VOLUME 9 FALL 1988 ISSUE 1

MISSISSIPPI COLLEGE LAW REVIEW

RACIST SPEECH AND THE FIRST AMENDMENT

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I. INTRODUCTION

A recognition of the twenty-fifth anniversary of the Civil Rights Act of 1964[1] reminds us of the evolving, rather than static, nature of societal racism. One group of problems that is lately of increasing salience focuses on the proper legal response to what may be thought of as racist speech. Putatively racist speech has become the subject of potential litigation in a variety of contexts, including the workplace,[2] ordinary commercial transactions,[3] public policy debate,[4] the public schools,[5] and the college campus.[6] However it is defined, racist speech takes a number of forms. It imposes or threatens a number of harms. As a result, a variety of legal strategies has been devised to address the problems of racist speech. The consistency of such solutions with the Constitution's free speech

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1. Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000(e)-2000(h)(6) (1982)).

2. *See, e.g.*, Gaiters v. Lynn, 831 F.2d 51 (4th Cir. 1987); Bailey v. Binyon, 583 F. Supp. 923 (N.D. Ill. 1984) (discussing no free speech issues); Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979) (en banc); Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (en banc); Lay v. Roux Laboratories, Inc., 379 So. 2d 451 (Fla. Dist. Ct. App. 1980) (per curiam); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977) (en banc).

3. *See, e.g.*, Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686 (6th Cir. 1981); Sambo's of Ohio, Inc. v. City Council, 466 F. Supp. 177 (N.D. Ohio 1979); Irving v. J. L. Marsh, Inc., 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977); Bradshaw v. Swagerty, 1 Kan. App. 2d 213, 563 P.2d 511 (1977); Dawson v. Zayre Dep't Stores, 346 Pa. Super. 357, 499 A.2d 648 (1985).

4. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952); Dominguez v. Stone, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981); Regina v. Britton, [1967] 1 All E.R. 486 (C.A. 1966); Glimmerveen and Hagenbeek v. Netherlands, 4 E.H.R.R. 260 (Eur. Comm'n H.R. 1979).

5. *See, e.g.*, Resetar v. State Bd. of Educ., 284 Md. 537, 399 A.2d 225, *cert. denied*, 444 U.S. 838 (1979); Clarke v. Board of Educ., 212 Neb. 250, 338 N.W.2d 272 (1983).

6. *See, e.g.*, Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135 n.12 (1982); *Report of the Committee on Freedom of Expression at Yale*, 4 HUM. RTS. 357 (1975). For a report on the current spate of racist incidents on predominantly white college campuses, many of which feature a speech component, see, *e.g.*, Kantrowitz, *Blacks Protest Campus Racism*, NEWSWEEK, Apr. 6, 1987, at 30.

clause is, however, controversial;[7] and this issue is central to the discussion that follows.

Initially, several legal strategies appear to have promise in deterring, punishing, or obtaining compensation for racist speech. Depending partly upon context, one might look to the torts of group defamation[8] or intentional infliction of emotional distress,[9] or to civil[10] or criminal[11] anti-discrimination statutes, while making appropriate use of the "fighting words" doctrine developed by the Supreme Court in *Chaplinsky v. New Hampshire.*[12] This Article surveys these legal strategies and discusses the constitutional free speech and other legal constraints on the use of these strategies, as well as the likely practical costs and disadvantages associated with their use. The Article then proposes some elements of a theory of restrictions on racist speech consistent with the requirements of the first amendment. This theory seeks to take into account the particular features of the predominant strains of contemporary racism as it is currently practiced and seeks also to give appropriate theoretical weight to the society's recognition of the sheer moral wrongness of racist speech, as distinguished from the possible harmful social and psychological consequences of such speech in particular cases.

In particular, this Article suggests that the use of crudely insulting racist invective, in the form of invidious racial epithets, alone or in the context of other speech, remains a significant problem. Most or all of such speech may constitutionally be restricted, chiefly on the grounds that such speech, inherently or in its context, does not amount to an attempt to communicate any particular social idea and therefore fails to fall within the class of speech in the constitutional sense, or speech the legal protection of which promotes the range of values or purposes that might be thought to underlie the free speech clause. In most or all cases in which racial epithets occur in the context of a more extended speech which by itself or in conjunction with the racial epithet communicates a sufficient social idea to otherwise qualify for free speech protection, it will ordinarily be possible to disaggregate the speech into a protected ideational component and an unprotected racist epithet component. Such speech may then be restricted not insofar as it conveys a particular social idea but insofar as the racist epithet's use either imposes social or psychological harms on its target or victim, or, more importantly, is thought of by the society as an act of deontic moral wrong.

It is, of course, possible to argue that at least in some contexts the social

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7. *Compare, e.g.*, Delgado, *supra* note 6 (detecting only minimal free speech constraints) *with* Heins, *Banning Words: A Comment on "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585 (1983).

8. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952).

9. *See, e.g.*, Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977) (en banc).

10. *See, e.g.*, Bailey v. Binyon, 583 F. Supp. 923 (N.D. Ill. 1984).

11. *See, e.g.*, Cotterrell, *Prosecuting Incitement to Racial Hatred*, 1982 PUB. L. 378.

12. 315 U.S. 568 (1942).

idea will be analytically inseverable from the invidious racial epithet or that the racial epithet itself necessarily bespeaks or implies or conjures up and seeks to convey a sufficient social idea. Perhaps surprisingly, in a number of the litigated cases, these claims are simply implausible. More importantly, though, it will be seen that proscribing racial epithets is crucially unlike proscribing words such as "solidarity" or "Jefferson." The latter may be examples of linguistic tokens that are indispensable, in the sense that at least at a particular time and place there are no substitutes for them that can as adequately communicate the speaker's intended message, insofar as protection of the utterance of that message promotes what we have referred to as free speech values.

But there are always adequate alternatives, or semantic substitutes, for racist epithets, insofar as what is sought to be conveyed through the epithet is a social idea, without distorting, subduing, or diluting either the social idea itself or the rhetorical power of conviction, or emotive force, with which it is conveyed. One might well wish to employ a racist epithet for reasons other than those purposes protected by the free speech clause, e.g., simply to inflict emotional pain or to vent frustration, unrelated to any social idea one has. But such purposes do not implicate significantly the purposes or values underlying the free speech clause.

The practically available alternatives to sheer racist epithets will often in fact be superior, from a free speech values standpoint, from the speaker's own perspective. It must be admitted, however, that it cannot be conclusively demonstrated in advance that there will never be a case in which, from the speaker's own standpoint, there is no combination of available English words that do not significantly distort at least the emotive meaning of his message, by comparison with the alternative of precisely a racist epithet, insofar as his emotive meaning falls within the range of the free speech values. While the racist epithet itself may not be perfect, it might conceivably be marginally better.

In this rare case, in which even the most fiery, impassioned rhetoric cannot convey the protected meaning as well as rhetoric involving the use of a racial epithet, the constitutional case for tolerance is at its strongest. But the trade-off involved in such a case should be made clear. In protecting such speech we forfeit the societal interest in preventing or redressing the deontic wrong, as well as the psychological and social injury attributable to the distinctive features of the racist epithet, in order to protect not the expression of the speaker's message, but the difference between the message conveyable using the racist epithet and the message conveyable using the best available substitute language from the speaker's standpoint.

This Article will thus argue that any unavoidable trade-offs between free speech values associated with the use of racial epithets and conflicting cognizable values will be both rare and, from the standpoint of free speech values, minimal in severity. If one seeks to impose broader restrictions, however, the costs in terms of free speech values, as well as other values, begin to mount

up considerably, at least in the longer term. To seek to authoritatively suppress a range of allegedly racist social ideas, in the absence of recognizable racial epithets, is to invite a variety of unintended adverse consequences of varying degrees of severity. And while such a project of broad suppression of arguably racist speech, where such speech is not otherwise actionable as an act of, say, employment discrimination, is in some respects historically timely, in other respects it is of historically diminishing utility. Whether one thinks of racism as waxing or waning overall, it seems clear from the evidence that the problem of the expression of relatively crude racist social ideas, beyond racist epithets, of a type that it is plausible to imagine society's legally suppressing, is of historically diminishing importance, as a general tendency, whatever its absolute magnitude of importance.

Thus, apart from the problem of racial epithets, as societal racism has become subtler, more refined, and more equivocal, it has become less responsive to a broad speech-suppressive legal strategy, beyond enforcing familiar civil rights and anti-discrimination statutes. Attempts at broad legal suppression of disfavored ideas in this context, whether successful or not, would likely engender a range of adverse consequences, discussed below, that would discourage even the proponents of such suppression, at least over the long term. This Article thus concludes that the legal suppression of racist epithets is generally consistent with the free speech clause and may in fact be well advised. This conclusion is tested by reference to Dean Lee Bollinger's sustained argument for the salutary effects of tolerating extremist speech.[13] However, to extend even successful legal suppression much beyond such a line is likely, we shall conclude, to become largely self-defeating.

II. THE LIMITATIONS OF CONVENTIONAL RESTRICTIONS ON RACIST SPEECH

A. Racial Group Defamation

In exploring the inadequacies of various approaches, including that of racial group defamation, it may be useful to envision a concrete, prototypical example of unmistakable, crude, contemporary racist speech. Imagine a black undergraduate student walking alone on a predominantly white college campus. As a car passes, the driver sees fit to hurl an opprobrious racial epithet at the black student. Only the targeted student hears the remark and has some sort of unspecified psychological reaction.

As it is ordinarily conceived, a racial group defamation approach to such an incident must falter on a number of grounds. This is so even if it is assumed

13. *See generally* L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

that prosecution for racial vilification poses no greater free speech problems today than it did in 1952 when the Supreme Court decided *Beauharnais v. Illinois*,[14] although this premise is seriously questionable.[15] One scholar has recently concluded that the constitutional reasoning in *Beauharnais* "was crippled by *New York Times Co. v. Sullivan*, and its holding was unmistakably undone by *Philadelphia Newspapers, Inc. v. Hepps*."[16] But the problems faced by a racial group defamation approach to the prototypical incident described above extend far beyond issues of actual malice or the burden of proof on the issue of truth or falsity.

To begin with, the opprobrious racial epithet does not seem most plausibly characterized as conveying a true or false statement of fact, either explicitly or by fair inference. Typical racial epithets, however evocative, are preeminently harsh, crudely insulting expressions of the speaker's negative evaluation of the target, by virtue of the target's race. Whether the epithet seeks to communicate a reasonably coherent particular social idea or not, it will at most rise to the level of what is considered in the law a statement of "opinion" and thus not be any more actionable in racial group defamation[17] than in individual defamation.[18] The most vitriolic, psychologically damaging racial invective need not assert any statement of fact. If it does not, it will generally not be actionable on a group defamation theory.[19]

The example cited above would thus likely be immune from attack on a racial group defamation theory on at least this ground. But the example could be changed. Suppose that the speaker abjures racial epithets but delivers a scurrilous tirade consisting not of opinion exclusively but in material part of true or false assertions of general fact about his target racial group. Even here, the choices are unattractive. Regardless of whether truth is made a defense, or falsity an element,[20] there are obvious prudential reasons counseling against making

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14. 343 U.S. 250 (1952).

15. *See, e.g.*, Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 694 n.7 (6th Cir. 1981) and the cases collected in Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). *But see* Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

16. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 330 (1988) (citations omitted). The *Times* case is reported at 376 U.S. 254 (1964), and *Hepps* at 475 U.S. 767 (1986).

17. *See* Post, *supra* note 16, at 330 ("*Beauharnais* depends on the argument that group libel is simply a variant form of individual defamation.").

18. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Ollman v. Evans & Novak, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 113A, at 813 (5th ed. 1984) [hereinafter W. KEETON]. For criticism of this result in the context of racial defamation, see Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 42-43 n.229 (1985).

19. *See* Note, *Group Defamation: Five Guiding Factors*, 64 TEX. L. REV. 591, 608-09 (1985). *See also* Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 691-92 n.69 (1988) (restricting the Note's defense of group libel laws to only those targeting potentially true or false statements of fact). In the international comparative context, see Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 496 (1987).

20. *See Hepps*, 475 U.S. at 775-76.

the truth or falsity of carefully phrased invidious racial assertions a central element in the case. It is difficult to imagine a forum better suited to the demagogue and the seeker of publicity. The factual assertions may raise complex, subtle, unresolved issues of natural or social science beyond the ken of most scientists, let alone most juries.[21] The risk of error or of public misimpression from a jury finding that the factual claims are not provably false, with an ensuing propaganda harvest, seems large.[22] The misconceived factual inquiry would predictably come to dominate the trial, until such time as the presiding judge risked accusations of censorship and suppression by limiting the scope and length of the defendant's presentation on the issue of falsity. This is all quite aside from the fact that the judicial inquiry into the truth or falsity of the defendant's claims is likely to be inherently demeaning to the targeted group.

One possible response to this problem would be to revive the tradition of libel prosecutions in which truth or falsity is legally irrelevant.[23] Just as a defendant might defame or otherwise injure through speech an individual member of a racial group, or the racial group itself, without making any assertion of fact, so an individual member of a group, or the group itself, may be injured by speech that is at least technically true, if perhaps incomplete or misguided. While such an approach would minimize a number of the problems noted above, it obviously faces substantial free speech and due process hurdles; and it suggests that some tort theory other than group defamation is perhaps more appropriate.[24] At the pragmatic level, the possibilities for martyrdom of a defendant who is found civilly or criminally liable for speaking what he will attempt to portray as an important alleged social truth seem substantial.

Of course, a racial group defamation approach to the racial epithet incident posed above faces other problems as well. If the action is thought of as civil in nature, it is not clear whether the proper plaintiff would be the individual target addressed or all persons encompassed within the scope of the racial epithet employed.[25] This choice raises issues not only of standing, but also of the theory and measure of damages, as well as even more basic issues. If the group allegedly defamed by the slander cannot show that the language employed fits

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21. *See* Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 301 (1975).

22. *See* Kretzmer, *supra* note 19, at 496.

23. *See* W. KEETON, *supra* note 18, § 116, at 840.

24. At least with regard to plaintiffs who are not public figures or public officials, the Supreme Court has not yet required the showing of a false claim of fact in cases brought on a theory of intentional infliction of severe emotional distress. For a contrary rule in the case of public figure plaintiffs, see Hustler Magazine v. Falwell, 108 S. Ct. 876 (1988). Whether black Americans, for example, would count as a "public figure group" by the standards of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) for purposes of the tort of intentional infliction of severe emotional distress has not yet been judicially resolved. See the discussion in Comment, *Group Defamation and Individual Actions: A New Look at an Old Rule*, 71 CALIF. L. REV. 1532, 1553 (1983).

25. *See* Comment, *supra* note 24, at 1545. In the context of actions brought on behalf of large religious groups, see Talal v. Fanning, 506 F. Supp. 186 (N.D. Cal. 1980).

into a limited number of traditional categories, it may have to show actual damages to the group caused by the defendant's language in order to recover.[26] Actual damages causally attributable to the particular defendant's remarks, in the absence of some concert of action theory that allows the plaintiff to rely on the harms attributable to racist speech generally, may be difficult to show.

In the racial epithet incident postulated above, there is, of course, no actionable defamation because the allegedly defamatory language was by hypothesis not published to a third party.[27] If the theory is racial group defamation, there is arguably still no publication if the racial epithets are addressed exclusively to even a large audience of the verbally targeted race. As well, it is at least arguable that invidious racial epithets heard only by target group members are not defamatory, at least in the traditional sense, in that such language in those circumstances would not tend to impair the target group's reputation in the community or to deter others from dealing with the target group,[28] however morally wrong, offensive, or psychologically damaging the epithets were. Such language under such circumstances impairs dignity, self-esteem, or a number of other crucial values,[29] but not reputation.[30]

The defamatory character of even the most venomous racial epithets may in fact remain at least contestable if the epithets are also heard by non-target group members. If the hearers who are not target racial group members can be shown already to have been racially prejudiced against the target group, the target group's reputation may well have been unaffected, or reinforced, but not impaired or diminished by the racist invective.[31] But if the non-target group members were not racially prejudiced, their natural reactions may range from mild disdain to shock and outrage toward the speaker and from indifference to active sympathy for the targeted group.[32] Defamation, or the damages flowing from defamation, may even under these circumstances be contestable.

B. Intentional Infliction of Severe Emotional Distress

The strategy of reliance on the tort of outrage, or intentional infliction of severe emotional distress, has had at best limited success to date in the context of racist invective. The tort itself is ordinarily defined in narrow, restrictive

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26. *See* W. KEETON, *supra* note 18, § 112, at 788-95.
27. *See id.* at § 113; Note, *supra* note 15, at 309.
28. *See* W. KEETON, *supra* note 18, § 111, at 774.
29. *See generally* Delgado, *supra* note 6.
30. *See* Comment, *supra* note 24, at 1532.
31. *See* Note, *supra* note 15, at 311.
32. Note as well that criminal prosecution for attempts to incite racial hatred or fear or a breach of the peace may also be difficult if the language used can be shown to have instead had a natural and probable tendency under the circumstances to promote sympathy for the target group. *See* Cotterrell, *supra* note 11, at 379.

terms.[33] One commentator has accurately observed that:

> Courts generally impose strict culpability requirements, permitting such actions only where the defendant intentionally or recklessly caused the plaintiff mental suffering. Further, the cause of action is normally limited to those cases in which the plaintiff has suffered a severe degree of emotional distress as the result of the defendant's "extreme and dangerous" conduct exceeding all reasonable bounds of decency.[34]

In elaborating on the degree of severity of emotional distress required, one court has observed that the distress must be "so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity."[35]

Some plaintiffs have successfully stated a cause of action on this theory in cases involving the defendant's use of racial epithets and racial invective against the plaintiff, but such cases generally involve other sorts of allegedly outrageous conduct in addition to the verbal epithets,[36] as well as special circumstances and a special relationship between the plaintiff and defendant[37] not characteristic of our archetypal campus racial epithet case. Whether even the repeated use of racial epithets would have sufficed to constitute intentional infliction of severe emotional distress must remain unclear as long as the plaintiff also alleges such grounds as arbitrary, groundless demotion or dismissal from the job.[38] Similarly, it is unclear whether verbal abuse of a stranger will suffice if those plaintiffs who have successfully stated a cause of action have alleged employee status, as well as the defendant's knowledge of the plaintiff's particular susceptibility to emotional distress and violation of union status.[39]

At least in the absence of a relevant special relationship or special "aggravating" circumstances, courts have been reluctant to allow "mere" use of racial epithets to reach a jury on a theory of intentional infliction of severe emotional distress.[40] The typical judicial analysis has involved a denunciation of the ra-

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33. See RESTATEMENT (SECOND) OF TORTS § 46 (1965) and the representative case of Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926). For discussion of the development of the tort, see Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

34. Comment, *supra* note 24, at 1550 (citation omitted) (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

35. Dominguez v. Stone, 97 N.M. 211, 215, 638 P.2d 423, 427 (Ct. App. 1981).

36. *See, e.g.*, Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977).

37. *See, e.g.*, Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (en banc).

38. *See, e.g., id.* at 498, 468 P.2d at 219, 86 Cal. Rptr. at 91.

39. *See id.* at 498, 468 P.2d at 218-19, 86 Cal. Rptr. at 90-91. The en banc California Supreme Court concluded explicitly that "plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger to defendants." *Id.* at 498 n.2, 468 P.2d at 218 n.2, 86 Cal. Rptr. at 90 n.2. If this is for no other reason, it may reflect the employee's "captive audience" status and his or her inability to ignore the employer. *See Contreras*, 88 Wash. 2d at 741, 565 P.2d at 1176.

40. *See, e.g.*, Lay v. Roux Laboratories, Inc., 379 So. 2d 451 (Fla. Dist. Ct. App. 1980); Irving v. J. L. Marsh, Inc., 46 Ill. App. 3d 162, 360 N.E.2d 983 (1977); Dawson v. Zayre Dep't Stores, 346 Pa. Super. 357, 499 A.2d 648 (1985).

cial epithets as objectionable,[41] but a characterization of the use of racial epithets as merely offensive, "insulting namecalling,"[42] for which, in light of the typically modest physical or psychological symptoms resulting,[43] no recovery may be had.

As the tort of intentional infliction of severe emotional distress is traditionally understood, these results are generally predictable and in that sense justified. Of course, the courts err in suggesting that the use of racial epithets by a member of a historically dominant racial group against a member of a traditionally explicitly subordinated racial group, in the American historical context, is essentially indistinguishable from mere rude forms of address or mere offensive namecalling.[44] But the problem is not so much insensitive or unduly constricted application of the tort, but its substantial misdirectedness even in theory. One may argue that the use of racial epithets is not so "extreme,"[45] at least in the sense of so statistically infrequent, as to fit within the tort, and one may point out that even predictable adverse psychological and social consequences flowing from the tort will not suffice unless the plaintiff's reaction can be characterized as "severe."[46]

All of this hardly establishes that the defendant's conduct cannot reasonably be thought of as tortious. Instead, it merely demonstrates that the tort of intentional infliction of severe emotional distress is an inapt vehicle and is poorly designed for the job. As this Article suggests more generally below, the essence of what is wrong with the use of racial epithets is not that it is offensive,[47] or that it is offensive and is becoming less common historically,[48] or even that it is offensive and is becoming in the minds of its targets increasingly so.[49] The essence of the public policy underlying the wrongness of the use of racial epithets is instead that it is morally wrong, largely independent of its degree of popularity or offensiveness. There would be good grounds in public policy for holding such activity tortious even if it were quite common and even if its victims had been socialized or impelled by circumstances to regard it as only minimally offensive.

Similarly, the essence of what is condemnable about racial epithets is not, as we shall see below, that they can by themselves be proved to inflict genuinely grievous, severe psychological injury on their targets, in some subjectively perceived sense. All this may be difficult to show in any particular case, despite the undoubtedly devastating, profound, and subtle short and long-term conse-

41. *See Irving*, 46 Ill. App. 3d at 167, 360 N.E.2d at 986; *Dawson*, 346 Pa. Super. at 360, 499 A.2d at 649.

42. *See Dawson*, 346 Pa. Super. at 360, 499 A.2d at 649.

43. *See id.* The plaintiff in *Dawson* alleged, *inter alia*, that "she cried and was unable to gain her composure for one-half hour." *Id.*

44. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 comment d, illustration 4 (1965)).

45. *See id.*

46. *See Irving*, 46 Ill. App. 3d at 167, 360 N.E.2d at 986.

47. *See Dawson*, 346 Pa. Super. at 360, 499 A.2d at 649.

48. *See Alcorn v. Anbro Eng'g, Inc.*, *2 Cal. 3d 493, 499 n.4, 468 P.2d 216, 219 n.4, 86 Cal. Rptr. 88, 91 n.4 (1970) (en banc).*

49. *See id.*

quences of American racist patterns and practices generally.[50] Whether it is scientifically demonstrable fact or not, it is certainly at least conceivable that persons who as a group are continually subjected to racist treatment, including racist epithets, tend to adapt in various ways so as to reduce their sensitivity in terms of the largely psychological shock effects measured by the tort of outrage. Even if no exotic psychological defense mechanisms are called into play to reduce one's direct psychological vulnerability to such shocks, the shocks might at least conceivably be reduced by the ordinary process of inurement through repeated exposure.[51]

But it is hardly a decisive argument against a legal restriction of racist epithets that the victims of such epithets tend to adapt, perhaps in self-defeating, self-destructive ways, such as by identifying with their tormentors[52] or with reduced levels of self-esteem,[53] to racist depredations, even if any such adaptation takes place merely because such perhaps inevitable adaptations reduce the severity of the victim's emotional distress in the particular ways for which the tort of outrage provides redress. At least in this context, the legal system should not single out, among all possible victim reactions, near hysteria as the sole compensable reaction, while ignoring the possibility of more severe, but less spectacular or less overtly manifested or less outwardly directed, victim reactions.[54] More fundamentally, the law should not ignore what a hard-won societal consensus has established as the elemental wrongness of the use of racial epithets, independent of any emotional distress or other psychological reactions they may cause. At the very least, as we shall see, the free speech clause does not preclude the recognition of a tort that focuses not so much on the tort's "unendurability" in virtue of the victim's reaction,[55] but on the tort's "unendurability" in terms of the clarity with which basic social norms have been flouted.

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50. *See generally* Delgado, *supra* note 6.

51. See the defendant's contention in this regard, not definitively rejected on appeal, in *Alcorn*, 2 Cal. 3d at 499 n.4, 468 P.2d at 219 n.4, 86 Cal. Rptr. at 91 n.4.

52. *See* Dominguez v. Stone, 97 N.M. 211, 213, 638 P.2d 423, 425 (Ct. App. 1981) ("Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to dissociate themselves from the group, even to the point of adopting the majority negative attitudes toward the minority.") (emphasis omitted).

53. *See* Delgado, *supra* note 6, at 136-37 (discussing doubt of self-worth and self-hatred among the stigmatized); Kretzmer, *supra* note 19, at 466 (discussing self-hatred and adverse impact on social relationships). *See also* Thomas & Hughes, *The Continuing Significance of Race: A Study of Race, Class, and Quality of Life in America, 1972-1985*, 51 AM. SOC. REV. 830 (1986) (blacks as scoring lower than whites on various measures of psychological well-being, even when social class is controlled for). Of course, these adaptations are in response to racism generally, and not distinctively in response to racist speech, let alone the type of racial epithet speech that is the focus of this section. This is irrelevant to our point, which is that even if we assume that blacks adapt to racial epithet speech in ways that minimize the sorts of injuries traditionally central to severe emotional distress such speech could still sensibly be viewed as tortious on some revised, alternative theory.

54. *See supra* notes 52 & 53.

55. *Cf. Dominguez*, 97 N.M. at 215, 638 P.2d at 427 ("[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it").

C. Criminalization of Racist Speech

Criminalizing racist speech has the advantage of shifting the focus from the relations between a particular victim and perpetrator to the question of the wilful violation of basic norms from which the community derives not only stability but also its legitimacy as a community respectful of the elemental dignity of its constituent members. The use of racist epithets, in particular, is ordinarily a knowing, wilful breach of minimal community solidarity, and it is appropriate that the judicial response take the form of an authoritative expression of repudiation in the name of the community itself.

However, drafting a practically workable criminal statute that can be effectively used to vindicate the community's rejection of racist speech, however defined, while respecting the recognized free speech rights and interests of speakers, the audience, and the public generally has proven unexpectedly difficult. Adverse consequences and intractable dilemmas, both anticipated and unanticipated, loom large. While other countries continue to experiment with limited success,[56] statutory criminalization of racist speech has had limited appeal for American states.[57]

Some of the recurring problems associated with criminalizing racist speech can be briefly illustrated as choices confronted by the statutory drafters. First, one must overcome the daunting challenge of defining the target kind of speech, the necessary state of mind or intent on the part of the defendant, the undesirable result of the speech that is sought to be suppressed, the nature and kind of causation between speech and result, and the degree to which those results must have been predictable.[58] Apart from any concerns for freedom of speech, one must draft a reasonably broad-ranging, efficacious statute, lest the statute become merely an empty symbol, while providing fair notice of its scope and not criminalizing speech which under the circumstances may seem justifiable or excusable.

A number of these problems do not seem resolvable by experimental tinkering with the wording of the criminal statute. For example, one might reduce the difficulty of proving the defendant's intent by statutorily emphasizing the actual or probable consequences of the defendant's speech. But the more ex-

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56. *See generally* Cotterrell, *supra* note 11; Hadfield, *The Prevention of Incitement to Religious Hatred—An Article of Faith?*, 35 N. IRELAND L.Q. 231 (1984); Hughes, *Prohibiting Incitement to Racial Discrimination*, 16 U. TORONTO L.J. 361 (1966); Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161 (1987); Lederman & Tabory, *Criminalization of Racial Incitement in Israel*, 24 STAN. J. INT'L L. 55 (1987); Leopold, *Incitement to Hatred—The History of a Controversial Criminal Offense*, 1977 PUB. L. 389.

57. *See* Comment, *supra* note 24, at 1547 ("criminal defamation laws are virtually nonexistent in modern criminal codes").

58. For a sense of the difficulties in proving such matters as the probability of provoking "hatred," as opposed to that of provoking a breach of the peace, see Cotterrell, *supra* note 11, at 379; Hadfield, *supra* note 56, at 242 (" '[H]atred' is not the same as distaste, disgust, odium or even anger.").

treme and outrageous the racist speech, hence the greater the speech's vulnerability to suppression, the greater the likelihood that the prosecution will not be able to prove beyond a reasonable doubt that the probable or actual consequences of the defendant's speech were predominantly something other than indifference, revulsion toward the speaker, or sympathy for the targets of the speech.[59]

There is as well the irresolvable conundrum of the defense of truth.[60] Perhaps in recognition of the truth that racism is in part a matter of how one looks at, explains, or interprets the undenied facts, a statute criminalizing racist speech might deny the relevance of a defendant's claim of the truth of his statements.[61] This would limit the potential for a criminal prosecution's turning essentially into an awkward, degrading, pseudo-scientific judicial trial on the merits of the group targeted by the speech, with the facts being found by amateurs and the initiative being held largely by the defendants.[62] Declining to recognize truth as a defense might also convey the public sentiment that some values simply outrank unrestricted freedom of speech, even in the absence of a public emergency.[63]

On the other hand, the inclination to view the truth status of propositions addressing issues of public policy as irrelevant or of secondary importance, is uncomfortably alien to the best traditions of Plato,[64] John Milton,[65] Thomas Jefferson,[66] and John Stuart Mill.[67] Certainly, any government assertions of the essential falsity of the racist speech will inevitably ring hollow with substantial segments of the public if the government even creates the arguable appearance of not itself being sufficiently convinced of the speech's falsity to allow such falsity to be judicially exposed through the adversary process, even if the government's motivation is quite otherwise.[68] There is thus some force to the argument that just as the question of clear and present danger must be determined judicially in each particular case,[69] so the balance between the pursuit of political truth and various arguably incompatible values must, at least, be

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59. *See* Cotterrell, *supra* note 11, at 379.

60. This dilemma is only heightened by requiring the prosecution to prove the falsity of the defendant's factual claims by analogy to the logic of Phildaelphis Newspapers, Inc. v. Hepps 475 U.S. 767, 774-76 (1986).

61. *See* Lederman & Tabory, *supra* note 56, at 63.

62. *See supra* notes 20-24 and accompanying text.

63. *Cf.* Hughes, *supra* note 56, at 365 ("What is needed . . . is a series of public, institutional practices which can inculcate respect for the principle of equality.").

64. *See generally* PLATO, THE APOLOGY OF SOCRATES & CRITO (L. Dyer ed. 1976).

65. *See generally* J. MILTON, AREOPAGITICA (G. Sabine ed. 1951).

66. *See generally* T. JEFFERSON, THE PORTABLE THOMAS JEFFERSON (M. Peterson ed. 1977). *See also* Justice Brandeis' quotations from Jefferson in Whitney v. California, 274 U.S. 357, 375 n.2 (1927) (Brandeis, J., concurring).

67. *See generally* J.S. MILL, ON LIBERTY (D. Spitz ed. 1975).

68. *See supra* notes 60-63 and accompanying text.

69. *See* Whitney v. California, 274 U.S. 357, 378-79 (1927) (Brandeis, J., concurring) (Defendant must be allowed in each individual case to show absence of clear and present danger, any general legislative declaration concerning speech of the general character of the defendant's notwithstanding.).

made judicially in each particular case, rather than once and for all by the legislature for the broad category of racist speech. Weighing the value of truth against that of solidarity, or of legally enforced solidarity, seems less manageable in the abstract than in particular cases.

Similarly difficult issues are posed by the question of whether the criminal statute should require that all prosecutions be brought only with the consent of some designated relatively highly-placed public official.[70] While the higher authorities may be more sensitive to the importance of free speech concerns than local prosecutors charged with preventing disruptive incidents[71] and while requiring higher approval might well result in more politically astute selection of cases for prosecution, as well as affirming the value of equal dignity from the highest levels of government, there are obvious costs in imposing such a requirement. If local authorities are inclined to prosecute, the failure of higher authorities to acquiesce, even for justified reasons,[72] may be perceived as legitimizing, if not endorsing, the content of the speech. Declining to prosecute because of realistic fears of the weakness of the government's case on perhaps one element may well be read by some of those most deeply concerned as indicating bias, insensitivity, or cowardice on the part of the highest governmental authorities. The government's choice will often be difficult because the most influential or most popular racist speakers, successful prosecution of whom might create the greatest benefit, will tend to be those whose unsuccessful prosecution may be both relatively likely and politically most disastrous.[73]

Finally, there is the controversial issue of whether the criminal statute should by its terms apply to racist speech directed by members of historically oppressed groups against groups not historically oppressed, or what would otherwise be racist speech if such historical power relationships did not obtain. While this problem is not unique to a criminal law response to racist speech, a criminal statute opposing racist speech poses the problem in particularly stark fashion. There is a certain superficial evenhandedness in criminalizing both anti-black and anti-white speech, but the costs of successful prosecution of black speakers where some arguably comparable white speakers are acquitted or left unprosecuted[74] may be substantial.[75] More fundamentally, it is deeply questionable whether black victims of racist speech are genuinely similarly situated

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70. See the discussion of this requirement in the international context in Kretzmer, *supra* note 19, at 502-03; Lederman & Tabory, *supra* note 56, at 64; Leopold, *supra* note 56, at 397.

71. *See* Kretzmer, *supra* note 19, at 502.

72. *See* Leopold, *supra* note 56, at 404 (discussing the expedience of declining to prosecute particular cases); *see also* E. BARENDT, FREEDOM OF SPEECH 163 (1985) (some prosecutions as securing greater publicity for the speakers).

73. *See* Leopold, *supra* note 56, at 404.

74. For a sense of the legitimate reasons for not prosecuting some such figures, see *supra* notes 71-72 and accompanying text.

75. *See, e.g.*, Leopold, *supra* note 56, at 397-98; *see also* E. BARENDT, *supra* note 72, at 163 (discussing convictions of militant blacks).

with at least those whites who are targeted as members of an undifferentiated white community. In many particulars, this debate must recapitulate the currently not fully resolved controversy between formal or color-blind neutrality and more compensatory or historically-oriented strategies of affirmative action.[76] It is, at least, hardly self-evident that anti-black and anti-white speech must rationally be regarded as symmetrical harms in nature and degree.

In sum, if the inescapable constitutional problems, including free speech problems, associated with criminalizing racist speech are set aside, the primary disincentive to adopting a criminal law restricting racist speech is not any single insuperable theoretical obstacle, but the discouragement induced by having to confront a series of difficult subordinate choices. Whether the cumulative cost of these choices becomes excessive may well depend upon one's appraisal of the constitutional permissibility of such statutes, the free speech dimensions of which are explored below.

III. DEONTIC TORTS AND THE PROBLEM OF SPEECH THAT DOES LESS OR MORE THAN CONVEY A SOCIAL IDEA

One reason why racist insults, or insults of persons as members of historically subordinated groups, are distinguishable from "mere insults" and other such offenses is that " 'they conjure up the entire history of racial discrimination in this country.' "[77] But an incident or an image or an object can "conjure up" a broad history or a social idea, without itself being speech in the constitutional sense. Despite the accumulated culture baggage toted by racial epithets, in many concrete instances, the plainest interpretation of the racist epithets involved is that they amount to "general [verbal] abuse"[78] rather than constitutional speech. Speech that does not seek to communicate at least some sort of social idea does not ordinarily implicate the purposes or values underlying the free speech clause[79] and therefore falls outside the compass of the free speech clause.[80] Professor Paul Chevigny has suggested that "[t]he essence of the notion of 'speech' for purposes of political protection is that it puts forth an argu-

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76. *Compare, e.g.*, Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25-26 (P. Kurland ed. 1975) *and* Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) (arguing against any differential treatment by government based on race) *with* Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steelworkers v. Weber, 95 ETHICS 86-89 (1984) (Moral revulsion against alleged anti-white discrimination draws much of its moral force from centuries of racial oppression of relatively powerless blacks.).

77. Bailey v. Binyon, 583 F. Supp. 923, 934 (N.D. Ill. 1984) (quoting Delgado, *supra* note 6, at 157).

78. Bradshaw v. Swagerty, 1 Kan. App. 2d 213, 215, 563 P.2d 511, 514 (1977).

79. *See, e.g.*, Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963) (specifying the values of self-fulfillment, ascertainment of truth, the process of societal decision-making, and maintenance of a balance between social stability and social change).

80. *See generally* Wright, *A Rationale from J. S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149 (P. Kurland, G. Casper & D. Hutchinson eds. 1986).

ment that must be understood, that is susceptible to explanation or response through other arguments before any other sort of action is taken."[81] One need not even adopt this rigorous formulation to recognize that the point, from the standpoint of the purposes of the free speech clause, of protecting at least some instances of the use of racial epithets is obscure.

Racial epithets may be resorted to, for example, in the context of an ordinary dispute over a parking space[82] or in an ordinary dispute over a department store lay-away ticket.[83] Publicly embarrassing racial references not involving racial epithets can also occur in contexts not fairly suggestive of any intent to convey any associated social idea.[84] While it is easy to assume that all earnest use of racial epithets must be charged with a "view"[85] of some feature of society or its proper ordering,[86] this assumption is universally sound only if we attribute to some speech an implausibly sweeping intent. The actual, substantive social ideational content that is necessarily implied, regardless of circumstances, by any particular racial epithet is minimal at best.[87]

To illustrate the importance of this recognition, we may take the example of the controversy over the use of the restaurant trade name "Sambo's."[88] If the government on some theory seeks to restrict the use of that particular trade name as racially offensive, the conventional legal response may be to assume not only that all offense is alike for constitutional purposes, but also that offense and distaste are simply the inevitable price of a robustly exercised freedom of speech.[89] But on our approach, a prior question must be asked if free speech concerns are to be implicated: were the owners of Sambo's Restaurants attempting to communicate some recognizable social idea through the use of that trade name? If, as judicially appears to be the case, they were not,[90] their use of the trade name "Sambo's" should not be thought to cognizably implicate free speech concerns.

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81. P. CHEVIGNY, MORE SPEECH 100 (1988). *See also* Lasson, *supra* note 18, at 33 (noting the possibility of construing racial defamation as non-speech, akin to hard-core pornography).

82. *See* Lay v. Roux Laboratories, Inc., 379 So. 2d 451, 452 (Fla. Dist. Ct. App. 1980) (per curiam) (threat to plaintiff's job, followed by argument over a parking space).

83. *See* Dawson v. Zayre Dep't Stores, 346 Pa. Super. 357, 359, 499 A.2d 648, 648 (1985) (plaintiff customer's dispute over lay-away ticket with store employee; employee resorted to racial epithet).

84. *See, e.g.*, Gaiters v. Lynn, 831 F.2d 51, 52 (4th Cir. 1987) (personally directed remark by singer during concert referring to plaintiff's appearance; remarks intended to be humorous).

85. *See* Bailey v. Binyon, 583 F. Supp. 923, 931 (N.D. Ill. 1984).

86. *See id.* at 927.

87. *Cf.* Irving v. J. L. Marsh, Inc., 46 Ill. App. 3d 162, 166, 360 N.E.2d 983, 985 (1977) ("In arguing that [a particular racial epithet] implies that an individual is generally lacking in the virtues of honesty, intelligence, or creativity, we believe plaintiff attributes a definition to the word that is far in excess of its meaning.").

88. *See, e.g.*, Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686 (6th Cir. 1981); Sambo's of Ohio, Inc. v. City Council, 466 F. Supp. 177 (N.D. Ohio 1979).

89. *See Sambo's of Ohio, Inc.*, 466 F. Supp. at 180; *see also* Heins, *supra* note 7, at 587-88. *See generally* Cohen v. California, 403 U.S. 15 (1971).

90. The record establishes that the name "Sambo" was chosen because of associations with pancakes, as well as the coincidence of combining portions of the names of two of the principals. *See Sambo's Restaurants, Inc.*, 663 F.2d at 698 n.4.

It may seem curious to decline to classify some literal speech, especially insofar as it may offend, or inflict suffering upon, identifiable groups, as speech in the constitutional sense. It is therefore useful to bear in mind what this claim does *not* amount to. It is not a claim that literal speech falls outside the scope of the free speech clause if it is primitive or fallacious,[91] or if it offers social ideas of no discernible "substance or merit,"[92] or if it touches upon social ideas that threaten basic values[93] or that must be regarded as settled.[94] Declining to extend free speech protection to literal speech that does not seek to convey any social idea is thus far removed from assuming that some "fighting faith,"[95] the truth of which we are at least for the moment convinced, justifies us in suppressing some disfavored speech.

It must certainly be admitted, however, that not all literal speech involving recourse to racial epithets will be entirely outside the scope of the free speech clause on this analysis. Racial epithets themselves are predictably offensive and derogatory, if only in an undifferentiated sort of way.[96] Beyond this, at least some uses of racial epithets involve an intent to communicate the social idea "that distinctions of race are distinctions of merit, dignity, status and personhood."[97] On some occasions, racial epithets are employed in the immediate context of at least tersely explicit statements of evaluative or descriptive social propositional statements.[98] Just as "an intent to injure another can accompany the expression of ideas,"[99] so the expression of ideas can accompany an intent to injure.

In such cases the government should not be barred by the free speech clause from severing or disaggregating the distinctive offense or distinctive moral wrong of the racial epithet from the cognitive or, to the extent constitutionally protected, the emotive meaning[100] of the speech. Such speech would not be subject to restriction insofar as it sought to convey a social idea, or in respect of its attempting to convey a social idea, even if that idea, however expressed, is inherently offensive to some degree. But such speech would be subject to

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91. *Cf.* Lasson, *supra* note 18, at 39 ("[l]ittle, if any intellect is necessary to hurl racial epithets").

92. *Id.* at 45.

93. *See* Hughes, *supra* note 56, at 363.

94. *See id.*

95. *See Report of the Committee on Freedom of Expression at Yale, supra* note 6, at 374-75 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

96. *See* Clarke v. Board of Educ., 215 Neb. 250, 256, 338 N.W.2d 272, 275 (1983).

97. *See* Delgado, *supra* note 6, at 136.

98. *See, e.g.*, Agarwal v. Johnson, 25 Cal. 3d 932, 941, 603 P.2d 58, 64, 160 Cal. Rptr. 141, 146 (1979) (en banc).

99. Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1755 (1985).

100. *See Cohen*, 403 U.S. at 26 (free speech protection accorded to "otherwise inexpressible emotions"). *See also* Cohen, *A Look Back at* Cohen v. California, 34 UCLA L. REV. 1595 (1987); Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283.

restriction insofar as it involves the injury infliction or deontic wrong of racial epithet speech.

This approach does not assume governmental infallibility or simply cast aside concerns for the pursuit of truth, self-realization, political participation, or other values thought to underlie the free speech clause.[101] These values would be jeopardized only if governmental restriction of the use of racial epithets suppressed or distorted, to a significant degree, the cognitive or, to the extent otherwise protected, the emotive meaning intended by the speaker. The potential for suppression or distortion of the social ideas sought to be conveyed by the speech is essentially a function of the degree of adequacy, from the standpoint of the speaker's own view of the free speech values he or she wishes to exercise and promote, of the alternative means or channels with which his or her message practically may be conveyed, that are left open and available for the speaker's use.[102] As a matter of logic, the courts should be reluctant to find a free speech violation where the complaining party is left with alternative means for conveying his or her message that are essentially as good from the speaker's own perspective on the relevant free speech values.

In a somewhat broader context, Justice Stevens has observed that a "requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[103] This is equally true in the context of racial epithet speech and is true not merely for the cognitive content of racist epithets, but also for the emotive content as well. Doubtless there is some sense in which a change in form necessarily involves some degree of change in content and in which no formulation of words is ever perfectly interchangeable with another, in all respects and for all purposes.[104] But a government regulation that prohibited, for example, the use of the phrase "looking glass," while leaving open and unimpaired the availability of the alternative word "mirror," would leave most speakers with what might be called a free speech value-equivalent means of communicating, regardless of the presence or absence of any repressive government intent.[105]

It is at least possible that a speaker may plausibly claim that requiring him to convey the protected emotive force of his message through means other than racial epithets not only impairs his general autonomy, as would virtually any

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101. *See* Emerson, *supra* note 79, at 878-79.

102. For a discussion of the importance of the availability of constitutionally adequate alternative speech channels, see generally Wright, *The Unnecessary Complexity of Free Speech Law and the Central Importance of Alternative Speech Channels*, 9 PACE L. REV. (1989) (forthcoming).

103. FCC v. Pacifica Found., 438 U.S. 726, 743 n.18 (1978) (opinion of Stevens, J., joined by Burger, C.J., and Rehnquist, J.).

104. *See generally* the popular expression of this theme in M. MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964).

105. *See generally* Wright, *supra* note 102.

police power regulation of any sort of activity,[106] but also distorts his message to some significant degree. Ordinarily, of course, it will be far from clear why the profundity, fervor, and certitude of one's convictions about any social issue cannot be conveyed without recourse to racial epithets.[107] That one feels quite strongly, or is willing to violate certain taboos because of the fervency of one's belief, does not seem incommunicable, to the extent it is relevant to free speech values, by means other than racial epithets. At the very least, such emotive messages do not seem inherently susceptible to more accurate or more powerful conveyance through racial epithets, to the extent that the sentiments involved can be faithfully communicated by language at all.[108]

Some of the divergence in meaning between racial epithet speech and nonracial epithet speech will be sheer "noise," in the sense of meaning variance neither consciously nor unconsciously considered or intended by the speaker. Some of the remaining variance will implicate no social idea. Presumably, a major reason why speakers of racist epithets would nonetheless object to restrictions on such speech would be their desire, at best irrelevant to free speech values, to inflict emotional pain on their targets. But to the extent that genuine free speech values are significantly implicated by such speech restrictions, any loss in free speech values from the speaker's standpoint must be considered in light of any free speech value loss, including speech autonomy loss, on the part of the targets of racist epithets, as well as the importance attributed to the sheer moral disvalue of racist epithets. Just as a speaker's autonomy, as a speaker, may legitimately be restricted to the extent necessary to criminalize verbal fraud, bribery, and blackmail,[109] so there is the possibility of justifying government restrictions on racist speech. Ultimately, it must be remembered that the benefits of restricting racial epithet speech must reflect the continuing unrestricted availability of other offensive, immoral ways of discussing racial groups. The policy logic of not restricting such alternatives is discussed below. But it is equally necessary to remember that the free speech costs of restricting racial epithet speech must be discounted to reflect the availability of alternative means of speak-

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106. *Cf.* J. AUSTIN, LECTURES ON JURISPRUDENCE 11-20 (R. Campbell ed. 1977) (law as the command of the sovereign to a subject).

107. While few of us are capable of the rhetorical power of, for example, a Winston Churchill or a Jesse Jackson, similarly few of us make our closest approach to the force and conviction of a Churchill or a Jackson through the use distinctively of racial epithets.

108. To the extent that one's sentiments or ideas or emotions cannot be successfully communicated by that person at all, government restrictions on his or her language in that context will generally not impair the speaker's freedom of speech, assuming the speaker's inarticulateness is not attributable to the government. *Cf.* G. ORWELL, 1984 (1983) (depicting the ability of a government, partially through control of language, to control the generation and articulability of particular thoughts).

109. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 (1976) (verbal proposals of illegal acts not within the same category as ordinary commercial speech) (citing Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973)).

ing that may be superior,[110] essentially as good,[111] or nearly as good from a free speech values standpoint.

Racial epithet speech may, therefore, in principle be subject to general restriction by government. The underlying rationale or justification for actually imposing such a restriction, given the constitutional legitimacy of doing so, is, however, controversial. The approaches referred to above in Section II tended generally to focus on concrete, individualized injuries to the particular plaintiff.[112] While the interests served by such restrictions are occasionally referred to broadly,[113] to the extent that such restrictions are aimed at promoting the "psychological well-being"[114] of the targets of racial epithets, the theory of restricting the speech may be misfocused. Restrictions of speech based on the content of the speech are generally disfavored.[115] Restricting racial epithet speech on the basis of contingent, speculative, unsystematic, causally obscure consequences for the broad psychological well-being of individual targets provides a relatively shaky foundation for such disfavored restrictions and may be no truer to our underlying motivations for restricting racial epithet speech than the less contingent, more straightforward deontic approach emphasized in this Article.

In some sense, it is doubtless true that "[t]he psychological or emotional harm alleged in [racial epithet] cases can be proved in the same manner as in other torts that protect psychological well-being."[116] However, most of the more serious potential psychological consequences of racist epithets, including social alienation, lower self-esteem, reduced aspirations, as well as effects on parenting practices,[117] may be ascribable to racism generally in some form, but not identifiable in any particular case involving racist epithets. Even if the plaintiff can show by a preponderance of the evidence a harm such as decreased self-esteem or less effective parenting, it will ordinarily be difficult at best for the plaintiff to show that the identified harmful psychological effects can be attributed not to his or her cumulative experience with disadvantage, poverty,

110. Again, it is entirely possible that a government restriction on racist epithets may coerce a user of racial epithets into using a form of speech that is actually higher in free speech values from the speaker's own subjective standpoint than that of racial epithets, if the speaker's preference for racial epithets reflects values other than free speech values, such as the speaker's desire to lash out satisfyingly, to inflict pain, or to attract attention of whatever sort to the speaker.

111. Most instances of the use of racial epithets, even if thought to at least imply some social idea, seem susceptible of reformulation so as to express pungently the speaker's contempt, animosity, or resentment without the use of racial epithets. *See, e.g.*, the language and context of Bailey v. Binyon, 583 F. Supp. 923, 925 (N.D. Ill. 1984); Resetar v. State Bd. of Educ., 284 Md. 537, 539, 399 A.2d 225, 227, *cert. denied*, 444 U.S. 838 (1979); Clarke v. Board of Educ., 212 Neb. 250, 252-53, 338 N.W.2d 272, 273 (1983).

112. *See supra* notes 14-76 and accompanying text.

113. *See, e.g.*, Delgado, *supra* note 6, at 173 ("The primary government interest served by a tort action for racial insults is the elimination of the harms of racism and racial insults . . . .").

114. *Id.* at 171.

115. *See generally* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

116. Delgado, *supra* note 6, at 167.

117. *See id.* Part I.

or racism or to a long-term of exposure to racist epithets from various persons not acting in any recognizable concert, but to the particular racial epithets of the particular defendant in the particular case.[118]

Even if the incremental harmful psychological effects of particular instances of the use of racial epithets could be shown reliably and at a reasonable cost, such an approach to racial epithets would largely miss the point. The public sentiment that persons should not be legally required to endure racist epithets is not exclusively a reflection of the intensity, duration, or overall psychological severity of the injury[119] or of a concern that the public esteem in which such victims are held will be diminished as a result of such epithets.[120] The public sentiment involved is not so dependent upon such contingent reactions of the victims or of other persons. Instead, such public sentiment more straightforwardly reflects the historically strengthening consensus that the use of racial epithets in typical cases involves a clear violation of an important public norm. It is not necessarily that racial epithets have become more abusive and insulting than formerly.[121] Rather, as a society we may be less willing than formerly to tolerate the same degree of abuse and insult of this kind because of the society's changing moral conceptions.

Issues such as the peculiar emotional susceptibility of particular individual targets of racist epithets[122] or of the potential for some violent or disruptive reaction by those subjected to racist epithets[123] are on this approach of only tangential importance. If the targets of racist epithets had invariably become so desensitized by repeated exposure to racist epithets that they regarded such language with great equanimity as a matter of course or if such victims reacted invariably with passivity or aggression turned inward only so that the threat of a violent reaction to such epithets was nil, the use of such racist epithets would remain just as reprehensible, if not more so, and just as fittingly subject to some form of legal censure. As one commentator has observed with regard to the use of ethnic slurs, "[i]t is not merely a question of preventing fights or riots; it is a matter of dignity."[124]

The legal system's tendency to underplay what this Article has referred to as deontic harms is illustrated, if not partially explained, by the fate of the two-pronged approach to "fighting words" in *Chaplinsky v. New Hampshire.*[125] Un-

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118. *Cf. id.* at 171 (recognizing the potential for "complex problems of proof of causation and damages" in racial insult cases).

119. *But cf.* Dominguez v. Stone, 97 N.M. 211, 215, 638 P.2d 423, 427 (Ct. App. 1981) (emphasizing the importance of such psychological concerns).

120. *But cf.* the authorities discussed *supra* notes 14-32 and accompanying text.

121. *See* Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d at 499 n.4, 468 P.2d at 219 n.4, 86 Cal. Rptr. at 91 n.4. (1970) (en banc).

122. *See* Contreras v. Crown Zellerbach Corp., 88 Wash. 2d at 741-43, 565 P.2d at 1177 (1977) (rejecting defendant's argument that as a truckdriver, truckdriver plaintiff must have become inured to abusive language, but leaving the plaintiff's own individual vulnerabilities to such injury to the trier of fact).

123. *See, e.g.*, Kretzmer, *supra* note 19, at 456.

124. J. TUSSMAN, GOVERNMENT AND THE MIND 91 (1977).

125. 315 U.S. 568 (1942).

der *Chaplinsky*, it is reasonably clear that constitutionally unprotected fighting words may take the form either of words tending "to incite an immediate breach of the peace"[126] or of words "which by their very utterance inflict injury."[127] But the vitality of the latter, more deontic prong has been seriously questioned.[128] At least on occasion, the latter prong has been judicially ignored in favor of the former.[129] And this is probably unfortunate because, as Professor Hadley Arkes has suggested, judicial emphasis on the breach of the peace prong "teaches the worst lessons that a regime of law could possibly teach. It suggests that, before citizens can expect the law to protect them or to vindicate their interests, they must be prepared themselves to use violence outside the law."[130] As well, the absence of any violent reaction to racial epithets, along with interracial harmony generally,[131] may at least conceivably be due to morally objectionable socialization, if not outright repression, of the targeted victims.

Recognizing some sort of tort action or some sort of criminal liability of some description for deontic injuries of the sort discussed above is a meaningful and appropriate response to racial epithet use. A tort or criminal action in response authoritatively vindicates and reaffirms the hard-won community sentiment that the use of racial epithets involves a clear and fundamental moral wrong. The individual victim is not left alone to fend for herself through some sort of "counterspeech" remedy,[132] which itself lends legitimacy to the appropriateness of the use of racial epithets. While there are less degrading means of reacting to some racially offensive speech—persons offended by the restaurant name "Sambo's" may organize a boycott[133]—such remedies will in some measure be insufficient. Even in the case of racially offensive speech that lends itself to boycott, economic theory can offer no guarantees that the speaker can be persuaded by changed marketplace incentives to cease indulging in his taste for racially offensive speech.[134] To the extent that the law can offer a remedy for the deontic harm of racial epithet speech that approaches more nearly a

126. *Id.* at 572.

127. *Id.*

128. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130, 143 (1974) and Sambo's Restaurants, Inc. v. City of Ann Arbor, 663 F.2d 686, 694 (6th Cir. 1981) (citing Gooding v. Wilson, 405 U.S. 518, 524-27 (1972)). *See also* Note, *supra* note 99, at 1756 ("What constitutes 'fighting' words has been limited to utterances . . . likely to provoke an immediate violent response by the addressee."). *But see Sambo's Restaurants, Inc.*, 663 F.2d at 697 n.1 (Keith, J., dissenting) (arguing for the continued viability of the infliction of injury by their very utterance prong of the "fighting words" doctrine).

129. *See, e.g.*, Harbin v. State, 358 So. 2d 856 (Fla. Dist. Ct. App. 1978).

130. Arkes, *supra* note 21, at 323.

131. *See* Delgado, *Can Science Be Inopportune? Constitutional Validity of Governmental Restrictions on Race-IQ Research*, 31 UCLA L. REV. 128, 185 (1983).

132. For an extended discussion of the role and limits of counterspeech as a remedy for objectionable or fallacious speech, see generally P. CHEVIGNY, *supra* note 81.

133. *See* Sambo's of Ohio, Inc. v. City Council, 466 F. Supp. 177, 180 (N.D. Ohio 1979). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (consumer boycott of private merchants for the broadly political purpose of protesting racial discrimination).

134. *See* T. SOWELL, THE ECONOMICS AND POLITICS OF RACE 178 (1983).

guarantee of redress, the nature of the deontic injury itself suggests that it should do so.

IV. THE DISTINCTIVE COSTS OF LEGALLY SUPPRESSING RACIST POLITICAL SPEECH IN GENERAL

Thus far, the argument has sought to establish the logic and the permissibility under the free speech clause of legal restraints on the use of racial epithets, at least where the targets of such epithets are members of historically subordinated groups. The interests at stake change, however, when it is suggested that the government should be empowered to restrict not only racist epithets, but at least some speech not involving the use of racist epithets that is nevertheless racially offensive, or racist, in communicating a recognizable social idea. Such an extended claim, while not currently widely influential in the United States, at least has the virtue of recognizing that restricting racial epithet speech only undeniably leaves open the possibility of deliberate infliction of suffering and embarrassment on members of particular racial groups, if perhaps through speech conveying a social idea. The approach argued for in this Article, it might be said, puts a premium on avoiding only the crudest, most inane sort of racist speech. One might argue that such an approach is class-biased.

How telling such criticisms are is controversial. Before such a judgment can be made, however, we should consider at least briefly some of the potential costs and risks distinctively associated with governmental restriction of allegedly racist speech, not involving racial epithets and conveying a recognizable social idea. Most of the burden of any argument against censoring offensive, unpopular, or evidently false social ideas must be borne by the classic apologies for freedom of speech.[135] Perhaps the most pertinent theme that can be developed in our particular context is that the question of whether governmental restrictions should be imposed on allegedly racist speech generally is not a matter of the relative weights one attributes to freedom of speech and to racial equality.[136] Freedom of speech, even for generally racist speech, may in fact tend to contribute to such racial equality as is practically attainable; and generalized censorship of racist speech may tend significantly to impair the cause of racial equality and community.

First, of course, the advocate of government restrictions on racist speech

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135. *See generally* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); J. S. MILL, *supra* note 67. *See also* L. BOLLINGER, *supra* note 13 (legal toleration of extremist speech as developing the social capacity for the civic virtue of mutual tolerance).

136. *But cf.* the Dissenting Statement by Kenneth Barnes to the *Report of the Committee on Freedom of Expression at Yale, supra* note 6, at 390 ("Under certain circumstances, free expression is outweighed by more pressing issues, including liberation of all oppressed people and equal opportunities for minority groups."). A narrower claim that the freedom of speech of majority groups, when used to propagate racist sentiments generally, impairs the ability of minority groups to develop and exercise their own free speech rights and capacities does seem interesting and important.

generally must choose among the possible ways of defining racist speech. Restricting all speech that tends to inflict even short-term discomfort on racial minorities, in their capacity as racial minorities, seems a well-focused approach; but such an approach would overlook the fact that receiving news that is unpleasant in the short term may be beneficial or even vital in the long run.[137] On the other hand, presuming to know in concrete detail what speech is destructive of minority interests in the long run must prove generally unconvincing. Avoiding these problems by defining racist speech to include only demonstrably fallacious claims may still occasionally involve pretensions to infallibility, as well as leaving much racially offensive speech untouched. Ultimately, a reasonably workable definition of racist speech that commands the agreement of even the targets of such speech may be practically unattainable, given that not only the behavioral patterns associated with racism,[138] but also the nature or definition of racism itself may change historically.[139] When one adds in the complications that the racist quality of a speech may depend not only upon context,[140] but also upon the reputation or intent of the particular speaker,[141] the problem of a satisfactory practical definition of racist speech seems daunting.

If a suitable definition of racist speech can be settled upon, the problems of interpreting and applying the legal standard to concrete situations begin. One possible approach, of course, is that of a continuing censorship bureaucracy. In the end, history teaches us that "the boundaries of the forbidden cannot reliably be drawn."[142] Professor Chevigny points out that "[i]n the Old South, . . . freedom of thought withered, not only in relation to slavery but generally as to all topics, because no one could predict when a discussion might suggest a new idea about slavery or race."[143]

Assuming that legal restraints on racist speech deter racist speech, genuine social gains may result. Enforced behavioral change, in the form of avoiding racist speech, may tend to produce genuine attitudinal change, as persons bring

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137. Glenn Loury discusses an important instance of our contemporary collective impulse to avoid short-term discomfort, at the cost of enduring more substantial long-term costs, in Loury, *The Moral Quandary of the Black Community*, 79 PUB. INT. 10, 16-19 (1985) (discussing the socially damaging consequences of tacit censorship and self-censorship within the academic community of constructive discussion of developing problems within or affecting contemporary black communities).

138. *See generally* Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1985). *See also* Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379-80 (1988) (referring to now "unspoken" forms of racist speech and thought).

139. *See* Pettigrew, *supra* note 138, at 686 ("[e]ven the definitions of, as well as the methods of measuring, 'prejudice' and 'discrimination,' have been brought into question").

140. It has been observed in a broader context that "[q]uestions can be premature or belated, relevant or irrelevant, superficial or profound, helpful or destructive, pointed or distracting, proper or improper." J. TUSSMAN, *supra* note 124, at 71. In a more specific context, see generally Delgado, *supra* note 131.

141. For an important international example, see P. BAUER, REALITY AND RHETORIC: STUDIES IN THE ECONOMICS OF DEVELOPMENT 87 (1984).

142. P. CHEVIGNY, *supra* note 81, at 103.

143. *Id.* Professor Chevigny concludes that "[c]ensorship, formal or informal, in every society where it is found, tends to spread over uncensored knowledge like a stain." *Id.*

their attitudes into line with their non-racist speech.[144] Even if no unpunished racist speech occurs, however, there may be limits to society's ability to change attitudes through enforced behavioral norms.[145] Some residue of alienated, resentful, seething, "underground" racist speech and belief will likely remain, fortified by the false conviction that opponents of racism are simply afraid that their own alleged errors would be exposed by an open debate that they therefore cannot permit.

Among the more subtle, but potentially serious, problems that would remain is the loss of racist speech as an indicator of social attitudes. Before a society or an industry adopts a program of affirmative action, for example, some sense of the program's practical workability is desirable. But if no racist speech, at least in a broadly defined sense, is legally permitted, the government's sense of the feasibility of such a program may be significantly distorted[146] in either an unduly optimistic or pessimistic way. After all, an enforced absence of public racist speech is compatible with either widespread skepticism about the norm upheld or with its complete and universal voluntary acceptance. It may seem worth paying some price, even one borne disproportionately by innocent victims, in order to have an improved sense of the real attitudes of much of society. It would be particularly unfortunate, for example, if the majority were genuinely receptive to more aggressive affirmative action programs[147] but little initiative was taken in that direction because in its ignorance of genuine majority attitudes society overestimated the extent of underlying, unarticulated opposition.

As well, it is predictable that at least in the long-term, racial minorities and the cause of racial equality would suffer from the disease of any legally enforced secular orthodoxy, in which vitally and vividly held principles, tempered in the fire of intellectual combat, gradually approach the admitted extreme of lifeless platitudes and cliches which lose their power to inspire. The Pledge of Allegiance tends to descend, in public school classrooms, to rote, not merely because it is frequently repeated, but because it is perpetually unchallenged. Coherent speech propagating a social idea, at least in the absence of the gratuitous element of racial epithets, that is classified as racist, indispensably serves the function of preventing the decay of the thought and rhetoric of racial equality. Even if wholly false, racist speech is in the long term not

144. *See* H. SCHUMAN, C. STECH & L. BOBO, RACIAL ATTITUDES IN AMERICA 206-07 (1985); Pettigrew, *supra* note 138, at 688 ("[S]ome whites who at first simply comply with the new norms of racial equality will in time internalize them.").

145. For a sense of the "stubbornness" of attitudes and the lengths to which a society might be pressed in order to effectively change even erroneous beliefs, see G. HARMAN, CHANGE IN VIEW 37-40 (1986).

146. *See* Kretzmer, *supra* note 19, at 486-87.

147. *See* Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524, 525-26 & n.11 (1987) (enthusiastic response to affirmative action programs by the business community).

without substantial value to the victims of racism itself, as John Stuart Mill has classically given us grounds to believe.[148]

These arguments seem insignificant, of course, in the context of the societal harms wreaked by racist actions that were informed and justified by racist ideas. Racism in its most familiar senses is pernicious in the extreme. But the wisdom of suppressing racist speech does not easily follow from this, largely because it is possible to suppress much of the harm of racism by informal social sanctions, by education, and by the imposition of legal requirements and legal prohibitions in the various realms of social conduct or action,[149] as distinct from speech.[150] Doubtless it is frustrating to realize that the impact of false and misleading racist speech generally cannot invariably be immediately effaced from the minds of its audience.[151] But this is equally true of any false and misleading speech.

To these considerations should be added another. It is not surprising that, as our tolerance as a society for racist speech decreases, the utility and practicality of confronting racism by restricting racist speech is diminishing. Whether racism is generally diminishing or not, it is apparently increasingly taking forms not susceptible of address by restrictions on speech. The kinds of racist speech most likely to inspire legal proscription will inevitably tend to be those crude, overt forms of blatantly racist speech that may be not only relatively unpersuasive, but also of diminishing significance historically.

Whether or not racism is diminishing in any absolute sense,[152] a consensus has developed that at least in the field of verbal public statements—the kind most amenable to legal control—there has over the past few decades been "a strong and steady movement of white attitudes from denial to affirmation of equality."[153] The historical "decline in the expression of racist ideology and racist attitudes toward blacks"[154] has led to a "near universal affirmation of the inadmissibility of racial prejudice in public political discourse"[155] and the virtual public disappearance of an "explicitly segregationist, white supremacist view."[156]

Of course, the virtual absence from public discourse of the most crude,

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148. *See* J. S. MILL, *supra* note 67, chapter II.

149. Not least among such legal instruments, of course, is the 1964 Civil Rights Act, cited *supra* note 1.

150. While the distinction between speech and conduct, including discriminatory conduct, is admittedly imperfect, it seems in most instances manageable. *See generally* United States v. O'Brien, 391 U.S. 367 (1968).

151. *See* Glass, *Anti-Racism and Unlimited Freedom of Speech: An Untenable Dualism*, 8 CAN. J. PHIL. 559 (1978).

152. *Compare, e.g.*, Kluegel & Smith, *Whites' Beliefs About Blacks' Opportunity*, 47 AM. SOC. REV. 518, 523 (1982) ("racial prejudice has markedly waned in the last three decades") *with* W. WILSON, THE DECLINING SIGNIFICANCE OF RACE 23 (1980) (holding open the possibility that racial conflict has not been substantially reduced historically, even though its nature and form have changed).

153. H. SCHUMAN, C. STECH & L. BOBO, *supra* note 144, at 135.

154. Thomas & Hughes, *supra* note 53, at 830.

155. Loury, *"Matters of Color"—Blacks and the Constitutional Order*, 86 PUB. INT. 109, 114 (1987).

156. Kinder & Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERS. & SOC. PSYCHOLOGY 414, 416 (1981).

and therefore most legally sanctionable, expressions of racism does not mean that anonymous, clandestine, transient, "underground" expressions of crude racism no longer occur, even, or especially, on college campuses. Nor does it necessarily mean that racial prejudice has not simply been transformed into more subtle, "ostensibly nonracial"[157] sorts of expression of perhaps a "more insidious type of racial bigotry."[158] But "ostensibly nonracial" expressions of racism are obviously relatively difficult to prosecute or to consistently hold tortious. Not surprisingly, it is only as the practical significance of relatively crude, objectively racist public speech has diminished that it has become possible to imagine legal restrictions on such speech becoming sufficiently popular to be practically workable. The evidence appears to establish that high and increasing percentages of white Americans regard minorities as able and competent[159] and prefer less invidious, and even self-accusatory, explanations for the persistence of racial inequality.[160] Contemporary discrimination is as likely to take the form of whites rating favorably perceived blacks more positively than favorably perceived whites.[161] However ultimately destructive such forms of bias may be, it is difficult to imagine a society's pressing its criminal or tort system beyond concern for discriminatory conduct, whether by omission or commission, to attack the social idea-communicating speech that underlies such forms of stereotyping.

V. CONCLUSION AND POSTSCRIPT: DOES THE VIRTUE OF TOLERANCE REQUIRE TOLERANCE OF RACIAL EPITHET SPEECH?

The argument sketched above has suggested that, while arguably racist speech seeking to convey some recognizable social idea should generally be constitutionally protected, speech in the form of racist epithets need not be so protected, in light of the purposes or values underlying the free speech clause. The argument has also suggested a particular approach to the question of why restricting the latter sort of speech is not merely constitutionally permissible, but sound public policy as well. A number of objections have been anticipated and discussed above, but no extended reference was made to the well-regarded

157. Pettigrew, *supra* note 138, at 674.

158. Frey & Gaertner, *Helping and the Avoidance of Inappropriate Interracial Behavior: A Strategy That Perpetuates a Nonprejudiced Self-Image*, 50 J. PERS. & SOC. PSYCHOLOGY 1083, 1083 (1986).

159. *See* Kinder & Sears, *supra* note 156, at 419 (Among the sample studied, "few thought blacks less intelligent than whites.").

160. *See* P. SNIDERMAN, RACE AND INEQUALITY 31 (1985) (About three-fourths of both a national and a San Francisco Bay area sample of white Americans preferred as an explanation for racial inequality that "generations of slavery and discrimination have created conditions that make it difficult for blacks to work their way out of the lower class.").

161. *See* Jussim, Coleman & Lerch, *The Nature of Stereotypes: A Comparison and Integration of Three Theories*, 52 J. PERS. & SOC. PSYCHOLOGY 536, 544 (1987).

and already influential defense of the constitutional protection of extremist speech developed by Dean Lee Bollinger in his recent book, *The Tolerant Society.*[162] There is much more in Bollinger's book that is of value, and much more that is susceptible of plausible criticism, than a brief discussion can suggest. Here we will attempt no more than to briefly indicate the major theme of the book and suggest why its implications for the argument sketched above in this Article are less significant than might be supposed.

Bollinger's thesis is that many observers have rightly felt that particularly in certain cases involving extremist speech, such as in the litigation involving the proposed Nazi parade in Skokie, Illinois,[163] the principle of freedom of expression has been carried beyond the bounds suggested by the most familiar explanations for the protection of freedom of expression.[164] To satisfactorily account for why such deeply painful, necessarily unpersuasive speech is protected, Bollinger suggests that we must recognize that excessive intolerance, in the realm of speech and elsewhere is a serious, looming threat[165] and that the exercise of voluntary self-restraint involved in permitting extremist speech to go legally unimpeded is, therefore, healthful in strengthening the public capacity for the important virtue of tolerance.[166] The particular value of protecting speech as profoundly offensive and inane as that of the Illinois Nazis lies in recognizing the truth of the character-building maxim, "[t]o straighten a bent stick you bend it back the other way."[167]

Recoiling from the impulse to excessive intolerance in the particular context of extremist speech is thus meant to be educative or public character-building, with benefits accruing far beyond the area of speech itself. Free speech is singled out for essentially practical reasons as "a discrete and limited context"[168] in which the costs of extraordinary self-restraint may be relatively low and the benefits relatively high.[169] This argument is, not surprisingly, set forth by Dean Bollinger with a good deal more subtlety and power than this brief account suggests; but this description may suffice for our limited purposes.

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162. L. BOLLINGER, *supra* note 13. *See also* Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617 (1982) (book review of A. NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979)). For a sample of the generally appreciative reviews of Bollinger's book, see Blasi, *The Teaching Function of the First Amendment*, 87 COLUM. L. REV. 387 (1987); Rosenfeld, *Extremist Speech and the Paradox of Tolerance*, 100 HARV. L. REV. 1457 (1987); Strauss, *Why Be Tolerant?*, 53 U. CHI. L. REV. 1485 (1986). For a sense of some of the limitations of the liberal political virtue of tolerance itself, see generally R. WOLFF, B. MOORE & H. MARCUSE, A CRITIQUE OF PURE TOLERANCE (1969).

163. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 915 (1978); Village of Skokie v. National Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

164. *See* L. BOLLINGER, *supra* note 13, at 14-15.

165. *See id.* at 106-07.

166. *See id.* at 120-25.

167. *Id.* at 125.

168. *Id.* at 121.

169. *See id.* at 124.

One might respond to Bollinger's thesis by suggesting that whatever civic virtues our society may be in acutely short supply of, the sort of tolerance and self-restraint in the realm of political ideas that Bollinger apotheosizes is not one of them. Certainly the students Professor Bloom describes in *The Closing of the American Mind*[170] tend more in the direction of an almost vacuous relativism than toward the tyranny of classic intolerance, at least in the realm of speech. But even if we assume that our contemporary inclination toward excessive intolerance is so pronounced that it is worth paying the very real price that the cultivation of tolerance of extremist speech exacts, it does not follow that the realm of racial epithet speech is an appropriate venue in which to display such tolerance. Judicial toleration of racial epithet speech devoid of, or as distinct from, articulated social ideas is still too readily interpretable, at least to some, as bespeaking not the virtue of tolerance, but continuing unconscious judicial indifference and insensitivity to the sensibilities of historically subordinated groups.

Ultimately, however, any excessive social intolerance we detect may simply not be attributable to excessive judicial intolerance of racial epithet speech or of extremist speech generally. It may well be that whatever pedagogical benefits that can be drawn from the technique Bollinger recommends are already being extracted. There is certainly no logical necessity that civic tolerance be enhanced particularly through the vehicle of restraint in even the broad area of speech.[171] There is arguably a surfeit of voluntary, quasi-principled judicial self-restraint, as the agent of the broader society, in other areas of the law, such as criminal sentencing. It can reasonably be argued that the sentences ordinarily actually served for violent crimes[172] are not rationally explainable on any established theory of criminal sentencing, apart from sheer, gratuitous self-restraint on the part of society. For a variety of reasons, then, Bollinger's argument does not establish the inadvisability of legal restraints on racial epithet speech.

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170. *See* A. BLOOM, THE CLOSING OF THE AMERICAN MIND 25-43 (1987).

171. *See* L. BOLLINGER, *supra* note 13, at 121-24.

172. *See* R. GOLDFARB & L. SINGER, AFTER CONVICTION 182 (1973) (citing a figure of median time to parole of 45 months for first degree robbers).