

## Book Review

### The Boundaries of Free Speech

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*Understanding Words that Wound*. By Richard Delgado<sup>†</sup> & Jean Stefancic.<sup>††</sup> Boulder: Westview Press, 2004. Pp. 238. \$27.00.

#### INTRODUCTION

Hate speakers continue to target the Latino community, threatening the well-being of citizens and immigrants alike. In *Understanding Words that Wound*, Richard Delgado and Jean Stefancic address the immediate danger of hate speech to Latinos and other historically disempowered groups. Delgado's twin aims of bringing attention to the social consequences of hate speech and suggesting solutions to its legal challenges began in 1982, when he wrote the seminal work on the subject, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*.<sup>1</sup> Since then, Delgado and Stefancic have paired up in a decade-long partnership to continue investigating the subject and add insight to the literature about it.<sup>2</sup>

Their efforts over the years have influenced academics and practitioners. The most noticeable indication of their influence was last year's cross burning case, *Virginia v. Black*, where the Supreme Court determined that a state can criminalize intentionally intimidating cross burning.<sup>3</sup> *Black* shifted the jurisprudence on hate speech away from the virtually absolute rejection of cross burning legislation in *R.A.V. v. St. Paul*<sup>4</sup> to a

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<sup>1</sup> Richard Delgado, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

<sup>2</sup> See, e.g., Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865 (1998); Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475 (1996); Richard Delgado & Jean Stefancic, *Apologize and Move On? Finding a Remedy for Pornography, Insult, and Hate Speech*, 67 U. COLO. L. REV. 93 (1996); 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); Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CAL. L. REV. 851 (1994).

<sup>3</sup> 538 U.S. 343, 362–63 (2003).

<sup>4</sup> 505 U.S. 377 (1992). In *R.A.V.*, the Court found that an ordinance singling out race,

more critical perspective, which Delgado and Stefancic advocate. This position requires that courts assess vitriolic communication on a case-by-case basis to evaluate the potential for destructive consequences. After *Black*, judges are required to evaluate the circumstances and historical content of symbols rather than automatically dismiss plaintiffs' claims about the dangers of intentionally intimidating messages.

*Understanding Words that Wound*<sup>5</sup> is the most comprehensive synthesis to date of the legal, sociological, and historical issues that the hate speech debate raises.<sup>6</sup> The book is written for readers interested in both sides of the hate speech debate but takes an unequivocal stand for regulating dangerous forms of hate speech. The book is opposed to the view of free speech absolutists, most prominently represented by the American Civil Liberties Union (ACLU), who contend that the First Amendment prohibits any hate speech regulation.<sup>7</sup> Delgado and Stefancic find the ACLU argument to be "paternalistic" and based on a supposed equal playing field that does not reflect the nature of racial stratification.<sup>8</sup> *Understanding Words that Wound* argues that unpunished hate speech harms individuals and society because it devalues targeted group members and advocates their unequal treatment.<sup>9</sup>

Hate speech reflects socially accepted stereotypes whose potential injury extends beyond specific instances of defamation.<sup>10</sup> Walter Lippmann,

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gender, color, creed, or religion, instead of altogether banning fighting words, was improper content-based discrimination. 505 U.S. at 391. For Justice O'Connor's qualification of *R.A.V.*, see *Black*, 538 U.S. at 361–63.

<sup>5</sup> RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* (2004).

<sup>6</sup> I use "destructive messages" and "hate speech" interchangeably. My meaning, however, is closer to "destructive messages" because harms that flow from that manner of communication arise not only when the speaker's purposes are malicious. I am referring to intentionally intimidating words that are uttered against out-groups without regard for whether they are spoken out of hate, the desire for monetary gain, or some other motive.

<sup>7</sup> See, e.g., SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* (1994); NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* (1992); Nadine Strossen, *Regulating Racist Speech on Campus*, 1990 DUKE L.J. 484 (1990); ARYEH NEIER, *DEFENDING MY ENEMY* (1979).

<sup>8</sup> DELGADO & STEFANCIC, *supra* note 5, at 36, 212.

<sup>9</sup> *Id.* at 16–17.

<sup>10</sup> Group defamation, unlike individual defamation poses a threat to "the peace and well-being of the State." *Beauharnais v. Illinois*, 343 U.S. 250, 258–59 (1952) (upholding an Illinois criminal libel statute against a First Amendment challenge). Nadine Strossen and Erwin Chemerinsky have argued that *Beauharnais* probably did not survive *New York Times v. Sullivan*, 376 U.S. 254 (1964), which announced an actual malice requirement in defamation actions brought by public figures. See Nadine Strossen, *Hate Speech and Pornography: Do We Have To Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449, 459 n.41 (1996); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 978 (2d ed. 2002). Their skepticism is unfounded since *New York Times* quotes *Beauharnais*, making clear its continued precedential vitality. 376 U.S. at 268. Moreover, even *R.A.V. v. St. Paul*, which otherwise held against the constitutionality of a hate speech ordinance, quoted *Beauharnais* for the proposition that some categories of speech are "not within the area of constitutionally protected speech." 505 U.S. 377, 383 (1992). *New York Times* only qualifies *Beauharnais* in cases where group libel is directed at public personalities. *New York v. Ferber*, 458 U.S. 747, 763 (1982).

who coined the term “stereotype,” explained how these generalizations structure beliefs and values:

[T]he pattern of stereotypes at the center of our moral codes largely determine what group of facts we shall see, and in what light we shall see them . . . . And since my moral system rests on my accepted version of the facts, he who denies either my moral judgments or my version of the facts, is to me perverse, alien, dangerous.<sup>11</sup>

The acute attitudes that stereotypes can prompt in both speakers and victims indicate the extent to which affective prejudices can constitute personal and group identities.

Statements against out-groups can reflect the speakers’ willingness to act in accordance to prejudice. Destructive messages, further, can catalyze crimes against humanity such as the Holocaust, American slavery, and Native American removal.<sup>12</sup> Claiming that all Mexicans are drunks, Jews greedy, Indians savage, blacks dangerous, and gays pederastic is not only inaccurate, but these mischaracterizations can overtly or subtly affect exclusionary employment or political practices. Even clearer is the connection between historical symbols like burning crosses and swastikas with menacing behavior. *Understanding Words that Wound* analyzes the sustained effects of expressed bias on American society.

## I. HATE SPEECH AND SOCIALIZATION

Widespread belief in the disparagement of historically shunned groups is perpetuated through emotive statements about them. The view that Latinos are inimical to American society has taken a toll on citizens and immigrants. Some pundits, for instance, raise a tide of anger against Latinos by decrying their supposed inability to assimilate into the culture.<sup>13</sup> Harsh treatment of immigrants may correspond with harsh treatment of citizens from the same ethnic group.<sup>14</sup> The regularly repeated political and

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<sup>11</sup> PUBLIC OPINION 126 (Transactional Publisher 1991) (1922).

<sup>12</sup> ALEXANDER TESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS chs. 2–4 (2002); Alexander Tesis, *The Empirical Shortcomings of First Amendment Jurisprudence: An Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 740–55 (2000).

<sup>13</sup> See, e.g., PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER 273 (1995) (“Allowing further massive Hispanic immigration may be one of the wrong policies that will wreck the assimilation of those already here. Many Mexican Americans are involved in a process they call reverse assimilation—going back to their roots.”).

<sup>14</sup> Juan F. Perea, *Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 306 (2003) (finding that the nativist wave in the mid-1980s that was aimed at undocumented Latinos resulted in derisive treatment and perceptions of Latino citizens).

media charges against Latinos have made many sense that they are outsiders, rather than coequal citizens, in their own country.<sup>15</sup> The spread of outsider rhetoric creates an atmosphere of negative perceptions against groups such as Latinos. That social milieu can lead to the exploitation of both Latino citizens and, even more often, undocumented aliens.<sup>16</sup>

One woefully familiar strand of thought regards any “[b]lack and Latino young males and females and members of ‘new’ immigrant groups” as menaces to the supposed demographic stability of the United States.<sup>17</sup> Delgado and Stefancic explain the extent to which the casting of negative traits on Latinos arises from our use of language. The racial world, they explain, is an artificial construct that is imbued with categorizations that often do not correspond to reality.<sup>18</sup> The disparaging of persons through racist perceptions relies on an overemphasis of irrelevant differences, such as skin color, while it disregards individual characteristics within disparaged groups.<sup>19</sup> The use of words that connote that Latinos, Jews, blacks or other ethnic groups have inherent flaws is not innocuous. To the contrary, as Delgado and Stefancic recognize, language is essential in the creation of discriminatory hurdles: “[P]eople acquire the idea of one’s inferiority not because one is in fact inferior but because of what they have heard, read, or seen in the behavior of others toward you and people like you.”<sup>20</sup> The harm of debasing depictions—such as ones that attribute dangerousness, laziness, moral depravity, hyper-sexuality, intellectual inferi-

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<sup>15</sup> Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as “Foreigners,” and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 351 (1997) (discussing how Asian Americans and Latinos are treated like permanent outsiders in the United States). The use of stereotyping to characterize immigrant communities is not limited to Latinos; other groups of immigrants, such as Far East Asians, also face such disparagements. See Keith Aoki, “Foreign-ness” and Asian American Identities: *Yellowface, World War II Propaganda and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 44–50 (1996) (discussing how stereotypes of Asian Americans contribute to negative immigrant images).

<sup>16</sup> Perea, *supra* note 14, at 307. Latinos are, for instance, significantly over-represented in dangerous jobs, leading to a disproportionate amount of work-related injuries in the community. *Workplace Safety and Health for Immigrant and Low Wage Workers: Testimony Before the Senate Subcomm. on Employment, Safety, and Training of the Comm. on Health, Educ., Labor, and Pensions*, 107th Cong. 19 (2002) (statement of John L. Henshaw, Assistant Secretary of Labor for Occupational Health). See also Nurith C. Aizenman, *Harsh Reward for Hard Labor*, WASH. POST, Dec. 29, 2002, at C1 (finding that work-related fatalities among foreign born Latinos are nearly two and a half times greater than among the average American worker); Steven Greenhouse, *Hispanic Workers Die at Higher Rate: More Likely Than Others to Do the Dangerous, Low-End Jobs*, N.Y. TIMES, July 16, 2001, at A11 (“[j]ob safety officials say that Hispanic immigrants, often unskilled and often here illegally, are hired disproportionately into many of the most dangerous jobs, like roofing, fruit picking and taxi driving”).

<sup>17</sup> ESTHER MADRIZ, NOTHING BAD HAPPENS TO GOOD GIRLS: FEAR OF CRIME IN WOMEN’S LIVES 156 (1997); TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY 6 (2001) (finding that there is a stereotypical image of black and Latino men as dangerous).

<sup>18</sup> DELGADO & STEFANCIC, *supra* note 5, at 25.

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

<sup>20</sup> *Id.* at 26.

ority, and intemperance—does not ring hollow. They have real world effects that bode ill for racial and ethnic minorities.

In other work on the subject, Delgado and Stefancic have pointed out that ethnic prejudice aims to detract from the humanity, dignity, self-respect, standing, and potential both of targeted individuals and of the racial or ethnic group to which they belong. Repetition of misethnic slurs perpetuates institutionalized discrimination.<sup>21</sup> Once individuals perceive members of identifiable groups as legitimate targets of aggression, collective biases reinforce their personal dislikes and rationalizations.<sup>22</sup> Calling someone a “spic,” a “kike,” or “nigger” floods the imagination not merely with a personal affront, but with insulting ideas about Latinos, Jews, and African Americans. The effectiveness of destructive messages can be measured by the amount of cultural associations that a few characteristics can elicit. Stereotypes that have been communicated repeatedly in diverse social contexts require less information to evoke a whole series of negative connotations.<sup>23</sup>

The urge to oversimplify dilemmas and find designated scapegoats for complex predicaments underlies the popularity of stereotypes. Approaching adversities from a biased perspective gives simplistic though meaningful answers to inexplicable predicaments. Latinos are often blamed for losses in jobs and the reduction in wages.<sup>24</sup> Immigrants are particularly easy targets for disparagement because they have virtually no political power to effectuate meaningful, democratic changes. Legal initiatives targeting immigrants are often based on the false assumption that they leech off welfare and try to gain citizenship by having children in the United States.<sup>25</sup> The statistics do not bear out the misethnically charged defamations about immigrants. To the contrary, immigrants are laboring members of society with a relatively low population on welfare.<sup>26</sup> The

<sup>21</sup> RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?* 4–5 (1997).

<sup>22</sup> Delgado & Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?*, *supra* note 2, at 478.

<sup>23</sup> HOWARD J. EHRLICH, *SOCIAL PSYCHOLOGY OF PREJUDICE* 39 (1973).

<sup>24</sup> Steven W. Bender, *Will The Wolf Survive?: Latino Pop Music in the Cultural Mainstream*, 78 *DENV. U. L. REV.* 719, 739 (2001); Joan Fitzpatrick, *Race, Immigration, and Legal Scholarship: A Response to Kevin Johnson*, 2000 *U. ILL. L. REV.* 603, 607 (mentioning the scapegoating of Latinos during economic downturns).

<sup>25</sup> Nancy Cervantes, Sasha Khokha & Bobbie Murray, *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 *CHICANO-LATINO L. REV.* 1, 5 (1995) (remarking on the stereotype that Latino families drain the welfare system). One unsuccessful measure to prevent the shibboleth of birthright citizenship was a House of Representatives subcommittee measure that sought a constitutional amendment that would have restricted birthright citizenship to the children of documented noncitizens and citizens. See Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 *N.Y.U. L. REV.* 54, 55 (1997).

<sup>26</sup> One survey found that contrary to stereotypes, most Latinas worked rather than sought welfare payments. Mary Ann Dutton, Leslye E. Orloff, & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 *GEO. J. ON POVERTY L. & POL'Y* 245, 297 (2000). See also Laura M. Padilla, “*But You’re Not a Dirty Mexican*”: *Internalized Oppression, Latinos and Law*, 7 *TEX. HISP. J.L. & POL'Y* 59, 62 (2001) (“The welfare stereo-

purveyors of destructive messages, however, are not searching for objective truth but professing a common cause against a perceived menace to their way of life.<sup>27</sup> Oft-repeated bigotry, as Delgado and Stefancic explain, can become socially internalized and later serve as the basis for “adopting immigration rules aimed at keeping a group out of the country.”<sup>28</sup>

Destructive messages not only catalyze political forces opposed to immigration; they can cause “serious psychological” trauma to their intended victim.<sup>29</sup> Hate speech can cause immediate and long-term discomfort, manifested by increased heart rate, elevated blood pressure, and dependency.<sup>30</sup> Frantz Fanon, a great psychoanalyst of ethnocentrism, has made the same point by his brief explanation of how group defamations can degrade the sense of self-worth:

I read white books and little by little I take into myself the prejudices, the myths, the folklore that have come to me from Europe. . . . the Negro selects himself as an object capable of carrying the burden of original sin. The white man chooses the black man for this function, and the black man who is white also chooses the black man. . . . After having been the slave of the white man, he enslaves himself.<sup>31</sup>

Hate speech, then, has long-term psychological ramifications on the targets’ sense of personal dignity.

Steven Bender, in a book he wrote for the Critical America Series, which Delgado and Stefancic edited for New York University Press, recently documented the prevalence of anti-Latino sentiments in American culture. His study shows the pervasiveness of denigrating images of Latinos generally and of persons of Mexican descent especially. Bender points out that movies regularly depict Mexicans as immoral *bandidos*, gang bangers, and drug dealers.<sup>32</sup> Even novels, like one of John Steinbeck’s well-known works, *Tortilla Flat*, depict Latinos as lazy drunks who are given to theft.<sup>33</sup>

Neither are disparaging images in literature unique to Latinos; they are also found in literary depictions of other out-groups. Classic works of

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type persists, even though Latino men are employed at one of the highest rates of any population group.”).

<sup>27</sup> GEORGE E. SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES 76 (4th ed. 1972).

<sup>28</sup> DELGADO & SEFANCIC, *supra* note 5, at 12.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 13.

<sup>31</sup> FRANTZ FANON, BLACK SKIN, WHITE MASKS 191–92 (1986).

<sup>32</sup> STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 4, 12 (2003).

<sup>33</sup> *Id.*

fiction have depicted Jews as social outcasts and pests. These depictions are found as early as medieval writings that portray Jews as Christ-killers. Prominent among these works is Geoffrey Chaucer's *Canterbury Tales*. Chaucer's "Prioress' Tale" tells of how the "cursed Jews" kidnapped and killed a Christian child.<sup>34</sup> Another equally important novel, *Oliver Twist* by Charles Dickens, drove home the view that Jews are low, mean creatures by showing Fagin the Jew as a demonic creature, gradually corrupting boys and turning them into heartless thieves. As in the case of novels that negatively portray Latinos, books that disparage Jews have social consequences.

Negative depictions that are spread through literature and music become part of popularly accepted prejudices. After a while, epithets refer not only to individuals and groups but also to cultural perceptions of them. As stereotyping becomes ever more respectable, perceptions of out-groups can increasingly become associated with belittling social definitions. Bigoted ideology, then, can energize shared cultural and political beliefs, attitudes, and behavioral rationalizations into a cauldron of volatile formative constructs.<sup>35</sup> Even day-to-day interracial interactions may become predicated on often subconscious social constructs of "the other."<sup>36</sup> Recognizable images of out-groups can bring together mass movements committed to exclusionary practices.<sup>37</sup> Persons who internalize a racist ideology can be deeply influenced by that worldview and its proposed solution.

The regular repetition of racism, Delgado and Stefancic point out, contributes to the development of a racial caste system that limits people's ability to enjoy the privileges and immunities of citizenship. Misethnic stereotypes create barriers for people seeking work, applying for loans, or simply tramping along the road.<sup>38</sup> The widespread acceptance of negative sentiments about Latinos can compel bigots to violent action, especially those bigots who are already predisposed to such antisocial behavior.

The spread of hate speech against Latinos often precedes hate crimes committed against them. The perpetrators of hate crimes translate their attitudes into violent or discriminatory conduct. The oft-repeated aspersions about Mexicans taking away work, depressing wages, and diminishing government resources become internalized and integral to bigots' attitudes toward Latinos. Strongly held racist beliefs can touch off violent actions against Latinos engaged in innocuous pursuits. Recently, a Bronx

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<sup>34</sup> GEOFFREY CHAUCER, *THE CANTERBURY TALES* 173–76 (Nevill Coghill ed., Penguin Books 2003) (circa 1386).

<sup>35</sup> See RODERICK STACKELBERG, *HITLER'S GERMANY* 42 (1999).

<sup>36</sup> GUSTAV JAHODA, *IMAGES OF SAVAGES* 233 (1999).

<sup>37</sup> Elsewhere I have explored how German anti-Semitism was instrumental for the Nazi instigation of the Holocaust, how American racism spurred slavery, and how depictions of Indians as savage nomads justified Indian removal. See *TSESIS*, *supra* note 12.

<sup>38</sup> DELGADO & STEFANCIC, *supra* note 5, at 17.

man shouted racist slurs at two Latino pizza deliverymen before he attacked them with a baseball bat.<sup>39</sup> Three men attacked six Latino church group members. The victims were celebrating a birthday at a restaurant when the three men began to shout racial insults and to assault them. The hand of one of the victims was slashed during the assault and had to be surgically repaired.<sup>40</sup> In Staten Island, two white couples began shouting racial slurs at a black and Latino couple before purposefully damaging the couple's vehicle.<sup>41</sup> In another incident a woman ran down and killed a Latino man in a Los Angeles parking lot and then made her motive clear by screaming anti-Latino aspersions immediately after the homicide.<sup>42</sup>

Such a link between hate speech and hate crimes is not unusual. One study found that in 976 reported bias crime incidents, hate speech was used in 62% of the cases, and 87% of the persons who were eventually convicted for bias crimes used hate speech during the perpetration of the crime.<sup>43</sup>

Hate speech is not only injurious when it is uttered during the course of bias crimes. Speech and crime can be separate events that threaten the autonomy of targeted minorities. Even when speech alone is used to instill an immediate sense of danger in a member of an identifiable group, as Delgado and Stefancic recognize, the injuries of "racist hate speech are neither minimal nor unserious."<sup>44</sup> Like hate crimes, hate speech can pose a threat to the defamed groups' ability to equally participate in the social and political life of their respective states.<sup>45</sup> In circumstances where one group's ability to express itself directly threatens another group's reasonable expectation of security, there is arguably a compelling interest for some government regulation of hate speech.<sup>46</sup>

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<sup>39</sup> Chrisena Coleman, *A Slice of Jail in Pizza Attack*, N.Y. DAILY NEWS, Oct. 3, 2003, at 1.

<sup>40</sup> Robert E. Kessler, *3 Indicted In Racial Incident*, NEWSDAY, Jan. 23, 2004, at A26.

<sup>41</sup> Jose Martinez, *Hate Crime Rap in S.I. Dustup*, N.Y. DAILY NEWS, Mar. 26, 2004, at 36.

<sup>42</sup> Anna Gorman, *Hate Crime Case to Proceed*, L.A. TIMES, Dec. 6, 2003, at B3.

<sup>43</sup> Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 PSYCHOL. PUB. POL'Y & L. 250, 273 (2004).

<sup>44</sup> DELGADO & STEFANCIC, *supra* note 5, at 17.

<sup>45</sup> Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL'Y 273, 275 (2004) (stating that hate speech regulation fosters equality by empowering socially subordinated groups to express their views). On carving out a hate-speech exception to free speech, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356-58 (1989). Such an exception would be analogous to the fighting words doctrine that permits the government to regulate messages that have "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Obscenity and child pornography are two additional content-based exceptions to First Amendment protections. *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

<sup>46</sup> See Cedric M. Powell, *The Mythological Marketplace of Ideas*: R.A.V., Mitchell, and Beyond, 12 HARV. BLACKLETTER L.J. 1, 40 (1995) (concluding that "[i]t is analytically

II. *VIRGINIA V. BLACK*

The Supreme Court's recent holding in *Virginia v. Black*<sup>47</sup> is perhaps the best indicator that, in the years since Delgado first published his article *Words that Wound* (1982),<sup>48</sup> the judiciary has become more amenable to the regulation of hate speech. The Court had previously refused to consider the historical context of cross burning.<sup>49</sup> Following the publication of *Words that Wound*, the Court in *R.A.V. v. St. Paul* found hate speech regulations unconstitutional unless they are viewpoint neutral.<sup>50</sup>

The Court's decision in *Black* announced, for the first time, the constitutionality of laws punishing intentionally intimidating expression.<sup>51</sup> The Court found that a Virginia statute that made it a felony for anyone to display a burning cross with the intent to intimidate did not violate the First Amendment.<sup>52</sup> Justice Sandra Day O'Connor, writing for the majority, recognized that hate groups often use symbols linked to past destructive events to incite violence and discrimination in the present.<sup>53</sup> Burning crosses refers to this country's history of involuntary servitude and mark vulnerable targets with a badge of supposed subordination.<sup>54</sup> These intima-

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incongruous to acknowledge the states' compelling interest in eradicating perceived societal harms in the area of hate crimes, and to ignore the same interest in the context of hate speech"). Only content-based regulations that are narrowly tailored to promote a compelling state interest are valid under the First Amendment. The government's compelling interest in regulating speech can be balanced in a variety of circumstances such as political parties' power to solicit, receive, direct, or spend campaign funds. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 141–54 (2003). *See also* *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) ("Since [the statute] is a context-based speech restriction, it can stand only if it satisfies strict scrutiny."); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.").

<sup>47</sup> 538 U.S. 343, 363. ("The First Amendment permits Virginia to outlaw cross burning with the intent to intimidate because cross burning is a particularly virulent form of intimidation.").

<sup>48</sup> Delgado, *supra* note 1, at 133.

<sup>49</sup> *See* Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the R.A.V. Case*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 133, 133–36 (Mari J. Matsuda et al. eds., 1993).

<sup>50</sup> 505 U.S. at 377.

<sup>51</sup> 538 U.S. at 362–63.

<sup>52</sup> *Id.* The statute provided that "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id.* at 348.

<sup>53</sup> *Id.* at 357.

<sup>54</sup> Several authors have followed the same line of reasoning. *See, e.g.*, Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 161 (1992) (suggesting that hate speech regulations are legitimate under the Thirteenth Amendment "to cleanse America of the badges and incidents of slavery, such as burning crosses in the yards of black families in the dead of night"); Daniel W. Homstad, Note, *Of Burning Crosses and Chilled Expression* 15 HAMLINE L. REV. 167, 185 (1991) ("In a his-

tions infringe upon the rights of targeted group members to live unmolested and can be used to put them in reasonable fear that threatening messages will turn into harmful action.

Regulation of hate speech, the Court found, is a legitimate limitation on speech that is of “such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.”<sup>55</sup> The Virginia statute constitutionally limited destructive expression that could pose an imminent threat of harm.<sup>56</sup> The Court also determined that the statute did not discriminate based on the speaker’s viewpoint because the statute prohibited any form of cross burning, regardless of whether it targeted the victims’ race, religion, or other characteristics.<sup>57</sup> Virginia could selectively punish cross burnings, even though it did not criminalize all other forms of virulent intimidation “in light of the cross burning’s long and pernicious history as a signal of impending violence.”<sup>58</sup> A plurality of the Court, however, found the statute’s prima facie evidence presumption to be unconstitutional because it failed to contextualize “factors that are necessary to decide whether a particular cross burning is intended to intimidate” or only to arouse anger.<sup>59</sup>

*Black* began to address the concerns with hate speech Delgado and Stefancic bring out in *Understanding Words that Wound*. Their book contains little detail about *Black*, however, because the Court happened to uphold the Virginia statute just as their work went to print, but the authors recognize that cross burning is a “tangible symbol of racial hate.”<sup>60</sup> They

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torical context the burning cross reminds us of a society openly tolerant of slavery.”)

<sup>55</sup> *Black*, 538 U.S. at 358–59 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

<sup>56</sup> The Court has repeatedly held that the First Amendment does not protect advocacy that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Black*, 538 U.S. at 359 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

<sup>57</sup> *Black*, 538 U.S. at 362.

<sup>58</sup> *Id.* at 363. This conclusion was an apparent departure from the Court’s holding in *R.A.V. v. St. Paul*, wherein the Court found that an ordinance banning fighting words singling out race, gender, color, creed, or religion, instead of altogether banning fighting words, was improper content-based discrimination. 505 U.S. at 391. In *Black*, however, the Court explicitly found its holding to be consistent with *R.A.V.* 538 U.S. at 344–45.

<sup>59</sup> *Black*, 538 U.S. at 367. Chief Justice Rehnquist and Justices O’Connor, Stevens, and Breyer made up the plurality, opining that the prima facie element of the offense was unconstitutional. Justice Scalia, who had joined the Court in other parts of the opinion, thought that the prima facie element may have been a legitimate form of rebuttable presumption that the Virginia Court should have been required to construe on remand. *Id.* at 368–80. Scalia was joined on this point by Justice Thomas, who wrote a separate dissent. *Id.* at 398–99. Justice Souter, concurring in part and dissenting in part with Justices Kennedy and Ginsburg, never reached the prima facie issue, writing instead against the constitutionality of the entire statute: “In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents’ conduct.” *Id.* at 387.

<sup>60</sup> DELGADO & STEFANCIC, *supra* note 5, at 145. Burning crosses promotes white supremacy and conduct associated with it. Therefore, as Justice Thomas pointed out in his dissent in *Black*, a burning cross “understandably instills in its victims well-grounded fear

devote an entire section of the book on the use of cross burning by the Ku Klux Klan and other supremacist groups.

### III. FREE SPEECH ABSOLUTISM

Opposed to Delgado and Stefancic's views are groups, such as the ACLU, who believe that the First Amendment protects vitriolic expression. The ACLU actively supports the rights of hate speakers by representing them in court. For example, the ACLU assembled the team of appellate attorneys who represented a Ku Klux Klan leader, Barry Elton Black, who brought the challenge to Virginia's anti-cross burning statute.<sup>61</sup>

The ACLU also represented Neo-Nazis who wanted to march, dressed in their militaristic regalia, in a suburb with a large Jewish population.<sup>62</sup> In *Collin v. Smith*, the Nazis proposed to march using swastikas and other Nazi paraphernalia.<sup>63</sup> Despite the intimidation that such a march would have caused the residents of Skokie, many of whom were Holocaust survivors, the ACLU successfully argued that the right to free speech overrode any of the village's sensibilities. The ACLU subordinated villagers' concerns to the preservation of anti-Semitic and other forms of white supremacist speech.

The ACLU's zeal to vindicate the rights of intolerant groups is an example of the absolutist devotion, as Delgado and Stefancic describe it, to protecting speech, no matter how abhorrent and intolerant its message.<sup>64</sup> Absolutists regard counterspeech as the only constitutional solution to destructive messages that are unaccompanied with any physical acts of violence.<sup>65</sup> Rather than accept the absolutist claims, *Understanding Words that Wound* adopts the legal realist notion that rights to free speech and

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of physical violence." 538 U.S. at 391 (Thomas, J., dissenting). See Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 366 (Fall 2001/Winter 2002).

<sup>61</sup> Rodney A. Smolla, *Terrorism and the Bill of Rights*, 10 WM. & MARY BILL RTS. J. 551, 562 (2002).

<sup>62</sup> See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978); Kathleen M. Sullivan, *Resurrecting Free Speech*, 63 FORDHAM L. REV. 971, 972 (1995) ("the ACLU's defense of neo-Nazis, who sought to goose-step in brown shirts past Holocaust survivors in Skokie, Illinois . . . stretched [the] neutrality principle nearly to the breaking point, costing the Civil Liberties Union many contributions along the way"). It is difficult to fathom that *Collin* survives the decision in *Black*. The neo-Nazis had sought to intimidate an entire community through the use of Nazi regalia. The risk seems even more immediate where anti-Semites march, carrying explicit, white supremacist messages, than it did in *Black* where the burning cross could be seen from the road. Cf. Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross Burning*, 55 SUP. CT. REV. 197, n.39 (2003) (questioning whether *Black* should apply to situations like *Collin*).

<sup>63</sup> 578 F.2d at 1200.

<sup>64</sup> DELGADO & STEFANCIC, *supra* note 5, at 203.

<sup>65</sup> Charles R. Calleros, *Paternalism, Counterspeech, and Campus Hate-Speech Codes: A Reply to Delgado and Yun*, 27 ARIZ. ST. L.J. 1249, 1258 (1995) (referring to counterspeech as being a mass response to hate speakers).

equal treatment should not be treated separately.<sup>66</sup> Methodologically, legal realism is a pluralistic view that marshals a multi-disciplinary analysis of the constitutionality of speech incorporating historical, linguistic, social and political insights.<sup>67</sup>

*Understanding Words that Wound* describes the paternalistic approach against hate speech of the moderate left<sup>68</sup> and the “tough love” approach of conservative libertarians.<sup>69</sup> Delgado and Stefancic begin by analyzing the moderate left’s various arguments, such as its premise that hate speech is a necessary means of emotional catharsis that allows minorities the opportunity to respond to their antagonists.<sup>70</sup> Social science does not bear out this pressure release theory; instead, it illustrates that permissive hate speech standards contribute to a charged atmosphere that is prone to the onset of racial violence.<sup>71</sup> Half a century ago, Gordon W. Allport, writing on the use of anti-Semitic rhetoric in Germany, wrote:

Although most barking (antilocution) does not lead to biting, yet there is never a bite without previous barking. Fully seventy years of political anti-Semitism of the verbal order preceded the discriminatory Nürnberg [*sic*] Laws passed by the Hitler regime. Soon after these laws were passed the violent program of extermination began. Here we see the not infrequent progression: antilocution → discrimination → . . . violence.<sup>72</sup>

A permissive standard for intimidating hate speech ignores dangers that victims experience and favors the bigots’ desire to advocate discrimination and violence.<sup>73</sup> Recognizing the importance of the First Amendment does not require an uncritical dedication to the liberty rights of bigots to express menacing messages.<sup>74</sup> Hate speakers are neither inviting intellectual rejoinder nor seeking political dialogue. Theirs is a campaign of silencing through intimidation—something that threatens the marketplace

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<sup>66</sup> DELGADO & STEFANCIC, *supra* note 5, at 217. J. M. Balkin has compared recent challenges to the free market model of speech to legal realist arguments in the 1920s and 1930s that were instrumental to deconstructing laissez-faire conservatives’ “ideology of the sacred right of freedom of contract.” J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 379–80, 383 (1990).

<sup>67</sup> DELGADO & STEFANCIC, *supra* note 5, at 219.

<sup>68</sup> *Id.* at 204.

<sup>69</sup> *Id.* at 208.

<sup>70</sup> *Id.* at 205.

<sup>71</sup> *Id.*

<sup>72</sup> THE NATURE OF PREJUDICE 57 (1979).

<sup>73</sup> Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1528 (2003) (stating that the dangers hate speech poses should be based, in part, on the context in which they are uttered); Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI.-KENT L. REV. 257, 267–68 (2004) (stressing that hate crimes indicate the danger racist communications can pose to a community).

<sup>74</sup> DELGADO & STEFANCIC, *supra* note 5, at 207.

of ideas and is no benefit to civil interactions.<sup>75</sup> Counter-speech can be effective in gainsaying individual biases, but it cannot be relied on to gainsay the deeply held prejudices of vociferous groups that feed off racism or ethnocentrism.<sup>76</sup> The libertarian argument that minority rights can best be protected by uninhibited and unrestricted hate propaganda is counterintuitive given how instrumental destructive rhetoric is to organizing misethnic movements.

Libertarians also oppose hate speech regulation because they claim that a racist whose views are known is less dangerous than one who expresses them clandestinely. Delgado and Stefancic, seemingly inadvertently, accept the conservative view that known racists are less dangerous than unidentified ones.<sup>77</sup> Here they overlook the role that well-known bigots play in marshaling systematic discrimination. Charismatic bigots can galvanize dangerous social movements by manipulating widespread prejudices. Racial stereotypes of Latinos have recently been exploited to gain popular support for federal statutes that limit the rights of legal and illegal immigrants,<sup>78</sup> California's Proposition 187, and the failed initiative to abolish the grant of birthright citizenship to children of undocumented aliens.<sup>79</sup> Historically, charismatic hate mongers have been able to recruit large-scale followings. Some of the greatest tormentors of humanity projected their misethnicity before taking political office: Andrew Jackson won the presidency in 1829, in part, because of his vocal support for Indian removal, and he pursued that aim during his term in office.<sup>80</sup> Adolf Hitler related his plans for persecuting Jews in his autobiography, *Mein Kampf*, years before he became Chancellor of Germany.<sup>81</sup> The marketplace

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<sup>75</sup> See Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 792 (1992) ("Hate speech frequently silences its victims, who, more often than not, are those who are already heard from least.").

<sup>76</sup> PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 105-06 (G. Raymond & M. Adamson trans., Harv. U. Press 1991).

<sup>77</sup> DELGADO & STEFANCIC, *supra* note 5, at 210.

<sup>78</sup> See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 (ADEPA), Pub. L. No. 104-132, 110 Stat. § 1214 (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. § 2105 (1996); Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. § 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

<sup>79</sup> See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 5 (1985).

<sup>80</sup> Ronald N. Satz, *The United States Constitution and the Cherokees*, 1 KENNESAW REV. 34, 38 (1987) (relating that by the time Andrew Jackson became president he had "long championed the relocation of all eastern Indians to trans-Mississippi location").

<sup>81</sup> Matthew Lippman, *The History, Development, and Decline of Crimes against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 994 (2004) (stating that *Mein Kampf* related Hitler's aggressive and imperialistic intents); Paulina McCarter Collins, Comment, *Has "The Lost Museum" Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to "Do Justice" for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115, 123 (relating how the Nazi party sought to carry out the racial ideology of *Mein Kampf*).

of ideas often favors dominant figures, and when destructive speech becomes part of their political rhetoric, the views often spill into both private conduct and discriminatory statecraft.<sup>82</sup>

The absolutist position is too dismissive of the dangers to a liberal republic emanating from speech that is intended to harm identifiable groups. An absolutist reading of the First Amendment discounts the importance of evaluating the circumstances of hate speech incidents, thereby losing track of real dangers in favor of an undifferentiating legal theory.<sup>83</sup> In *Black*, the Supreme Court determined that a cross burnt with the intent of intimidating was an unprotected form of speech because of that symbol's historic context.<sup>84</sup> *Black*, as one author pointed out, "applied a socio-historical analysis in rendering its ruling on the constitutionality of a Virginia Statute outlawing cross burning."<sup>85</sup>

The criticism in *Understanding Words that Wound* likewise favors a circumstantial evaluation of speech and faults absolutists for their indiscriminate defense. Certain words and statements, Delgado and Stefancic remind us, "reinforce histories of subordination."<sup>86</sup> The many restrictions on speech—such as those that prohibit libel, defamation, false advertising, and plagiarism—indicate that the Court rejects the notion that all manner of speech is protected against regulation.<sup>87</sup> The Court explicitly stated, in *Nebraska Press Ass'n v. Stuart*, that it "has frequently denied that First Amendment rights are absolute."<sup>88</sup>

<sup>82</sup> Justice Oliver Wendell Holmes, who adopted the marketplace of ideas doctrine into First Amendment jurisprudence, based it on his affinity to Social Darwinism. See Alexander Tsesis, *Hate in Cyberspace*, 38 SAN DIEGO L. REV. 817, 843–49 (2001) (discussing how Holmes's Social Darwinism influenced his notion of the marketplace of ideas); Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 ST. JOHN'S L. REV. 119, 148 (a "marketplace of ideas . . . operates (if at all) on the principles of social Darwinism rather than distributive justice"); Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791–1930*, 35 EMORY L.J. 59, 132 (1986) (differentiating between Holmes's Social Darwinism and Justice Brandeis' proclivity for social and economic equality).

<sup>83</sup> See Michael Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1526–28 (2003) (breaking down a circumstantial analysis of hate speech into four factors).

<sup>84</sup> *Black*, 538 U.S. at 352–57 (using a historical analysis to evaluate circumstances when cross burning is intended to intimidate).

Similarly, the Court's recent holding in *Bob Jones University* implies that, under some circumstances, governmental interest in preventing dignitary harms can outweigh free speech interests. *Bob Jones University v. United States*, 461 U.S. 574 (1983) (holding that despite a private university's First Amendment rights, it cannot engage in racial discrimination); cf. Peter H. Hanna, Note, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2443 (2004) (making a similar point about *Bob Jones University* in the context of the Free Exercise Clause). But see *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that associational rights allowed the Boy Scouts to use discriminatory criteria for membership).

<sup>85</sup> Chris Demaske, *Modern Power and the First Amendment: Reassessing Hate Speech*, 9 COMM. L. & POL'Y 273, 312 (2004).

<sup>86</sup> DELGADO & STEFANCIC, *supra* note 5, at 212.

<sup>87</sup> *Id.* at 203–04.

<sup>88</sup> 427 U.S. 539, 570 (1976).

The phrase, “Congress shall make no law abridging freedom of speech,” is not a blanket prohibition against all regulation of communicative acts. Its underlying idea is far more complicated. A court evaluating whether a speech regulation violates the First Amendment must deliberate over whether the regulation restricts more speech than is necessary to prevent foreseeable harms and whether it chills protected speech.<sup>89</sup> First Amendment issues should be decided by considering the competing public and private concerns involved in a particular case.<sup>90</sup> In a concurrence, Justice Frankfurter explained that “[t]he demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.”<sup>91</sup> The need for the contextual analysis, which absolutists ignore, is of particular importance in avoiding harms to children.

#### IV. CHILDREN’S UPBRINGING

Children are even less capable of countering racist arguments than are adults. They are less likely to realize when hate speakers misleadingly manipulate stereotypes. Delgado and Stefancic argue that children’s susceptibility to the sway of adults requires the enactment of special protections.<sup>92</sup> The “marketplace of ideas” perspective on the First Amendment inadequately addresses children’s impressionability to widely accepted prejudices. This perspective regards argument and counterargument, rather than regulation, to be the only response to hate speech.<sup>93</sup> The premise behind this school of thought is that a group must be given the opportunity to express its points of view, even when it is part of a racist fringe.<sup>94</sup> Such a perspective places racist and anti-Semitic expression on

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<sup>89</sup> See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (holding that “the greater ‘objectivity’ of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones . . . and that the greater ‘hardiness’ of commercial speech . . . likely diminishes the chilling effect that may attend its regulation” (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976))); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that as long as liability for defamation is based on intentional or reckless falsehood, it does not impermissibly chill protected speech).

<sup>90</sup> See *Barenblatt v. United States*, 360 U.S. 109, 126 (1959).

<sup>91</sup> *Dennis v. United States*, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring).

<sup>92</sup> DELGADO & STEFANCIC, *supra* note 5, at 93.

<sup>93</sup> See *R.A.V.*, 505 U.S. at 396 (indicating that a city’s only recourse to hate speech is to respond to it, and that it cannot ban it).

<sup>94</sup> One problem with regarding hate speech as a means of reaching truth in the marketplace of ideas is that it equates intentional disparagement with legitimate political expression. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market”); *R.A.V.*, 505 U.S. at 382 (“The First Amendment generally prevents government from proscribing

the same level of importance as democratic speech for ascertaining truth.<sup>95</sup> Whatever the merits of the marketplace model when it comes to adults, children clearly have no effective means of responding to bigotry. They typically lack the knowledge and experience to gainsay hate speech, and, even when they realize it to be false, children lack the resources to disseminate their views.

Delgado and Stefancic provide details from some recent judicial records detailing how hate speech negatively affects children. These judicial examples illustrate the special case of youth.<sup>96</sup> In the twenty-first century, the Internet has emerged as a particularly “fertile source for hateful messages directed at children.”<sup>97</sup> Websites sometimes use graphics, such as crayon-like drawings, that appeal to children, to purvey messages like “Kill the Jew pigs before it’s too late.”<sup>98</sup> Some Internet sites display violent video games that involve such “play” as hunting Jews, or they depict Jews, Latinos, and blacks as sub-humans.<sup>99</sup> Others use games, puzzles, and cartoons to expose children to derogatory stereotypes.<sup>100</sup> One website markets a “Turner Diaries” game, which is modeled after a book, *The Turner Diaries*. The book influenced white supremacist Timothy McVeigh’s decision to bomb the Federal Building in Oklahoma City, on April 19, 1995.<sup>101</sup>

Some Internet purveyors of hatred incite children to act on stereotypes and cultural prejudices by manipulating activities and objects familiar to youngsters. Early lessons in misethnicity, regardless of the medium for transmitting them, can manifest in the roles that children depict at play. Prejudices are often learned early in life, before children are wise

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speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed.”).

<sup>95</sup> See *R.A.V.*, 505 U.S. at 402 (1992) (White, J., concurring in the judgment) (“by characterizing fighting words as a form of ‘debate,’ the majority legitimates hate speech as a form of public discussion”) (internal citations omitted).

<sup>96</sup> DELGADO & STEFANCIC, *supra* note 5, at 97–102.

<sup>97</sup> *Id.* at 103. Cf. Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817 (2001) (addressing a variety of issues concerning Internet hate speech).

<sup>98</sup> DELGADO & STEFANCIC, *supra* note 5, at 103. See also Tanya Talaga, *Neo-Nazis Trying to Snare Kids Through Net*, TORONTO STAR, Mar. 26, 1997, at A4 (explaining how some hate groups have even taken to recruiting children through catchy music and colorful games).

<sup>99</sup> DELGADO & STEFANCIC, *supra* note 5, at 103.

<sup>100</sup> Tiffany Komarsara, Comment, *Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required To Impose Liability on Internet Communications*, 29 CAP. U. L. REV. 835, 844 (2002).

<sup>101</sup> TSESIS, *supra* note 12, at 75; Bill Williams, *Where Religion Meets Terrorism*, HARTFORD CURRENT, Mar. 11, 2000, at D5 (“Convicted bomber Timothy McVeigh was influenced by a book called ‘The Turner Diaries,’ in which the fictional hero blows up a federal building. The book has sold 200,000 copies, many of them at gun shows.”); Tim Rutten, *Pausing During Holy Season to Spread Hatred in Egypt*, L.A. TIMES, Oct. 30, 2002, at 1 (stating that McVeigh slept with *The Turner Diaries* under his pillow in an article primarily about anti-Semitic Egyptian television series); Howard Pankrantz, *’92 Meeting in Estes “Kickoff” for Militias*, DENVER POST, Sept. 19, 1996, at A20 (paraphrasing a statement of Jo Thomas whose journalistic investigation indicated that *The Turner Diaries* influenced McVeigh and Terry Nichols’s commitment to racist violence).

enough to question their validity.<sup>102</sup> Frantz Fanon has shown pop culture's appeal to children's minds. He described how popular images in magazines and comics spread bigotry among the children of the French Antilles. The heroes of folktales, legends, and illustrations that children learned and recounted were invariably white. Children, white and black, identified with the heroes of these stories and developed antipathy toward vanquished Africans. Based on cultural images, children wanted to be grandly clad conquerors, not cannibals.<sup>103</sup> The games that children play can convince them that groups branded as fair targets for abuse are inferior and, in some way, deserving of being treated unequally.<sup>104</sup>

Culture imprints beliefs and practices in children that can easily be manipulated by the advocacy of violent, antisocial behavior against a historically disempowered group.<sup>105</sup> Television depictions of Latinos as criminals or drunkards perpetuate racism and discrimination by giving the depictions a de facto stamp of popular approval.<sup>106</sup> Children acquire and personalize racist and ethnocentric dispositions through a fourfold progression: (1) *indoctrination* through school, family, friends, media, and fables; (2) *questioning* why some people are treated differently than others; (3) *acceptance* of ethnic and racial stratification; and (4) *affectation* of inclinations, habits, and behaviors grounded in misethnic ideology.<sup>107</sup>

<sup>102</sup> Henri Tajfel, *The Roots of Prejudice: Cognitive Aspects*, in *PSYCHOLOGY AND RACE* 86–87 (Peter Watson ed., 1973).

<sup>103</sup> FANON, *supra* note 31, at 146.

<sup>104</sup> Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 461 (1990) (discussing how racially demeaning labels remind the world that out-groups “are fair game for physical attack,” evoking cultural beliefs of inferiority that are the vestiges of servitude). The messages of inferiority are also spread to children through unequal educational opportunities. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494, 495 n.11 (1954) (regarding the expressive effect of segregated schools).

<sup>105</sup> See GEORGE E. SIMPSON & J. MILTON YINGER, *RACIAL AND CULTURAL MINORITIES* 64 (New York: Harper & Row, 4th ed. 1972) (discussing how children acquire prejudiced beliefs). The most glaring recent example of how a society can ingrain children in misethnicity is the Palestinian National Authority's use of its television network that often includes messages on children's television shows that legitimize genocide against Jews. See Greg Myre, *On the Air, Palestinians Soften Tone on Israelis*, N.Y. TIMES, Dec. 15, 2004, at 1.

Children's access to television is, of course, not limited to children's shows, and the recent rise of anti-Semitism in the Arab world can partly be attributed to the popular depictions of Jews in countries like Egypt and Syria. See Judea Pearl, *This Tide of Madness*, WALL ST. J., Feb. 20, 2003, at A12 (discussing the recent Egyptian state media's production of a television special based on the Protocols, asserting the “fantasy that Jews are plotting to take over the world”); State Department Press Releases and Documents, *U.S. Will Press OSCE to Adopt New Measures to Fight Anti-Semitism—U.S. Envoy to Israel Previews OSCE Conference in Berlin in April*, 2004 WL 59149725 (stating that, in 2003, Syria financed a twenty-nine part Hizbollah broadcast “which was full of anti-Semitic and demonizing representations of Jews based on the ‘Protocols of the Elders of Zion’”).

<sup>106</sup> Leonard M. Baynes, *White Out: The Absence of Stereotyping of People of Color by the Broadcast Networks in Prime Time Entertainment Programming*, 45 ARIZ. L. REV. 293, 327 (2003) (discussing how stereotyping of Latinos and blacks on television shows can shape children's perceptions of people of color).

<sup>107</sup> Phyllis A. Katz, *Acquisition of Racial Attitudes in Children*, in *TOWARDS THE ELIMINATION OF RACISM* 148 (Phyllis A. Katz ed., 1976) (elaborating a multistage process of ra-

Regardless of the predispositions of individual children, whether passive or aggressive, they are not born with their prejudices. It is only through interaction with peers and mentors, whose examples young children implicitly follow, that views about various groups are transmitted.<sup>108</sup> The state, as Delgado and Stefancic point out, can recognize children's hyper-sensitivity to hate speech and punish those orators who manipulate youngsters with it.<sup>109</sup>

## V. INTERNATIONAL CONTEXT

Numerous democracies have recognized the potential harms of hate speech on children and on democratic society as a whole.<sup>110</sup> In chapter 12, Delgado and Stefancic compare the United States' treatment of hate speech with the regulation of such speech in other Western societies, and they show the relatively greater acceptance of such regulation in international agreements.

Germany, which is one of the countries they discuss, has several laws to prevent both the long- and short-term risks of destructive messages. Anyone attacking the human dignity of others by inciting hatred against a segment of the population, advocating the use of "violent or arbitrary measures against them," or exposing them to malicious slander is subject to imprisonment.<sup>111</sup> Germany, further, punishes Holocaust denial and prohibits Nazi and neo-Nazi groups from using the Internet to disseminate their ideology.<sup>112</sup> Germany counterbalances the government's interest in regulating hate speech for preserving democratic institutions with an interest in protecting the free speech rights of individuals.<sup>113</sup> Despite its open polity, Germany outlaws political parties that threaten democratic order.<sup>114</sup> Israel, too, has a law barring political candidates from national

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cism acquisition in children)

<sup>108</sup> ERIC J. DINGWALL, *RACIAL PRIDE AND PREJUDICE* 212–13 (1946).

<sup>109</sup> DELGADO & STEFANCIC, *supra* note 5, at 94–95.

<sup>110</sup> Some of the Western democracies that prohibit hate speech are Austria, Finland, and Italy. See § 283 StGB (Aus.); Penal Code ch. 11, § 8 (Fin.); Decree-Law 122 (Apr. 26, 1993), Law 205 (June 25, 2003) (Italy). For a fuller discussion, see TESIS, *supra* note 12, at ch. 12.

<sup>111</sup> See § 130 STRAFGESETZBUCH (StGB) (F.R.G.) reprinted in J. Wetzel, *Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany*, in *UNDER THE SHADOW OF WEIMAR* 105 n.12 (Louis Greenspan & Cyril Levitt eds., 1993).

<sup>112</sup> DELGADO & STEFANCIC, *supra* note 5, at 197.

<sup>113</sup> Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1554 (2004) (discussing the limits of free speech in Germany because of its regulation of anti-democratic expression); cf. Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 YALE J. INT'L L. 179, 204 (2001) (arguing that the German restrictions on hate speech represent an incursion into free speech rights).

<sup>114</sup> GRUNDGESTZ [GG] [Constitution] art. 21.2, reprinted in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 115 (A. P. Blaustein & G. H. Flanz eds., official

office who incite others to racism.<sup>115</sup> Similarly, Canada prohibits hate speech that subverts the democratic process.<sup>116</sup> British law, likewise, punishes those who incite others to racial hatred.<sup>117</sup> Great Britain recognizes that tolerance of speech that calls for the abuse of racial, ethnic, and religious groups can popularize racist attitudes and increase inter-group friction.<sup>118</sup>

Countries that have adopted hate speech legislation show a concern for the well-being of targeted groups. They recognize that the decision over whether to regulate speech requires governments to balance individual with social interests. Many countries that restrict hate speech, as Delgado and Stefancic point out, “believe that human rights and freedoms contain a collective, as well as an individual, dimension and that a citizen’s right to promote racist views must be weighed against the interests of society.”<sup>119</sup> In this regard, the Austrian Penal Code places a greater emphasis on the dignity rights of the targets than the rights of intimidating hate speakers. Section 283 of the Austrian Penal Code makes it an offence to incite hostilities against religious, racial, ethnic, or national groups and to violate “their human dignity” through slander.<sup>120</sup>

Countries like Austria that have anti-hate speech laws “wish to deter the violence and fighting they believe it encourages.”<sup>121</sup> Such is also the case in Hungary, where Parliament passed a law criminalizing the organizing or providing of finances for any event which may provoke violence against a national, ethnic, racial, religious, or other group, hatred or incitement against the Hungarian nation, or any national, ethnic, racial, or religious group.<sup>122</sup> On the international level, the International Covenant on Civil and Political Rights similarly enjoins signatory states to

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trans., 1994).

<sup>115</sup> Basic Law: The *Knesset* (Amendment No. 9) Law, 1985, *quoted in* D. Kretzmer, *Racial Incitement in Israel*, 22 ISRAEL Y.B. ON HUM. RTS. 243 (1992).

<sup>116</sup> See *Regina v. Keegstra* [1990] 3 S.C.R. 697, 764 (Can.) (finding that hate propaganda argues “for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics”). The Supreme Court of Canada reaffirmed its commitment to this holding in *Regina v. Keegstra* [1996] 1 S.C.R. 458 (Can.).

<sup>117</sup> The Public Order Act of 1986 §§ 17–29 (U.K.) are quoted in Kenneth Lasson, *Racism in Great Britain*, 7 B.C. THIRD WORLD L.J. 161, 173–77 (1987).

<sup>118</sup> ERIC BARENDT, FREEDOM OF SPEECH 161 (1985).

<sup>119</sup> DELGADO & STEFANCIC, *supra* note 5, at 196.

<sup>120</sup> *Quoted in* United Nations Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention: Thirteenth Periodic Report of States Parties Due in 1997, Austria*, available at <http://www.hri.ca/fortherecord1999/documentation/tbodies/cerd-c-319-add5.htm>.

<sup>121</sup> DELGADO & STEFANCIC, *supra* note 5, at 196.

<sup>122</sup> United Nations, Convention for the Rights of the Child, *Consideration of Reports Submitted by States Parties: Hungary*, CRC/C/8/Add.34 (Sept. 24, 1996), available at <http://www.hri.ca/fortherecord1997/documentation/tbodies/crc-c-8-add34.htm> (stating that in March 1996 the Hungarian Parliament “adopted a new amendment to the Criminal Code qualifying as a criminal offence the organizing of any event, or providing finances for any event which may provoke violence against a national, ethnic, racial, religious or other group, hatred or incitement against the Hungarian nation, or any national, ethnic, racial or religious group.”)

curb “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>123</sup>

The experiences of western democracies who have enacted hate speech regulations indicate that a limited proscription does not erode the government’s commitment to protecting free speech and inquiry.<sup>124</sup> Countries like England have found that hate speech regulations serve declaratory purposes because they indicate governments’ commitment to the well-being of minorities.<sup>125</sup> United States free speech jurisprudence is anomalous. Democracies generally recognize that preserving human rights supersedes bigots’ desire to spread vituperative messages. The history of racism in the United States, from Native American dislocation, to slavery, to Japanese internment, demonstrates that here in the U.S., as in other democracies, intolerance and persecution can exist alongside free speech. Safeguards against the real harms of hate speech can prevent the erosion of civil rights.

#### VI. ANTI-SEMITISM AMONG BLACK NATIONALISTS

The hate speech laws of other democracies, such as Canada, sometimes prohibit discrimination against any group, regardless of the groups’ past experiences with discrimination and persecution. Despite the greater risk to the members of persecuted minorities, these countries’ laws prohibit discrimination in general terms. The Canadian Criminal Code, for instance, contains a cause of action against the public incitement of others to hatred: “Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.”<sup>126</sup> Destructive messages are discouraged as a whole, regardless, of their object. Racist speech is harmful because it alienates groups and intimidates reasonable people.

Delgado and Stefancic recognize that the hate speech of Black Nationalist organizations, such as the New Black Panther Party or the Nation of Islam, can be just as vituperative as those of white hate speakers.<sup>127</sup> Most of this hate speech is anti-Semitic but some of it is aimed at whites in general.<sup>128</sup> The New Black Panther Party is an anti-Semitic or-

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<sup>123</sup> Art. 18-20, 999 U.N.T.S. 171.

<sup>124</sup> DELGADO & STEFANCIC, *supra* note 5, at 200.

<sup>125</sup> Michael Banton, *The Declaratory Value of Laws Against Racial Incitement*, in STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 352 (Sandra Coliver ed., 1992).

<sup>126</sup> Criminal Law, R.S.C., ch. C-46, § 319(1) (2000) (1985) (Can.).

<sup>127</sup> DELGADO & STEFANCIC, *supra* note 5, at 181, 184-85.

<sup>128</sup> *Id.* at 181-82.

ganization that blames Jews for a variety of crimes against humanity, including the September 11th terrorist attacks against the World Trade Center.<sup>129</sup> Louis Farrakhan, the Nation of Islam's leader, has repeatedly singled out Jews in his statements, considering them to be devils and agents of Satan.<sup>130</sup> Given Farrakhan's charismatic style and large following, his dissemination of Holocaust denial is particular troubling. Farrakhan has described Judaism as a "gutter religion" and has called Hitler "a great man." On an even more dangerous note, Farrakhan has "promised to 'grind' Jews and 'crush them into little bits.'" <sup>131</sup>

White supremacist and Nation of Islam ideologies are alarmingly similar in their separatist aims. *The Final Call*, the Nation of Islam's official newspaper, contains separatist, non-democratic ideology. The end of each issue of *The Final Call* lists the Nation of Islam's demands and aspirations. Among these is the following: "We want our people in America whose parents or grandparents were descendants from slaves, to be allowed to establish a separate state or territory of their own—either on this continent or elsewhere."<sup>132</sup> Such ideas closely resemble those of David Duke and the KKK, which also advocate the view that whites and blacks should live separately because of their innate incompatibilities.<sup>133</sup> Wanting to return to the days of "separate but equal" education, *The Final Call* argues for "equal education—but separate schools up to 16 for boys and 18 for girls . . . . We want all Black children educated, taught and trained by their own teachers."<sup>134</sup> The level of support that black nationalists receive from some in the black community, Delgado and Stefancic explain, may result from the current laxity toward hate speech, which breeds more anger and resentment against scapegoats.

#### CONCLUSION

*Understanding Words that Wound* is the most expansive treatment of hate speech to date. A book review of this length can only touch on some of the subjects that it covers. Only scholars who have been working in the field for decades and keeping up with its literature could have

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<sup>129</sup> See *American Muslim Clerics Join Malik Zulu Shabazz of Anti-Semitic New Black Panther Party for Press Conference on C-Span*, available at [http://www.adl.org/anti\\_semitism/shabazz.asp](http://www.adl.org/anti_semitism/shabazz.asp); see also Andy Gold, *Trademarking a Political Movement*, 20 ENT. & SPORTS LAW. 10, 10–11 (Winter 2003) (distinguishing the antisemitism and xenophobia of the New Black Panther Party from the original Black Panther Party).

<sup>130</sup> DELGADO & STEFANCIC, *supra* note 5, at 182.

<sup>131</sup> D. L. Schaefer, Commentary, *Farrakhan's Vilifying Videos Don't Belong in High School Classrooms*, TELEGRAM & GAZETTE, Mar. 27, 1998, at A11; Editorial, *Farrakhan Show*, WASH. POST, Aug. 1, 1984, at A23.

<sup>132</sup> *The Muslim Program*, THE FINAL CALL, Mar. 16, 1999.

<sup>133</sup> See *Duke Seeks Ex-Rep. Livingston's Seat*, CHI. TRIB., Mar. 19, 1999, at 23 ("[David] Duke . . . has written a new book that calls for separate nations for whites and blacks.").

<sup>134</sup> *The Muslim Program*, *supra* note 132.

brought together so many subjects under one cover. The book is written in language accessible to the general reader but also adaptable to courses. Each chapter includes discussion questions and a list of references that educators teaching doctrinal courses, seminars on hate speech specifically, or the First Amendment generally will find helpful.