

About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties

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INTRODUCTION: FORMAL RULES AND SUBSTANTIVE JUSTICE

One day, a lawyer dies and goes to Heaven, where he is met by St. Peter outside the Pearly Gates.

“What do we have here?” St. Peter asks.

“A lawyer,” he replies.

“Another one. We’ve sure been getting a lot of those lately. Well, what do you have to say for yourself?”

“I followed all the rules,” the lawyer replies, modestly, but with quiet pride. “I never broke any of the canons of professional responsibility, and I got all my briefs in on time. Except one, when my wife had a baby. But the judge gave me an extension.”

“Not bad. Did you represent plaintiffs or defendants?”

“Both, in equal numbers. And I was respectful to everyone—my adversary, witnesses, and, of course, the judge.”

“Let’s see,” says St. Peter, picking up a thick book marked LEGALITY. After thumbing through a few pages, he says, “Here you are. Right there on page three. Not bad. It seems you colored between the lines at all times. You cited case law accurately, so far as we can tell, given the indeterminacy thesis.¹ And you never coached a witness or engaged in a conflict of interest.”

“So, do I get in?” the lawyer asks, eagerly.

“There’s just one more thing,” St. Peter replies, picking up a second book labeled JUSTICE. “Hmmm. I don’t see you on page three in this one.” He leafs through several more pages,

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¹ On the indeterminacy thesis, see ROBERT L. HAYMAN, JR., NANCY LEVIT & RICHARD DELGADO, JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 402–09, 431 (2002).

*then looks up. "We'll have to look into this a little further. Please take a seat over there for a minute." Clapping his hands: "Research assistant!"*²

The point of this story, of course, is that formal rules do not necessarily guarantee justice; indeed some of history's most ignoble chapters—slavery, Indian relocation, World War II internment, the Holocaust, Operation Wetback—seem to have been completely legal at the time.³ This quandary suggests a second one that is the subject of this Essay: What is the relationship between the group of largely formal rules known as civil liberties and the set of substantive values known as racial justice or civil rights?

The editors of *CR-CL* have invited me to offer my thoughts on the relationship between civil rights and civil liberties. Both are emblazoned on their masthead. A few years ago, one of my favorite authors, historian Robin Kelley, wrote a prize-winning book about white media, black culture, and the huge gulf between them, entitled *Yo' Mama's Disfunktional*.⁴ Does a similar gap exist between civil rights and civil liberties? Is the masthead dysfunctional, committing *CR-CL* by its terms to an inherently self-contradictory agenda, like a law review that billed itself as "The Global Development and Environmental Protection Journal" or "The Review of Religion and Atheism"?

Are civil liberties and civil rights in tension, pulling in different directions? Is it possible for a society to have both, in full measure and without limitation? If not, should *CR-CL* split up into two separate journals? Part I of this Essay examines a few instances in which civil rights and civil liberties may be entirely compatible. Then, Part II shows how our system of civil rights and civil liberties can exhibit tensions and strains, as exemplified in the area of hate speech. Part III explains the source of these tensions, while Part IV offers some thoughts on how to live with them. I hope that what follows will prove helpful not just in this one area but will also enable us to understand better the relationship be-

² This story occurred to me when I learned that a liberal legal advocacy organization declined to send a speaker to a Harvard Law School program on the ground that civil rights and civil liberties are exactly the same and cannot conflict. Telephone conversation with Joi Chaney, Editor, *CR-CL* (Apr. 2, 2003).

³ See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (declaring that slaves and their descendants are not U.S. citizens entitled to the privileges and immunities of citizenship); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese Americans). See also JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 190, 317, 320 (2000) (discussing Indian relocation and Operation Wetback, a Congressionally approved program in which at least 1.3 million Latinos, many of them U.S. citizens, were deported in 1954).

⁴ ROBIN D. G. KELLEY, *YO' MAMA'S DISFUNKTIONAL: FIGHTING THE CULTURE WARS IN URBAN AMERICA* (1997) (showing how establishment writers and social scientists depict black "ghetto" society according to frames of reference radically different from those of the residents of inner-city neighborhoods).

tween civil rights and civil liberties in general. As you may recall, the poor lawyer who spent his life maximizing one variable is still sitting anxiously on that chair outside the Pearly Gates, waiting for the overall verdict on whether his life served justice in the law.

I. SOME INITIAL INSTANCES IN WHICH CIVIL RIGHTS AND CIVIL LIBERTIES MAY BE COMPATIBLE

In one sense, civil liberties and civil rights are certainly compatible in that they are both aspects of the good life. One would not want to live in a society that scrupulously protected the interests of minority groups and did not tolerate violations of their civil rights but denied its citizens the rights of free speech, privacy, worship and assembly. By the same token, one would not want to live in a society that safeguarded those rights but treated minorities harshly outside those spheres.

This, however, is not to say very much about their fundamental compatibility. Civil rights and civil liberties may both be desirable, though not simultaneously. When one legal interest is realized, it may interfere with another.⁵ One might occupy a higher place in our echelon of values, so that we hesitate to advance the other at its expense.⁶ Civil rights and civil liberties might not always be coextensive, so that one could maximize one value in certain settings without interfering with the other. In other settings, the two might conflict.⁷ They may be only trivially compatible because of an unimportant element they have in common⁸ or by means of a bogus monetization.⁹

One can insist that another person's favorite interest, *properly understood*, is really an aspect of one's own,¹⁰ or imagine civil rights and civil liberties only during good times, when society is faced with little scarcity and people are on their best behavior.¹¹ One can also frame the

⁵ For example, national security may conflict with the right of privacy.

⁶ One might argue that environmental protection trumps the right to drive a large, gas-guzzling car.

⁷ National security (again) may or may not affect the right to travel—by car to the grocery store versus by private plane above a military base or to a theater of conflict.

⁸ For example, the Iraqi and U.S. scrap metal associations might both agree that the war in Iraq was a bonanza.

⁹ Recall how the Bush administration, in March 2003, called for a study to explore assigning monetary values to each of our civil liberties. The idea is that, in times of war, the Executive branch would like to feel free to engage in surveillance of private citizens, read their mail and credit card records, and see what books and videos they check out from libraries. To prevent its doing so too cavalierly, the Office of Management and Budget proposed to find out how much value citizens assign these rights; the government would then weigh that against the value it placed on national security objectives. According to press accounts, the ACLU thought this was a good idea. See Edmund L. Andrews, *Threats and Responses: Liberty and Security*, N.Y. TIMES, Mar. 11, 2003, at A13.

¹⁰ For example, some pro-development forces insist that environmental interests, properly understood, are really part of national energy policy.

¹¹ In an idyllic society in which few speakers use hate speech to threaten equality and

issue as pitting a grand, systemic value against an individualized, particularized one held unreasonably by the other side.¹² For example, adherents of free speech absolutism sometimes assert the worth of the generalized value society derives from our system of freedom of expression in light of the momentary annoyance of a Latino or black who is the target of a single, isolated racial epithet. How can the temporary offense of mere wounded feelings stack up against the tremendous gains, including inventions, libraries, presidential debates, and PBS, that spring from our system of free expression?¹³

These efforts at reconciliation are unsuccessful because they dodge hard cases, minimize conflicts that are real, or define the area of disagreement in a manner that allows only one answer.¹⁴ Using the example of hate speech, I will demonstrate that the alleged tension between civil liberties and civil rights is real, and examine what drives it and how we should think about and learn to live with it.

human dignity, why would one need hate speech controls? Racist speech would carry little sting, while protection against the rare case could chill legitimate expression.

¹² In the free-speech-versus-hate-speech setting, see SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 20–21, 165–67 (1994); Nadine Strossen, *Regulating Racist Speech on Campus*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS AND CIVIL LIBERTIES* 212 (Henry Louis Gates et al. eds., 1994) [hereinafter, Strossen, *Regulating Racist Speech*]; Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1170–71 (1993) [hereinafter, Strossen, *A Feminist Critique*].

¹³ Of course, advocates for minority causes are sometimes guilty of asking the same sort of loaded question. They may ask how anyone could sacrifice *their* favorite value—equality—for the mere momentary relief some Nazi or skinhead derives from hurling invective or burning a cross in the front yard of an African American family. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Narratives in Collision*] (calling attention to this and similar strategies on the part of the minority Left). Both approaches juxtapose an emaciated, individualized, slice-of-life version of the competing interest against a robust, grand picture of their own; guess which one prevails? See RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* (forthcoming 2004) [hereinafter DELGADO & STEFANCIC, *UNDERSTANDING WORDS THAT WOUND*] (discussing this strategy).

¹⁴ For instance, one might argue that equality is a matter of giving everyone enough rights, and so civil rights collapses into—and is “nothing more than”—civil liberties distributed widely and impartially. See Peter Weston, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (making a version of this argument). If this were the case, however, the problem with which this Essay is concerned would emerge in another form, since one very large component of rights (free speech) would be at odds with another (freedom from hate speech).

Similarly, the counterposing of a large, generalized value dressed up in dramatic language against the opponent’s value depicted in emaciated, unattractive terms is a transparent debater’s device—the way one asks the question implies that only one answer is possible. See *supra* note 13.

II. HATE SPEECH AND THE DEBATE SURROUNDING CIVIL RIGHTS AND CIVIL LIBERTIES

Free speech absolutists and critical race theorists have taken opposing positions regarding hate speech. Absolutists, including the ACLU, maintain that a certain amount of vigorous criticism, even hate speech, is inherent in a democracy such as ours. A vital liberty and a cornerstone of democracy, speech must never be suppressed. In contrast, the Critical Race Theory position holds that hate speech silences its victims, contributes to a climate of disrespect for women and minorities, and undermines the very democracy that free speech is said to undergird. Each side marshals case law and policy justifications in support of its position.

A. *The Absolutist Position*

The national organization of the ACLU represents the absolutist position, that all speech should receive blanket protection under the First Amendment.¹⁵ Except for speech used in the furtherance of crime, few restraints on its exercise are acceptable. If campus authorities wish to confront a tide of racist slurs, graffiti, and e-mails disparaging students of color, a speech code is not an appropriate remedy. Instead, it is argued that minority students should learn to speak back or ignore the offenders.¹⁶ Authorities can condemn racist remarks, declaring them tawdry and in poor taste.¹⁷ Moreover, if hate speech is delivered in a way that inspires fear, authorities can charge assault; if the speech defaces university property, they can charge trespass or similar offenses.¹⁸ Civil rights and minority interests are thus worthy of protection but only insofar as they do not limit speech.

The absolutist scholars believe that both constitutional bedrock and current case law support their position. Doctrines such as the prohibition of content and viewpoint discrimination,¹⁹ Supreme Court decisions such as *R.A.V. v. St. Paul*,²⁰ *Texas v. Johnson*,²¹ and *New York Times v. Sulli-*

¹⁵ See, e.g., NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* (1992); ARYEH NEIER, *DEFENDING MY ENEMY* (1979); WALKER, *supra* note 12; Strossen, *Regulating Racist Speech*, *supra* note 12.

¹⁶ See, e.g., HENTOFF, *supra* note 15, at 100–02, 111, 159, 167 (forcefully advocating the talk-back solution).

¹⁷ See Charles Calleros, *Paternalism, Counterspeech, and Campus Hate Speech*, 27 ARIZ. ST. L.J. 1249 (1995); Nadine Strossen, *Regulating Hate Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 562 (1990) [hereinafter Strossen, *Hate Speech on Campus*].

¹⁸ Nadine Strossen made this comment during a debate with this author at Cornell University in the fall of 1995.

¹⁹ See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 790 (2d ed. 1988).

²⁰ 505 U.S. 377 (1992) (striking down an ordinance prohibiting hate speech and conduct).

²¹ 491 U.S. 397 (1989) (striking down a flag-burning statute).

van,²² and a trio of lower court cases invalidating university speech codes at Wisconsin,²³ Michigan,²⁴ and Stanford,²⁵ all suggest that campus hate speech rules are unlikely to withstand judicial scrutiny.²⁶

Still, a few cases can be read to uphold speech codes,²⁷ and the belated development of First Amendment legal realism²⁸ has been engendering doubt in some of the faithful absolutist scholars. In response, they have sought to fortify their position with policy arguments. One, the “best friend” argument, holds that free speech is minorities’ most reliable ally. If those clamoring for hate speech regulation knew the history of minorities in this country, the argument goes, they would realize the vital part that speech, marching, and protests have played in the struggle for civil rights; consequently, they would hesitate to impose limitations on such a precious instrument.²⁹ A second, “pressure valve” argument holds that permitting racists to unburden themselves of vituperative language allows them to discharge anger that might otherwise explode in more damaging forms, such as physical attacks. If outsider groups realized this, they would stop demanding hate speech rules that only place them in greater jeopardy.³⁰ A third argument asserts that hate speech rules will end up hurting minorities because authorities will inevitably apply the new rules against them when they speak out against their oppressors. Lastly, another absolutist argument holds that more speech is always the preferred response to bad speech. Hate speech rules preempt private responses, so that minorities never learn how to defend themselves. Talking back to the aggressor is empowering, while running to the authorities whenever one hears a hurtful word increases one’s sense of helplessness and victimization.³¹ Free speech absolutists deploy such policy arguments to reason that even if free speech law were to some extent malleable, de-

²² 376 U.S. 254 (1964) (increasing protection for disfavored libelous speech).

²³ *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

²⁴ *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

²⁵ *Corry v. Stanford Univ.*, No. 1-94-CV-740309 (Cal. Super. Ct. Feb. 27, 1995).

²⁶ For a review of the ACLU position, see Strossen, *Hate Speech on Campus*, *supra* note 17. See also Marjorie Heins, *Banning Words: A Comment on Words that Wound*, 18 HARV. C.R.-C.L. L. REV. 585 (1983) (reviewing these First Amendment doctrines).

²⁷ See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding criminal libel statute in face of First Amendment challenge).

²⁸ See J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990); Richard Delgado, *First Amendment Formalism is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994) [hereinafter Delgado, *Giving Way*]; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

²⁹ See Richard Delgado & David Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation*, 82 CAL. L. REV. 871, 881–82 (1994) [hereinafter Delgado & Yun, *Bloodied Chickens*].

³⁰ *Id.* at 876–80.

³¹ *Id.* at 883–85.

cisionmakers should exercise discretion in favor of the cherished freedom of expression.

B. The Critical Race Theory Position

Twenty years ago, *CR-CL* published the first piece of legal scholarship specifically addressing hate speech. Entitled *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*,³² the article reviewed a number of harms associated with hate speech and name-calling. Urging recognition of a new, freestanding tort, I pointed out that courts were already affording relief under such rubrics as defamation, intentional infliction of emotional distress, assault, and statutory discrimination. A number of United States courts and a landmark Canadian Supreme Court decision followed suit.³³

A few years later, critical race theorist Mari Matsuda, in a much-cited article, urged that protection against hate speech should be expanded to include public law remedies, such as criminal prosecutions.³⁴ Then, in the course of a colloquy with ACLU president and law professor Nadine Strossen, Charles Lawrence argued that *Brown v. Board of Education* was a hate speech case, specifically addressing the problem of campus antiracism rules. When the Court reversed long-standing precedent and held that separate schooling sent a socially pernicious message to black schoolchildren, Lawrence argued that it was tacitly holding that certain messages of hate and inferiority should not be spoken. *Brown*, then, would stand as a precedent justifying campus rules aimed at curtailing racist hate speech.³⁵

These three articles, and a book growing out of them,³⁶ could be said to constitute the first wave of hate speech writing and activism. The next major development saw diverging lines of case authority and the advent of a legal theory aimed at interpreting them. In the early 1990s, two federal courts endorsed the absolutist position in striking down campus hate speech rules at leading universities,³⁷ while the Canadian Supreme Court, citing American critical race theorists, weighed in with a free speech case asserting more or less the direct opposite.³⁸ At the same time, federal and

³² Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words That Wound: A Tort Action*].

³³ See DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 13 (discussing this subsequent history).

³⁴ Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

³⁵ See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990).

³⁶ RICHARD DELGADO ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

³⁷ *UWM Post*, 774 F. Supp. 1163; *Doe v. Univ. of Mich.*, 721 F. Supp. 852.

³⁸ *The Queen v. Keegstra*, [1990] 3 S.C.R. 697.

state courts were affirming causes of action for minority and female plaintiffs targeted by hate speech in other settings, such as K–12 schools and at work.³⁹

Many people then questioned what was happening in the civil rights and civil liberties arena. A second article in the pages of *CR-CL* posited that the judiciary was belatedly beginning to apply the lessons of legal realism to the First Amendment.⁴⁰ Rejecting mechanistic tests, shopworn maxims, and per se rules, courts were beginning to consider a host of factors, including setting, power disparities, history, communication theory, and social science, on the way to a decision.⁴¹ Scholars addressed each of the paternalistic objections to hate speech regulation put forth by liberals⁴² and another “toughlove” set favored by the neoconservative right.⁴³ These authors also examined First Amendment romanticism and the idea that only by protecting “the speech we hate” can we safeguard the speech we love.⁴⁴

Further scholarship built upon narrative theory and cognitive psychology to address why more speech—an accurate, countervailing message—cannot always counter the evil of hate speech and why judges find it so difficult to balance free speech and extrinsic interests.⁴⁵ Authors examined the experience of other Western democracies that prize freedom of expression, but that nevertheless punish hate speech;⁴⁶ they demonstrated that a climate of hate propaganda often precedes and accompanies atrocities like Indian extermination or the Holocaust.⁴⁷ The debate over hate speech, then, has become more nuanced, while showing no sign of diminished intensity.

³⁹ See DELGADO & STEFANCIC, UNDERSTANDING WORDS THAT WOUND, *supra* note 13.

⁴⁰ Delgado, *Giving Way*, *supra* note 28.

⁴¹ *Id.* at 174.

⁴² See Delgado & Yun, *Bloodied Chickens*, *supra* note 29.

⁴³ See Richard Delgado & David Yun, *The Neoconservative Case Against Hate-Speech Regulation—Lively, D’Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807 (1994).

⁴⁴ Richard Delgado & David Yun, “*The Speech We Hate*”: *First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics*, 27 ARIZ. ST. L.J. 1281 (1995).

⁴⁵ Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991). See also Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of “A Just Balance” Changes So Slowly*, 82 CAL. L. REV. 851 (1994) [hereinafter Delgado & Stefancic, *Hateful Speech*].

⁴⁶ See, e.g., Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World*, 53 ME. L. REV. 487, 489 (2001). See also LEE BOLLINGER, *THE TOLERANT SOCIETY* 38 (1986).

⁴⁷ See generally ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002).

III. THE SOURCE OF THE TENSION

If the hate speech debate highlights a tension between civil liberties and civil rights generally, what is the source of that tension conceptually, historically, and ideologically?

A. *Conceptually*

Speech and equality are, as mentioned earlier, aspects of the good life. But they correspond to somewhat different facets. Like most civil liberties, speech exhibits an individual dimension; it is an element of self-expression. Unlike equality and civil rights, which are inherently social in nature, liberty interests are ones we are capable of exercising by ourselves. “Leave me alone; I’ve got my rights.” “Stay off that property; it’s mine.” “I’ll say what I please, this is a free country.” As our Critical Legal Studies forebears pointed out, rights of this type correspond to our individual natures. They separate us, emphasizing our individualistic, rights-guarding, solitary tendencies.⁴⁸

Although that characterization might seem needlessly dire, with hate speech at least it may contain a grain of truth. Race may be a social construction, requiring a tacit agreement to endow certain minor human differences with great significance. But how do racial categories receive their content, if not from a system of images, messages, media roles and coverage, narratives, scripts, jokes, and code words such as “those people,” “inner city resident,” and “unassimilable hordes”—in short, hate speech?⁴⁹ Defenders of hate speech emphasize its liberty aspect; detractors focus on its impact on social values and justice. The tension arises from what each group chooses to highlight in its own and then minimize in the other’s position.

A second dichotomy, between capitalism and democratic ideals, built into our system of law and politics takes on special force in connection with hate speech.⁵⁰ Our public law, as everyone knows, is committed to radical democracy. All men and women are equal; one person, one vote, and so on. By the same token, our system of tripartite government fea-

⁴⁸ See, e.g., Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988) (considering the Critical Legal Studies view of rights in relation to minorities’ situation); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984). Civil liberties may hold special appeal to those whose experience has taught them that solo activity is the road to happiness and success; civil rights and broad social justice may attract those whose lives have taught them the need for cooperation and community.

⁴⁹ See Delgado & Stefancic, *Images of the Outsider*, *supra* note 45.

⁵⁰ See Richard Delgado, *Where Is My Body? Stanley Fish’s Long Goodbye to Law*, 99 MICH. L. REV. 1370, 1384–89 (2001).

tures a system of checks and balances, with each branch of government playing its own role and limiting the discretion of the others.⁵¹ Our private law, however, is based on libertarian principles and, in the marketplace, capitalism.⁵²

This disjunction between a public law full of lofty democratic precepts and aspirations, and a system of moneymaking essentially governed by the acquisitive impulse and protection of settled interests, rarely attracts notice, at least when the two spheres are operating smoothly.⁵³ Hate speech is a civil liberty that, much like most manifestations of racial discrimination, distorts the marketplace so that private preferences operate irrationally and are impervious to change. It also disserves the dominant values of the public sphere, endangering democratic decisionmaking and full inclusion.⁵⁴ Regardless of the public or private terms with which one seeks to justify hate speech, one finds little to commend in it. A strange form of liberty, it wars with other liberties at the same time that it erodes the system of mutual respect on which our society aspires to build a just state.

B. Historically

If civil rights and civil liberties correspond to different impulses and conceptions of national life, they also contract and expand in response to different forces. Many free speech advocates seem to assume a romantic dynamic in which both civil rights and civil liberties expand in response to advancing morality. They believe that when we are good, virtuous, generous, and mindful of our better natures, we expand both our freedoms and the inclusiveness of our institutions.

Derrick Bell and other historians have shown that the interaction of civil rights and civil liberties is more complicated than this idealistic view.⁵⁵ Civil rights expand most during wartime or periods of international competition, such as the Cold War, when African Americans registered impressive gains.⁵⁶ Those times, of course, are when civil liberties are most in danger of contraction.⁵⁷ Conversely, during times of *internal*

⁵¹ *Id.* at 1380–89.

⁵² *Id.* at 1385–89.

⁵³ *Id.* at 1386.

⁵⁴ See Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1189–98 (1993).

⁵⁵ See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

⁵⁶ See MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 79–114, 249–54 (2000). See also Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002) (book review) (discussing Cold War tensions as contributing to *Brown v. Board of Education* and the Civil Rights Act of 1964).

⁵⁷ See RICHARD DELGADO, *JUSTICE AT WAR: CIVIL LIBERTIES AND CIVIL RIGHTS DURING TIMES OF CRISIS* 56–91 (2003).

competition and scarcity, for example when jobs are scarce, the nation experiences an upsurge in racism and a decrease in generosity towards the perceived outcast.⁵⁸ But domestic socioeconomic competition seems to have little effect on our regime of civil liberties. Thus, the material forces that drive civil rights and civil liberties differ. One could, of course, still maintain that the two are aspects of the same broader system of social goods or ideal governance. But one would need to concede, I think, that they flourish and contract at different times, in response to different forces.

C. Ideologically and Constitutionally

The original Constitution protected the property and political interests of white males, while providing for the continuation of the institution of slavery in no fewer than six clauses.⁵⁹ When the Bill of Rights added protection of speech, the Framers almost certainly had in mind the speech, music, literature, arts, and scientific discourse of elite, educated white males, rather than that of women writers, poets, anarchists, immigrants, or black slaves.⁶⁰ The document was, in short, stronger on liberty than equality. The protection of the latter came much later, after a bloody civil war and three constitutional amendments.

One could argue that the Fourteenth Amendment gives the First Amendment an equality-protecting gloss, since a common legal maxim holds that a later writing supersedes a previous one on the same subject.⁶¹ But courts and the ACLU have not endorsed this argument. In the meantime, the two sets of constitutional values—protecting equality and safeguarding liberty—operate side by side. They enable us to say, at times of crisis, “We may be sacrificing X—temporarily and slightly—but we are still the Y-est country in the world.” Embracing contradictory values enhances legitimacy; when the need arises, one can limit one value and point out how the other remains in full force.

Occasionally, one hears that it is the First Amendment that makes America the most prosperous, freest, most generous country in the world, with the highest standard of living and the greatest degree of personal freedom. However, it may be that the exceptions to the system of free expression, rather than the system itself, make America the country it is. The United States today stands unquestionably atop the world in two

⁵⁸ This socioeconomic competition theory of racism and discrimination was probably first explained by Gordon Allport. See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1979).

⁵⁹ See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 45–48 (3d ed. 2000).

⁶⁰ See Delgado & Stefancic, *Hateful Speech*, *supra* note 45, at 862.

⁶¹ See Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 800 (2000).

dominant respects—military might and economic power.⁶² But if our system of free speech plays any part in those achievements, it is because of the protection we afford official and commercial secrets, inventions and creative works.⁶³ And, of course, everyone knows that the speech of soldiers and government workers is much less free than that of the citizenry at large.

Apart from economic and military power, the United States does not stand at the top of the world.⁶⁴ A great income gap separates the richest and poorest sectors, and the country also exhibits high rates of misery in minority communities, including suicide, alcoholism, divorce, incarceration, and early death.⁶⁵ Hate speech and media stereotypes, which undoubtedly contribute to the discrimination that engenders this misery, are free under current law. Free speech law, then, may contribute to the flaws of the United States, while the exceptions are responsible for much of its military-industrial prowess. Our reigning free speech ideology pays scant attention to this, just as it screens from view the compromises between liberty and equality reflected in the original Constitution. Thus, many people would wrongly conclude that speech is equally good for everyone and responsible for much of this country's wealth and well-being, when matters are more complicated than that and close to being the other way around.

IV. IS YOUR MASTHEAD DYSFUNCTIONAL? HOW TO LIVE WITH COMPETING PARADIGMS WHILE ON THE LAW REVIEW OR ANYWHERE ELSE

We want and need both liberty and equality. Yet those two values often are at odds. Hate speech may bring this conflict into bold relief, but I suspect that examining other areas would reveal similar strains and tensions between what we consider civil rights and civil liberties.

In part because we bring different histories to such controversies, we tend to act as though one half of the problem is insignificant or should be solved by the other side's coming around to our position. For instance, when some people learn that a university is considering a hate speech code, they will frame the issue as a First Amendment problem. This position then shifts the burden to the adversary to show that the interest in protecting members of the minority community from insults and name-calling is compelling enough to overcome the usual presumption that speech should be free.⁶⁶

⁶² *Id.* at 794–95.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Delgado, *Narratives in Collision*, *supra* note 13, at 345–46.

Moreover, the university must show that no less restrictive means are available to advance its objective of protecting outsider groups from disparagement. It must also contend with a host of legal rules, such as the prohibition on content or viewpoint regulation,⁶⁷ and maxims such as “the best cure for bad speech is more speech.”⁶⁸ Furthermore, what of the decisionmaker who will adjudicate claims under the new rules? Might he or she not turn into an overbearing tyrant, imposing his or her own notions of political correctness on an environment that flourishes best when speech is free? For the one whose sympathies run to free speech, certain slopes will look slippery and hard to draw. Couldn’t practically everything be considered hate speech, even *Hamlet*?

Others, however, will frame the problem in terms of a different value, equality.⁶⁹ Hate speech targets vulnerable minority groups by silencing, marginalizing, and causing some to underperform or drop out. It teaches all who hear or learn about it that equality and civil rights are of no great value, and demoralizes those who would wish to live in a more respectful society. This group will see nothing problematic with granting campuses the power to enact reasonable rules protecting vulnerable members of their communities in order to safeguard core values and institutional concerns emanating from the Thirteenth and Fourteenth amendments.⁷⁰

If one characterizes the issue in this light, a similar set of doctrines and discursive strategies comes into play, but from a different direction. The side championing the right of the hate speaker now needs to show that protecting that form of speech is compelling enough to overcome the legal system’s usual presumption in favor of equality and civil rights. It will need to show that the interest of the supremacist in hurling abuse is discharged in the way least damaging to equality. This group, too, will harbor concerns about the adjudicator of such controversies, but from the opposite standpoint. Will he or she have a sufficient background in minority history, code words, and vulnerabilities to know what to look for? A different set of slopes will look slippery, different lines hard to draw.⁷¹

It is not just that the two sides begin with different constitutional paradigms. Each hears and is attuned to different stories. One side will see the issue as an extension of society’s struggle against superstition and ignorance.⁷² Its heroes will be Hollywood figures who stood up to the

⁶⁷ See *supra* text accompanying note 19. See also Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 Nw. U. L. REV. 1099, 1122 (2002).

⁶⁸ See *supra* text accompanying note 16. See also Felicity Barringer, *Campus Battle Pits Freedom of Speech against Racial Slurs*, N.Y. TIMES, Apr. 25, 1989, at A1; Garry Wills, *In Praise of Censure*, TIME, July 31, 1989, at 71.

⁶⁹ See Delgado, *Narratives in Collision*, *supra* note 13, at 345–46 (commenting on how the adversaries’ slopes always look slipperier than one’s own).

⁷⁰ *Id.* at 346.

⁷¹ *Id.* at 345–46.

⁷² *Id.*

House Un-American Activities Committee, martyrs like Socrates, Galileo, and Peter Zenger, and theorists like Hobbes, Voltaire, and Hume who defended the value of free expression. They will evoke struggles against state-sponsored censorship, Hollywood blacklists, official religion, and book burning.⁷³ Juxtaposed with stories like these, the interest of a minority group in guarding against an occasional wounded feeling will not loom large.

The other side, however, will tell a story of its own.⁷⁴ That story includes World War II resistance fighters who stood up for Jews and members of the underground railroad who risked their lives to help slaves reach freedom. It includes Martin Luther King, college students who put their lives on the line during the Civil Rights movement, and Mexican farmworkers who picketed California grape producers to protest inhumane working conditions. Compared to that stirring, centuries-long struggle for equality and human decency, the interest of an ignoramus or white supremacist in cussing out a fellow student of color will look pretty attenuated.⁷⁵

My view, and here is where your masthead comes in, is that both views are equally valid but not because they are complementary or coexist easily side by side. They are no more compatible than a private system of competitive free market economics that coexists with a public law system based on radical democracy and equal participation.⁷⁶

Nor can judges easily and comfortably balance the two sets of values. Any new proposal (such as hate speech rules) runs counter to a host of entrenched narratives. The judge, a member of an interpretive community, will be asked to strike the balance in a way that changes the contours of that community,⁷⁷ treating groups who are currently outsiders with greater respect than that which they now receive. Judges are not simply balancing two discrete interests, like one neighbor's desire to have a fence and another's wish to receive unblocked sunlight in her living room. Rather they are deciding between two versions of speech/ equality, two interpretive communities in which we might live.⁷⁸ It is easy to overlook that a vigorous system of free speech requires a respectful audience, while equality, at least in an instrumental sense, requires speech, remonstrance, the right to petition and protest unfair conditions. Thus, speech and equality both presuppose and endanger each other by mechanisms so subtle and linked that shifting the balance in either direction from that to

⁷³ *Id.* at 347 (citing ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 497–501 (1941)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *supra* text accompanying notes 50–54.

⁷⁷ Delgado & Stefancic, *Hateful Speech*, *supra* note 45, at 854–59.

⁷⁸ *Id.* This, in turn, would seem to require a pre-political normative reckoning—the sort of thing that judges are apt to be uncomfortable with, perhaps because relatively few cases call for this sort of analysis.

which we are accustomed is a formidable task.⁷⁹ The group asking for change can easily be seen as impossible, petty, humorless, or dangerous fanatics prepared to sacrifice precious rights and liberties.

Still, one can reason around the edges. For example, concerted speech, as hate speech is apt to be since it often targets the same victim time and again, stands on a different footing from the isolated kind. Equality means something more when a black undergraduate is told to go back to Africa than it does when a shopper knocks some groceries off a shelf and is reproved for being a clumsy oaf.⁸⁰ We can expand analysis, as the legal realists urge, to include considerations of power, communication science and social theory in examining speech in different settings. We can, occasionally, move each other marginally in a different direction, by force of argument or an apt example.

Changing the way we look at core values, especially in relation to others with which they hold a close association, is a challenging, sometimes uncomfortable task. Recall the lawyer we left nervously waiting to find out his standing in that second book, the one that evaluated him from the unfamiliar reference point of justice. I do not believe such predicaments are forms of cultural schizophrenia. Instead, I think the willingness to confront social reality in all its guises is an indication of courage and good health. *CR-CL*, in my opinion, should keep its masthead exactly the same—but continue to consider, struggle, and reckon with the tension it bespeaks.

⁷⁹ *Id.* at 854–59, 868–69.

⁸⁰ See Delgado, *Words That Wound: A Tort Action*, *supra* note 32, at 136 (arguing that racist slurs are more damaging than most other kinds).