed that free speech should occupy a “privileged position” among the rights (stretching back at least to *Palko vs. Connecticut*).

Second, the liberal views free speech as not only an inherent good but also an instrumental one. One of the instrumental goods afforded by free speech is knowledge itself. Proponents free speech on college campuses argue that the advancement of knowledge depends on permitting *any* expression or concept to be advanced and debated. While it is entirely reasonable to *want* to silence white supremacists and advocates of hate, liberals will argue that advocates for censorship fail to recognize that only through *more* speech are these inferior ideas ferreted out and discarded. When speech is unlimited, scholars are unafraid to turn over any stone in search of the truth, as Thomas Jefferson said of the institution he founded in his hometown of Charlottesville, the University of Virginia: “This institution will be based on the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.”²⁶

The argument for free speech based on the advancement of knowledge has several premises, each of which deserves mentioning and exploring. One of these premises is that the advancement of knowledge depends on non-conformism and creativity, both of which are possible in free speech contexts but blunted in conditions of censorship. This point is made by John Stuart Mill in *On Liberty*, which he wrote in response to the threat of an old, monarchic tyranny being replaced by a new kind of tyranny made possible by democratic governments, what he called the “tyranny of the majority” (borrowing language from Tocqueville’s *Democracy in America*). The masses could potentially coerce others through “compulsion and control, whether the means used be physical force in the form of legal penalties, or moral

²⁶ Letter from Thomas Jefferson to William Roscoe (December 27, 1820). A. E. Bergh, ed., *The Writings of Thomas Jefferson* (Washington, DC: The Thomas Jefferson Memorial Association, 1907) vol. 15: 302. Summary online at: <https://www.loc.gov/exhibits/jefferson/75.html>.

coercion of public opinion.”²⁷ The lack of diverse opinions is stifling, and it is broader than legal issues: Christopher Macleod describes “moral coercion” as “informal mechanisms of social pressure and expectation” that “could, in mass democratic societies, be all-controlling. Mill worried that the exercise of such powers would lead to stifling conformism in thought, character, and action.”²⁸ When only one line of thinking dominates or hegemonically controls the discussion, new ideas are not heard. Only freedom in thought and communication, the liberal will argue, allows us to test views in public, subjecting them to public scrutiny and the informed opinions of peers. We should begin with the presumption in favor of liberty, for Mill, because freedom of speech, communication, and thought is vital for a society that desires to push its ideas to their logical conclusions and evaluate alternative points of view.

Another premise on which the knowledge point rests is human intellectual fallibility. Mill, again, offers a defense of this idea in *On Liberty*. It displays courage to welcome a diversity of viewpoints, says Mill: if we do not have freedom of speech, “the price paid for this sort of intellectual pacification is the sacrifice of the entire moral courage of the human mind.”²⁹ Moreover, humans are deeply fallible creatures who need the corrective thinking of other free people. Mill puts it this way: “That mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognizing all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions.”³⁰

²⁷ Mill, *On Liberty*, 13.

²⁸ Christopher Macleod, “John Stuart Mill,” in *The Stanford Encyclopedia of Philosophy* (E. N. Zalta, ed.; Fall 2018 edition). Online at: <https://plato.stanford.edu/archives/fall2018/entries/mill>.

²⁹ Mill, *On Liberty*, 40.

³⁰ Mill, *On Liberty*, 68.

These premises build upon one another and they create a third premise: If humans are fallible, and if knowledge is the sort of thing that is progressive and advances over time, then there are times when repressing an idea may distort the truth or prevent it from coming out. Mill believes that unrestricted free speech should be the norm because it can lead to truth: “the opinion which it is attempted to suppress by authority may possibly be true,”³¹ but if a person refuses to at least consider alternative points of view, s/he ignores the brute fact of his/her own fallibility. And further, if a person is *unwilling* to consider unpopular views, this reveals much about the insecurity with which they hold their positions. If a censor disallows free speech, s/he reveals his/her deep intellectual insecurity by being threatened by the likelihood that the censor is mistaken. Another way this might work, according to Mill, is this: we may not subject falsehoods to scrutiny and, therefore, risk perpetuating *untruth*. The truth, for Mill, has *usefulness* for the progression of humankind, and can emerge best in a context of absolute freedom of speech.³²

Joel Feinberg³³ presents a similar idea in the second volume of his magisterial *Moral Limits of the Criminal Law* series, *Offense to Others*. He notes that while it is “important to each individual to voice his own opinion about matters of public policy,” it is “also important to him that he have fair access to the opinions and arguments of all his fellows, and important to the whole community that all possible roads to truth be left open lest our leaders become committed to insufficiently examined policies, with disastrous social consequences.”³⁴ For Feinberg, these other opinions include the ones we normally associate with bigotry and hate: “It is necessary to emphasize here... that unpopular, unorthodox, and extreme opinions, no less than any others,

³¹ Mill, *On Liberty*, 21.

³² Mill, *On Liberty*, ch. 2.

³³ The Feinberg texts included in this essay are: *The Moral Limits of the Criminal Law* (4 vols.; New York: Oxford University Press, 1984-1988), including *Harm to Others*, *Offense to Others*, *Harm to Self*, and *Harmless Wrongdoing*. I also present material from Feinberg’s *Social Philosophy* (Englewood Cliffs: Prentice Hall, 1973) and *Rights, Justice, and the Bounds of Liberty* (Princeton, NJ: Princeton University Press, 1980).

³⁴ Feinberg, *Offense to Others*, 38.

need their spokesmen, in order that our chances of discovering truths and making wise decisions be increased.”³⁵ What about situations in which a person will be severely offended? Feinberg does not draw a line there. Rather, he says “no amount of offensiveness in an expressed opinion can counterbalance the vital social value of allowing unfettered personal expression.”³⁶

The argument for the utility of maximizing liberty for the advancement of knowledge is based on the epistemic needs of knowledge (non-conformism and creativity), human fallibility, and the possibility that censorship will suppress views that are either fully true or partially true. Mill was concerned with maximizing liberty on speech issues for this very reason, and his whole argument is geared toward that “liberal” end: “If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.”³⁷ So far should liberty reach that if the vast majority believed one thing and only one person believed another, freedom of speech would be a positive good if for only that one person. Mill says, “If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.”³⁸ We can summarize Mill’s view of the utility of freedom in thought, speech and expression in this way: humans are intellectually fallible, so limiting freedom of speech risks silencing a view or part of a view that might be (wholly or partially) true, so all views need to be expressed and tested to confirm their truth and keep inquiry from becoming stagnant.

On college campuses in particular, this sort of liberty with respect to speech is paramount from the liberal perspective, as campuses are the primary place in which knowledge is sought

³⁵ Feinberg, *Offense to Others*, 38.

³⁶ Feinberg, *Offense to Others*, 39.

³⁷ Mill, *On Liberty*, 20n1.

³⁸ Mill, *On Liberty*, 21.

and dispersed through classes, research, publications, and presentations. As stated by Erwin Chemerinsky and Howard Gillman, “universities contribute to society when faculty are allowed to explore the frontiers of knowledge and suggest ways of thinking that may be considered crazy, distasteful, or offensive to the community.”³⁹ The stakes could not be higher for knowledge, they say: “When people ask the censor to suppress bad ideas in higher education, many important and positive ideas never have the chance to flourish, and many dangerous or evil ideas are allowed to thrive because they are not subjected to evaluation, critique, and rebuttal.”⁴⁰ Chemerinsky and Gillman argue that censorship is antithetical to the advancement of knowledge, for “no belief should be treated as sacrosanct... [and] we must be willing to subject all ideas to the test.”⁴¹

Finally, professors who advocate for free speech and also care about their teaching will argue that the “advancement of knowledge” argument is broader than researchers and professors; it also includes student knowledge. Institutions of higher education are not only in the business of educating toward the goal of placing students in jobs, but also teaching them valuable character traits and dispositions. Chief among them is the virtue of intellectual humility. Professors are often charged with teaching students to “think critically,” and many view their position as a vocational mission, not just a job. Many professors wish that their students become better people, not just more educated, as a result of their classes. And allowing all sorts of content to be expressed in class, including content that makes students uncomfortable, teaches the valuable intellectual trait of humility. Dogmatism is the risk when speech is limited: old ideas can become calcified, and critical, creative thinking is less possible. If censorship of unpopular ideas is permitted, if some ideas are silenced, the truth may get muted, as Mill worried. It is

³⁹ Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (New Haven, CT: Yale University Press, 2017), 62.

⁴⁰ Chemerinsky and Gillman, *Free Speech on Campus*, 62.

⁴¹ Chemerinsky and Gillman, *Free Speech on Campus*, 62.

unthinkable to the liberal free speech advocate that this is a contestable proposition: certainly, s/he argues, none of us is so arrogant as to think that all of our current beliefs or viewpoints are correct. Only free and unlimited speech subjects all ideas to debate and scrutiny.

Now, in addition to (a) the inherent value of maximizing liberty, which (b) contributes to the advancement of knowledge, a third case for free speech relates to (c) social progress. The liberal's argument here is a simple one: social progress is only possible in an environment in which everyone is given a chance to voice their opinion on perceived injustices. Free speech is seen as the condition for the possibility of other freedoms. On college campuses, speech permits the expression of potential injustices on campus and beyond. This is the argument for free speech as a *first* freedom, upon which other freedoms depend. As noted above, speech has a "preferred position" among the rights enumerated in the U.S. Constitution. As Supreme Court Justice Benjamin Cardozo opined in *Palko vs. Connecticut*, "Freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom."⁴²

The assumption of the "social progress" defense of free speech is that humans are bearers of dignity, and the argument can be made in both deontological and consequentialist ways. Not only our self-understanding (i.e., knowledge), but also our self-realization or self-actualization depends on having freedom of speech. The social progress argument depends on the advancement of knowledge; once we learn the truth, we would do well to align our lives with it, the liberal argues. Again, Mill is instructive here. Human individuality, for Mill, is deeply connected to its dignity. Lest his argument be understood as a kind of Kantian appeal to humans as "ends in themselves," Mill mentions that his advocacy for free speech is as a result of his utilitarian views: "It is proper to state that I forego any advantage which could be derived to my

⁴² Robert C. Post, "Subsidized Speech," in *Yale Law Journal*, 198 (1996). Online at: https://digitalcommons.law.yale.edu/fss_papers/198.

argument from the idea of abstract right, as a thing independent of utility.”⁴³ That is to say, his views on liberty in speech are grounded in his utilitarian ethics because only by permitting nearly⁴⁴ all speech are we able to (a) root out incorrect views and continue better ones (the knowledge point), but also (b) bring our progressive species closer to the greatest good or happiness for the most people.

Not only is knowledge itself at stake, for the liberal, but also the forward motion of humanity in the world. We are a progressive species, argues Mill. For although humankind can create great works of art, more than those “the first in importance surely is man himself.”⁴⁵ For Mill, “Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.”⁴⁶ That is to say, progress of our species depends on permitting society and its members to test out ideas, with the better ones extending like branches of a tree. Pettit puts the point differently, but his comments on speech can be taken as a defense of seeing speech as a basic right. Pettit said as recently as March 2017 that speech is one of the “upstream” liberties upon which downstream liberties depend: rather than merely being “unhindered,” speech ought to be “protected (and, as we may assume, consequently unhindered).”⁴⁷

When examples are given to defend the liberal perspective on speech, they usually involve the advancement of knowledge and social progress made possible by liberal speech

⁴³ Mill, *On Liberty*, 14.

⁴⁴ Here, the qualification “nearly” refers to Mill’s “corn dealer” scenario discussed below.

⁴⁵ Mill, *On Liberty*, 71.

⁴⁶ Mill, *On Liberty*, 72.

⁴⁷ Pettit, “Two Concepts of Free Speech,” Lecture delivered on March 27, 2017 at Australian National University. Announcement online at: <http://philosophy.cass.anu.edu.au/events/philip-pettit-anuprinceton-two-concepts-free-speech>. Philip Pettit, “Two Concepts of Free Speech,” in *Academic Freedom* (J. Lackey, ed.; New York: Oxford University Press, 2018), ch. 4. Pettit sent me the unedited manuscript, which is subject to change in the final, edited version.

codes. Here I will give only two, selected because they blend these two instrumental reasons for permitting all sorts of speech on college campuses: these two cases, both involving race, are thought to advance knowledge and promote social progress simultaneously.

First, in March of 2017, hundreds of Middlebury College students confronted an author who had been invited to speak on campus.⁴⁸ Charles Murray, along with Richard Herrnstein, co-authored *The Bell Curve: Intelligence and Class Structure in American Life*⁴⁹ in the 1990s, which argued among other things that inherent racial differences explain some of the disparities in educational and vocational success. This thesis is seen as an affront to those of us who maintain strong notions of racial equality, but liberals argue that without freedom of speech, Herrnstein's and Murray's conclusions may have gained traction and converted those who were on the fence about its claims. Some commentators have noted that "it would have been tempting to prevent such an idea from being expressed at all."⁵⁰ *The Bell Curve* received considerable negative feedback. The authors were charged with racism: "Many critics found deeply offensive the idea that blacks in America were overall less successful than whites not because of persistent discrimination, but because they were less intelligent."⁵¹

Herrnstein's and Murray's arguments, which were evaluated subsequently by a host of faculty members and academic organizations housed at a number of schools – e.g., Stephen Jay Gould⁵² and the American Psychological Association⁵³ – were found to be severely lacking in

⁴⁸ Katharine Q. Seelye, "Protesters Disrupt Speech by 'Bell Curve' Author at Vermont College," in *The New York Times* (March 3, 2017). Online at: <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html>.

⁴⁹ Charles Murray and Richard Herrnstein, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: Free Press, 1994).

⁵⁰ Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (New Haven: Yale University Press, 2017), 63. Note: Chemerinsky and Gillman do *not* endorse the censorship of this idea but rather give it as an example of what happens when ideas are not subject to scholarly debate.

⁵¹ Chemerinsky and Gillman, *Free Speech on Campus*, 63.

⁵² In the revised and expanded edition of *The Mismeasure of Man* (New York: Norton, 1996), Gould claimed that the entire premise of the book was tenuous at best, as it rested on a number of unproved assumptions.

merit. In this case, liberals argue that potentially racist ideas *could have* exercised greater influence had they not been discredited by subsequent scholarship. Free speech was vindicated, they say, as it made the advancement of knowledge and social progress possible in this case. Conversely, in a different situation, someone may have attempted to refute a truthful idea, but the critique of the original idea may have failed. In either situation, the advancement of knowledge and social progress depend on maximizing liberty by having a free and open marketplace of ideas on college campuses.⁵⁴

A similar second example is given in Stephen Carter's *Reflections of an Affirmative Action Baby*,⁵⁵ in which Carter describes an event held by his undergraduate alma mater. Stanford University decided to give a platform to physicist and Nobel Laureate, William Shockley, who for reasons unknown to Carter and others, left his primary academic field and began publishing and speaking about the genetic basis of racial inequality, ideas that many on Stanford's campus considered "dangerous." Like Herrnstein and Murray, Shockley's main thesis was that "white people on average score higher on intelligence tests because, on average, they are more intelligent, and they are more intelligent because they are born that way."⁵⁶ Conversely, "the mean intelligence of black people is significantly below that of white people," and "this result is so heavily influenced by genetic inheritance that it is folly to imagine that environmental factors can do much to change it."⁵⁷ Shockley's subsequent thought-experiment-turned-policy-proposal asked people to consider whether human progress or evolution demands that the

⁵³ See Ulric Nessler, et al., "Intelligence: Knowns and Unknowns," in *American Psychologist*, 51 (1996), 77-101, in which the authors explore the possibility and likelihood that other factors like culture and class are primary, not race.

⁵⁴ For details on the negative response to *The Bell Curve* in the academy, see Nicholas Lemann, "The Bell Curve Flattened: Subsequent Research has Seriously Undercut the Claims of the Controversial Bestseller," in *Slate Magazine* (January 18, 1997). Online at: <https://slate.com/news-and-politics/1997/01/the-bell-curve-flattened.html>.

⁵⁵ Stephen L. Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1991).

⁵⁶ Carter, *Reflections*, 182.

⁵⁷ Carter, *Reflections*, 182.

government provide financial stipends to less intelligent people to convince them to *not* reproduce.

Carter and his fellow students sat in the audience before the event, a debate between Shockley and two others, nervous that the claims might be irrefutable. One of the debaters, a “rabble-rousing psychologist who happened to be black,” was unable to refute Shockley’s claims, which left many in the audience, Carter included, dismayed. The other debater, “a world-renowned geneticist who happened to be white... in his turn made mincemeat of Shockley’s arguments – such utter mincemeat,” Carter notes, “that I began to wonder what all the talk of dangerousness was about.”⁵⁸ This was a moment of clarity for Carter, who later reflects on the event:

“The point is not that Shockley’s arguments were correct – they were nonsense – but rather that the decision to dismiss them, if indeed they were to be dismissed, should have been made on the ground of scientific error, not on the ground of racist effect. Put otherwise, the mere fact that his theories were unattractive should have had no bearing on whether they were accepted as true.”⁵⁹

The liberal points out that only through reasoned debate – made possible through free and unlimited speech – were students able to see the *untruth* of the points of view being advocated. The socially conscious liberal takes a victory lap in situations like these: Middlebury and Stanford students, faculty, and other attendees learn that there are good reasons for rejecting racist views (social progress) but they were also equipped with the requisite scientific data and arguments to illustrate the nonsense of such views (advancement of knowledge). I shall have more to say about these sorts of arguments below, but the point here is that they are offered by free speech proponents as evidence of the value of free speech for knowledge and progress.

⁵⁸ Carter, *Reflections*, 184.

⁵⁹ Carter, *Reflections*, 185.

STANDARD PROBLEM CASES FOR FREE SPEECH

There are many potential responses to the arguments from liberty, knowledge, and progress that deserve exploration. Three will be explored in this section, each of which problematizes the liberal perspective by raising a counterexample thought to override the value of knowledge or progress in favor of speech codes. These arguments claim that speech can and should be limited in situations where (a) there is no epistemic value to the speech being uttered, (b) institutional integrity is at stake, or (c) the victim is unable to escape the perpetrator's insults. I will address each in what follows.

First, some argue that racial insults and epithets have no epistemic value whatsoever. Otherwise expressed, insofar as the argument for the free speech depends on the advancement of knowledge, which itself depends on a broad-reaching understanding of how knowledge works, a potential criticism of this point could be raised here regarding the utility for knowledge of racial epithets and insults, i.e., hate speech. Critics of free speech on campus have argued that yelling the "n-word" at a person of color has only negative consequences, no positive ones that contribute to knowledge.

Liberals who value free speech would offer a shaky, qualified response. While certainly less obviously applicable to the advancement of knowledge than, say, scientific studies of a controversial nature, even hostile outbursts or racial slurs can be fodder for academic and/or scholarly inquiry. There are at least some relevant and timely observations that can be made in expressions of racial hatred, free speech proponents would argue. For example, if an informed

viewer has requisite knowledge of the person doing the yelling or insulting, one can ascertain important connections about the impetus for hate itself: where it comes from, how it is expressed, what it reveals about human nature, and how psychological coping mechanisms against a changing world are manifested in real-life situations. If a witness or victim has a chance to follow the hate-speech with a question, thereby giving the hate-speaker the opportunity to put into argument his/her hate, s/he can learn about a distinct political or ideological perspective s/he did not have access to before the hate was spoken. The liberal argues a broader pedagogical point here: any instance, any situation, any phrase, any spoken word, is an opportunity for the advancement of knowledge. Every situation is a teachable moment, “teachable” referring not to the content of the hate speech but rather the contexts that give rise to hate.

What is more, if racial slurs are met not with further anger and violence but with confidence and a desire to understand, some liberals believe this may go much further in changing the minds that had been distorted into believing false ideas about other races. Here the liberal points to the success of non-violent protests of the 1950s and 1960s in the United States, or India’s struggle for self-rule in the early twentieth century, as examples of the power of treating hostile “others” as bearers of dignity who can be responded to with respect. The contemporary “restorative justice” movement uses these same principles to put perpetrators and victims into conversation with one another, which has had some transformative effects when used in school settings.⁶⁰

Second, critics of absolutist libertarian perspectives on speech argue that speech should be limited in situations where the permitting free speech could lead to the dismantling of the very institution in which the speech occurs. I will refer to this as the “existential threat” argument. The

⁶⁰ Maisa Winn, *Justice on Both Sides: Transforming Education through Restorative Justice* (Cambridge: Harvard Education Press, 2018).

U.S. courts have broadly upheld speech restrictions in times when voices of dissent were sufficient to threaten the very institution that the leaders were in charge of protecting. In times of war, for example, United States politicians have limited the liberty of citizens for fear of undermining the existence of the country, including limiting what people can say.

These measures were taken as early as the founding of the Republic and continued until the latter half of the twentieth century. Leaders attempted to deal with a major threat to the new Union in the passage of the Alien and Sedition Acts (1798), which President John Adams signed into law. During World War I, the Espionage Act of 1917 limited dissent from those opposing the draft, which birthed a 1919 response written by Oliver Wendall Holmes, who argued that there are times when free speech can present a “clear and present danger”⁶¹ to national security and public safety. And during World War II, the *Chaplinsky vs. New Hampshire* case established the “fighting words” framework: the defendant was charged with violating statutes that prohibited “any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place.” It was considered “a breach of the peace by provoking the person addressed to acts of violence.” The courts ruled that Chaplinsky’s “damned Fascist” and “damned racketeer” language was not protected speech, and limiting his speech in those ways did “not substantially or unreasonably impinge upon freedom of speech.” The court believed that these are “epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”⁶²

As it relates to the topic of free speech on campus, the existential threat argument urges colleges to prevent guest speakers or forms of speech that would cause such damage or violence

⁶¹ Richard Parker, “Clear and Present Danger Test,” in *The First Amendment Encyclopedia* (Murfreesboro, TN: Middle Tennessee State University). Online at: <https://www.mtsu.edu/first-amendment/article/898/clear-and-present-danger-test>.

⁶² Details found online at the Cornell University *Legal Information Institute*: <https://www.law.cornell.edu/supremecourt/text/315/568#writing-ZS>.

that the event threatens the very institution itself. Presumably, this is what schools like the University of California at Berkeley have in mind when they refuse speakers like Milo Yiannopoulos⁶³ and Ann Coulter.⁶⁴

When viewed through the broader lens of U.S. History, however, proponents of free speech argue that limiting speech for reasons of existential threat is problematic, as it risks more than it benefits. For example, while some biographers of Adams (e.g., Page Smith) minimize Adams's involvement in the passage of the Alien and Sedition Acts or defend the acts as a necessary sacrifice of liberty in the context of a new republic,⁶⁵ other historians question this sort of liberty limitation. John Ferling, for example, argues that "the acts were undertaken largely toward the goal of maintaining Federalist hegemony."⁶⁶ He continues: "The measures sought to stifle domestic opposition to a war movement that many Federalists perceived as essential for the Party's salvation" and Adams "must share complicity in the creation of the measures... by questioning the conduct of alien residents and by repeatedly warning of Republican treachery and foreign-inspired cabals."⁶⁷ In a letter to Thomas Jefferson, who was adamantly opposed to limiting liberties, Adams himself expressed regret of his part in the Alien and Sedition acts.⁶⁸

In modern U.S. history, liberty on speech issues has been expanding, not contracting, and free speech proponents argue that we would do well not to lose the progress we've made by now outlawing certain words or expressions on college campuses. After the "Free Speech Movement"

⁶³ Phil McCausland and Yelena Dzhanova, "Free Speech Week at UC Berkeley Canceled, Milo Yiannopoulos Blames School," in *NBC News* (Sept. 23, 2017). Online at: <https://www.nbcnews.com/news/us-news/free-speech-week-uc-berkeley-canceled-milo-yiannopoulos-blames-school-n804171>.

⁶⁴ John Woodrow Cox, "Berkeley gave birth to the Free Speech Movement in the 1960s. Now, conservatives are demanding it include them," in *The Washington Post* (April 20, 2017). Online at: https://www.washingtonpost.com/news/retropolis/wp/2017/04/20/berkeley-gave-birth-to-the-free-speech-movement-in-the-1960s-now-conservatives-are-demanding-it-include-them/?noredirect=on&utm_term=.c11b5b687ceb.

⁶⁵ See, e.g., Page Smith, *John Adams* (2 vols.; New York: Doubleday, 1962).

⁶⁶ John Ferling, *John Adams: A Life* (New York: Oxford University Press, 2010), 366.

⁶⁷ Ferling, *John Adams*, 366.

⁶⁸ Joseph Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Random House, 2003), 190-191, 229.

at Berkeley, for example, the court took a novel interpretation of the Constitution in *Cohen vs. California*. The state objected to a jacket worn in the Los Angeles County courthouse, upon which were written the words, “F**k the Draft.” In this case, the court did *not* say that Cohen’s objection to the Vietnam war was unprotected in the name of national security; Cohen’s speech/expression was seen by the courts as deserving of First Amendment protections. The court’s opinion was quite clear about this: “Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us... One man’s vulgarity is another’s lyric.”⁶⁹ Three decades later, during the George W. Bush presidency, objections to the Iraq and Afghanistan wars were rampant, yet they were all permitted as free speech. These sorts of objections to and protests of public policy are necessary, even vital, according to the free speech proponent, for liberal democracies in which maximizing liberty and diversity of opinion contributes to social progress.

On university campuses, too, free speech proponents say the existential threat argument risks more than it benefits. Many of the universities and colleges that host guest speakers with controversial views are time-tested, multi-generational institutions that cannot be upended by the speech of a few individuals. These institutions have excelled to become great institutions precisely because of their historical commitment to liberty, because they have permitted all sorts of speech for reasons mentioned above (advancement of knowledge and social progress). That is to say, liberals note how ironic it is that the former home to the “free speech” movement of the 1960s – UC Berkeley – has become a bastion for censorship of unpopular speakers and ideas. Liberals think promoters of strict speech codes on college and university campuses are simply forgetting their history. Would-be censors also ignore the advances made through speech and

⁶⁹ Cornell University, *Legal Information Institute*. The case of *Cohen vs. California* can be found online at: <https://www.law.cornell.edu/supremecourt/text/403/15>.

that speech is a first freedom on which other freedoms depend. As Chemerinsky and Gillman put it:

“Each generation brings new calls to suppress speech, for reasons that appear noble at the time. Today it is to help create inclusive learning environments for students, and also to stop speech that might help terrorists. Not long ago, it was to stop pornography on the ground that it was discrimination against women. From the 1920s until the 1960s, it was to stop communism. During World War I, it was to preserve the draft and win the war. The specific issues vary, but the underlying question is always the same: when to stop speech that is perceived as harmful. One of the key lessons is that almost always, on reflection, society concludes these efforts were misguided.”⁷⁰

From the perspective of the free speech proponent, limiting speech on the basis of fear that an institution will face an existential threat is problematic both on a national level and on college campuses today. Limiting speech has historically propped up those who were already in power and silenced voices of dissent, which is to say that limiting speech has the potential to hurt those who need free speech most. And it undermines the very value that it is intended to protect, namely, liberty.

Third, some object to free speech and instead argue for speech codes or speech restrictions on college campuses when victims cannot escape the situation. Unlike the arguments mentioned above – the non-scientific nature of racial epithets and the existential threat argument – liberals like Feinberg are sympathetic to this concern, and his present-day intellectual heirs believe it should be incorporated into speech codes on university campuses. To be sure, in the majority of cases, Feinberg agrees with Mill that a government should only intervene in private matters to prevent “harm to others,” and Feinberg believes that he represents Mill’s liberalism in today’s unique context.⁷¹ Feinberg believes liberty is a necessary component of any democratic

⁷⁰ Chemerinsky and Gillman, *Free Speech on Campus*, 50-51.

⁷¹ Feinberg, *Offense to Others*, x: Feinberg says he is arguing his case “without departing *drastically* from the traditional usage of the liberal label or from the motivating spirit of past liberal writers, notably John Stuart Mill.”

state,⁷² which leads to his rejection of legal paternalism and legal moralism as sufficient principles on which to ground the limitation of liberty.⁷³

But *offense* to others is a different matter for Feinberg, as it is on college campuses. Wise judgment on speech matters requires getting into the weeds to sort out what types of expression can justifiably be limited. He discusses a number of cases in which someone has claimed to be the victim of “profound offense.”⁷⁴ These situations (a) are deeper and more serious in tone or shattering, (b) may offend even if the offended party is not there to witness the action/speech, (c) exist on a deeper level than sensory nuisances and, in some sense, express evil, (d) express evil and is, therefore, offensive, not *vice versa*, or (e) can be offensive even when they are not personal, meaning that the offense is not directed at a specific person.⁷⁵ Feinberg gives several examples of profound offense, but the one that relates most directly to the subject of this essay is this: “Profound offense is never more worthy of respect than when it results from brandishing the symbols of race hatred and genocide.”⁷⁶

However, Feinberg suggests that not all these demand speech restrictions. Everything hinges on the *voluntariness* of the parties involved, what Feinberg calls “the *Volenti* standard.”⁷⁷ He shows this by offering some “balancing tests” to evaluate the situation, which measure the value of a speech act against the potential harm that speech act might do.⁷⁸ One of these tests has

⁷² Feinberg, *Harm to Others*, 9. In response to those who would argue thoughtless limitations on liberty, Feinberg says “while it is easy to overemphasize the value of liberty, there is no denying its necessity.”

⁷³ Feinberg, *Harmless Wrongdoing*, x.

⁷⁴ Feinberg, *Offense to Others*, ch. 9.

⁷⁵ Feinberg, *Offense to Others*, 58-59.

⁷⁶ Feinberg, *Offense to Others*, 86.

⁷⁷ Feinberg, *Offense to Others*, 26 ff.

⁷⁸ Feinberg is careful to weigh these tests against the actions of others (hence the term, “balancing” tests). Neither the offending party nor the offended party has a monopoly on standards of behavior, and some offensive expression may be justified if deemed reasonable according to various tests: (a) how important the action/expression is to the one performing or expressing it, (b) the social value of the conduct, either to society in general or intellectual matters of an “historical, scientific, theological, philosophical, political, and moral” (44) sort, (c) how available other times and locations are for the expression, ideally at a date/time acceptable to the offender while minimizing the offense to the victim, which also includes

to do with the offensive action/expression itself and how intense the experience was. As an example, Feinberg quotes William Prosser's *Handbook of the Law of Torts* to show that minor annoyances are not justifiable reasons to limit someone's liberty, but constant or unrelenting ones may be: "The seriousness of the inconvenience depends on the extent, duration, and character of the interference."⁷⁹ Another test involves the ability of the offended man or woman to extricate him/herself from the situation: this is where a mere nuisance offense becomes a *wrongful* offense. If a person is easily able to remove her/himself from the situation and, therefore, not be offended, Feinberg suggests that the limitation of liberty is not warranted. Feinberg wrote earlier in *Social Philosophy* that "No one has a right to protection from the state against offensive experiences if he can effectively avoid those experiences with no unreasonable effort or inconvenience,"⁸⁰ a view he reiterates later in *Offense to Others*.⁸¹ One final test that Feinberg offers relates to the prior knowledge of a would-be victim of hate speech. Feinberg says it is morally and legally relevant if the offended party knew that s/he may be offended and still participated in the activity in which s/he was offended. The "*Volenti* standard" states that the victim's "offended states... were voluntarily incurred, or the risk of which was voluntarily assumed by the person who experienced them," and, therefore, they ought "not to count as 'offenses' at all in the application of a legislative 'offence principle.'"⁸²

One of Feinberg's examples illustrates the kinds of offense he believes are not justifiably limited: writings or images that offend the sensibilities of others, as in the case of graphic or obscene literature. "When an 'obscene' book sits on a shelf," Feinberg says, "who is there to be

contextual considerations about which localities are more hospitable to potentially offensive expressions and which are less so, and (d) whether the expression was motivated by malice or spite. See Feinberg, *Offense to Others*, 44.

⁷⁹ Feinberg, *Offense to Others*, 7.

⁸⁰ Feinberg, *Social Philosophy*, 44.

⁸¹ Feinberg, *Offense to Others*, 32: "... no one has a right to protection from the state against offensive experiences if he can easily and effectively avoid them without unreasonable or inconvenience."

⁸² Feinberg, *Offense to Others*, 35.

offended? Those who want to read it for the sake of erotic stimulation presumably will not be offended (or else they wouldn't read it), and those who choose not to read it will have no experience by which to be offended.”⁸³ Having “bare knowledge” of a reality that, if one were directly exposed to it would seriously offend, but having no direct access to it or not being forced to engage in it is not sufficient for the limitation of liberty. In fact, becoming offended at the mere existence of some material reveals more about the offended party than it does about the limits of liberty. Feinberg writes “if ‘bare knowledge’ that discreet and harmless ‘immoralities’ are occurring in private leads to severe mental distress, we should attribute the distress to abnormal susceptibilities rather than to the precipitating cause.”⁸⁴ If the offence principle were applied to cases of “bare knowledge,” this is more appropriately a case of “legal moralism,” since there is an impersonal aspect to bare offense cases. In legal moralism, the mere fact that a person is acting immorally is seen as justification for the limitation of his/her liberty. “The offense-causing action must be more than wrong,” says Feinberg, “it must be *a wrong* to the offended party, in short a violation of *his* rights.” He continues: “If his impersonal moral outrage is to be the ground for legal coercion and punishment of the offending party, it must be by virtue of the principle of legal moralism to which the liberal is adamantly opposed.”⁸⁵

The liberal argues that rather than having “bare knowledge” of offensive material, an individual must be a victim of unintended and inescapable exposure to profoundly offensive speech to justify institutional intervention. S/he must be unable to extricate herself from the situation. The issue at stake here is the victim’s liberty. And in the name of liberty, she should

⁸³ Feinberg, *Social Philosophy*, 45.

⁸⁴ Feinberg, *Offense to Others*, 34.

⁸⁵ Feinberg, *Harmless Wrongdoing*, xiv. He continues: “It is likely then that there is no argument open to a liberal that legitimizes punishing private harmless behavior in order to prevent bare-knowledge offense” (xiv).

not be required to listen to someone whose ideas are profoundly offensive. This is the only way to do justice by both the speaker and listener in controversial speech situations.

From the perspective of the free speech proponent, the *Volenti* standard has some important implications for today's campus free speech debates. Instead of the *Volenti* standard being a rule about the *content* of speech, this is a rule about the *contexts* in which it may be presented. In contexts where hearers are unable to remove themselves from offensive situations with a reasonable degree of effort, the speaker should be mindful of his/her audience and make sure everyone is voluntarily there. In situations where a listener is not free to leave, the university administration and security should impose content restrictions on speech until the potentially offended parties are able to remove themselves. However, in situations where everyone is voluntarily present, the liberal argues that there should be no restrictions on the content of the speech.

What is more, the free speech proponent points out that the liberty argument cuts both ways. No one compels guest speakers to only advance socially acceptable ideas, and similarly, no one compels would-be protesters to participate or show up. Just as a guest speaker is free to present any idea in a free-speech environment and agreed upon context, so too is the potentially offended party free to *not* attend, *not* get involved, *not* engage the speaker. The state's and university administration's involvement are dependent on an individual's ability to *voluntarily* withdraw from the situation. Importantly, contemporary proponents of free speech argue that this is not the case with most of the free speech debates on college campuses happening today; it is not the case that students are being forced to listen or watch a speaker of hate. Rather, most often nowadays, students are voluntarily exposing themselves to the hateful ideologies of guest speakers on campuses in order that they might protest.

Another consequence of the *Volenti* standard is that those who pose the most serious risk – i.e., those who break the rules – should be punished by university administrators and/or local officers. This, of course, brings us to the “incitement to violence” criterion, which is often cited as a justifiable reason for the limitation of speech. Although Mill authorized only the “harm to others” principle and a near absolute liberty with respect to speech, he also suggested that there are cases in which incitement of a mob to violence is justifiably the purview of the state (to which we add, the university administration). Here, Mill’s “corn dealer” scenario is relevant. Mere offense becomes harmful, in Mill’s view, when “delivered orally to an excited mob assembled” in front of the house of a person toward whom they are hostile (e.g., corn dealers).⁸⁶ One is free to disagree with a corn-dealer’s business practices, even to circulate or publish “that corn dealers are starvers of the poor,” but one cannot and must not be permitted to distribute the material to those on the precipice of violent action: “The liberty of the individual [in this situation] must be thus far limited; he must not make himself a nuisance to other people.”⁸⁷ Harm to the corn-dealer’s business in the form of lost money or clients is insufficient to limit speech, but harm to his person or his family is sufficient to warrant “the active interference of mankind.”⁸⁸ Publishing critiques is legitimate whereas inciting violence is illegitimate harm insofar as it violates the rights of the corn dealer, in Mill’s view. Using Feinberg’s terminology, the offense principle becomes an “wrongful offense” when physical injury is likely (which puts it under the umbrella of the harm principle).

Today’s free speech advocates argue that the prohibition of offensive speakers from presenting their ideas on campus due to security concerns reveals much: it speaks *not* to the value of those ideas, but rather the character of their students and protesters who will show up to

⁸⁶ Mill, *On Liberty*, 68.

⁸⁷ Mill, *On Liberty*, 68.

⁸⁸ Mill, *On Liberty*, 68.

controversial events. Bearing in mind the *Volenti* standard, the liberal argues that an angry or hateful (though peaceful) rhetorician does not pose a greater threat than students who cannot be trusted to respond rationally to ideas with which they disagree. Free speech proponents point to recent examples of violence from students and activists on college campuses: punching peaceful protesters, throwing smoke bombs, setting fires, knocking down barriers, etc.⁸⁹ The liberal, in short, says the person who actually *commits* a violent act is a greater threat to security than the person who merely *expresses* a bigoted opinion verbally. Punishing or silencing those who speak pulls us away from the real threats to security, the liberal argues.

The free speech proponent, having liberty as his/her fundamental value, applies the *Volenti* standard widely in society: no one is forced to read Facebook posts, Twitter tweets, Instagram updates, Snapchat messages, or view television. If a viewer becomes offended, s/he has the freedom to turn it off. The ability to voluntarily remove oneself from the offensive situation is what separates the “harm principle,” the subject of Feinberg’s first of four volumes in the *Moral Limits* series, from the “offense principle,” the subject of his second. Offense only becomes harmful when a person is unable to avoid the offender. As stated in the often-cited case of hate speech involving the *Village of Skokie vs. National Socialist Party of America*,⁹⁰ the Illinois Supreme Court said that “A speaker who gives prior notice of his message has not compelled a confrontation with those who voluntarily listen... [We] direct the citizens of Skokie that it is their burden to avoid the offensive [swastika] symbol if they can do so without reasonable inconvenience.”⁹¹

⁸⁹ Steph Solis, Jessica Guynn, and Chalsie Arnold, “Milo Yiannopoulos’ speech at UC-Berkeley canceled as protest turns violent,” in *USA Today* (Feb. 1, 2017). Online at: <https://www.usatoday.com/story/news/politics/2017/02/01/uc-berkeley-campus-protest-milo-yiannopoulos-breitbart/97378104/>.

⁹⁰ Illinois Supreme Court, 373 N.E.2d 21 (1978). Online at: <https://law.justia.com/cases/illinois/supreme-court/1978/49769-6.html>.

⁹¹ Illinois Supreme Court, 373 N.E.2d 21.

Those of us who followed the Charlottesville incident and its fallout can see that this is what Tina Fey had in mind in *Saturday Night Live*'s "Weekend Update: Summer Edition" of 2017. A University of Virginia graduate, Fey said,

"I know a lot of us are feeling anxious and are asking ourselves, 'What can I do? I would urge people, instead of participating in the screaming matches and potential violence... Don't yell at the Klan. I want to encourage all sane Americans to treat these rallies like the opening of a thoughtful movie with two female leads: don't show up! Let these morons scream into the empty air.'"⁹²

With respect to the content of speech, the liberal pushes proponents of restrictive speech codes to accept that even someone as detestable as a white supremacist should be afforded an opportunity to speak. For while most of his opinions are reprehensible, racist views are not the totality of what he argues. Since his is a minority position, at least some of his argument must also be for his right to speak. And when he argues for his right to speak, he is arguing for *everyone's* right to speak, a point on which he agrees with those who defend liberal democracies.

For Mill and Feinberg, it is likely that most opinions contain some amount of truth and some amount of falsehood, but free speech permits those statements of truth to be revealed. What at first seems like a river of opinions frighteningly gushing downstream will lead to "the deposit which was left behind them when the flood subsided."⁹³ In today's context, even a left-leaning proponent of liberty accepts the one kernel of truth white supremacists have that is worth listening to: their petition for freedom of speech. If we silence them, free speech proponents argue, we silence free speech in two senses: in both their immediate content and context (e.g., not giving them a platform), and in the broader sense of silencing their arguments about free speech, which *should* be heard.

⁹² *Saturday Night Live*, "Weekend Update: Summer Edition," season 42, episode 24 (August 24, 2017).

⁹³ Mill, *On Liberty*, 57.

Thus far, the liberal case for free speech argued that regardless of how offensive or seemingly hurtful, the freedom to speak any point of view is necessary for the advancement of knowledge and for the progress of society. And whereas the *Volenti* standard exists to increase liberty – namely, freedom of movement – the existential threat argument was problematic, as it undermined fundamental liberties and has historically been regretted by those who imposed restrictions on speech. Unlike some other freedoms (e.g., guns⁹⁴), free speech proponents see it as a *first freedom* that has a “preferred position” of vital public interest, a moral and political prerequisite for the expression that one has other fundamental interests. In the liberal’s view, knowledge and social progress depend on it.

⁹⁴ See, e.g., Hugh LaFollette’s differentiation of the “right” to own a gun from that of the First Amendment freedoms in “Gun Control,” in *Ethics 110* (University of Chicago Press, 2000): 263-281: “Fundamental rights (freedom of speech, freedom of association, etc.) benefit society as well as individuals. Permitting free speech, religion, and association is the best – and arguably the *only* – way for society to uncover the truth” (emphasis added). See also LaFollette’s *In Defense of Gun Control* (New York: Oxford University Press, 2018), in which he argues “A right to free speech cannot be ignored simply because others find my utterances offensive.”

THE CASE FOR SPEECH RESTRICTIONS ON CAMPUS

As racially-charged speech is given more expansive legal protections, so too do the charges of speech's misuse increase, and there are those who argue for censorship of hostile words and phrases. In this section, we will hear their arguments. I will first explore the reasons for regulating speech on college campuses – psychological and potentially physical effects of hate speech on college students – and responses by specific schools to address these challenges. Second, I will discuss the solution advocated by some critical race theorists, in particular, Charles Lawrence, who suggests that racist speech should be seen as “fighting words.” Third, we will hear from thinkers who express great hostility toward the very idea of a “war on free speech,” those who are challenging the narrative surrounding speech in today's debates but nonetheless argue for speech restrictions of some sort (Stanley Fish, Anthony Leaker, and Philip Pettit).

Critics of liberal speech codes give many reasons for wanting to limit offensive speech on campus, and they all hinge on a tacit assumption regarding the social purpose of a university: to protect its students. The argument runs as follows: we don't want students to be marginalized by exposure to material that may cultivate in them the feeling that they are not full members of our community. Those about whom the offensive comments are made (or on whose backs they fall) have dignity and deserve respect by virtue of their personhood; they should be spoken about accordingly. On this much, there is overlap between conversations about offensive speech and discussions of hate speech.

According to advocates for restrictive speech codes, hate speech has real – mental, emotional, *and* physical – effects in the lives of its victims. Richard Delgado suggests that hate speech causes serious psychological harms, which result in fragmentation and polarization based on (among other things) racial categories: “In addition to the harms of immediate emotional distress and infringement of dignity, racial insults inflict psychological harm upon the victim. Racial slurs may cause long-term emotional pain because they draw upon and intensify the effects of the stigmatization, labeling, and disrespectful treatment that the victim has previously undergone.”⁹⁵ Not only are there psychological impacts of hate speech, but also potentially physical ones. Mari Matsuda says, “Victims of vicious hate propaganda experience psychological symptoms and emotional distress ranging from fear in the gut to rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress syndrome, stress disorder, hypertension, psychosis, and suicide.”⁹⁶ These are serious consequences, and insofar as offensive speech mirrors the effects of hate speech, they demand a response.

The solution to these serious consequences of hate speech is, in the minds of critical race theorists, censorship of hostile words and phrases. Delgado partnered with Jean Stefancic to write *Critical Race Theory*, arguing that the only way to minimize these negative effects is through legislation, on college campuses and in society more broadly. As they discuss the potential responses to critical race theory, they argue that “the status quo is inherently racist, rather than merely sporadically and accidentally so... The need for regulation of hate crime and speech will probably eventually become evident [in the United States], as it has to dozens of

⁹⁵ Richard Delgado, “A Tort Action for Racial Insults, Epithets, and Name Calling,” in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (M. Matsuda, ed.; Boulder, CO: Westview Press, 1993). Passages from *Words that Wound* are taken from Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (New Haven, CT: Yale University Press, 2017), 84.

⁹⁶ Mari Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story,” in *Words that Wound*.

European and Commonwealth nations.”⁹⁷ We stop offensive speech by prohibiting it on campus, critical race theorists say. After that, we will make progress toward limiting offense felt by innocent victims. If offensive or hateful speech is harmful, then the college is justified in getting involved to limit what people can and cannot say. More speech is not the solution; it is the problem, in response to which “we should deepen suspicion of remedies for deep-seated social evils that rely on speech and exhortation.”⁹⁸

Their advice has been followed by many schools,⁹⁹ manifested in speech codes of various types. Some schools hold individuals accountable and punish them if their actions provoked in another student fear or anxiety. Other schools punish students if their speech is religiously, racially, or otherwise offensive to another student. Universities are dedicated to fostering a rich and satisfying college experience for students, and words or phrases that offend make the environment inhospitable to student success.

Another critical race theorist, Charles R. Lawrence III, provides an argument that illustrates *why* colleges should adopt these policies.¹⁰⁰ In his essay, “If He Hollers Let Him Go:

⁹⁷ Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York: New York University Press, 2001), 135.

⁹⁸ Delgado and Stefancic, “Images of the Outsider in American Culture and Law: Can Free Expression Remedy Systemic Social Ills?” in *Critical Race Theory: The Cutting Edge* (2d. ed.; Philadelphia: Temple University Press, 2000), 232-233. Delgado and Stefancic give four proposals, of which this is only one.

⁹⁹ Three examples will suffice: First, Alabama A&M University has a broad-reaching speech policy that reads as follows in the Code of Conduct section of the most recent Student Handbook: “Harassment includes language to physical acts which degrades, insults, taunts, or challenges another person by any means of communication [including social media], so as to provoke a violent response, communication of threat, or defamation of character.” But it also “includes the use of profanity, verbal assaults, derogatory comments or remarks, sexist remarks, racist remarks or any behavior that places another member of the University community in a state of fear or anxiety.” (Available online at: http://www.aamu.edu/administrativeoffices/student-affairs/Documents/2017-10-12-StudentHandbookRevisions_All.pdf.) Second, consider Fresno State’s internet policy, which prohibits “offensive material based on gender, race, color, religion, national origin, sexual orientation, or disability” (Available online at: http://www.fresnostate.edu/mapp/documents/apm/622_000.pdf.) Third, consider Florida State University’s policies regarding one’s speech toward individuals or groups: “Behavior that may be considered offensive, demeaning, or degrading to persons or groups will not be tolerated.” (Available online at: https://hr.fsu.edu/PDF/Publications/diversity/EEO_Statement.pdf.)

¹⁰⁰ Charles R. Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus,” in *Duke Law Journal* (1990): 431-483. Online at: <https://scholarship.law.duke.edu/dlj/vol39/iss3/2>.

Regulating Racist Speech on Campus,” Lawrence provides justification for speech restrictions in two ways. First, Lawrence argues that First Amendment protections should not apply to racial insults because “the injury is instantaneous” and “there is neither the opportunity for intermediary reflection on the idea conveyed nor an opportunity for responsive speech.”¹⁰¹ In Lawrence’s view, racial epithets do not serve the First Amendment; they *subvert* it. He writes, “If the purpose of the first amendment is to foster the greatest amount of speech, then racial insults disserve that purpose. Assaultive racist speech functions as a preemptive strike.”¹⁰² Lawrence echoes Delgado’s comments about the real psychological effects of hate speech on campuses in what he calls “the visceral, emotional response” that “precludes speech.”¹⁰³ In response to such hatred, Lawrence says students who are already disenfranchised are stunned and unable to think clearly enough to respond. Further, he argues that nothing can solve the problem: “When one is personally attacked with words that denote one’s subhuman status and untouchability, there is little (if anything) that can be said to redress either the emotional or reputational injury.”¹⁰⁴ The voluntariness criterion in liberal speech codes is a fiction: hostile words and phrases strike an initial, irreparable blow.

Second, Lawrence argues for limiting speech by equating racist remarks with “fighting words.” Since victims of racist speech are flummoxed and powerless in response, he believes there is a “functional equivalent” between hate speech and fighting words. What difference is there, Lawrence could ask, between yelling “damned Racketeer” at someone, which was not protected speech, and yelling the “n-word” at a vulnerable student? To be sure, Lawrence says “the fighting words doctrine is a paradigm based on a white male point of view,” and “the

¹⁰¹ Lawrence, “If He Hollers,” 452.

¹⁰² Lawrence, “If He Hollers,” 452.

¹⁰³ Lawrence, “If He Hollers,” 452.

¹⁰⁴ Lawrence, “If He Hollers,” 453.

fighting words doctrine presupposes an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence.”¹⁰⁵ But “since minorities are likely to lose the fight, they are forced to remain silent and submissive.”¹⁰⁶ The best option to address this problem, in Lawrence’s view, is not only to “deny the truth of the word’s application,” but also to “deny the truth of the word’s meaning.”¹⁰⁷ And at the time when Lawrence is writing, the early 1990s, it is “a meaning shouted from the rooftops by the rest of the world a million times a day.”¹⁰⁸ In other words, universities should adopt policies meant to contribute to student flourishing, which means prohibiting certain words or phrases.

Socially-conscious free speech proponents view Lawrence’s intentions as noble, but they take issue with several aspects of his argument. Most disconcerting to them is that Lawrence is sending the wrong message to and about minority groups in general and African Americans in particular. What message does it send to a young black student to be told that s/he does not possess the wherewithal to countenance insulting language and respond rationally with confidence using the facts of racial equality? Conservative commentator and former State Department official, Alan Keyes, expresses an indignant response: “To think that I [as a black person] will... be told that white folks have the moral character to shrug off insults, and I do not... That is the most insidious, the most insulting, the most racist statement of all!”¹⁰⁹

Reflecting on Keyes’s statement, Stephen Carter expresses the same preference: “My sympathies

¹⁰⁵ Lawrence, “If He Hollers,” 453.

¹⁰⁶ Lawrence, “If He Hollers,” 454.

¹⁰⁷ Lawrence, “If He Hollers,” 455.

¹⁰⁸ Lawrence, “If He Hollers,” 455.

¹⁰⁹ Quoted in Stephen Carter, *Reflections*, 171 (parenthetical remark about Keyes’s race are found in Carter’s book). Carter gets his quote from Nadine Strossen, “Regulating Racist Speech on Campus: A Modest Proposal?” in *Duke Law Journal* (1990): 484.

generally run toward freedom, and I would oppose efforts to regulate racism that is reflected in simple speech, even when the racist views are insulting, offensive, or painful.”¹¹⁰

Even from the point of view of some African American academics, Lawrence’s position is overly extreme: when Lawrence argues for prohibiting racial epithets in *any* context, he departs from other, more moderate critical race theorists like Mari Matsuda. While describing some of the emotional and physical pain associated with hate speech on campus, Matsuda suggests that we should not censor those who make such claims under the banner of academic inquiry and scientific discovery, a claim that Carter praises.¹¹¹ Free speech proponents say that we should permit various content to be spoken, including the use of speech to counter incorrect or hateful speech. Rather than giving students tools to overcome hatred, African American free speech proponents suggest that Lawrence’s assessment of the situation further disempowers young minority students.

But Lawrence and other critical race theorists have a ready-made retort. As noted above, critical race theorists argue that making a content/context distinction already betrays a racist bias: the context of the distinction itself is inherently racist. Racial imbalance, they argue, is already woven into a system that claims to be viewpoint-neutral. And so, no matter what response a liberal will offer, the free speech proponent cannot escape the fundamental assumption made by critical race theorists. Daria Roithmayr writes that scholars who work in critical race theory,

“share two very broad commitments. First, as a critical intervention into traditional civil rights scholarship, critical race theory describes the relationship between ostensibly race-neutral ideals, like ‘the rule of law,’ ‘merit,’ and ‘equal protection,’ and the structure of white supremacy and racism. Second, as a race-conscious and quasi-modernist intervention into critical legal scholarship, critical race theory proposes ways to use ‘the

¹¹⁰ Carter, *Reflections*, 171.

¹¹¹ Carter, *Reflections*, 183.

vexed bond between law and racial power' . . . to transform that social structure and to advance the political commitment of racial emancipation."¹¹²

That is to say, critical race theory departs from liberalism, even the liberalism of the civil rights movement, by opining that racism is built into the system. There is no "neutral space" in which to pursue a reasoned discussion. "To think that access to higher education is neutral and apolitical is to be hoodwinked by the myth of meritocracy," argues Margaret Zamudio, as "It rests on an uncritical acceptance of the master narrative that asserts our educational (and other) institutions have banished racism and bias after the passage of civil rights legislation in the 1950s and 60s."¹¹³

Nor are critical race theorists satisfied by the liberal's "equality before the law" argument. Against those who see the Constitution as color blind, Neil Gotanda says that this notion is absurdly "self-contradictory."¹¹⁴ If leaders in a political system vow *not* to recognize race in their administration of justice, they paint themselves into a philosophical corner: "For nonrecognition to make sense, it must be possible to recognize something while not including it in making a decision,"¹¹⁵ a proposition Gotanda finds self-refuting.

When arguments for equality under the law were advanced in the early Civil Rights movement, progress did not follow at the speed with which many hoped it would. That is to say, people of color tried to be heard and competitive in the "color blind" world of early civil rights activists, playing by the same rules as their oppressors, accepting the table as it had been set for them. When they still did not believe their voices were heard, they wrote new rules and played a

¹¹² Daria Roithmayr, "Introduction to Critical Race Theory in Educational Research and Praxis," in *Race Is... Race Isn't: Critical Race Theory and Qualitative Studies in Education* (L. Parker, D. Deyhle, and S. Villenas, eds.; New York: Westview Press, 1999), 1.

¹¹³ Margaret Zamudio, et al, *Critical Race Theory Matters: Education and Ideology* (New York: Routledge, 2011), 64.

¹¹⁴ Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind,'" in *Critical Race Theory: The Cutting Edge* (2d. ed.; Philadelphia: Temple University Press, 2000), 35.

¹¹⁵ Gotanda, "A Critique," in *Critical Race Theory: The Cutting Edge*, 35.

different game. “Critical race theory scholars demonstrated that concepts that the reformists had taken for granted as helpful – color blindness, formal legal equality, merit, integration – in fact reflected, created, and perpetuated institutional racial power.”¹¹⁶ Early critical race “scholars pointed out,” for example, “that the color-blind perspective represses and renders irrelevant the ways in which race shapes social relationships.”¹¹⁷ Additionally, they also “explained how formal legal equality in fact adopts the perspective of the perpetrator by requiring evidence of conscious racial animus in a discrete discriminatory act, and by ignoring those instances in which racism is built into the structure of social institutions.”¹¹⁸

Put simply, critical race theorists do not accept the fundamental assumptions that guide the liberal’s point of view: that in an environment of free speech, the best arguments will win out and the truth will overcome. They argue against the system they view as indelibly racist. Critical race theorists play by different rules and begin with different presuppositions.

In addition to critical race theorists, a second group favoring restrictions on speech argue that there is no “war on free speech,” as conservative pundits assert. They question the “cultural narrative” surrounding speech while, simultaneously, arguing for various forms of speech restrictions. That is to say, these “cultural narrative” critiques take issue with the ways in which speech is talked about today. Stanley Fish, for example, titled an essay and the book in which it is located, “There’s No Such Thing as Free Speech, and It’s a Good Thing, Too.”¹¹⁹ Fish and others (e.g., Haworth,¹²⁰ or Horton and Alexander¹²¹) argue that free speech does not have inherent value, only instrumental value, and it should be held alongside competing values and

¹¹⁶ Roithmayr, “Introduction,” 2.

¹¹⁷ Roithmayr, “Introduction,” 2.

¹¹⁸ Roithmayr, “Introduction,” 2.

¹¹⁹ Stanley Fish, *There’s No Such Thing as Free Speech, and It’s a Good Thing, Too* (New York: Oxford University Press, 1994), chapter 8.

¹²⁰ Alan Haworth, *Free Speech: Problems in Philosophy* (London: Routledge, 1998).

¹²¹ Lawrence Alexander and Paul Horton, “The Impossibility of a Free Speech Principle,” in *Northwestern Law Review* (1984) 78:5, 1319 ff.

judged in light of the potential sacrifices of those other values. While Fish does not direct his remarks at the college or university environment *per se*, his comments are nonetheless relevant to understanding why those on campuses might want to limit the speech that takes place on those campuses. If speech were absolutely unlimited, all of the arguments about the good of free speech could get drowned out by yelling voices. Some governance of speech or rules of conduct that limit speech are necessary to preserve order while various viewpoints are being presented.

However, the liberal would respond, again, that there is a difference between the content of speech and the contexts in which speech is expressed (contra critical race theorists). And insofar as Fish is arguing against an unrestricted context, the liberal position is in full agreement: speech has never been and never should be truly unlimited in context. Proponents of free speech accept that we need rules to govern how we speak to each other so as to increase everyone's ability to speak. But Fish recognizes neither the expanding protections for speech nor how that expansion has benefited minority groups who have used speech to better their situation.

Fish goes further, however, to say that the concept of free speech has been hijacked by zealots who are merely advancing their own agendas. The concept of "free speech" itself, does "not have any 'natural' content but [is] filled with whatever content and direction one can manage to put into [it]."¹²² The concept is just a title, a name, a placeholder that allows us to "serve the substantive agendas we wish to advance."¹²³ It's not an independent American ideal as much as it is "a political prize, and if that prize has been captured by a politics opposed to yours," Fish states, "it can no longer be invoked in ways that further your purposes."¹²⁴ When

¹²² Fish, *There's No Such Thing as Free Speech*, 102.

¹²³ Fish, *There's No Such Thing as Free Speech*, 102.

¹²⁴ Fish, *There's No Such Thing as Free Speech*, 102.

free speech becomes a political prize, it loses its original value and strays from the intention of the First Amendment, “for it is now an obstacle to those purposes.”¹²⁵

Fish’s argument against free speech in today’s context is similar to the “cultural narrative” argument offered by Anthony Leaker in his forthcoming book, *Against Free Speech*.¹²⁶ Leaker laments that free speech is a “Trojan horse” for unverified, unscientific, hateful ideology, “part of an onslaught against a range of oppressed minorities and progressive gains of the last half century.”¹²⁷ The idea that there is a crisis with free speech is, for Leaker, “a self-serving myth manufactured... by racist opportunists.”¹²⁸ Leaker believes their real agenda/goals are to preserve their “dominant worldview” which “normalizes and universalizes the values of their gender, race, and class.”¹²⁹ Leaker’s assessment of the current situation is harsh, and his attribution of motives on those who defend free speech is uncompromising. For example, he charges free speech advocates of hypocrisy; they “decry censorship while denying their critics a voice.”¹³⁰

Leaker disagrees with free speech proponents who marshal Mill in defense of their positions by pointing out that the situations Mill addressed and the situations current advocates of free speech address are drastically different: (a) Mill, he argues, attacked social arrangements and viewed speech as contributing to that end while free speech advocates today seek to preserve social arrangements; (b) Mill valued diversity while today’s “free speakers” want homogeneity; (c) Mill despised custom as a roadblock to progress, while today’s free speech advocates only

¹²⁵ Fish, There’s No Such Thing as Free Speech, 102.

¹²⁶ Anthony Leaker, *Against Free Speech* (Lanham, MD: Rowman and Littlefield, 2019). Since Leaker’s book is not yet released, this essay will refer to an essay he published in the “Free Speech in International Perspective” issue of *Cato Unbound: A Journal of Debate* (June 13, 2018). Online at: <https://www.cato-unbound.org/2018/06/13/anthony-leaker/against-free-speech>.

¹²⁷ Leaker, “Against Free Speech,” online.

¹²⁸ Leaker, “Against Free Speech,” online.

¹²⁹ Leaker, “Against Free Speech,” online.

¹³⁰ Leaker, “Against Free Speech,” online.

desire to protect old, “calcified points of view”; and (d) “above all, Mill recognized the importance of questioning the framing of a debate or the conditions of possibility of argument,” which Leaker does not see in today’s free speech advocates. In sum, Leaker argues “against free speech” because it is in conflict with that which we hold dear: equality, tolerance, respect, inclusion, etc. Today’s free speech defenders, Leaker says, are “far removed from the Millian ideal of serving the pursuit of truth, progress, and the improvement of mankind.”¹³¹

In an interview with the *Freedom for Individual Rights in Education (FIRE)*, a non-profit and non-partisan advocacy group for free speech on college campuses, Leaker showed how his views relate to situations universities are facing with hate speech and guest speakers.¹³² One theme that emerged from Leaker’s interview is that he does not believe the government should be responsible for policing language or speech; state-sponsored intervention is not the solution. Another theme that emerged from this interview is that Leaker thinks the status quo privileges straight white men, “and the university is no different.” His primary goal is to challenge the narrative that free speech is under threat in the college or university context. Leaker, like critical race theorists, argues that free speech may well be a good ideal if all participants were equal contributors, but the hoped-for “viewpoint neutrality” is a farce because there are great structural inequalities and power imbalances. Leaker’s perspective is hostile to the idea of free speech, and his language is practically Nietzschean in its ambitious will to power.

His position is also subject to the most criticism from proponents of free speech on campus. The liberal can offer several responses to Leaker’s *Against Free Speech*, counterarguments that also apply to Fish’s comments on the hijacking of free speech. First, Leaker makes the argument against free speech within a context that permits his argument to be

¹³¹ Leaker, “Against Free Speech,” online.

¹³² Foundation for Individual Rights in Education, “So To Speak: Podcast” interview with Andrew Leaker, December 27, 2018. Online at: <https://www.thefire.org/sotospeak/>.

made; that is, he benefits from and is only able to raise his concerns from within the context provided by liberal speech codes. Leaker believes that speech has been co-opted by racists to racist ends, but then he co-opts speech to call others racists. The liberal will point out that Leaker's paradoxical reliance on the very principle he attacks is *prima facie* self-refuting. Leaker admitted as much to the *FIRE* host, calling the title of his book "self-defeating" and "polemical."

Second, when pressed by the *FIRE* representative, Leaker admitted that his real target is not speech, but rather structural inequality that has economic roots. The liberal will respond, therefore, that Leaker not devoting his time and attention spilling ink on the *real* issues he cares about – racism and economic opportunities – and instead attacking the vehicle those very disenfranchised people can most use (their self-expression/speech) to make their situation better. This second liberal response to Leaker says that speech is a scapegoat or smoke-screen, which betrays his inability to deal with the real problems he would like to address.

Third, liberals will take issue with Leaker's mechanism of enforcement (or lack thereof). Leaker does not want the government in charge of enforcing speech codes, and presumably the same logic by which he arrives at this conclusion would prompt him to not want a university's administration or discipline policy to enforce them. Presumably, a small group of governing authorities cannot be trusted to safeguard individual liberties. However, institutional policies require enforcement, and Leaker is not clear on whom he is relying to do the enforcement for which he argues. If it is not the leaders, then it is the masses, which could lead to mob mentality and the very tyranny of the majority that worried Mill. What if the person or persons charged with creating and enforcing speech codes on his campus in the U.K. had a different perspective than he does on which material was offensive and/or hateful? Leaker's argument provides no helpful answers to the proponent of free speech.

Fourth, Leaker presents students as suffering under harsh institutional regimes, yet free speech proponents suggest that often students have much more power than he believes they do. Students can petition faculty and administration, they can hold peaceful protests, they can negatively evaluate their school and professors (these days made more widely available through the internet), etc. Again, taken to an extreme, student protests can devolve into ferocious mob rule, which should have been peacefully combatted through free speech, according to the liberal.

Finally, Leaker's argument is, as stated above, a cultural narrative critique, but free speech proponents say he undercuts his real goal when he argues against the very tools through which a disenfranchised person can become enfranchised. When asked about his solutions to the inequality that he hopes his comments on speech will address, Leaker had none to give. Many of Leaker's comments in the *FIRE* interview would be seen by liberals as striking – that there are other places for free expression than a university; universities aren't seeking truth these days; we don't need a balanced view about some things; there are some arguments we don't need to hear anymore – but he offers no solutions other than to attack the mechanism by which free people improve their situation. The liberal can praise one part of Leaker's approach, however, the fact that his perspective is evolving: Leaker says he is beginning to acknowledge the complexity of the issue and that his position is evolving with the more he reads about the benefits of free speech. But as of the time of this writing, he has yet to put his appreciation for the benefits of free speech in print.

Philip Pettit offers a similar cultural narrative critique of free speech today. Pettit takes stock of current trends in culture and politics, and finds major changes in the intellectual and social landscapes that set communications today apart from those of the early 1990s, including the media college students are ingesting. Pettit says, "I am quite ready to believe that freedom of

speech in some areas impacts negatively on other equally or more important freedoms,” which he then proceeds to explain in terms similar to Feinberg’s “harm principle.”¹³³ As recently as May 2018, Pettit argued in a University of Melbourne lecture¹³⁴ that we have left the context in which Enlightenment ideals of freedom of speech were created and refined. These values were steeled in the fires of despotism, “when the danger was the despotism of a single, dictatorial voice, religious or political.”¹³⁵

However, Pettit says the times have changed. We no longer face the threat of a tyrannical government in the west, but rather we face the chaos – anarchy even – created by an unrestricted free speech. These previously held values “need rethinking at a time when” we are living in a “free-for all of many undisciplined voices.”¹³⁶ He likens our current era to a polluted sky: “Just as light pollution stops us from seeing the stars, so pollution of the news and science media stops us from tracking the truth.”¹³⁷ This problem is more pressing now than ever, says Pettit, because “it invites us to wallow in our preferred view of the world, signing up to whatever view most appeals.”¹³⁸ In contrast to our contemporary plethora of twenty-four hour news and social media, Pettit says “freedom requires that we should be entitled to our own opinions, as Daniel Moynihan once said, but not that we be entitled to our own facts.”¹³⁹ When institutions shift, as he believes they have in the Trump era, so too must we rethink the Enlightenment ideals we are holding onto. Pettit says, “the marketplace of ideas will foster truth only in the presence of contestability.

¹³³ Pettit, “Enfranchising Silence,” 45.

¹³⁴ Philip Pettit, “Truth, Free Speech, and Free Science,” Lecture delivered on May 16, 2018 at the University of Melbourne, Australia. Pettit sent me his manuscript, but the announcement of his lecture can be found online at: <http://alumni.online.unimelb.edu.au/s/1182/match/wide.aspx?sid=1182&gid=1&pgid=13824&cid=19658&ccid=19658>.

¹³⁵ Pettit, “Truth, Free Speech, and Free Science.”

¹³⁶ Pettit, “Truth, Free Speech, and Free Science.”

¹³⁷ Pettit, “Truth, Free Speech, and Free Science.”

¹³⁸ Pettit, “Truth, Free Speech, and Free Science.”

¹³⁹ Pettit, “Truth, Free Speech, and Free Science.”

And contestability presupposes traceable speakers, group norms and a concern with esteem. But while despotism undermines this, so does the sort of anarchy allowed by the internet.”¹⁴⁰

Unlike Leaker, Pettit offers some general and specific solutions. The general solution is that we engage a “non-despotic gatekeeping institution” of “the economy of esteem.”¹⁴¹ By this, Pettit means that we should separate areas of persuasion from areas of truth-seeking, and do our best not to confuse the two. “Let scientific institutions and media,” says Pettit, “be independent of politics, commerce, and religion.”¹⁴² Distinct domains would, presumably, provide appropriate checks and balances on messaging. And while orthodoxies may emerge, in the economy of esteem they can be challenged and rethought.

In addition to the general suggestion to keep persuasion and truth-seeking distinct, in a recent interview Pettit offers a suggestion on the persuasion category, specifically as it relates to political campaigns.¹⁴³ In the 2016 US Elections, messages were sent without concern for who (or “what,” as is the case with “bots”) sent the message, especially through “narrow casting” towards a specific niche audience on social media platforms. Pettit suggests that advertisers should be compelled to offer a “signature” in the same way that television advertisements are required to do so (e.g., “I’m So-and-so, and I approved the content of this advertisement” or “This ad paid for by So-and-so for America PAC”). In online platforms, Pettit suggests, advertisers should include a website that links to all of the advertisements they have paid for or

¹⁴⁰ Pettit, “Truth, Free Speech, and Free Science.” Pettit has recently echoed these sentiments in other recent contexts, two of which I will mention here. First, in an interview with ABC of Australia, Pettit described our attempts to “Find the Truth” these days, and mentions again that the context has changed. Although social media can increase democratization of ideas, it can also create an anarchic multitude of competing claims through which the general public has no means of sorting to find the truth. The difference now, mentioned in his Melbourne lecture and in this interview is *contestability*, and without contestability any sense of a real debate of ideas is gone.

¹⁴¹ Pettit, “Truth, Free Speech, and Free Science.”

¹⁴² Pettit, “Truth, Free Speech, and Free Science.”

¹⁴³ Philip Pettit and Patricia Karvelas, “New Ways to Think About Free Speech?” on ABC: *RN Drive* (Australia; May 16, 2018). Interview found online at: <http://www.abc.net.au/radionational/programs/drive/new-ways-to-think-about-free-speech/9768240>.

used, a registry of this PAC or candidate’s messaging. If all the messages by a company were available for viewing by the public or members of the truth-seeking media, we would not find out “after the fact” that an election was compromised, and voters could have information as close to “real time” as possible.

Additionally, Pettit offers a suggestion not only about the content of our speech, but also the manner in which it is conveyed, i.e., the *conduct* of our expression. Pettit believes the basic liberties need to be co-satisfiable, and he argues that even though some thorny issues rear their heads when trying to accomplish this, they can be solved by adopting “rules under which people are given options that are close to the original, problematic options but are capable of meeting the constraint of co-satisfaction.”¹⁴⁴ He considers a town hall meeting in which various voices may drown out the others, and in response argues for the deployment of Robert’s Rules, which “allow people to take turns in speaking, dictating a pattern under which they can each make proposals, suggest amendments to the proposals of others, and debate and vote on the various issues that arise in their discussion.”¹⁴⁵ According to Pettit, many of the issues we have in the conducting of public debates can be solved by adopting a standard of rules which everyone agrees to follow.¹⁴⁶

On several points, the free speech proponent is in agreement with Pettit. Insofar as he is supportive of the concept of freedom as “non-domination,” the liberal is in total agreement with him. Non-domination is seen as a helpful principle for establishing a set of rules in which speech may be truly free. Further, free speech is not significantly threatened by more transparency in online advertising; transparency increases liberty, not hinders it. Finally, Pettit’s suggestion that

¹⁴⁴ Pettit, *Just Freedom*, Kindle location: 1166-1171.

¹⁴⁵ Pettit, *Just Freedom*, Kindle location: 1166-1171.

¹⁴⁶ Here Pettit shows his affinity for Hobbes, who also suggested that adherence to rules may limit the danger one faces in states of total anarchy. See Pettit’s “Free Speech and Non-Human Speakers” at the *Leverhulme Centre for the Future of Intelligence*. Discussion available online here: <https://youtu.be/TWKnlcg-Slk>.

public events unfold according to Robert's Rules (or some other agreed-upon format) is not antithetical to the free speech proponent's point of view, as it will maximize liberty for a greater diversity of opinions to be shared.

However, proponents of free speech will take issue with some of Pettit's other ideas. First, behind Pettit's attack on specific content – e.g., that people are not entitled to their own facts – lies a deeper concern that speech restrictions will not fully address or eradicate. The liberal would suggest that, just like Leaker above, the real target of Pettit's remarks is not an abundance of speech. Speech is seen by the liberal as a vehicle through which a darker reality is brought to light, but speech is not the root issue itself. Pettit's real, underlying concern is for a gullible public who cannot tell fact from fiction. The present day “anarchy allowed by the internet” is not solved by regulating speech online; it is solved, according to free speech proponents, by teaching internet users to think more critically. Unless private property is abolished, advertisers and so-called “influencers” will always seek to push people to purchase, do, believe, say, or support this or that. It is up to *teachers*, the liberal argues, philosophy professors like Pettit, to help students sort through it all.¹⁴⁷ Further, those who argue for free speech say it is up to *families* to teach kids the value of turning entertainment off and thinking more mindfully about the media they consume (and the products they buy). More concerning than the content we consume are the almost ravenous habits of our consumption, the liberal argues.

Second, the liberal will take issue with the fact that Pettit, like Leaker, does not adequately specify the identity of the censor, or what mechanisms should hold the censor

¹⁴⁷ This is similar to Gorgias's response to Socrates in the dialogue that bears his name: rhetoricians influence others but it's the easily-swayed public that is unable to sort through the levels of untruth to arrive at the truth or goodness.

accountable. Governmental agencies may require political advertisers to identify themselves, but who regulates or oversees those governmental agencies? Pettit, like other advocates for restrictions on free speech, is setting himself and other learned academics up as something of a new medieval church, the arbiter of truth in what they perceive to be a post-truth age. But the free speech proponent will argue that the answer to incorrect speech is not less speech, but *more*, until a consensus emerges around that which is true. And even then, old ideas should be continually rethought.

Third and finally, Pettit can be criticized from the liberal's perspective and critical race theorists when he fails to recognize the bias inherent in all efforts to communicate. No one is value-free, there is no "view from nowhere," and everyone is biased. This is the reality that critical race theories are intended to address: "the status quo is inherently racist," they say. Proponents of free speech argue that this is precisely why we *need* the content of speech to be unrestricted. To suggest that there are "truth-seekers" out there is to neglect that truth-seeking comes in degrees; some will be better at it than others. But silencing the opinions of some at the expense of others does not lead toward greater truth but rather greater conformity and less innovative thinking.

IRRECONCILABLE INCOMPATIBILITIES

Thus far, we have heard from advocates of free speech and advocates of speech restrictions on college campuses. Proponents of free speech believe maximizing liberty on speech issues advances knowledge and social progress, but free speech proponents struggle to find meaningful responses that allay the worries of those who claim there is no epistemic value of racial epithets; the “every event is a teachable moment” argument seems cruel in events where a member of a minority group is experiencing that event as harassment. Certainly, gaining some modicum of knowledge by witnessing and permitting a harmful speech act is not worth the sacrifice to the victim’s person or mental state. Further, free speech proponents must concede some restrictions on the contexts in which expressions are uttered, if only for maximizing the number of speakers, making their “freedom at all costs” approach heavily qualified and dependent on a content/context distinction that critical race theorists have spilled much ink contesting. The other side fares no better: proponents of speech restrictions on college campuses seek to minimize the painful and lasting effects of racial discrimination, but in doing so they undermine the means through which disenfranchised minorities can improve their situation.

One potential solution to this dilemma is to seek middle ground, draw further distinctions, and hope both sides can eventually see eye to eye. For example, one could differentiate the *legal* and *moral* questions. Feinberg describes the distinction by saying, “A man has a legal right when the official recognition of his claim (as valid) is called for by the governing rules... A man has a moral right when he has a claim the recognition of which is

called for... by moral principles, or the principles of an enlightened conscience.”¹⁴⁸ In an otherwise neutral plane of argument, the legal and moral questions ought not be conflated: the legal issue at stake in this essay is one of *liberty to speak*, but the moral issue concerns the *content of the speech*, thereby refining a second distinction already mentioned between the content of speech and the contexts in which it is expressed. Free speech proponents argue for no restrictions on the content of speech while recognizing and embracing the fact that there are some contexts in which certain types of speech should be limited. Colleges and universities are well within their rights, they argue, to create a set of rules for what types of speech can occur in which locations, but they also suggest that these rules must apply equally to all members of their communities, regardless of content. Many free speech proponents repudiate white supremacy and bigotry by making the context/content distinction. Chemerinsky and Gillman argue that only by deregulating and extending freedom in the realm of speech can we root out inferior beliefs and effectively convince others to change their beliefs and actions.

Those proposing middle or moderate positions exploit distinctions like these to find common ground between the extremes on both sides. Andrew Altman, for example, believes two things may both be true at the same time: some proponents of free speech are racists, homophobes, etc. *and* free speech is also a public good that can serve to discredit those same people. Altman sees himself as a full member of the “liberal” tradition, and in his article, “Liberalism and Campus Hate Speech: A Philosophical Examination,”¹⁴⁹ Altman seeks a middle ground between those who argue on the one hand that we should not outlaw any speech and those who argue for robust censorship in words and phrases. “Like those who favor sweeping regulation, I accept the claim that hate speech can cause serious psychological harm to those at

¹⁴⁸ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 154.

¹⁴⁹ Andrew Altman, “Liberalism and Campus Hate Speech: A Philosophical Examination,” in *Ethics*, vol. 103 (University of Chicago Press; January 1993), 302-317.

whom it is directed,” but “I do not believe that such harm can justify regulation, sweeping or otherwise” and instead we should regulate only certain kinds of hate speech.¹⁵⁰ Rather than embracing the extremes, “there is a defensible middle ground between those who oppose all campus hate-speech regulation and those who favor the sweeping regulation of such speech.”¹⁵¹

Altman differentiates between “perlocutionary effects” of speech (the impact on a listener) and “illocutionary force” of speech (the kind of speech it is, e.g., advising, insulting, questioning, etc.).¹⁵² He suggests that Matsuda and Lawrence are actually arguing against hate speech because it “can inflict a wrong in virtue of its illocutionary acts, the very speech acts performed in the utterances of such speech.”¹⁵³ The problem with Matsuda’s and Lawrence’s view of regulation, according to Altman, is that it is messy. “I do not believe,” he says, “that a clean and neat line can be drawn around those forms of hate speech that treat their targets as moral subordinates.”¹⁵⁴ As a liberal, Altman is bound by the principle of “viewpoint-neutrality,” which can only be overturned in situations where speech (a) does not contribute to public dialogue, (b) is not within the jurisdiction of governmental authorities to police, and, most worrisome for Altman, (c) is not likely to result in some extreme regulation (i.e., the slippery slope argument does not work).¹⁵⁵

Notwithstanding the messiness involved, Altman asks the reader to accept that the wrong of hate speech is not the specific words but rather the moral subordination or one group or

¹⁵⁰ Altman, “Liberalism and Campus Hate Speech,” 302-317.

¹⁵¹ Altman, “Liberalism and Campus Hate Speech,” 317.

¹⁵² Altman, “Liberalism and Campus Hate Speech,” 309. Altman is also drawing on the work of others, including J. L. Austin, *How to Do Things with Words* (New York: Oxford University Press, 1962), 98 ff.; John Searle, “Austin on Locutionary and Illocutionary Acts,” in *Philosophical Review* 77 (1968): 420 ff.; John Searle, *Speech Acts* (New York: Cambridge University Press, 1969), 31; John Searle, *Expression and Meaning* (New York: Cambridge University Press, 1979); and, finally, John Searle and D. Vanderveken, *Foundations of Illocutionary Logic* (New York: Cambridge University Press, 1985).

¹⁵³ Altman, “Liberalism and Campus Hate Speech,” 309.

¹⁵⁴ Altman, “Liberalism and Campus Hate Speech,” 311.

¹⁵⁵ Altman, “Liberalism and Campus Hate Speech,” 312-313.

individual at the hands of another: “Some forms of hate speech do wrong to people by treating them as moral subordinates,” and “this is the wrong that can and should be the target of campus hate-speech regulations.”¹⁵⁶ That is to say, campus speech regulations should be primarily concerned with the *intent* of the speaker, specifically the intent to treat another person as a moral subordinate, and that the inherent risks of limiting these kinds of speech are not as bad as the effects of permitting them.

Free speech advocates will appreciate Altman’s effort to craft speech policies from a position of “viewpoint neutrality,” which the liberal believes is essential in crafting policies that apply to different kinds of people with different points of view. Further, moderates will appreciate that Altman posits a middle ground between the extremes in this debate (a point he reaffirms in his essay, “Speech Codes and Expressive Harm”¹⁵⁷). Altman also recognizes the complexity of the situation, which requires the weighing of some social goods against other goods, for “it is reasonable to think that general rules against all forms of verbal harassment would be preferable to a speech code limited to categories such as race and gender.”¹⁵⁸ And when it comes to evaluating a specific instance of speech to determine whether it violated a code, his standard asks whether “the abusive speech materially interfere with a student’s opportunity to take advantage of the benefits of campus life? But in the interpretation and application of that standard, the distinctive expressive power of racist epithets and similar terms of abuse would be taken into account.”¹⁵⁹ Altman tries to craft a policy around the content/context distinction, which other liberals appreciate. And in some situations, Altman recognizes that speech should

¹⁵⁶ Altman, “Liberalism and Campus Hate Speech,” 317.

¹⁵⁷ Andrew Altman, “Speech Codes and Expressive Harm,” in *Ethics in Practice* (H. LaFollette, ed.; Oxford: Blackwell, 2007), 411-420.

¹⁵⁸ Altman, “Speech Codes and Expressive Harm,” 411-420.

¹⁵⁹ Altman, “Speech Codes and Expressive Harm,” 411-420.

not be limited at all: “scientific or philosophical discourse” is a very different thing than speech intended “to express the feelings of the speaker.”¹⁶⁰

But as is the case with any moderate/middle position, Altman’s is subject to criticism from both sides of the debate. In elucidating the divergent assumptions, the debate appears to become more and more irresolvable. Altman’s attempts at finding middle ground will likely fall on deaf ears, for both sides are too entrenched. The “all else being equal” nature of his argument does not represent how advocates of speech restrictions view the situation. The “neutral plane” of argument simply does not exist, in the view of critical race theorists and those who question the cultural narrative surrounding speech, and the former left critical liberalism and traditional civil rights approaches for this very reason: “Unlike traditional civil rights, which embraces incrementalism and step-by-step progress,” Delgado and Stefancic argue, “critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.”¹⁶¹

Similarly, free speech proponents can criticize Altman’s approach: liberals who favor free speech for social progress purposes will point to examples when the regulating the content of even *some* speech negatively impacts the wrong people. Jonathan Rauch, who is gay and Jewish, illustrates this point well:

“What is especially dismaying is that the purists pursue prejudice in the name of protecting minorities. In order to protect people like me (homosexual), they must pursue people like me (dissident)... In order to bolster minority self-esteem, they suppress minority opinion... Against the power of ignorant mass opinion and group prejudice and superstition, we have only our voices.”¹⁶²

¹⁶⁰ Altman, “Speech Codes and Expressive Harm,” 411-420.

¹⁶¹ Delgado and Stefancic, *Critical Race Theory: An Introduction*, 3.

¹⁶² Jonathan Rauch, “In Defense of Prejudice: Why Incendiary Speech Must Be Protected,” in *Harper’s Magazine* (May 1995). Online at: <https://harpers.org/archive/1995/05/in-defense-of-prejudice/> or https://www.jonathanrauch.com/jrauch_articles/in_defense_of_prejudice/.

The free speech advocate will argue that to do justice to all voices, freedom of speech must be the rule. Rauch mentions a University of Michigan student who was “prosecuted for saying that homosexuality is a treatable disease.” Rauch urges us to “notice that he was black.”¹⁶³ Henry Louis Gates, Jr., laments the fact that under the University of Michigan’s strict speech code, almost two dozen African Americans were charged with racist speech, while “not a single instance of white racist speech was punished.”¹⁶⁴ Chemerinsky and Gillman argue that speech codes like this “are often used to punish the speech of people who were not their intended targets.”¹⁶⁵

Socially conscious liberals can mention similar situations that have occurred in many areas where speech codes were in place: in Florida, where a policeman was called a “white cracker” by a black man, and in “the first hate-crimes case to reach the Supreme Court” the “victim was white and the defendant black.”¹⁶⁶ As a tool of power, censorship has been occasionally used in inequitable ways to perpetuate the disparity and oppression of already disenfranchised groups of people. Efforts to limit what can be said and by whom may backfire when the censor abuses his/her power or administers justice selectively in response to an overly broad prohibition against certain words, phrases, or ideas.

Another problematic feature of any moderate proposal is that free speech advocates and critics of free speech disagree about what constitutes violence, a disagreement that will not likely be solved with more discussion. The liberal will argue that Altman’s proposal to regulate even *a little* speech content can have negative social consequences: the enforcement of speech codes and policies takes away time and resources from more serious crimes on which we are all agreed:

¹⁶³ Rauch, “In Defense of Prejudice,” online.

¹⁶⁴ Henry Louis Gates, Jr., et al., *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* 45 (1994).

¹⁶⁵ Chemerinsky and Gillman, *Free Speech on Campus*, 105.

¹⁶⁶ Rauch, “In Defense of Prejudice,” online.

actual, physical harm to others. Rauch, for example, harshly criticizes those who equate verbal harm and physical harm, like a University of Michigan professor of law, who said, “To me, racial epithets are not speech... They are bullets.”¹⁶⁷ Rauch sees similar tendencies in Nobel and Pulitzer-prize winning novelist Toni Morrison, who said “oppressive language does more than represent violence; it is violence.” Rauch offers a simple reply to the claim that speech is violent, “It is not violence.”¹⁶⁸

For Rauch, the remedy to situations where fear may drive a person to act irrationally is not to censor him/her, not to crack “down on words or thoughts” to “pretend that we are doing something about violence and oppression.”¹⁶⁹ The solution to such problems is to crack down on the violence. Rauch’s point, which illustrates the argument for free speech, is succinct and clear: “Every cop or prosecutor chasing words is one fewer chasing criminals.”¹⁷⁰ This argument against censorship suggests that there are better, more effective ways to deal with larger, more threatening problems than censorship. Not only physical assault, but also systemic racism, is undercut and unaddressed when speech codes get our time and resources. “With so many false cries of racism around,” Carter says, “it is hardly any wonder that the *true* examples of racism... tend to be drowned in the sea of less compelling complaints.”¹⁷¹

Rauch’s defends free speech against attempts to regulate it at all (like Altman), but he is likely to go unheard by those who begin with different assumptions about what constitutes violence. Rauch unfortunately provides no argument for the idea that speech acts cannot constitute violence, and therefore, his position will likely be unsatisfying to those who argue for

¹⁶⁷ Rauch, “In Defense of Prejudice,” online.

¹⁶⁸ Rauch, “In Defense of Prejudice,” online.

¹⁶⁹ Rauch, “In Defense of Prejudice,” online.

¹⁷⁰ Rauch, “In Defense of Prejudice,” online.

¹⁷¹ Carter, *Reflections*, 187.

speech restrictions. If the status quo is inherently racist, the problem is more than just the utterance of certain words or phrases. The *reality* is racist, according to the aforementioned contemporary advocates of strict speech codes. The ground on which to have a debate about the subject are also *de facto* racist. Altman's commitment to "viewpoint neutrality" is seen as precluding any conversation after the fact about the best way to address the situation. Altman's essay, nuanced as it is, fails to recognize the implicit and inherent differences the free speech and restricted speech positions build into the fabric of their positions.

Second, in addition to the fundamental disagreement on a context/content distinction, progress is impossible given the current state of the debate between free speech proponents and advocates of restrictive speech codes due to rampant charges of contradictions and self-refutation. The liberal points out to the censorship advocate that they should recognize the irony that they are, in no small amount, relying on the very free speech protections they argue against. This was true of Leaker above. However, this criticism cuts both ways. With free speech as well, there is a paradox of sorts: on the one hand, the liberal claims, with Mill, that humans are fallible creatures, ultimately uncertain of any of their intellectual commitments, and yet on the other hand, they argue that this is the basis for a claim about the primacy of liberty on speech issues, an objective remark about the best way to address this uncertainty. Obviously, the progressive nature of knowledge relativizes the liberal prescription for a solution. In the act of making their arguments for their respective sides, both free speech proponents and advocates of restrictive speech codes undercut those very arguments. This charge of self-refutation cannot be added as an argument against censorship without also undercutting advocates of free speech.

Liberals respond to the charge of contradiction, however, by suggesting that another formulation of it cannot be dismissed so easily. This response, again, has to do with the problem

of enforcement. Restrictions in speech content would presumably be enforced by campus administration through punishment, that is, through coercive measures. But as Carter reminds us, this creates a pragmatic inconsistency, not only on college campuses but in American society at large: “If it is true that the campuses are hotbeds of racism,” Carter says, “then why would anyone concerned about racism want to put in the hands of campus authorities the power to decide what words can and cannot be used?”¹⁷² If, as critical race theorists suggest, the status quo is inherently racist, what sense would it make to give racist authorities the power to silence dissenters? We should not think so highly of their goals, argues Carter: “To imagine that an essentially racist authority would wield so extraordinary a power only in the ways that its dissenters envision is sheer fantasy.”¹⁷³ On the broader national level, Carter adds in a footnote that “the theory... was that the state would use its new-found power wisely and in furtherance of the general good, but matters did not quite work out that way.”¹⁷⁴ This brings us to the most popular criticism of censorship, namely, that regulating the content of speech is a slippery slope, to which we now turn.

Third, liberals argue that each advocate of censorship has an unsatisfactory response to the slippery slope argument. As Chemerinsky and Gillman noted above, history shows us that, on college campuses and in the nation more broadly, we almost always regret imposing regulations on the content of speech. If one takes the historical argument for free speech seriously, as free speech proponents argue we should, it is likely that stricter speech codes would be regretted as well. Free speech advocates ask those in favor of restrictions some hard follow-up questions: if we were to prevent the most hurtful, bigoted, racist, and morally repugnant ideas from being uttered, as many of us reasonably want to do, what is next? Would it not then be

¹⁷² Carter, *Reflections*, 177.

¹⁷³ Carter, *Reflections*, 177.

¹⁷⁴ Carter, *Reflections*, 177.

easier after *some* censorship is accepted to silence ideas that not only cause harm, but also outrage or offense? What follows that? Certainly, a society that disallows outrage and offense does not have to go far to outlaw any speech or ideas that it finds uncomfortable. Would we then only permit those political or social ideas the masses find acceptable? Wouldn't we then have something of the "tyranny of the majority" that worried Mill so much?

Where do we draw the line?, the liberal asks. Certainly not with public officials. In theory, if we permit lawmakers to decide for us what we can and cannot say, then who is to stop them from outlawing a word we *do* believe is necessary to make a social, political, moral, religious, or pedagogical point? And what is to stop them from going further, say, to outlawing not only certain expressions, but also certain states of mind or concepts? On the slippery slope's telling, the censorship story ends in a state or administration with nearly unlimited power, a totalitarian regime of Orwellian proportions and the "thought police." What then separates the way the United States handles sensitive subjects from China, or worse, North Korea? Granting additional power to a potential censor and then expecting him *not* to abuse that power is, as Carter warns, "sheer fantasy" to the free speech proponent. Feinberg agrees, saying that regulations "of the strong kind" have "an acrid moral flavor, and creates serious risks of governmental tyranny."¹⁷⁵

In response to the slippery slope argument, proponents of restrictions on speech argue that we are already on the slope. We limit speech – in both content and context – every time we impose rules on who can speak when. Anyone who has been in a conversation in which everyone is talking over everyone else knows that some restrictions on speech are necessary. Insofar as we expect others to follow widely accepted rules of discourse in our courts, debates, conversations, etc., we limit the speech of others. Rightfully so, argue those in favor of speech restrictions. And

¹⁷⁵ Feinberg, *Social Philosophy*, 52.

while free speech proponents argue that we need to be ever on guard against governmental tyranny, Pettit and others disagree with this fundamental assumption, as noted above. Twenty-first century Americans need not worry about despotism any more. And, of course, the liberal will respond that we need not worry about it only because we have mechanisms in place to check governmental power, like free speech, and that our contemporary political liberties like speech were bought at a price. “Freedom is not free,” they say.

Fourth and finally, the debate between free speech proponents and advocates of restrictive speech codes devolves to an irreparable and irreconcilable degree when liberals draw a distinction between harm and offense, so crucial to the positions of Mill and Feinberg. From the perspective of those who argue for free speech, it seems as if many advocates of censorship ignore that harm and offense are distinct categories, often conflating the two. No participant in this debate disagrees with the idea that harm to others is a justifiable reason to limit liberty; on this point, Mill and Feinberg are in absolute agreement with Matsuda, Lawrence, Fish, Leaker, Pettit, and Altman. However, free speech proponents suggest that it is often the case that putative harms experienced by today’s college students are not harms at all. They should be more appropriately considered “offenses,” which free speech permits. Stephen Carter advocates this position, when he says,

“I suspect that many of those who fought and died to make it possible for today’s students of color to have the opportunities they do would have been alarmed at the idea that this much energy would not go into learning, but into making sure no one says anything to suggest doubt about our abilities. I am quite sure that the answers our grandparents would have given is that our response must be to work hard enough to make ourselves, very simply, too good to ignore... Our parents and their parents fought to breach the barrier, faced far worse than we must, and won the fight. To honor them... we have little time to spend chasing down racists and punishing their speech. The barriers are starting to come down, opportunities are opening up, and there is work to be done.”¹⁷⁶

¹⁷⁶ Carter, *Reflections*, 178, 181.

Carter voices a call to educational excellence as the best response to hateful speech, and he frames the discussion in light of the history of struggle, literal *physical* struggle between the disenfranchised and the powerful. Speech enabled that progress, in Carter's view. But to call an offensive word, phrasing, gesture, or costume harmful is an overstatement, for the free speech advocate, if it has been done peacefully and if the victim is free to leave the situation.

Even some left-leaning, socially conscious proponents of free speech reject the conflation of harm and offense, and they point to the unique sensitivities of today's college students as contributing to the blurred lines. New York University professor, Ulrich Baer, believes that the term "snowflake" to describe a member of this generation of college students is pejorative and unfair.¹⁷⁷ We got where we are today, he says, through "a thorough generational shift" in which "personal experience and testimony, especially of suffering and oppression, began to challenge the primacy of argument."¹⁷⁸ Postmodern philosophical work has, in Baer's view, served to "legitimate experience – especially traumatic experience – which has been dismissed for decades as unreliable, untrustworthy, and inaccessible to understanding."¹⁷⁹ To be sure, Baer presents this experiential epistemology as a positive development, not a negative one,¹⁸⁰ but that notwithstanding, free speech proponents believe Baer tells us something valuable about the current generation of college students: they have come to see their experience as just as valuable as an argument for a specific point of view. They *feel* the truth of their opinions; therefore, those opinions are seen as *valid*.

¹⁷⁷ Ulrich Baer, "What 'Snowflakes' Get Right About Free Speech," in *The New York Times* (April 24, 2017).
Online at: <https://www.nytimes.com/2017/04/24/opinion/what-liberal-snowflakes-get-right-about-free-speech.html>.

¹⁷⁸ Baer, "What 'Snowflakes Get Right,'" online.

¹⁷⁹ Baer, "What 'Snowflakes Get Right,'" online.

¹⁸⁰ In a sense, Baer makes a case for the dispensability of making cases, offers an argument for dispensing with arguments; such is the paradox of debating free speech, as noted above in the "contradictions" portion.

Even many (politically) liberal scholars agree that this generation of college students has a problem seeing their experience as non-normative. And many colleges and universities bend over backwards to reinforce this self-centered perception by catering the college experience to that which most maximizes “student satisfaction.”¹⁸¹ If a student is unhappy, s/he believes that something is wrong with the system or his/her professor, not him/herself. And if a student perceives that a racist comment has been made, s/he does not need to present a case but rather rely on his/her subjective feelings of offense. The conflation of harm and offense results in all sorts of outrageous consequences, from the free speech proponent’s point of view: “I’m a Liberal Professor, and My Students Terrify Me,” wrote a professor pseudonymously in *Vox*.¹⁸²

Greg Lukianoff and Jonathan Haidt suggest that there is something new afoot in today’s college students, probably as a result of their childhood experiences in which adults told them “life is dangerous, but adults will do everything in their power to protect you.”¹⁸³ Ours is a different world than college students faced in the 1990s, and many of the arguments offered in that decade simply do not apply to a world connected online, as Pettit showed. This generation is more sensitive than others, subject to “affective partisan polarization,” otherwise expressed as “morality binds and blinds,” which can have the negative result of preventing clear thinking: “Acknowledging that the other side’s viewpoint has any merit is risky – your teammates may see you as a traitor.”¹⁸⁴ What is more, higher education has, as Baer noted above, embraced

¹⁸¹ See, e.g., Jack Stripling, “The Lure of the Lazy River,” in *The Chronicle of Higher Education*, vol. 64:8 (Oct. 15, 2017). Online at: <https://www.chronicle.com/article/The-Lure-of-the-Lazy-River/241434>.

¹⁸² Edward Schlosser, “I’m a Liberal Professor, and my Liberal Students Terrify Me,” in *Vox* (June 3, 2015). Online at: <https://www.vox.com/2015/6/3/8706323/college-professor-afraid>. See Tom Lindsay’s response at: “Leftist Professors: We Have Met The Enemy, And He Is Us,” in *Forbes* (June 13, 2015). Online at: <https://www.forbes.com/sites/tomlindsay/2015/06/13/leftist-professors-we-have-met-the-enemy-and-he-is-us/#8528b3b600f5>.

¹⁸³ Greg Lukianoff and Jonathan Haidt, “The Coddling of the American Mind,” in *The Atlantic* (September 2015). Online at: <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>.

¹⁸⁴ Lukianoff and Haidt, “The Coddling,” online.

“emotional reasoning,” which “will damage their careers and friendships, along with their mental health.”¹⁸⁵ Conflating harm and offense, according to Lukianoff and Haidt, as well as Feinberg, is dangerous. Feinberg says, “Not everything that we dislike or resent, and wish to avoid, is harmful to us”¹⁸⁶ and “It is not a necessary truth that we are personally wronged by everything at which we are morally outraged.”¹⁸⁷ The problem liberals see with using the university setting as a place where students are primarily *cared for* and secondarily educated is that the atmosphere in no way reflects or prepares students for the harsh realities of life.

Free speech proponents worry that failing to recognize the difference between harm and offense returns the college or university to the role of a parent. Shortly after the Berkeley Free Speech movement, as free speech protections were expanding in the U.S., the *en loco parentis* doctrine was shrinking, and liberals argue that we would do well not to return to it. This is to say: it is not at all clear that those who criticize free speech on campuses are aligned with what many colleges publicly declare to be their social purpose and mission.¹⁸⁸ Advocates of restrictive

¹⁸⁵ Lukianoff and Haidt, “The Coddling,” online.

¹⁸⁶ Feinberg, *Harm to Others*, 45.

¹⁸⁷ Feinberg, *Offense to Others*, 219.

¹⁸⁸ Consider the mission statements of the three schools I mentioned in a note above that have illiberal speech codes.

Alabama A&M University states in its mission that it is “dedicated to intellectual inquiry” and “the application of knowledge and excellence in teaching, research, and service... [It] is responsive to the needs of... the social and economic needs of the state and region” and “prepare students for careers in the arts, sciences, business, engineering, education, agriculture and technology. As a center of excellence, the University is dedicated to providing... [an] environment for the emergence of scholars, scientists, leaders and critical thinkers, who are equipped to excel through their contributions and leadership in a 21st century national and global society.” (Online at: <http://www.aamu.edu/aboutaamu/office-of-the-president/plan/pages/mission,-vision-and-values.aspx>.)

One wonders whether a school whose speech codes prevent challenges to others by any means of communication, including social media, is doing their students a disservice by *not* preparing them for the harsh realities of life after graduation.

A similar paradox is found in the mission of California State University, Fresno, which simply aims “to boldly educate and empower students for success.”

(<http://www.fresnostate.edu/studentaffairs/division/about/index.html>.) What “boldness” could they aspire to when their policies limit offensive material based on not only arbitrary but also non-arbitrary factors?

And how well are students trained for post-college life by not encountering views that challenge their prior assumptions about the areas they list in their speech code: gender, race, color, religion, national origin, etc.?

And finally, Florida State University has as its first Core Value to inspire “transformative daring” in which “we support thoughtful risk-taking that leads to successes that improve our world dramatically. And when we

speech codes seem to free speech proponents as if they view the college or university as “protector” of students, that its central goal is to make students feel welcome and never challenge their pre-existing views.

The liberal believes, however, that the social purpose of a university is not to protect students from potentially harmful forces or ideas, but rather to *prepare* them for their post-college life. Part of this preparation, they argue, is exposing them to views they will encounter when they leave the university. The solution they offer is exposure to *more* speech, a *more* diverse set of ideas than those we find comfortable (which Haidt and Lukianoff refer to as “exposure therapy,” or “habituation,” etc.).¹⁸⁹ Liberals like Haidt and Lukianoff impress on their students the idea that “you can never achieve happiness by making the world conform to your desires. But you can master your desires and habits of thought.”¹⁹⁰

However, there is a fundamental disagreement among free speech proponents and advocates of restrictive speech codes about the nature of the university itself, and about education more broadly, an intractable debate that juxtaposes protection of students against preparation of them. Simply put, the use of logic and evidence that “qualifies” as admissible is rejected by critical race theorists. This is why critical race theorists highly value *story-telling* as appropriate and admissible data. “Storytelling is a part of critical race theory,” says Ladson-Billings, which “underscores an important point within the critical race theoretical paradigm –

face challenges, we confront them with resilience, curiosity, and renewed desire to overcome hurdles to our goals.” FSU’s mission is to preserve, expand, and disseminate “knowledge in the sciences, technology, arts, humanities, and professions.” They do this by instilling “the strength, skill, and character essential for lifelong learning, personal responsibility, and sustained achievement within a community that fosters free inquiry and embraces diversity.” (Online at: <https://www.fsu.edu/about/mission-vision.html>.)

The mission and Core Values of FSU – promotion of knowledge, free inquiry, etc. – stand in contrast to the speech code it has adopted. All of this is to say that the speech codes of at least some colleges and universities limit the extent to which they will be able to fulfill their mission. Advancing knowledge and preparing students requires unlimited speech, not restrictions on it, or so I have argued.

¹⁸⁹ Lukianoff and Haidt, “The Coddling,” online.

¹⁹⁰ Lukianoff and Haidt, “The Coddling,” online.

race still matters.”¹⁹¹ Jacqueline Bridgeman agrees, arguing that advancing positions through stories permits non-white and non-male participants in the conversation: “We must create space and the conditions for all voices to be heard. To not only make the invisible visible but to prepare a place where all can belong. Employing counter narratives in the field of education is one place where this important work can be done.”¹⁹² Delgado also argues for the utility of storytelling as a tool to counter traditional points of view:

“Stories, parables, chronicles, and narratives are powerful means for destroying mindset – the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves. Ideology – the received wisdom – makes current social arrangements seem fair and natural. Those in power sleep well at night-their conduct does not seem to them like oppression. The cure is storytelling (or, as I shall sometimes call it, counterstorytelling).”¹⁹³

Those who argue for stricter speech codes – like those who work in critical race theory – operate according to a different methodology than those who use academic and/or scholarly tools. That is to say, there is an impenetrable disagreement on the utility of storytelling for ascertaining or discovering truth.

The contradictory assumptions and methodologies of free speech proponents and advocates of restrictive speech codes were on full display when Amy L. Wax, a University of Pennsylvania Law School professor, wrote an op-ed for the *Philadelphia Inquirer*. On December 12, 2017, Wax gave a public lecture in which she describes the blowback she received from her

¹⁹¹ Gloria Ladson-Billings, “Just What Is Critical Race Theory, and What’s It Doing in a Nice Field Like Education?” in *Race Is... Race Isn’t*, 8.

¹⁹² Jacquelyn L. Bridgeman, “African American Counter-Narratives: Telling One’s Story, Finding One’s Place,” in *Critical Race Theory Matters*, 150.

¹⁹³ Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative,” in *Critical Race Theory: The Cutting Edge*, 61.

piece.¹⁹⁴ Wax’s op-ed, co-authored with University of California, San Diego law professor, Larry Alexander, argued that the cultural norms of the 1960s – which prized hard work, civic responsibility, education, marriage, etc. – were better suited to engender a productive and cohesive society than the norms of today, evidenced in staggering statistics in a number of categories: single parenthood, drug epidemics, rampant illiteracy, violence, etc. Their most controversial passage made the claim that “cultures are not equal in terms of preparing people to be productive citizens in a modern technological society,”¹⁹⁵ singling out elements of Native American, poor white, black, and Hispanic cultures. In response, the free speech proponent would argue that we should subject claims like these to debate to assess their validity. Wax says this would be “the proper response... to attempt to explain, using logic, evidence, facts, and substantive arguments, why these opinions are wrong.”¹⁹⁶

But this is not the response Wax received, even from many of her Penn colleagues. She received letters, emails, statements, and petitions that “condemned the piece as racist, white supremacist, hate speech, heteropatriarchal, xenophobic, etc.”¹⁹⁷ Students and faculty members alike demanded her resignation, or at least her removal from committees. Notably, however, they demanded these responses without substantively engaging the argument and evidence of the op-ed. Some of her colleagues described their piece as an “attack” that would “damage” their institution; others “invited students... to monitor” her “and to report any ‘stereotyping and bias’ they might experience or perceive.”¹⁹⁸ In one of the few instances when an attempt at an actual argument was made against Wax and Alexander, the charge was “the sin of praising the 1950s –

¹⁹⁴ The speech was adapted and published later as: Amy Wax, “Are We Free to Discuss America’s Real Problems?” in *Imprimis*, Vol. 47:1 (January 2018). Online at: <https://imprimis.hillsdale.edu/are-we-free-to-discuss-americas-real-problems/>.

¹⁹⁵ Wax, “Are We Free,” online.

¹⁹⁶ Wax, “Are We Free,” online.

¹⁹⁷ Wax, “Are We Free,” online.

¹⁹⁸ Wax, “Are We Free,” online.

a decade when racial discrimination was openly practiced and opportunities for women were limited.”¹⁹⁹ Others accused Wax of speaking in “code” as a “dog whistle” for Nazism.

The knee-jerk hostility Wax faced is anathema to rational deliberation, according to the liberal free speech proponent, but the swift response was not perceived as unfounded at all for those who view the status quo as already racist. The situation has caused Wax to rethink her position on the proper rules of debate. “Of course one has the *right* to hurl labels like ‘racist,’ ‘sexist,’ and ‘xenophobic’ without good reason – but that doesn’t make it the right thing to do. Hurling such labels doesn’t enlighten, inform, edify, or educate. Indeed, it undermines these goals by discouraging or stifling dissent.”²⁰⁰ Reflecting later on the events, Wax makes clear why free speech proponents and advocates of restrictive speech codes will not make progress on this debate:

“The charge that a statement is ‘code’ for something else, or a ‘dog whistle’ of some kind – we frequently hear this charged leveled, even against people who are stating demonstrable facts – is unanswerable. It is like accusing a speaker of causing emotional injury or feelings of marginalization. Using this kind of language, which students have learned to do all too well, is intended to bring discussion and debate to a stop – to silence speech deemed unacceptable.”²⁰¹

Wax’s insight reveals the deep division in discussions of regulating race-related speech on college campuses. Conversation *cannot* move forward if one side pre-emptively throws *ad hominem* bombs into the mix, of which those on the far right and far left are guilty. This, of course, means that those advocating speech restrictions are reaching their desired goals: in making the charge of racism, they blunt further conversation and end up silencing the speech they find distasteful.

¹⁹⁹ Wax, “Are We Free,” online.

²⁰⁰ Wax, “Are We Free,” online.

²⁰¹ Wax, “Are We Free,” online.

In Wax's view, the stakes could not be higher: "Democracy thrives on talk and debate, and it is not for the faint of heart... Offense and upset go with the territory; they are part and parcel of an open society. We should be teaching our young people to get used to these things, but instead we are teaching them the opposite."²⁰²

²⁰² Wax, "Are We Free," online.

CONCLUSION

This, of course, brings us to some very uncomfortable questions, to which this essay can but gesture. Should scholarship still depend on reason, evidence, logic, and argument to ascertain truth? What should be done in situations where someone uses these tools well, but in service of an uncomfortable or politically incorrect conclusion? What if an argument is well-supported but the conclusion to which the author drives is not only uncomfortable but also socially dangerous? What if the truth actually is offensive? What if the point of view a controversial speaker espouses is true, and that truth undermines our cherished commitment to equality? What if the advancement of knowledge and social progress, so central to the free speech proponent's argument for maximizing liberty, do not always work together and can be, in some situations, at odds with one another? What if the advancement of knowledge *limits* social progress?

Scholars enter socially dangerous territory when they evaluate race-related arguments and counterarguments. With respect to the two cases mentioned by the free speech proponents above – Herrnstein and Murray's *The Bell Curve* and Shockley's Stanford address – some scholars continued to debate these matters, despite their social unacceptability. In 1994, over fifty signatories signed a statement for the *Wall Street Journal* in which they rebuffed “conclusions dismissed in the media as discredited,”²⁰³ chief among them the issue of racial intelligence. These scholars were careful to acknowledge that there are a variety of causes and conditions for racial disparity, but they also believe that “intelligence... can be measured, and intelligence tests

²⁰³ Linda S. Gottfredson, “Mainstream Science on Intelligence: An Editorial With 52 Signatories, History, and Bibliography,” in *Intelligence* 24:1 (1997), 13.

measure it well.”²⁰⁴ Nor are those tests “culturally biased against American blacks or other native-born, English-speaking peoples in the U.S.... IQ scores predict equally accurately for all such Americans, regardless of race and social class.”²⁰⁵ The signatories proceeded to give race-related results on those tests, which puts “Jews and East Asians” at the upper ends of the spectrum and all others – whites, blacks, etc. – below them.

In an environment where arguments have the potential to threaten and harm entire groups of people; where some ideas will have negative social consequences; where no one is ultimately unbiased enough to get a fair hearing from both of the opposing sides; in situations like these, one wonders whether the best option is simply to not engage in scholarship of this type. Philip Kitcher rejects “race” as a suitable category of scholarly exploration for precisely these reasons and instead favors a more “democratic science” in the face of “subversive truths.”²⁰⁶ Every scholar and every piece of scholarship is hopelessly value-laden. Perhaps, then, not all knowledge is beneficial:

“There are vast oceans of truth that aren’t worth exploring, and so the thesis must give way to the more plausible claim that it is always better for us to know *significant* truths. If there is no context-independent notion of significance, and epistemic significance is intertwined with past and present practical projects, then we cannot set the value of apprehending significant truths on some ‘higher’ plane, so that inquiry must inevitably take precedence over everyday concerns.”²⁰⁷

Racial categories, when explored or exploited by those in ivory towers, can contribute to social unrest and inequality.²⁰⁸ The free speech proponent, who argues for the necessity of the exploration, and advocates of strict speech codes, who argue that the inquiry itself is racist, “pull

²⁰⁴ Gottfredson, “Mainstream Science,” 13.

²⁰⁵ Gottfredson, “Mainstream Science,” 14.

²⁰⁶ Philip Kitcher, *Science, Truth and Democracy* (New York: Oxford University Press, 2003).

²⁰⁷ Kitcher, *Science, Truth and Democracy*, 148. Note: Kitcher’s assertion that there are some truths not worth exploring is not the same as Leaker’s above. Whereas Leaker argues that we do not need to hear some arguments anymore because of the consensus of the scholarly community, Kitcher argues that we need not explore some areas because of their potentially harmful social consequences.

²⁰⁸ Kitcher, *Science, Truth, and Democracy*, 96-107.

in different directions.” So a “responsible verdict on the notion of race must await the elaboration of information about all the uses, their consequences, and the prospects of doing better without racial categories.”²⁰⁹ Therefore, “continued viability of these notions should not be decided by any group of academic researchers” and doing so for reasons of the “independence of scientific inquiry rings hollow.”²¹⁰ The concept of “race” as a subject of scientific or scholarly activity would require “ideal deliberators,” but ideal deliberators do not presently exist, for “there are considerations pulling in different directions.”²¹¹

My goal in this essay has been to explain how these incompatibilities arise, why there seems to be an impasse that university cannot move past. This required hearing the positions of each position and presenting how the other side would respond. I suggested throughout that if progress is to be made, either or both of the two sides will need to reconsider three fundamental features of their argument: first, their starting point, whether the status quo is inherently racist and whether view-point neutrality is possible; second, what methodology is appropriate to these complex issues, storytelling or the traditional tools of argument and evidence; and third, whether and to what extent the fundamental values that animate these positions – liberty or equality – are compatible. Thus far, neither side seems willing to hear the other out in ways that do justice to the original positions, except for moderates who, unfortunately, are attacked from both sides.

Until more scholars seek common ground, or until those seeking common ground are given a fair hearing by those on both sides, further dialogue is of little use. Free speech proponents strive to maximize liberty as a prerequisite for other liberties, even to the point of accepting terrible uses of it. “University student groups may express any viewpoint they wish,” says a recent court opinion, “including a discriminatory one, for the court [is] committed to

²⁰⁹ Philip Kitcher, “Does ‘Race’ Have a Future?” in *Philosophy and Public Affairs* 35:4 (Fall 2007), 316.

²¹⁰ Kitcher, “Does ‘Race’ Have a Future?”, 317.

²¹¹ Kitcher, “Does ‘Race’ Have a Future?”, 317.

protecting the freedom to express *the thought that we hate*.”²¹² Liberals worry about regulating the *thought* that we hate, for no governmental or university administrator should be empowered to regulate ideas and the expression of those ideas in speech. Conversely, advocates of restrictive speech codes argue that harm – literal, real harm – is being done while liberals remain aloof in their debates, disconnected from the real world stories of struggle among those who are already disenfranchised in society. Their responses take issue with the thought that *we hate*, and they intend to use their platform not just to rebalance the scales, but to swing the pendulum in their direction as reparation.

The issue of speech is personal for me. Since the Charlottesville event, I have come to appreciate and seek remedies for natural self-deceptive strategies present in all of us at some level, and nowhere is this more apparent than in confirmation bias. While I resonate with the liberal’s claim that the best cure for confirmation bias is exposure to new data, new ways of thinking, and unfamiliar ways of life, doing so will mean attending and listening to those who suggest that the status quo is already, inherently, fundamentally, and essentially racist. This essay has been an exercise in hearing both sides out. But I am not hopeful about the contemporary state of the conversation, and I worry both sides are too entrenched to take meaningful steps toward unity.

This essay is part of a growing body of literature aimed at explicating the current dilemma on speech issues. The contribution it makes is illustrating to both sides why they may not be as effective as they would like in changing hearts and minds. The field on which speech

²¹² Christian Legal Society Chapter of the University of California, Hastings College of Law vs. Martinez (2010): 130 S.Ct. 2971, 2994n26. Passage taken from Keith E. Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton, NJ: Princeton University Press, 2018), 78 (emphasis added). Somewhat ironically, Whittington and other cases have used this language of “the thought that we hate,” yet it was opined as a minority opinion in a decision that went against freedom of conscience (to take up arms, serve in war, etc.). See Cornell University, *Legal Information Institute* “United States vs. Schwimmer,” (1929), Online at: <https://www.law.cornell.edu/supremecourt/text/279/644>.

conversations take place may shift soon, however. The same Gallup Poll that surveyed today's college students and found them inhospitable to hate speech also surveyed high school students. The results were surprising, for high school students are, on the whole, comfortable with accepting and promoting the value of free speech and the First Amendment in particular.²¹³ Therefore, we can expect that, at least for the next few years, the issue will remain contested and contestable. Today's high school students are tomorrow's college students, and they will be influenced by scholars on both sides of the issue, perhaps even adding their own voices to the conversation.

²¹³ Niraj Choksi, "First Amendment Support Climbing Among High School Students," in *The New York Times* (Feb. 7, 2017), Online at: <https://nyti.ms/2kIKYkQ>.

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