'Hate speech' and 'First Amendment absolutism' discourses in the US

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ABSTRACT. This article argues that the First Amendment to the US Constitution, seen inside and outside the USA as a historical high water-mark of discursive freedom, has suffered from an ideological refusal to acknowledge its dangerous implications for the growth of hate speech, whether against people of color or other subordinated groups. This refusal has led in turn to a virtual vacuum in intelligently conceived strategies to combat hate speech. First, issues in the 'absolutist' position are reviewed, and then four problems are discussed in greater depth: the actual remit of the First Amendment in practice; its international reference points; whether 'race' is the only vector at stake; and the deficiency of purely legal conceptualizations of the issue. The article continues with a brief note on critical legal theory and critical 'race' theory, and concludes by considering two different angles of vision on the subject, one that of appropriate, sociologically informed administrative responses to hate speech within an institution, the other Charles Husband's statement of the need to plan for the 'right to be understood' within a multi-ethnic public sphere.

KEY WORDS: *antisemitism, critical legal theory, First Amendment, hate speech, public sphere, racism*

Taken together, the explosions of ethnic hatred in the former USSR and the former Yugoslavia, anti-Roma violence across eastern Europe, ubiquitous police violence against people of color, anti-immigrant sentiment fostered in France, the USA and elsewhere, challenge politically engaged scholars to prioritize the relation between discourse, communication, media, and violent repression. This is one of the most vital practical and theoretical matters in our field. I argue here that within the US there is evidence in relation to hate speech an abusive and

highly irresponsible reading of the Constitution's First Amendment, a reading that connives with racial subordination or constantly risks doing so.

The First Amendment

We must first then address in some detail the question of the First Amendment, since in the USA the hate speech issue is effectively counterposed to contemporary understandings of what it means ('Congress shall make no law . . . abridging the freedom of speech, or of the press'). It is common to find the relation between the two framed as a battle between priorities: protecting free expression, and avoiding the perpetuation, or exacerbation, of racism.[1] A rather entrenched deduction in the USA currently is that freedom of speech has to be assigned priority over anti-racism, partly because the former is constitutionally enshrined, and partly because its application governs every dimension of the public sphere. Any interference with the principle of whatever grounds will lead, in this view, to a slippery slope toward the elimination of free speech, or even a flash flood drowning it outright. Freedom of speech ends up as the greater good, hate speech as the lesser evil.

There is, furthermore, a widespread view in the USA that the best and only cure against the harmful effects of negative speech is 'more speech', an opinion originally laid down by Justice Louis Brandeis in Whitney V. California (1927). This hypothesis holds that public outrage at racist speech and other forms of negative speech will provoke a counter-reaction in which the errors and ugliness of racism, or some other evil, will be exposed and subjected to criticism and condemnation, thus leading to a healthier situation than one in which people are not compelled to confront the issue.

In line with this position, Whillock and Slayden (1995) repeatedly, and Smith in his chapter in their book equally strongly, insist that there is an innate social law that produces the positive out of the negative. Smith (1995) argues that hate speech is a form of early warning system, even though the fact that it *may* fulfill that function does not in the slightest guarantee that it will. 'Dialogue *will* occur', Whillock and Slayden write (added emphasis), 'rather than isolation, exclusion, quarantine' (p. xv). Smith (1995: 260) writes of the need to 'expose . . . the canker sore [of hate speech] . . . to the air of speech and the light of reason, the healing antibiotic of counterargument'.

An incident that would seem to underpin the view held by Whillock, Slayden and Smith was when some years ago in the small university town of Missoula, Montana, a house displaying menorah – the branched candlestick especially used in the Jewish Hannukkah festival – was physically attacked. Other citizens, outraged when they heard of the attack, displayed menorahs or cut-out paper menorahs in their front windows by the hundreds, even though overwhelmingly they themselves were not Jewish. Public meetings were organized to protest the attack. There were no further antisemitic desecrations or outrages. This episode

seems perfectly to confirm the 'more speech' hypothesis. However, we shall question whether this is really so.

Downs (1985) similarly engages with the issues raised by a proposed 1983 neo-Nazi march through Skokie, Illinois, a community which was home to a substantial number of Holocaust survivors (the march was eventually relocated as a result of protracted legal proceedings). He argues that we have to weigh the pain and fear of an impending neo-Nazi march on Holocaust survivors, and the potential for considerable street violence had it taken place, against three positive outcomes. These were the mobilization of opposition that actually took place, the sense for survivors of reasserting control through activism, and the generation of public debate about free expression. None of these, however, was a factor in stopping it – legal maneuvers did that – and had it taken place, reasserting control would hardly have been an overwhelming sensation. Generating debate about free expression can be effectively done by far less menacing means.

Faced with conclusions concerning hate speech such as these, we must ask some searching questions in return. *What* was the 'healing antibiotic' after the 1838 Cherokee Trail of Tears, after the 1890 massacre at Wounded Knee, after the Rosewood massacre[2] in 1921, after Kristallnacht in 1938? *Why* will dialogue occur? What *kind* of dialogue?

Other nations do not have exact constitutional equivalents to the First Amendment, although many[3] purport both to guarantee civic freedoms, including the freedom of speech, and to outlaw racially inflammatory speech (incitement to racial hatred). Those responding to this point – if I may echo further the entrenched view of the matter frequently to be found in the USA – argue that the banning of incitement to racial hatred demonstrates even more strongly the importance of the First Amendment. Was it not the case, the argument goes, that under Soviet rule, and under Tito, questions of ethnic identity and therefore expressions of racial hatred were effectively banned from public discourse? But once that 'lid' was removed, goes the triumphant warning, the volcano erupted with all the more pent-up violence in Armenia, Azerbaijan, Georgia, Uzbekistan, Yugoslavia. Ethnic 'cleansing' was the terrifying result.

The argument seems obvious, nigh-invincible. But is it? I argue here that this entrenched position on the First Amendment begs a whole series of questions;[4] let me begin by citing support for my claim that it is entrenched. Schauer (1995) has recently proposed that typical US discourse concerning the First Amendment meets most of the hallmarks of an ideology, namely (by his definition) a viewpoint held tenaciously in the face of very significant contradictory evidence. He points out that the ideology/discourse in question is generally concentrated among the chattering classes in the universities, the legal profession, journalism, and related professional areas, and suggests that it is significantly influenced by those particular social contexts.

The nub of his argument is the stubborn resistance he points out as typical in those circles to publicly discussing whether the First Amendment offers too much protection. This pronounced reluctance even to discuss is the Achilles heel of First

Amendment absolutism,[5] for if J.S. Mill were correct in arguing that even the patently true needs questioning from time to time in order for its truth to be reinforced and valued, then this resistance flies straight in the face of Mill's logic. And Mill is the thinker cited above all in free speech discourse. So is the First Amendment – at least as currently perceived in the USA – a sacred cow? Should legal protections from hate speech be sacrificed to it?

Fish (1994) has similarly noted the elements of pure assertion and blind faith put forward by First Amendment absolutists in their claim that only total adherence to totally free speech guarantees a secure democratic future: 'The[ir] requirement is that we endure whatever pain racist and hate speech inflicts for the sake of a future whose emergence we can only take on faith' (p. 109). In defense of their position the proponents of First Amendment absolutism often argue that nothing but a cast-iron principle makes us safe against tyranny, yet as Fish notes, this inexorably involves them in a series of jesuitries of their own devising: '. . . it looks like speech, but it's really action; or, it looks like action, but it's really speech; or, it looks like intimidation, harassment, libel, and group vilification, but it's really the expression of an idea' (p. 125).

Four key problems

Keeping in mind, then, this crux in contemporary policy culture in the USA, let us examine four questions often begged by contemporary discourse there concerning the First Amendment and hate speech.

One is the actual meaning and force of the First Amendment.[6] The second, consequent in part upon the first, is whether that piece of constitutional law is and has to be peculiar to the USA, or whether it represents a desirable and feasible universal model of speech regulation. Or *de*regulation. The third is whether 'racial' situations should be regarded as the only zone in which hate speech is of communicative or constitutional significance. The fourth is whether a standard legal problematic is adequate to conceptualize the issues involved, or whether it does not seriously distort issues of history and sociology, politics and economics, and a patriarchal culture, that are also crucially involved.

1 WHAT IS THE FIRST AMENDMENT IN PRACTICE?

Like all law, the First Amendment has gone through a series of changes determined by judicial and legal precedent. Many are unaware that it has never applied in the workplace. Even more are unaware that it does not apply on Native American reservations. Some know that commercial speech – e.g. advertising – enjoys a lower level of constitutional protection than political communication, and that protection is also weak for 'obscene'[7] speech in mass media that are easily available to children.

Furthermore, in many cases in which the law has been attempted to be invoked in favor of citizens' broadcast speech rights, US courts have repeatedly countered that the market, not the First Amendment, is the governing principle at work in

them.[8] As Stein (1997, chs 3–4) has shown, with media defined as private institutions, the speech-rights of their owners have repeatedly been held to take absolute precedence over the public's speech-rights. In the course of a pellucid historical overview of the First Amendment, Kairys (1982) powerfully unsettles the argument that the First Amendment has been systematically enforced throughout US history in favor of free public speech. Indeed, the evidence suggests quite the opposite. Linfield (1990) offers a mass of supporting evidence in the same direction during wartime periods. The First Amendment does not guarantee a right to communicate, it only prohibits government from passing certain types of legislation, and even this prohibition has to be interpreted, ultimately, by a given Supreme Court.

What then is the First Amendment's actual force? There is no way of offering a comprehensive answer to that question here. But it is important to consider the position put forward by Jensen and Arriola (1995), who argue that the First Amendment offers illusory protections. The ideology that in the USA anyone can *constitutionally* say anything, bypasses the social factors inhibiting the free and full expression of grievances and problems: '. . . the vast majority of survivors of sexual violence are ignored, blamed, pathologized, threatened, disbelieved, and otherwise revictimized when they protest the violation and try to hold their offenders accountable' (pp. 195–6). Thus women or ethnic minority groups with important stories to tell who do not tell them, are subject to what Jensen and Arriola sum up as 'oppressive silencing' (pp. 199–203) – yet can comfortably be presumed by the public to have nothing of substance straitjacketing them because there is a talismanic First Amendment in existence. In reality that Amendment in no way protects their freedom to communicate, or their right to freedom from hate-based communication that does indeed straitjacket them. Hostile power in society is far from being only governmental, and the suppression of rights goes far beyond what has been legislated to that end.

2 IS THE FIRST AMENDMENT PECULIARLY AMERICAN?

On one level, yes. There is no exact equivalent, not least because of its interrelation with the whole corpus of US legislation, constitutional and otherwise. Some would go further, however, and claim it is part of a distinctively American constitutional genius, one of the features of the USA that citizens of other nations should envy and aspire to reproduce, if they are up to it. Often lurking in this second claim is the assumption that no country enjoys more freedom of expression than the USA, almost as though in all other nations the citizens were constantly hedged about with blockages on public speech. With some degree of justice, the atrociously written British libel laws are the example of choice for those arguing this position, but even in Britain it is hardly the case that citizens are cowering in case they will be carted off to court for communicating freely. This viewpoint almost seems to squidge dictatorships and liberal democracies into a single bag, and thereby to trumpet American glory and exceptionalism (see Smith, 1995: 228).

At this point it is probably appropriate to dispel some typical American illusions about European laws that ban incitement to racial hatred. Far from muzzling all free speech, as the rather apocalyptic First Amendment essentialist would claim, these laws are very rarely used. And in British experience, they have mostly been used against Black nationalist and Black racist speakers, rather than across the board. Nor is Germany free of publicly communicating neo-Nazis, even though it is unlawful there to deny the Nazi Holocaust (Stein, 1986). In other words, as currently written, many such laws inhibit neither free speech nor hate speech. Often this is because of weak enforcement procedures at all levels.

Or should not, rather, every nation aspire to have a First Amendment? Or should every nation aspire to include positive freedoms to communicate, so that people should not be so handily constrained by racist or patriarchal or homophobic social pressure? And should not the First Amendment absolutists in the USA exhibit a large dollop of humility about the actual state of social communication in that country?

3 SHOULD WE SYSTEMATICALLY BROADEN THE HATE SPEECH FOCUS TO A VARIETY OF NON-'RACIAL' SITUATIONS?

The collection of essays edited by Whillock and Slayden (1995) does exactly that. Chapters 2–8 focus, in turn, on the manipulation of hatred as an electoral stratagem, on intensified homophobic framing of gays and lesbians in mainstream US media, on the expression of hatred of job-supervisors' control and surveillance, on the contemporary utilization of Nazi symbols in youth culture, on gender hatred from the lips of confessed rapists, on the rhetoric of justifying violence against abortion clinic personnel, and on the venomous onslaught against scandalizing art in the 1990s US National Endowment for the Arts controversy.[9]

So how far does the grouping of these disparate groups by Whillock and Slayden under the rubric 'hate speech' actually work, conceptually speaking? Does not establishing a single category for all those who express hatred for anything whatsoever risk becoming principally a moral or psychological judgment, rather than a discursive or sociological one? And even in ethical terms, does not a single category flatten out the moral significance of all forms of hatred? However idiotic and contemptible the attacks on the National Endowment for the Arts, are they really to be placed on the same plane as incitement to despise, extrude, and violate the rights of all Mexican Americans?

At the same time, there is nothing to be gained from claiming a 'uniquely hated' status for 'racially' defined subordinated groups, as though gender fascism or homophobic utterances were somehow marginal and unthreatening. In their introduction, the editors describe 'hate speech' as both a 'a communication phenomenon' (p. ix) and as 'the failure of an overarching vision' (p. xvi). Yet their examples of hate speech do not self-evidently make up a 'unitary' phenomenon, and the claim of 'failure' sounds more like a lament for lack of tolerance than an analysis of these forms of aggressiveness that locates them in history, culture, and social structure. Thus despite usefully broadening the focus, I would argue

Whillock and Slayden's selection of topics overshoots the mark. The collection of essays edited by Allen and Jensen (1995), albeit not directed overall to the question of hate speech, stays within a more convincing boundary through focusing on gender, sexual orientation, and 'race'.

4 LIMITATIONS OF LEGAL DISCOURSE

Arguably, when First Amendment absolutists urge the right to hate speech as free speech, they are trapped in a straitjacket formed by the priorities of legal discourse. Those priorities ultimately require bases to be laid that will rationalize and permit court decisions on individual cases at a particular moment in time. Was or was not this particular individual damaged in some way in this place and time by this particular expression of 'racial' hatred?

This focus evacuates the societal and historical dimensions of hate speech. It further presumes a firewall to be in place between speech and action. And, finally, it relies on an unspoken quasi-Durkheimian premise concerning the role of deviance in cementing social cohesion. Let us take each of these in turn.

Once each act of hate speech is disaggregated for court purposes, its social and historical embedment is ripped away and discarded. It is inconceivable to claim that Kristallnacht was simply an individual act against a large number of individuals perpetrated by a specific genocidal regime that sprang from nowhere. Antisemitism had been nurtured in Germany and the rest of Europe over decades in its modern form, and over very many centuries in its Christian versions. An early post-Holocaust text analyzing this cumulative impact was aptly entitled *Rehearsal For Destruction* (Massing, 1949). Similarly, White supremacism has five centuries of international momentum behind it. Protecting people against hate speech involves infinitely more than dealing with a piecemeal issue at a given moment.

In the first essay in the Whillock and Slayden collection, Van Dijk (1995) presents a condensed version of his book *Elite Discourse and Racism* (1993). His argument lifts the debate in important ways, as readers of this Journal probably well know, out of another of its besetting assumptions, namely that racist speech is only a product of ill-educated members of the public responding to proto-fascist demagogues. Rather, Van Dijk points out, such speech is very well-connected. It finds its hegemonic expression in the standard discourse of educated and seemingly responsible sectors of the elite: TV journalists, sociologists, textbook writers, leading politicians, corporate executives. Thus the problem, at its source, involves far more than specific acts of hate speech by individuals, for these individuals are linked in numerous ways to the racist speech, shorn of its most saliently ugly language, of society's leaders.

Still other sources confirm the danger of this conceptual disconnection between extremism and the general culture. Essed's study (1991) of Black women's experience of everyday racism in the Netherlands and the USA clearly demonstrates how wrong 'those perceptions of racism that only recognize it as problematic in its extreme manifestations' (p. 283). We may compare Raboy's dis-

cussion (1992) of the link between everyday sexism and the murderous attack killing 14 women engineering students at the University of Montréal in 1989. He notes how in the aftermath, some 'political authorities, seconded by their acolytes in the media, spared no effort to camouflage the *social* character of the killer's act – its sexism, its misogyny, its anti-feminism' (p. 140, my emphasis). Whillock and Slayden too argue (p. xiii) that we need to understand 'the naturalization of hate, that it finds subtle as well as extreme expression, that it is not simply an irrational, unseemly outburst'.

Despite these strong considerations, it is plainly very uncomfortable for many people to address honestly the integrating links between extremism and the everyday. Moreover, when by dint of a legal focus individual cases are at center stage, the debate often descends to having First Amendment absolutists ask the 'thick skin' question: everyone gets insulted at some point in their lives, so why should someone on the receiving end of a racist or homophobic or other insult be so delicate and sensitive about it? 'Grow up and get over it', is the implied advice. But as Matsuda et al. say (1993: 47): 'Legal insiders cannot imagine a life disabled in a significant way by hate propaganda'. Delgado and Stefancic (1997: 69) observe that racist speech 'is tacitly coordinated . . . in a broad design, each act of which seems harmless but which, in combination with others, crushes the spirits of its victims while creating culture at odds with our[10] national values'.

Furthermore, the legal perspective draws a sharp division between speech and action. 'Racially' hostile actions such as attacking individuals or discriminating against them are said to be appropriate for banning legislation. But as long as people restrain themselves to speech acts, no legal action should be taken against them.

This presumed firewall between the two forms of action represents a phantasmagorical social theory. It is as though human beings were chopped up into speakers and actors and, like Kipling's pessimistic vision of East and West, 'Ne'er the twain shall meet'. Why do people speak in 'racially' hostile ways if not either to persuade others to join them in extruding the imagined enemy, or to terrorize the imagined enemy, or both? And does this speech have zero practical effect? Does it not seek to create a climate within which hostilities are more and more likely to be perpetrated because they are seen as excusable, even meritorious, even inevitable? Does it not, as we saw Jensen and Arriola (1995) point out, create an atmosphere in which free speech is liable to be rather, or even very, effectively suppressed among the targets of hate speech? A reading of Charles Payne's (1995) brilliant and detailed evocation of Greenwood, Mississippi, in the early period of civil rights campaign shows how truly remarkable it was for African Americans in rural communities to dare to speak publicly against the racism that dominated much of their lives.

Thus together with the omission of societal and historical context, the contrived divorce between speech and action drives a speculative wedge protecting those whose hate-strategy is in reality a seamless tissue.

Finally, to return to the Brandeis notion of 'more speech': this relies on a quasi-

Durkheimian[11] notion that crime serves to strengthen, not weaken, social cohesion because society's horrified and punitive reaction to the crime and its perpetrator(s) dramatically refreshes its conviction concerning its own rules and priorities (Durkheim, 1966). This episode in the life of Missoula referred to earlier seems to validate this notion, but in fact does not and cannot do so, heartening though it is to know it happened.

Firstly, where was the 'more speech' during the centuries of slavery in the South, or even the North? Was the Civil War fought simply because Frederick Douglass and Sojourner Truth and William Garrison and their relatively few supporters *spoke*? Secondly, where is the 'more speech' today on those occasions when mainstream media acknowledge some of the everyday acts of racist violence by the police? When there is 'more speech' on those occasions do we normally see a demonstration mostly composed of the White majority population of the USA?

I cannot refrain from citing an episode when the student newspaper in my university published, after much debate and demonstration, a full-page paid advertisement denying the Nazi Holocaust had ever happened. At this point I and some faculty and student colleagues organized a campus-wide seminar on the Holocaust, introduced by the university president. Many who nodded sagely at the notion of 'more speech' did not even attend; none offered to help organize the event, or considered initiating it. I do not suppose these reactions to be unique, but that is the point: it is hard to know what evidence really exists for supposing that 'more speech' will even occur, let alone have the desired effect. Indeed in the event the student newspaper's editorials constantly harped on the free speech dimension, and never on racist communicators and their agenda – a crystal-clear example of how free speech absolutism blots out the issues actually in play and at stake.

In the end it is hard not to draw the conclusion that the 'more speech' hypothesis is mainly a way of claiming that nothing too disastrous will ever happen in the USA, that no Holocaust is imaginable in this most laudable of democracies. Aside from casually blotting out the Holocaust experienced by Native Americans, and by African Americans in the centuries of the Middle Passage, this sunny presumption represents a wild and terrifying gamble with the future. Germany was Europe's paragon of civilization. The economy, sciences, engineering, and the arts were developed to the highest point, with Jews represented everywhere from the ranks of chief bank executives to the Communist Party leadership, from symphony conductors to world-class research scientists. Yet it was in 12 short years, in this very land of opportunity, that the Nazi Holocaust was devised and executed. And it was the advanced liberal democracies that pride themselves on their speech rights, such as England and the USA, that refused asylum to very large numbers of Jewish refugees.

For all these reasons, therefore, it is high time to demythologize contemporary First Amendment discourse, and to strip it of its undercurrents of nationalistic boastfulness and naïveté. It is also urgent to undertake sustained dialogue between the voices of social analysts, anti-racist and other activists, public

administrators, and lawyers, in order to frame effective codes, legal and otherwise, that address hate speech much more forcefully than is currently the case (see the concluding section of this article). In turn this dialogue should explore other nations' policy experience in these matters and not snooze self-satisfied on delusions of American grandeur.

All the evidence points to the spread of hate speech, not its confinement to narrow circles. Uncomfortable as it is to re-think cherished assumptions, uncomfortable as it is to take hate speech seriously, there is no other course of action open.

Critical legal theory and critical 'race' theory

Matsuda et al. (1993), writing from the joint perspectives of critical legal scholarship and critical race theory, have taken sharp issue with the First Amendment absolutist position. They argue vigorously that words can assault, injure and exclude. They also point out that only once we acknowledge the actual history of racism can we grasp how it has been imaginable, legally speaking, that defamation and invasion of privacy do not enjoy First Amendment protections, but racist 'assaultive speech' – their preferred alternative term to 'hate speech' – has always been ceded that privilege.

Matsuda and her colleagues' insistence on connecting legal principle up to social reality is, as argued here, a crucial one. Delgado and Stefancic (1997) equally strongly emphasize the importance of the 'legal realist' position in analyzing this topic, i.e. the growing acknowledgment in legal circles that the letter of the law is meaningless once split from its societal context.

However, they argue that 'hate speech' can be construed as 'fighting words' (Matsuda et al., 1993: 66–71). These have been construed by the Supreme Court in the past as words that 'by their very utterance inflict injury or tend to incite an immediate breach of the peace' (p. 67), and thus are unprotected by the First Amendment. It is hard to join them with much enthusiasm at this point in their reasoning, for their logic once again rests upon individual harm at a given moment and place, and therefore falls short of the collective and historical dimensions of the issue.

In an Afterword to the Whillock and Slayden collection, Goldberg (1995) similarly argues against the term 'hate speech', on the ground that it connotes an individual act based on socio-psychological dynamics and with purely individual effects. Instead he proposes to integrate the forms of communication that are called hate speech within relations of 'racial' power in society at large. The practical conclusion he argues is that such speech damages 'humanity', a term he deploys as a trope of anti-racist solidarity between all those whose common life is damaged in one way or another by the perpetuation of racism. Like Matsuda et al. and Delgado and Stefancic, Goldberg seeks thereby to dethrone the legal definition of such speech in much US discourse on the topic, as purely individual tort.

Calvert (1997), however, seeks to expand the legal definition of the issue by

bringing to bear Carey's (1989) distinction between transmission and ritual modes of communication. He suggests that typical legal definitions implicitly assume only the transmission model to be in force, by concentrating purely on the question of damage to those immediately addressed by hate speech. By contrast, Calvert argues, use of the ritual model would direct attention to the reinforcement of racism in society through the repetition of hate speech as a form of cultural ritual. His argument echoes a number of the points already made, though he too seems intimidated by contemporary First Amendment discourse to the point that he is compelled to conclude only that consideration of the ritual model would provide 'courts and legislative bodies with a framework for understanding that hate speech causes harm in addition to the emotional or physical reactions of its victims' (p. 17). Yet we must ask, much as this enhanced understanding is desirable, what will the courts do with it?

Greenawalt (1995: 47–70) highlights a particularly interesting legal aspect of the issue, however, namely that the USA may be the only country whose legal system does not distinguish clearly between speech that some find objectionable (e.g. ad hominem insults or the mockery of religious beliefs) and racist speech. He discusses a series of recent Canadian cases (see Mahoney, 1992) in which effective limits were placed on hate speech (see Delgado and Stefancic, 1997: 57–8, 123–8). His essay is a further prod toward the necessary comparative analysis of legal and public practice as regards hate speech.

Two concluding perspectives

In conclusion, consideration of these issues is enriched from two further sources.

One writer, an educational administrator rather than a lawyer, has addressed issues of racist expression, notably in the case of a Nation of Islam speaker at Kean College, New Jersey, in 1993 (Marcus, 1996). The speaker, Khalid Mohammed, consciously creating a highly charged atmosphere from the very outset of his speech, launched a vicious and contemptible antisemitic diatribe before a very large and seemingly appreciative student audience. While Marcus also engages with some of the legal issues, he valuably extends his analysis to a discussion of the policies that academic administrators need to consider in situations such as these. Once again, a legal focus, while a needed component of the discussion, is pointlessly constraining on its own. That of an academic administrator, a figure academics love to despise, is suddenly very interesting.

Marcus points out (pp. 98–9) that campus administrators often respond to hate speech situations as a public relations question, not as a question of civil rights; in addition, they are much readier to attack student speech than professorial speech. He urges devising a crisis management plan, that a human relations audit monitoring 'race' relations on campus be instituted, and that the administration reach out to groups targeted by a hate speaker. He also analyzes an important dimension in most such occurrences, namely the elements specific to the Kean situation that contributed to the debacle.[12]

Where campus speech codes are often vague and poorly drafted, uncertain as to whether they are targeting racist or sexist intent or the conduct associated with the intent, Marcus further proposes (p. 22 ff.) that the notion of 'differential zones' where speech may or may not be controlled may prove to be helpful. He too notes the role of 'fighting words' in this context (p. 120), and the constitutionally supported role of enhanced penalty provisions for bias-related crimes (p. 141), as possible guides to framing effective policies.[13]

The importance of this administrative viewpoint is that it dissolves over-reliance on legal institutions and perspectives to solve the problems of hate speech. We urgently need to consider other levels and spheres of oppositional activity. Although technically it is the state's task to protect citizens, realistically, especially where police behavior is heavily racialized, there is no way of relying on that source for redress. Possibly even some of the professional 'racial' codes in force over some decades now in the US military might offer experience and suggestions.

The second writer, Charles Husband (1996), poses an unsettling question. He demands that we turn the customary problematic upside down. Namely, how does a nation conceive of a *pro-active policy to ensure a multi-ethnic public sphere*, as opposed to the current public sphere, habitually defined as 'about as democratic as we're likely to see', that is nonetheless still so strongly tilted toward ethnic minority exclusion? Why not discharge that very same energy now poured into arguing for a simplistic view of the First Amendment, into working out how a nation may organize public communication founded not simply on the general right to communicate, but on the right to be *understood*? Whereas no one fails to understand the racist hate speaker, many do fail to understand – either through obtuseness, arrogance, socially ingrained instinct, plain lack of concern, and sometimes absence of information – the experiences of historically repressed minority ethnic groups. No forward movement is possible until this situation is addressed.

The essential point is that the benchmark Husband proposes for the future is collective and interactive, not individual. This is not to eviscerate individual rights, only to try to ensure that they are not wandering lonely as a cloud in a firmament where collective rights are typically off the agenda altogether. It is an attempt to set up the necessary goal for a multi-ethnic society's functioning, against which contemporary realities can be measured. It is also an attempt to go even one step beyond people's negative right – not to be intimidated or unnerved or even simply harassed by hate speech, and to develop a positive right to have majorities actively develop fora, mediatic and otherwise, in order to listen attentively to minorities. And vice versa.

NOTES

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1. While hate speech may target other victims than people of color, it is racism that has been the example of choice in much of the debate.

2. Portrayed in the powerful film '*Rosewood*' (dir. John Singleton, 1997).
3. See Coliver, 1992.
4. Not least the magnificently simplistic reduction of the causes of vicious ethnic strife in the countries named, to previous barriers to the free expression of ethnic bias. If proponents of this case perceived these nations as actual places, rather than invoking them as shadowy parts of a former Soviet-era checkerboard, such banal conclusions would be recognized as laughable a priori.
5. The term is used by opponents of this reading of the First Amendment to describe those who take a fundamentalist approach to the Bill of Rights as if it were a secular version of the Ten Commandments, written in stone and divinely bestowed by the genius of American life.
6. For a helpful overview of the current state of play as regards the First Amendment, see Demac (1997).
7. Legal definitions of obscenity are notoriously clumsy and vague. The core in practice usually consists of anal and genital discourses, but then the question basically pivots on how widely such discourses are prosecuted.
8. Delgado and Stefancic (1997: 63) list a whole number of unprotected forms of speech beyond those enumerated here.
9. The National Endowment for the Arts is a fund-giving agency, federally supported, that drew savage attacks from political conservatives in and out of Congress during the 1990s because of a few highly publicized 'scandalizing' projects it funded. The tone of many of the attacks on it went beyond the hysterical into the violently paranoid and aggressive.
10. This 'our' seems more rhetorical than real, and detracts from their argument. Historically speaking, it could be easily argued that racism has been a national value of the USA more or less since the first settlement, and that indeed, with different leitmotifs, it was part of the bag and baggage brought from 17th-century Europe.
11. Not to mention J.S. Mill.
12. These included, for example, yet a further twist in the ethnic politics of the situation, namely the readiness of Latino student groups to interpret criticism of the college president's late and weak reaction to the speech as an attempt to subvert her because she was the first Latina president.
13. In a personal communication, Dr Edward Lenert suggests that a fruitful legal approach to these issues might be to draw some parallels between libelous speech and hate speech, albeit conceived as having a collective rather than an individual injury, where hate speech would be conceived as 'a form of toxic information, which burdens the entire ecology of dialog in a social system'. I am grateful to him for permission to cite this potentially helpful formulation of the problem.

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