February 2014

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TIPTOEING THROUGH THE JUNKYARD:
THREE APPROACHES TO THE MORAL DILEMMA OF
RACIST HATE SPEECH

ADÈLE HUTTON AUXIER*

INTRODUCTION

Professor Rick Garnett uses the analogy of a yard to describe the Supreme Court's free speech jurisprudence. It goes like this: the more manicured the lawn, the more gently the government must tread if it wants to regulate. If we extend the analogy, we could say that racist hate speech is not a lawn, but a junkyard—full of sharp objects, health hazards, and useless junk that still retains both its power to attract and its power to wound.

If racist hate speech is a junkyard, then why does the Supreme Court still require the government to tiptoe? Since World War II, nations around the world have moved to ban aggressive racist speech commonly called racist hate speech.¹

* Juris Doctor candidate, Notre Dame Law School, 2007; A.B., Princeton University, 2001 (Politics). This Note was written as part of Professor Rick Garnett’s fall 2005 course on Freedom of Speech and Professor Vincent Rougeau’s Journal of Law, Ethics & Public Policy Seminar on John Paul II and the Law. Their support was crucial, particularly in the early stages of the project. Professor Brian Rapske of the Associated Canadian Theological Schools provided invaluable help in navigating the unfamiliar territory of New Testament scholarship. Professor Jay Tidmarsh of Notre Dame Law School commented on two drafts. Anyone who knows him will not be surprised to hear of the graciousness, generosity, and insight he displayed throughout the revision process. Professor Teresa Phelps (now of American University Washington College of Law), David Mathues and Greg Sanford (both of Notre Dame) also deserve thanks for the time they took to review and comment on drafts of this piece. Finally, I would like to thank the 2006-2007 staff and editorial board of the Notre Dame Journal of Law, Ethics & Public Policy for selecting this Note for publication and for putting in the work necessary to bring it to light. The mistakes which remain are mine.

American and international scholars have pressed U.S. courts and lawmakers to do the same. Nevertheless, the Supreme Court has consistently struck down laws which purported to restrict speech based on the viewpoint of the speaker, even when that speaker was spouting violent racist threats.

Although the Supreme Court has spoken, American academics continue to debate the merits of racist hate speech regulation—and their conversation has strong moral overtones. On one side, practitioners of outsider jurisprudence argue that aggressive racist speech should be regulated because it hurts its targets, and those who have been targets are no longer willing to bear the costs of free speech for the rest of us. Scholars like

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...
Mari Matsuda argue that rules that allow for virulent racist speech are not "neutral" with regard to the good, but allow the perpetuation of racist ideologies that have been deeply rooted in our national story. On this account, hate speech regulation is a needed part of the struggle against the ideologies of racism and white supremacy, both because our words shape our actions and because racist speech perpetuates the effects of these once-dominant ideologies in the hearts and minds of its victims.

Of course, "the lived experience of people of color" is not monolithic, and that is one of the reasons that academics as diverse as Donald Lively and Nadine Strossen reject most hate speech regulations. Both writers incorporate personal experience, their own or that of others, into their rebuttals of the outsider jurisprudences. The stories they appeal to lead them to very different conclusions about the wisdom of entrusting any kind of content-based speech regulations to the government. Strossen argues that once we cede to the government the power to determine which ideas are dangerous and evil enough to be suppressed using speech regulation, we have opened the door to the suppression of other ideas as well. Strossen also asks whether allowing the state to regulate hate speech will undermine the "moral legitimacy" of the First Amendment. Professor Lee Bol linger makes the argument that permitting distasteful speech trains us in the virtue of toleration, which he identifies as essential to American society.

in Considering the Victim’s Story at 2323–24). However, for the remainder of this Note, I use “outsider jurisprudence” as a simplified way of referring to those legal theorists who practice outsider jurisprudence from the perspective of people of color, simply because this is the perspective taken by the outsider jurisprudences discussed in this paper.

5. See Matsuda, supra note 4, at 2378.
8. In this sense, Lively and Strossen have ratified the outsider jurisprudences' methodology of starting with "lived experience." As we shall see, however, the two groups of theorists assign different meaning to the experiences they discuss. See infra Part II.A (discussing Bollinger, Lively and Strossen) and Part II.B (discussing Matsuda, Lawrence and Shiffrin).
This disagreement about racist hate speech regulation has important moral and philosophical dimensions. Civil libertarians say that the experience of American socialists last century

11. Although humans are capable of speaking with hatred towards others based on a seemingly infinite range of personal characteristics, this Note only deals with racist hate speech. This is because several of the legal theorists discussed in this Note who argue in favor of racist hate speech regulation rely heavily on historical arguments about the ideology of racial superiority. While some of the arguments they make are applicable to hate-motivated speech based on other personal characteristics, I limit the discussion to the particular contours of racist hate speech in order to simplify the conversation.

For example, Lawrence reads Loving v. Virginia, 388 U.S. 1 (1966), and Brown v. Board of Education, 347 U.S. 483 (1954), as specific repudiations of white supremacy. Lawrence, supra note 4, at 439–41 & n.44. Lawrence writes: Brown held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that black children are an untouchable caste, unfit to be educated with white children . . . . If segregation's primary goal is to convey the message of white supremacy, then Brown's declaration that segregation is unconstitutional amounts to a regulation of the message of white supremacy.

Id. at 439–41.

Lawrence also notes that:
The Court is clearest in its articulation of this understanding of the central purpose and meaning of segregation in Loving v. Virginia . . . . In striking down the Virginia statute prohibiting interracial marriage, Chief Justice Warren noted that the State's purposes "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy.

Id. at 441 n.44 (internal citations omitted).

Likewise, Matsuda calls the ideology of racial superiority "sui generis" because of its historical role in outbreaks of violence and points out what she calls "the universal acceptance of the wrongness of the doctrine of racial supremacy." Matsuda, supra note 4, at 2359. Matsuda says, Racist speech is best treated as a sui generis category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.

Id. at 2357.

In disarming the objection that allowing the government to regulate speech based on content will usher in a new era of McCarthyism, Matsuda contrasts the doctrine of racial superiority with Marxism. She says: Marxist speech . . . . is not universally condemned. Marxism presents a philosophy for political organization, distribution of wealth and power, ordering of values, and promotion of social change. By its very content it is political speech going to the core of ongoing political debate. Many nations adhere to Marxist ideology, and it is impossible to achieve world consensus either for or against this view. Marxists teach in universities. While Marxist ideas are rejected and abhorred by many, Marxist thought, like liberal thought, neoconservative economic theory, and other conflicting structures for understanding life
shows that permitting the state to take a stand with regard to morality and suppress ideas because they are "evil" opens the door to state oppression. Outsider jurisprudences respond that the present state of "neutrality" already oppresses people of color. In short, practitioners of outsider jurisprudence and civil libertarians fundamentally disagree about the correct state response to the near-universal moral norm of racial equality.

We need to widen the debate over racist hate speech to include other perspectives on the junkyard of racist hate speech. The technical legal questions about which kinds of laws and policies are constitutional remains the domain of legal academics, lawmakers, and judges. But technical answers do not fully respond to the underlying moral questions about whether speech regulation is an offensive constraint on human liberty or a much-needed protection for people whose dignity is under assault. It is time to draw non-American, non-legal and explicitly moral reflections into the conversation about how we, as a society, deal with the problem of racist hate speech.

This Note applies the moral philosophy of John Paul II to the moral dilemma of racist hate speech in contemporary

and politics, is part of the ongoing efforts of human beings to understand their world and improve life in it.

Id. at 2359–60.

12. Of course, many legal theorists on different sides of the hate speech regulation debate would say that equality can be legitimately advocated and enforced by government for other, non-moral reasons—for example, its importance as a precondition for democratic political participation. Shiffrin seems to come close to this position when he says "[m]y argument is that we must be hinged to an ideology of equality of persons, or else our government has no claim to our respect. That is, a democratic system presupposes some minimum conditions of our collective identity." SHIFFRIN, supra note 2, at 165 n.175.

13. See Matsuda, supra note 4, at 2378.

14. For a claim that the rejection of racist ideology is now a universally accepted norm, see Matsuda, supra note 4, at 2359.

15. This echoes the insight of Veronica Gentilli, a student of outsider jurisprudence, that the project of social justice is inescapably moral. She says: Because of the prescriptive force of objective moral claims, the critical race theorist cannot abandon the idea of the possibility of attaining objective moral truths. As a member of an oppressed group, she will find it her most powerful tool. Given that she lacks power, she cannot accept the idea that moral judgments and legal concepts are inherently and necessarily subjective. Something other than power has to justify her insistence that we reconstruct our legal and moral concepts in a way that will include her perspective.

America.¹⁶ I draw three conclusions. First, racist hate speech is a subset of the underlying moral evil of contemptuous speech. Contemptuous speech is not a trivial matter and it has been recognized as a serious moral evil since at least the time of Jesus’ Sermon on the Mount. It is worth our time and energy to oppose it. Second, we have a moral obligation to seek justice for those who are victims of contempt, particularly the systematic race-based contempt of racism. As John Paul II repeatedly emphasized, we must stand in love-based solidarity with the victims of racism. In the American context, one aspect of solidarity includes developing legal mechanisms to respond to racially-motivated injustice. Third, we must rigorously protect the free speech and free conscience of even the most deeply wrong speakers, and closely scrutinize legal proposals that may limit these freedoms. John Paul II understood that freedom of speech and freedom of conscience are essential aspects of the dignity of each human person. Explicit speech regulations, as opposed to other legal sanctions such as bias-based crime statutes, present unique moral problems and should be approached with caution.

This Note has four parts. Part One briefly summarizes the different approaches that American lawmakers and judges have adopted towards violent, racist speech in the twentieth century. Part Two discusses the views of six important legal scholars who have addressed racist hate speech regulation. Bollinger, Strossen and Lively oppose speech regulation as a strategy for dealing with racist hate speech, while Matsuda, Lawrence and Shiffrin each propose laws that would ban such speech. Part Three steps back from the contemporary American debate to reflect on the morality of racist and contemptuous speech. This section draws on both Jesus’ teaching in the Gospels and the moral philosophy of John Paul II. Part Four concludes with some thoughts on how John Paul II’s moral insights about human dignity and solidarity

¹⁶. See infra Part III. This Note evaluates John Paul II’s claims as those of a thoughtful moral philosopher, not a religious leader. I recognize that the choice of John Paul II may be discomfiting to both civil libertarians and outsider jurisprudens. Civil libertarians will find the belief that the state must not be neutral with regard to the good just as unacceptable when argued by John Paul II as they do when argued by outsider jurisprudens. Outsider jurisprudens, although by no means monolithic, may be unimpressed with the moral philosophy John Paul because he was the representative of the Catholic Church, against which serious charges of racial and religious discrimination have been made. On race and religion, see Andrea Smith, Soul Wound: The Legacy of Native American Schools, AMNESTY MAGAZINE (2005), available at http://www.amnesty usa.org/amnestynow/soulwound.html (discussing the Catholic Church’s involvement in the Native American residential school system in the United States and Canada).
could add a much-needed depth to the moral dimensions of the American racist hate speech debate.

I. RACIST HATE SPEECH IN AMERICAN LAW: A (VERY) BRIEF GLANCE

Generally speaking, American free speech doctrine teaches that the government may not regulate speech based on its content. Racist speech, popularly called hate speech, has been analyzed under the rubric of speech inciting violence, group libel, fighting words, threats, and bias-motivated crimes. Because each of these approaches defines the offense differently, there is not a single, unified definition of "hate speech" in American law.

A. Speech Inciting Violence

In Brandenburg v. Ohio, the Supreme Court ruled that a nationally televised Ku Klux Klan rally, which included threats of violence against African-Americans and Jews, was not 'speech inciting violence.' Brandenburg, the rally organizer, was convicted under a post World War I-era Criminal Syndicalism statute, which made it an offense to advocate use of crime, violence, or terrorism to achieve political change. The Supreme Court struck down the law because it criminalized "merely advocacy." The Court held that in order to prosecute someone for advocating violence, the speech has to threaten imminent illegal action, not just vague illegal actions sometime in the future. The speech

17. See, e.g., R.A.V., 505 U.S. at 382 ("Content-based regulations [of speech] are presumptively invalid.").
18. Id.
23. Creating a legally adequate definition for terms like "racist" and "hate" is one of the biggest challenges in this area of law. For example, the proposed hate speech regulations put forward by Matsuda, Lawrence, and Shiffrin each define the category of "racist hate speech" differently. See infra Part II.B (discussing and analyzing each thinker's proposed regulation). Bias-motivated crime laws, discussed infra Part I.B, seem most successful at avoiding definitional problems.
25. Id. at 447.
has to be likely to produce the imminent illegal action. Finally, the speaker must actually intend to produce the imminent illegal action.

B. Bias-Motivated Crimes

Forty-six states and the District of Columbia have passed hate crime laws modeled on a draft statute prepared by the Anti-Defamation League (ADL) in the 1980s. Laws based on the ADL "penalty-enhancement" model sidestep the difficult task of defining hatred per se by relying on the unspoken assumption that committing a crime against a person because of her race or other enumerated characteristic displays hatred towards her on that basis. The Federal Hate Crimes Sentencing Enhancement Act, for example, defines a "hate crime" as "a crime in which the defendant intentionally selects a victim . . . because of the actual or perceived race . . . of any person." Courts can increase the penalties for crimes if it determines that they were committed with a biased motivation.

C. Fighting Words

States seeking to target speech or expressive conduct more directly have run into serious obstacles. One approach has been to ban hate speech under the "fighting words" doctrine found in Chaplinsky v. New Hampshire. The St. Paul, Minnesota ordinance struck down in R.A.V v. City of St. Paul is one example of this approach. The law penalized anyone who placed graffiti or other symbols which they knew or should reasonably have known "arouses anger, alarm or resentment in others on the basis of
race, color, creed, religion or gender." Even those Supreme Court justices who supported hate speech laws in principle were deeply troubled by the subjectivity of the definition of hatred in this law and agreed that on its face it was unconstitutionally overbroad. Justice Scalia, writing for the majority, held that the St. Paul law was a content-based restriction on speech. The fact that the ordinance had been construed to reach only low-value "fighting words" did not save it. The Court held that, in general, content-based regulations were invalid even within categories of speech which the government could constitutionally regulate. As we will see, the Court's holding in R.A.V. has rendered many proposals for hate speech regulation moot, at least for the time being.

D. Threats and Intimidation

R.A.V. seemed to close the door on many proposed hate speech regulations. However, in 2004, the Supreme Court upheld a Virginia statute that banned cross burning "with an intent to intimidate." As in R.A.V., the Court held that cross burning was a form of expression protected by the First Amend-

33. Id. at 380.
34. Id. at 413–14 (White, J., concurring).
35. Id. at 382 ("Content-based regulations [on speech] are presumptively invalid.").
36. Id. at 381 ("[W]e accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute "fighting words" within the meaning of Chaplinsky.") (internal citations omitted).
37. Id. at 384–85 ("[T]he exclusion of "fighting words" from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a "nonspeech" element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a "mode of speech" . . . both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.") (internal citations omitted).
38. See infra Part IV.B. Matsuda and Lawrence have strongly critiqued R.A.V., without apparently altering their proposals for content-based hate speech regulation. In their 1993 book WORDS THAT WOUND, they call R.A.V. "ahistorical and acontextual" and say it is "a clean example of the kind of legal analysis [their work] is intended to counter.
ment and could not be banned because of its message. Nevertheless, given the historical context of Klan violence preceded by a burning cross, when done with the intent to intimidate, the Court recognized that cross-burning could be a particularly virulent form of "true threat." Although the message of white supremacy traditionally associated with cross burnings could not be banned outright, the use of cross burnings to intimidate others could be criminalized. However, the state was not free to single out one ground of intimidation for special treatment, for that would be to discriminate among viewpoints—the shoal on which the St. Paul ordinance ran aground.

Speech commonly called "hate speech" has been prosecuted under laws banning incitement to violence, fighting words, true threats, and bias-based crimes. The last two categories have fared the best before the Supreme Court. However, the Court altered its free speech jurisprudence many times in the 20th century, and proponents of hate speech regulation express hope that it may do so again.

II. ARGUMENTS FOR AND AGAINST REGULATING HATE SPEECH

As we have seen, the Supreme Court has left little legal space for regulating racist hate speech. However, the academic debate rages on. Not surprisingly, American legal theorists on each side of the racist hate speech discussion differ sharply about the pragmatic question of whether speech regulation is an effective response to racist hate speech. Some, such as Donald Lively,

40. Id. at 365–66.
41. Id. at 343, 360. The Court found that the Virginia law was similar in effect to the exception noted in R.A.V. which allowed states to ban some pornography because of its particularly prurient nature, since prurience was the feature which made pornography unprotected speech in the first place. Id. at 362.
42. Id.
43. For a general discussion of the development of free speech doctrine in the 20th century, from a relatively restrictive regime which tolerated broad government regulation to the relatively unrestricted regime we have today, see Chemerinsky, supra note 19, at 952–81.

One example of restrictive government speech regulation comes from the anti-Communist movement in the middle of the last century. As Justice Douglas pointed out in Brandenburg v. Ohio, over 20,000,000 Americans were processed in loyalty proceedings first begun during the Truman administration, and numerous cases from the 1920s on drew fine distinctions between verbally advocating Communism and "actually" working towards the overthrow of American government. 395 U.S. 444, 456.
44. See, e.g., Matsuda, supra note 4, at 2320 ("If the harm of racist hate messages is significant, and the truth value is marginal, the doctrinal space for regulation of such speech is a possibility.").
make pragmatic issues the core of their argument, and all the theorists examined in this Note spend significant time on pragmatic concerns. However, important voices like Nadine Strossen, Lee Bollinger, Mari Matsuda, Charles Lawrence, and Steven Shiffrin address the debate at a more basic level: virtue and moral legitimacy.

Lee Bollinger proposes that allowing racist speech teaches us the virtue of tolerance towards those with whom we disagree, a virtue which is vital to sustain our civil liberties in times of national crisis. We could call this the virtue-enhancing approach. Nadine Strossen hints that human dignity and autonomy make it morally illegitimate for the state to regulate speech based on content, even when that content is what many consider to be evil. We could call this the moral legitimacy approach.

The three sampled writers who advocate hate speech regulation have their own responses to the virtue-enhancing and moral legitimacy arguments of Bollinger and Strossen. Instead of the virtue of cultivating tolerance, Matsuda and Lawrence appeal to the virtue of protecting the vulnerable. Instead of focusing on the moral right of every person to speak her mind, Matsuda and Lawrence argue that national and international consensus against the ideology of racial superiority has made it morally legitimate to deny protection to those who advance it. Shiffrin justifies racist hate speech regulations on procedural grounds. He claims that it is legitimate to regulate racist hate speech in a free and democratic society because this kind of speech prevents its targets from fully participating in public life.

John Paul II's philosophy addresses the pragmatic, virtue-enhancing, and moral legitimacy arguments in the American hate speech debate. His statements about the role of hate-based propaganda in paving the way for the Nazi atrocities in World War II address the virtue-enhancing and pragmatic arguments of Bollinger, Lively, and others. John Paul II's experience under Nazi and Soviet tyranny made him a staunch defender of the liberty of conscience and expression emphasized by Strossen's moral legitimacy approach. John Paul's methodology and philosophical insights into the nature of hate speech can make a meaningful contribution to the moral dimensions of the American debate about hate speech regulation.

A. Arguments Against Hate Speech Regulation

1. Lee Bollinger

One of the most compelling positive justifications for America's unique approach to speech regulation comes from
Lee Bollinger in his now-classic book *The Tolerant Society: Freedom of Speech and Extremist Speech in America*. Bollinger asks what free speech can do to make us more virtuous. Bollinger pushes beyond the classical model of free speech, which emphasizes the instrumental value of free speech in creating an efficient marketplace of ideas, and the fortress model, which sees freedom of speech as a bulwark against the tyranny of both the government and the majority. Bollinger identifies tolerance as the leading virtue of American society. Our extremely liberal free speech regime helps us to cultivate this virtue, he says, by allowing us to see and reflect on our intolerant reactions to extreme speech. Having done so, we will be more able to identify the same intolerant impulses when they arise in other legal and political contexts where we may actually be empowered to suppress others. Bollinger sees this as a way of reaching the locus of what concerns us about extremist speech, namely, the motivations of the speaker—motivations which are, he says, beyond the reach of the law.

2. Nadine Strossen

Bollinger speaks of virtue, and of free speech, as a sort of moral discipline—essential for the ways they reveal our immoral impulses towards intolerance. Civil libertarians such as Nadine Strossen of the ACLU appeal to ideas like individual autonomy and dignity as “independently sufficient, rationales for the content-neutral protection even of hate speech.” She advances the traditional civil libertarian view, namely, that “if the Constitution forces government to allow people to march, speak and write in favor of peace, brotherhood and justice, then it must also require government to allow them to advocate hatred, racism, and even genocide.” By this logic, bans on hate speech (or any other content-based speech bans) lack moral legitimacy.

In addition to questioning the moral legitimacy of content-based speech regulations, Strossen also identifies four practical problems inherent to hate speech regulation. Her account of the “lived experience” of African-Americans and other minority

45. BOLLINGER, supra note 10.

46. Id. at 238 (“It seems likely that the ordering of the several virtues will vary from society to society, depending on the conditions prevailing . . . . For a country like the United States, tolerance appears to have assumed a leading position.”).

47. Id. at 243.

48. Id. at 125.

49. Strossen, Modest Proposal?, supra note 7, at 535.

50. Id. at 534 (quoting Lawrence Tribe).

groups is at the top of the list. Strossen says hate speech rules are particularly prone to abuse by those in power because of the discretion required to enforce them. Second, she says that hate speech codes carry the “inescapable” risk of chilling speech beyond their scope, as people seek to avoid even being charged with hate speech. Third, she says that such speech codes can be used as a precedent to ban other types of speech. She points out that while some may be in favor of exceptions to free speech for racist hate speech, others will have their own preferred exceptions such as flag-burning or anti-Semitic speech. Finally, she questions the actual efficacy of hate speech regulations to affect racist attitudes. Because a hate speech regulation narrowly drawn enough to pass Constitutional scrutiny would only affect a small portion of racist speech, it would have, at most, symbolic importance. The positive impact of this anti-racist symbolism, she says, must be weighed against the “more pervasive direct impact . . . [of] undermining the first amendment’s moral legitimacy.” Banning racist hate speech, in addition to presenting serious practical problems, may also lend dangerous legitimacy to the idea that the state has the right to suppress speech with which it disagrees.

3. Donald Lively

If Strossen advances the classic civil libertarian view, Donald Lively speaks from the opposite end of the spectrum, from within
outsider jurisprudence itself. Lively chastises fellow academics of color for wasting time and energy fighting for chimerical speech regulations when basic issues of racial justice remain unresolved. He charges that “racist speech management effectively conspires with the established order by demanding cosmetic change rather than a reshuffling of the cards of power.”  

Lively joins Strossen in pointing to the negative effect of speech restrictions like the fighting words doctrine on African-Americans. He further cautions that “successful enactment of hate speech laws promises a hollow victory to the extent it redirects racism into more secretive and insidious enterprises.” In this sense he faults hate speech regulations for failing to meet the results test, a criteria used within outsider jurisprudence: hate speech regulations do not work to promote justice.

Lively sharply disagrees with outsider jurisprudences who would exempt intragroup racist comments from regulation. He says that “racially demeaning speech within a group may be especially effective in stigmatizing and reinforcing pernicious stereotypes.” Lively discusses the heightened sense of shame and confusion that can come from being attacked for one’s racial characteristics (such as darker or lighter skin) by someone within the same group. He cites his wife’s experience of overtly racist comments by African-American teachers and others, and the pain this caused her.

Finally, Lively questions the effectiveness of creating hate speech regulations which will be administered by the same people who, it is claimed, already demonstrate latent racism through their minimization and denial of overtly racist incidents. For Lively, the hope that such people will evenhandedly enforce hate speech laws—without abusing them when their interests are implicated—“seems neither well-conceived nor well-placed.” In sum, he dismisses racist hate speech regulations as a “low-return reform” which only distracts from the real and ongoing struggle for racial justice.

58. Lively, supra note 6, at 875.
59. Id. at 880.
60. Lively, supra note 6, at 881.
61. Id. at 883.
62. Id. at 885.
63. Id. at 886.
64. Id. at 884.
65. Id. at 899.
B. Arguments For Regulating Hate Speech

Other legal scholars disagree. Starting in the early 1980s with theorists like Mari Matsuda, calls have gone out for regulation to address the evils of racist hate speech. Professor Charles Lawrence gives a personal testimony of the pain and damage racist speech has caused in his life and in the life of his family.66 Matsuda appeals to liberty and equality as values and as an “ideology” to justify limiting racist speech.67 And Steven Shiffrin proposes a limited ban on face-to-face assaultive hate speech as the only form of regulation that will not provoke a backlash in a society which he argues is still largely racist.68

1. Charles Lawrence

In 1989, the ACLU debated and defeated a resolution supporting “narrowly framed restrictions of racist speech on campuses.”69 Charles Lawrence delivered a paper at that conference, urging the ACLU delegates to support campus speech codes banning some modes of racist speech.70

Lawrence started by reminding his hearers that Brown v. Board of Education and the civil rights cases which followed it were explicitly aimed at regulating the message of white supremacy.71 Lawrence proposed regulating “assaultive racist speech” in face-to-face encounters where the intent of the speaker was to injure and silence the hearer and where the injury experienced by the hearer was “immediate.”72

Lawrence argued that counter-speech was particularly ineffective in the context of informal “assaultive” speech for two reasons. First, assaultive racist speech frequently produces (and is intended to produce) a visceral emotional response of shock, fear, and rage in the listener, which hinders their ability to respond verbally. Second, speech is perceived as an inadequate response to such a total attack on one’s identity. Lawrence saw

66. Lawrence, supra note 4. See also infra Part II.B.1.
67. Matsuda, supra note 4. See also infra Part II.B.2.
68. Shiffrin, supra note 2. See also infra Part II.B.3.
69. Lawrence, supra note 4, at 431.
70. Id. at 484.
72. Lawrence, supra note 4, at 452.
these verbal assaults as a kind of “preemptive” strike designed to silence and dehumanize the victim.73

Finally, Lawrence reminded his hearers that the “interest in the free flow of ideas” was not as compelling for all speakers. The First Amendment’s speech protections did not originally extend to blacks at all.74 The “free marketplace” of ideas in America has contained quite a bit of racist speech, and sometimes defenders of free speech have attacked those who publicly oppose racist incidents for trying to “silence speech.”75 Lawrence says that this criticism misses the point that blacks and other historic victims of discrimination make about racism and racist speech—namely, that one of the main goals and effects of racist ideologies is to silence speech by members of disfavored groups.76

2. Mari Matsuda

Mari Matsuda, who has been called “one of the most thoughtful academic critics of racist speech,”77 started a 1993 analysis of hate speech regulation with an appeal: “let us present a competing ideology, one that has existed in tension with racism since the birth of our nation: there is inherent worth in each human being, and each is entitled to a life of dignity.”78 Matsuda’s claim is unashamedly moral—she asserts “the necessity of creating a legal response to racist speech . . . because it is wrong.”79

Matsuda’s claim is also a pragmatic one. She says, “[s]etting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech.”80 The alternative to treating racist hate speech differently based on its content is to seek to fit it into an existing exception in free speech jurisprudence. However, Matsuda believes that “[t]his stretching ultimately weakens the first amendment fabric, creating neutral holes that remove protec-

73. Id. at 452.
74. Id. at 467.
75. Id. at 477.
76. Id. at 472.
78. Matsuda, supra note 4, at 2381.
79. Id. at 2380.
80. Id. at 2357.
tion for many forms of speech," resulting in regulation that can "spill over to censor forms of political speech." Matsuda's proposal is to create a narrow restriction of racist speech. She would single out the worst kind of racist speech using three identifying characteristics. First, the message is of racial inferiority (which is the prime identifier of racist speech). Second, the message is directed against a historically oppressed group. This characteristic adds the dimension of "structural subordination" based on a belief in racial inferiority. Finally, the message is persecutorial, hateful, and degrading.

Matsuda points out that her test would have dramatically different effects depending on the racial identity of the speaker and the target. A white speaker could be convicted for saying something that an Asian, African-American or Hispanic would not be penalized for, however insulting or degrading his or her intent. Matsuda explicitly considers several "hard cases," including Malcolm X's controversial "white devil" statements. Under her proposal, this kind of speech would not be penalized because Matsuda's definition of racism requires the speech to be "tied to the perpetuation of racist vertical relationships." Matsuda thinks it is reasonable for courts to examine case by case whether a group is subordinated in a particular time and place before deciding whether their statements should be censored.

However, for academics such as social scientists who propose scientifically based theories of racial inferiority, she believes that another response is more appropriate. If their work is academically deficient, it should be denied an academic platform.

81. Id.
82. Id. at 2360.
83. Id. at 2356–61.
84. Id. at 2357.
85. Id. at 2357.
86. Id. at 2361–74.
88. Matsuda, supra note 4, at 2361. Although Matsuda acknowledges that this criterion on its face excludes most racist and anti-Semitic statements by non-white speakers, she would still ban such speech. She says, "[w]hile I have argued here for tolerance of hateful speech that comes from an experience of oppression, when that speech is used to attack a subordinated-group member, using language of persecution, and adopting a rhetoric of racial inferiority, I am inclined to prohibit such speech." Id. at 2363–64. Regarding intragroup speech, Matsuda proposes adopting the "recipient's community standard" to judge whether a particular statement is degrading and persecutorial in context. Id. at 2363–64. Matsuda would ban "classic forms of anti-Semitism" outright, even if they do not fall directly under her three-prong formula, because of their "historical context and connection to violence." Id. at 2367.
89. Id. at 2362–63.
"Assuming the dead-wrong social-science theory of inferiority is free of any message of hatred and persecution, the ordinary, private solution is sufficient: attack such theories with open public debate . . . ." Matsuda directly addresses the concerns of those who fear that content-based hate speech laws will usher in a new era of McCarthyism. She says there is a normative difference between Communism and racism, which we can know through human experience, "our only source of collective knowledge." The knowledge that slavery and apartheid are wrong "is reflected in the universal acceptance of the wrongness of the doctrine of racial supremacy." Matsuda says that it is appropriate to regard racist speech as sui generic. "We have fought wars and spilled blood to establish the universal acceptance of this principle. The universality of the principle, in a world bereft of agreement on many things, is a mark of collective human progress." Marxist speech, she says, is not universally condemned either in the academy or in the community of nations, and it takes its place beside liberal and neoconservative thought as one among many "conflicting structures for understanding life and politics." Matsuda appeals to the collective human experience to derive normative standards of right and wrong, including the standard of racial equality.

3. Steven Shiffrin

Steven Shiffrin joins Matsuda in proposing an alternative story about the meaning of America, although his theory for deriving collective norms is quite distinct. Like Matsuda (on whom he relies for an understanding of outsider jurisprudence) Shiffrin says, "our country is necessarily committed to the proposition that each citizen is worthy of equal respect. From that premise I suggest that hate speech implicates far less of the First

90. Id. at 2365.
91. Id. at 2367-68.
92. Id. at 2359.
93. Matsuda, supra note 4, at 2359.
94. Id.
95. Id. at 2360.
96. On the restriction of her argument to racist hate speech, see id. at 2331-32 (noting that regulation of hate speech based on other protected categories would require a separate analysis).
Amendment value than is frequently claimed by free speech advocates.\textsuperscript{97}

Shiffrin does not rely on universal human experience to derive his moral principles. He sees equality as a necessary precondition for democracy. He rejects the argument that "'[p]ublic discourse cannot be defined normatively, for any such attempt is hinged to some ideological notion of what our collective identity should be.'\textsuperscript{98} Instead, Shiffrin argues that "we must be hinged to an ideology of equality of persons, or else our government has no claim to our respect."\textsuperscript{99} He distinguishes racist ideology from Communism because "if [Communists] are correct, their contribution to the marketplace of ideas is valuable... If the [KKK] succeeds, in contrast, it is inevitably the case that the system is illegitimate."\textsuperscript{100}

Unlike Matsuda, however, Shiffrin does not propose regulations for most kinds of hate speech. His proposal is narrow for pragmatic reasons:

\[\text{O}ur country is racist to the core, and from that premise I argue that prohibitions of hate speech would not advance the cause of equality but would perpetuate inequality. Tolerating hate speech on this analysis should be a pragmatic concession to the needs of equality. It should not be a case for celebrating our glory as a nation but an occasion for shame.}\textsuperscript{101}

In contrast to Bollinger or civil libertarians like Strossen, Shiffrin does not see this restraint as an expression of virtue.

The narrow category of hate speech which Shiffrin would regulate is speech which targets specific individuals, families, or small groups of people.\textsuperscript{102} Under this framework, some intragroup racist statements would not be covered because they are

\begin{quote}
97. \textit{Shiffrin}, supra note 2, at xii.
99. \textit{Shiffrin}, supra note 2, at 165 n.175.
100. \textit{Id.} at 164 n.173.
101. \textit{Id.} at xiii.
102. \textit{Id.} at xiii, 163 n.162. His proposal is as follows:
Speech or other expression should be punishable if it (1) is intended to insult and stigmatize an individual (except for public officials, including police officers or their private counterparts, and public figures) on the basis of his or her belonging to a group historically oppressed because of its race, color, or national origin; and (2) is either addressed directly to the individual whom it insults and stigmatizes, or addressed or distributed in a way that is ultimately communicated to the individual; and
\end{quote}
not "stigmatizing" in the same way as words by a European-American would be, although they may be insulting. Shiffrin believes that "only stigmatizing insults directed at members of historically disadvantaged groups should be subject to sanctions."

Shiffrin justifies limiting hate speech laws to targeted, face-to-face encounters by pointing out that such laws will be much less likely to create martyrs out of racist speakers. He says:

When government protects a specific victim from a personal remark, the public is much less likely to see the law as censorship. Irrational as it may seem, a speaker who explicitly and obviously harms a single, particular person through speech is often less sympathetic than one whose speech hurts many more people. The harm is more concrete and less diffuse.

Shiffrin's pragmatic and limited approach to regulating hate speech would cover far less expression than the proposals by Lawrence and Matsuda, but for that reason it escapes some of the criticisms of civil libertarians like Strossen.

Taken together, outsider jurisprudences Lawrence, Matsuda, and Shiffrin all insist on the existence and knowability of principles of justice. They each make a normative judgment about the content of racist hate speech. What distinguishes them from many who oppose hate speech regulation is their willingness to see the government act upon these knowable principles of justice. Lawrence draws on his understanding of the normative content of Brown v. Board of Education as a condemnation of the ideology of white supremacy. Matsuda finds a universal world consensus against doctrines of racial supremacy, which justifies treating racism differently from other contested and historically threatening ideologies like Communism. Shiffrin says that belief in racial equality is a sine qua non of a functional modern democracy. Their conviction about the dangerous nature of racist ideas justifies non-content-neutral rules restricting racist speech.

(3) makes use of words or symbols that insult and stigmatize an individual on the basis of his or her belonging to a group historically oppressed because of its race, color, ethnicity, or national origin; unless (4) the speech or other expression is provoked by fighting words, threats, or violent conduct.

Id. at 161 n.161.
103. Id. at 162 n.161.
104. Id. at 163 n.161. Shiffrin notes, however, that the Supreme Court is unlikely to accept his distinction between speakers based on race. Id.
105. Id. at 83.
Although they differ regarding the scope of appropriate regulation, they share a common conviction about the unique nature of racist ideology and the importance of expending legal resources to combat it.

III. John Paul II and Hate Speech

Like outsider jurisprudes, John Paul II believed that the content of the good was knowable, and placed a duty of action upon those who sought it. He forcefully condemned racism and taught that societies have an obligation to stand in solidarity with its victims. However, as a survivor of two dictatorships, he had a particular appreciation for the appropriate boundaries of state power and the importance of intellectual freedom, sharing some of the concerns raised by Strossen and other civil libertarians.

John Paul II had a deep understanding of the moral problems presented by attempts to regulate racist and contemptuous speech. On one hand, in encyclicals like *Sollicitudo Rei Socialis* and *Centesimus Annus*, and in Church statements like *The Church and Racism*, John Paul II spoke forcefully of the responsibility of states to protect each person from the profoundly dehumanizing effect of racism, out of the moral obligation of solidarity. On the other hand, encyclicals like *Veritatis Splendor* and *Fides et Ratio* (both built on the foundation of the Vatican II document *Dignitatis Humanae*) taught that the very dignity of each person makes coercion in matters of conscience wrong, even when the person in question embraces an evil and harmful ideology. The tension between human freedom and the ways that freedom can be abused to harm the dignity of ourselves and others is a recurring one in John Paul’s thought, and it can shed useful light on our discussion of hate speech regulation in America.

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107. Cf. Matsuda, *supra* note 4, at 2321 (“[T]his Article moves between two stories. The first is the victim’s story of the effects of racist hate messages. The second is the first amendment’s story of free speech. The intent is to respect and value both stories.”). Matsuda’s article, with its emphasis on “hearing the victim’s story,” is asking for something very close to the solidarity proposed by John Paul II. *See infra* Part III.B.3. The same could be said of Lawrence and Shiffrin.

108. *But see infra* Part III.C (outlining John Paul’s understanding of the vital relationship between truth and freedom).

109. *See infra* Part III.B.

110. *See infra* Part III.C.
A. Moral Reflection on Contemptuous Speech: The Gospel of Matthew

In *Veritatis Splendor*, John Paul II told his readers that Christ teaches the truth about moral action and directed them to “turn to Christ once again in order to receive from him the answer to their questions about what is good and what is evil.”111 Following the structure of John Paul’s thought in *Veritatis Splendor*, this section will begin with a discussion of the teaching of Christ and then look at John Paul’s comments about racist regimes in the 20th century and his application of Catholic Social Thought to the problems of racism, freedom of conscience, and human dignity.

Jesus’ impatience with the racial and ethnic lines which divided people in his day is well known.112 Approaching the scriptures with the attitude of John Paul, what kind of information can we gather about the human problem of hateful, contemptuous speech? What inferences can be drawn from Jesus’ teaching about how to approach the moral problem of contemptuous speech?

1. Jesus’ Teaching on Contemptuous Speech in *Matthew 5* and Jesus’ Denunciation of Religious Authorities in *Matthew 23*

Jesus addressed the topic of contemptuous speech directly, apart from the context of race. In the *Gospel of Matthew*, Jesus used the term “fool” twice. The first time, in the Sermon on the Mount, Jesus warned his listeners against speaking contemptuously towards others and told them that if they say to their brother “you fool!” they are in danger of the fires of hell.113 The second time, in the Seven Woes, Jesus himself called the religious

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111. Pope John Paul II, *Veritatis Splendor: The Splendor of Truth* para. 8 (1993) ("It is [Christ] who opens up to the faithful the book of the Scriptures and, by fully revealing the Father’s will, teaches the truth about moral action. At the source and summit of the economy of salvation, as the Alpha and Omega of human history, Christ sheds light on man’s condition and his integral vocation."). See also Pope John Paul II, *Fides et Ratio: On Faith and Reason* para. 80.1 (1998) (“In Sacred Scripture are found elements, both implicit and explicit, which allow a vision of the human being and the world which has exceptional philosophical density.").

112. See, e.g., Luke 10 (The parable of the Good Samaritan; Samaritans, the descendants of Assyrian colonists, were considered ‘unclean’ by ethnic Jews in Jesus’ day). John 4 (Jesus’ encounter with a Samaritan woman at a well). But see Matthew 15:21–29 (Jesus replies to a non-Jewish woman’s request for healing by remarking, “it is not right to take the children’s bread and toss it to their [pet] dogs;” he later praises her faith and calls her “daughter.").

113. Matthew 5:22.
authorities of Jerusalem "blind fools."114 What can be learned about the moral problem of contemptuous speech from the juxtaposition of these two apparently contradictory statements?

a. The Sermon on the Mount (Matthew 5)

In one of his most well-known discourses, often referred to as the Sermon on the Mount,115 Jesus told his hearers what a truly moral life looks like.116 Throughout the Sermon, Jesus taught by contrasting the requirements of the civil or religious law with the requirements of a truly just life, which involved not just right action but also right motivation.117 In Matthew 5, Jesus turned to the topic of murder. He said,

"You have heard that it was said to your ancestors, 'You shall not kill; and whoever kills will be liable to judgment.'

"But I say to you, whoever is angry with his brother will be liable to judgment, and whoever says to his brother, 'Raqa,' will be answerable to the Sanhedrin, and whoever says, 'You fool,' will be liable to fiery Gehenna."118

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116. It is important not to read the Sermon on the Mount as Jesus’ proposal for a new code of civil law. Just a few verses later in the same discourse, Jesus says the famous words “if your right eye causes you to sin, gouge it out and throw it away.” Matthew 5:29. Jesus takes the civil law as a starting point for his sermon and then pushes his listeners to think more deeply about the moral life. For one discussion of the distinction the Jesus of the Gospels draws between religious obligation and secular law, see Jean Bethke Elshtain, Religion and the Limits of Liberal Democracy, in Recognizing Religion in a Secular Society (Douglas Farrow ed., 2004).
117. The rhetorical structure of the Sermon on the Mount follows a relatively consistent pattern. Jesus chooses a specific moral rule or teaching from traditional religious authorities and critiques it, for example, for failing to address the root causes of illegal and immoral behavior (as with the connection between murder and anger in Matthew 5:21). For a detailed scholarly discussion of the Sermon on the Mount, see generally D.A. Carson, Matthew, in 8 The Expositor’s Bible Commentary 192–96 (F.E. Gaebelien et al. eds., 1982).


Sanhedrin: the Sanhedrin were the ruling council of the Jews in Jerusalem in Jesus’ day. Bauer et al., supra, at 967 (“A governing board . . . in Roman times this was the highest indigenous governing body in Judaea . . . . This body was the ultimate authority not only in religious matters, but in legal and governmental affairs as well . . . .”). But see Carson, supra note 117, at 148–49 (noting
Jesus drew a surprising connection between violence and angry speech. While his hearers knew that they would be subject to the judgment of civil tribunals if they murdered another person, Jesus warned them that being angry and speaking with contempt to others would expose them to the judgment of the moral law.

In this passage, Jesus reminded his hearers that publicly insulting a person using certain offensive and banned words ("raqa") would open oneself to be examined by the courts of the day. Using such words would make the speaker "liable" or "answerable to" the Sanhedrin, before whom he would have to defend his statements. In the last clause of Matthew 5:22, Jesus pointed out that even ordinary words can be used as vehicles for bone-crushing contempt and anger ("you fool"). Jesus told his hearers that if they spoke contemptuously to their brothers, their actions would be subject to evaluation by a far more frightening authority than the civil courts: they would be "liable to" or answerable to the judgment of hell. Jesus' purpose in this passage was not to push for an expansion of the list of banned words, but to open the eyes of his hearers to the serious moral danger they were in when they spoke to another person with contempt or hatred.

The passage implies that some words were known to be illegal and make the speaker liable for civil punishment. This seems like the kind of activity at which civil law excels—enumerating and categorizing different kinds of offenses, boxing off those that are "out of bounds" and establishing clear-cut boundaries between what is "socially acceptable" and what is a threat to social order. A word like "fool" would be difficult to include on a civil list of forbidden words because it does have legitimate

that "synedrion" can mean either "Sanhedrin" or simply "council," and that the "council" in Matthew 5 could refer to "(God's) council" of judgment in heaven.

Geheenna: Geheenna was a valley just outside Jerusalem, used as a dump for burning trash in Jesus' day. Bauer et al., supra, at 190–91 ("Geheenna . . . Valley of the Sons of Hinnom, a ravine south of Jerusalem. There according to later Jewish popular belief, God's final judgment was to take place . . . . In the gospels it is the place of punishment in the next life, hell . . . . [It is used to refer to] a place of fire [in Matthew] 5:22 . . . .").

119. In this passage, "liable to" and "answerable to" are different translations of the same underlying Greek word, enochos. See New American Standard Exhaustive Concordance of the Bible 458, 1527 (Robert L. Thomas & W. Don Wilkins eds., updated ed. 1998) [hereinafter NASB Concordance].

120. Some commentators suggest that the "council" referred to in Matthew 5:21 is in fact the "Divine council," i.e. God's judgment, not the earthly Sanhedrin. See, e.g., Carson, supra note 117, at 148–49; C.S. Keener, A Commentary on the Gospel of Matthew 182–84 (1999). This reading would not alter the core of Jesus' teaching in this passage, which was to point out that anger and contempt are the real moral roots of interpersonal violence.
descriptive uses and is not obscene. Yet Jesus considered the use of this term in some contexts so dangerous to the self and others that it merited a far more serious penalty than a trial before the Sanhedrin: judgment before God.121 This conclusion is a strong affirmation of the insight that modern insider jurisprudes have come to through observation: contempt and hatred can have a dangerous and destructive effect even if they are only expressed through words and not accompanied by criminal action.122

b. The Seven Woes (Matthew 23)

Speech addressed to groups or to people in authority, even when it uses violent and angry imagery, seems to raise somewhat different issues in Jesus’ moral code. The writer of Matthew records Jesus himself calling others “fools” in the context of a public speech denouncing abuses by the religious and civil authorities of his day. In this speech, traditionally known as the “Seven Woes,” Jesus calls the religious authorities of Jerusalem hypocrites,123 vipers,124 and blind fools125 for their attacks on him and his followers, their misguided interpretation of the religious law and their selfish lifestyles. Jesus’ language is harsh and uncompromising. The tension between the Sermon on the Mount and the Seven Woes cannot be attributed to translation because the writer of Matthew uses the same Greek word for “fool” in Chapter 23 as he did in Jesus’ earlier teaching recorded in Chapter 5.126

c. Morally Relevant Distinctions Between Matthew 5 and Matthew 23?

Is there a morally meaningful distinction between the situations in Matthew 5 and Matthew 23? There is no way to reach a definitive answer, but there are at least five ways to distinguish the two speeches. First, the difference between Jesus’ use of the word “fool” in each speech may rest in the context in which the word is used: in Matthew 5, Jesus uses the example of a personal, face-to-face confrontation; in Matthew 23, Jesus is engaged in

121. “... liable to fiery Gehenna.” Matthew 5:22. See Bauer et al., supra note 118, at 191.
122. See supra, Part II.B.2 (discussing Matsuda) and Part II.B.1 (discussing Lawrence).
126. See NASB Concordance, supra note 119, at 338, 1549 (explaining that the Greek word moros, meaning dull, stupid, or foolish, is translated as “fool(s)” in both Matthew 5:22 and Matthew 23:17).
public speech aimed at moral and social reform. On this reading, there could be a moral difference between a personal attack and impassioned commentary on political and social affairs.

Second, the targets of the insulting language had very different abilities to respond in each situation. Although Matthew 5 does not elaborate the context for the statement “you fool!”, it seems closest to “name-calling,” a situation similar to the racist taunting which, Lawrence argues, effectively prevents its target from responding at all. Matthew 23 contains a speech that is part of an ongoing public debate in which both sides speak clearly and have an opportunity to present their views. Impassioned and derogatory language used in open dialogue may, on this reading, be fundamentally different from a personal insult whose purpose is to silence its target.

Third, the two passages might be distinguishable because of the position of power held by the speaker. In Matthew 5, the speaker is the target’s “brother,” implying roughly equal status. In Matthew 23, the speaker is Jesus, a religious dissident who is attacking social and religious authority figures for their oppressive system of rules.127 This interpretation is appealing, and contains echoes of the identity-based regulations proposed by Shiffrin and Matsuda. A power-based analysis of these two passages runs into trouble insofar as it ignores the belief, held by Jesus as described by the writer of Matthew, that he was in fact God Incarnate.128 In other words, within the total context of the book of Matthew, where Jesus Christ is presented as a divine figure with power to command nature, the actual status of Jesus and the religious authorities is reversed. Although contemporary readers may see Matthew 23 as an example of a member of a subordinated group speaking out against authority figures, it is very unlikely that either Jesus himself or the writer of Matthew saw Jesus’ subordinate status within his own ethno-religious community as a justification for his use of strong language, since in their eyes he was not in fact subordinate.129

127. Jesus and the religious leaders he addressed were both members of the same Jewish ethnic and religious community and were both experiencing serious identity-based oppression at the hands of the Roman authorities. Matthew 23, like Matthew 5, is an example of intragroup speech. See also Keener, supra note 120, at 536 (“Matthew’s critiques, like these, are Jewish critiques within Judaism, ‘no more anti-Semitic’ than the Dead Sea Scrolls,’ and not intended for exploitation by Gentile anti-Judaism.”) (internal citation omitted).

128. See, e.g., Matthew 26:52-53 (“Then Jesus said to him... ‘Do you think that I cannot call upon my Father and he will not provide me at this moment with more than twelve legions of angels?’”).

129. Going further, the reverse could be true: it could be that the writer of Matthew viewed Jesus’ use of the word “fool” acceptable because Jesus, as the
Perhaps the most natural distinction between the two passages is the distinction between true and false statements. On this reading, Jesus implies in Matthew 5 that speech which attacks the humanity of another person is never true and is an assault on the truth about who human beings are—an assault important enough to merit moral and spiritual judgment. On the other hand, speech which attacks people for their policies, actions, or rules with strong and contemptuous words, as with Jesus' speech in Matthew 23, may be true and worth saying. This reading would be consistent with the use of the word enochos, "liable to [judgment]" in Matthew 5. Jesus himself would be subject to divine judgment or evaluation for his words in Matthew 23. However, because he was speaking truth to power and had the right motivation for doing so, he would be vindicated.

Finally, the key to distinguishing between the two passages may be in the motivation of the speaker. This would be consistent with the lesson Jesus was driving at throughout the Sermon on the Mount: to behave morally, it is not enough to merely stay within the letter of the law. True morality involves right motives as well as right actions. Viewed from this perspective the motivation for Jesus' speech in Matthew 23 (to denounce injustice and immorality in high places and exhort leaders to undertake personal and social change) may be what distinguishes it most from the contemptuous statement of the anonymous brother in Matthew 5. This interpretation is favored by many scholars who have interpreted Jesus' statements in Matthew 5 to be a comment on the inability of civil law to adequately address the motivations of the human heart.130 If this is the correct interpretation, then it is

divine Son of Man, had unique moral authority over the religious elite and all other community members. This possible interpretation does not help us here since it turns on the one-of-a-kind status possessed by Jesus Christ and not the morality of different kinds of ordinary person-to-person speech.

130. See, for example, Keener and D.A. Carson, who both say that the core of Jesus' teaching in Matthew 5 was the way that God would evaluate the inner motivations of each person's heart. Keener says:

This text addresses not just how one acts but who one is, that is, one's character. Earthly courts generally could not judge such offenses as displays of anger (except in tightly controlled communities like Qumran . . . ; Roman law also penalized defamatory words . . . ). But God's heavenly court would judge all such offenses.

Keener, supra note 120, at 182 (internal citations omitted).

D.A. Carson analyzes the same passage, saying:

Jesus' contemporaries had heard that the law given their forefathers . . . forbade murder . . . and that the murderer must be brought to "judgment" (krisis, which here refers to legal proceedings, perhaps the court set up in every town; or the council of twenty-three persons set up to deal with criminal matters). But Jesus insists—the "I" is
not surprising that American legal scholars working two thousand years later still wrestle with how to craft a law that will truly reach the evils of race-based contempt.

2. Insights About Racist Hate Speech from the Gospel of Matthew

Matthew 5 and Matthew 23 yield some important insights about the morality of contempt-filled speech in 21st century America—insights that can help us evaluate the likely effectiveness of hate speech regulation proposals by thinkers like Shiffrin and Matsuda. First, hateful speech is neither a recent nor a rare phenomenon. Racist speech may be seen as a special case of the broader moral problem of contemptuous speech. Second, contempt is not limited to a set of particularly offensive words but can be expressed even in relatively mild words (“raqa . . . you fool”). The evil resides in the attitude of the speaker, not necessarily the words spoken. Third, words that are sometimes used to express hatred and contempt can also be used to express morally legitimate outrage (contrast the contemptuous “you fool” in Matthew 5 with the political commentary on “blind fools” in Matthew 23). The speaker’s intent is decisive. Fourth, Jesus’ example in Matthew 5 tells us that intragroup speech between equal-status individuals can sometimes be hateful and contemptuous. We should therefore be skeptical of frameworks which claim that the morality of a statement is decisively or exclusively determined by the identity of the speaker vis-à-vis the target. Finally, taking our cue from the overall message of the Sermon on the Mount, we should not be overly optimistic about our ability to create laws that reach all or most of the contemptuous and hateful words spoken each day in this country. As many New Testament scholars have observed, Jesus’ goal throughout the Sermon on the Mount was to point out the inadequacy of the civil and religious law of his time to produce true morality in the hearts of those who merely observed its outward requirements.\(^\text{131}\)

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\(^\text{131}\) See, e.g., supra note 130.

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\(^\text{131}\) See, e.g., supra note 130.
First, Jesus’ discourse tells us that hateful and contemptuous speech is a serious moral evil. Those who engage in it are liable not only to civil authorities, but to God. Speaking contemptuously and hatefully to another person is not a peccadillo that can be overlooked, but a serious moral wrong. The deeply immoral nature of hate speech also implies that it is not something which its victims should be expected to just “shrug off.” After all, Jesus prefaced his comments on hate speech by drawing his hearer’s attention to the crime of murder, where the harm to the victim is clear. Hate speech’s evil nature is located not just in the attitudes which produce it but also in the harm it causes its victims.

Jesus’ discussion of hate speech in a religious teaching thousands of years old also tells us that the phenomenon of hate speech is neither recent nor rare. This recognition should humble us as we seek to address its effects in our day. Hateful and contemptuous speech is a serious moral evil that human communities have had to grapple with for thousands of years. This reality should make us extremely skeptical of claims that hate speech does not exist in our community today, or that it is not a serious problem.

Second, Jesus’ own use of critical words demonstrates that hate speech is not limited to the use of particular words or phrases, and a word which can be used in a hateful statement can also be used in a socially useful one. Statements which contain superficially similar words may have utterly different intents and meanings, while statements that use very different terms may be equally hateful in intent and impact. The intent of the speaker is an essential component of the moral validity of a particular speech act.

Jesus’ discussion of the banned word “raqa” underlines the limited usefulness of “lists” of prohibited words. If Jesus’ teaching is correct, any such list will be liable to fail in two directions. First, as he pointed out in Matthew 5:22, a list of banned words will fail to reach the harm caused by even everyday words spoken to someone contemptuously and in anger. A list of prohibited words will therefore tend to be underinclusive because it cannot possibly catch all the ways people insult, belittle, and show contempt for one another. Second, any list broad enough to catch harmful speech at the margins is likely to suppress some valuable and legitimate speech and be overinclusive. Jesus’ reform speech in Matthew 23, denouncing political and religious rules and
actions by cultural leaders, would presumably fall into this category.\textsuperscript{132}

Third, there seems to be a morally significant difference between attacking an individual for her identity and attacking a political or religious group for its policies. On this reading, even very strong public speech that is part of an ongoing public dialogue on political, religious, or social reform where both parties to the dialogue are presenting their views is rationally distinguishable from insults where the speaker attacks or shows contempt for the humanity of her target and whose speech silences her target. The latter has little or no possible positive effect, while the former has at least the potential to create positive social and political change.

Fourth, Jesus' discussion of hate speech is explicitly \textit{not} limited to speech between people of different racial or other characteristics insulting one another on the basis of historical or political animus.\textsuperscript{133} On this view, the serious moral wrong of hate speech exists even when that speech is between two equal-status members of the same community. On the other hand, Jesus' words in Matthew 23 lead to the inference that a higher-status person can be innocent of hate speech for sharply criticizing lower-status members of the same community. Taken together, these two observations throw into question the identity and status-based hate speech regulations proposed by theorists like Matsuda and Shiffrin. They imply that the evil of hate speech is not so much linked to the difference in status and power between the speaker and the target, but to the attitude of contempt by one human being towards another.

Finally, we should not be overly optimistic about our ability to address the root of the problem of hateful racist speech through legislation. Jesus' teaching tells us that hateful, contemptuous speech is a serious moral wrong. However, Jesus

\begin{itemize}
  \item \textsuperscript{132} Another distinction that may be drawn between the two passages is the being/action distinction—criticizing someone for what they do rather than for who they are. Among contemporary thinkers, this distinction has also been made. Lawrence, for example, pointed out that it is particularly difficult to respond to an attack on one's identity, because one cannot respond by denying that identity. Lawrence, supra note 4, at 452.
  \item \textsuperscript{133} It is interesting that Jesus chose to address intragroup hate speech and not inter-group hate speech in his discourses. Given the historical circumstances of the day, inter-group hate speech was probably not uncommon. In Jesus' time, historic Israel was ruled by the Roman Empire and its puppet regimes, and the oppressiveness and brutality of military dictators in Jerusalem (including, of course, Pontius Pilate), has been well documented. Against this background, anti-Semitism was also a feature of Roman society. See Everett Ferguson, Backgrounds of Early Christianity 513 (3d ed., 2003).
\end{itemize}
never proposed a "model law" to regulate this kind of speech. In fact, his theme throughout the Sermon on the Mount was the way in which civil and religious laws were inadequate to stop the true evil of the human heart from flourishing. This ought to make us both realistic and humble as we consider ways to address contemptuous racist speech in our day.

B. Human Dignity as Solidarity: John Paul II’s Historically Grounded Reflections on Racist Speech

Like practitioners of outsider jurisprudence, John Paul begins his analysis of moral problems by reflecting on actual human experience. Before he became Pope, Karol Wojtyla was a philosopher. More specifically, he was a phenomenologist, a school of 20th century philosophy that takes as its starting point the holistic experience of the embodied person.

Throughout his papacy, John Paul used a phenomenological approach to analyzing contemporary moral issues. First, he looked to human experience. From there, he reasoned using both philosophy and the resources of the Christian tradition to which he belonged. Out of this combination of lived experience and moral philosophy, he sought concrete steps for human action. His philosophy can help us as we deliberate about how to

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134. John Paul’s philosophical methodology has a particular bearing on this discussion, which is characterized by concern for the priority of lived experiences as a source for moral direction. As one writer put it, “Catholic social thought [has been described] as a triad of... solidarity, subsidiarity and social justice. To these, John Paul II has added subjectivity—the human person as subject, as agent, as center of imagination, initiative and determined will.” Michael Novak, John Paul II: Christian Philosopher, AMERICA, Oct. 25, 1997, at 16.

Scholars of John Paul’s thought note that for John Paul, however, the turn to experience is not a joining in the Cartesian project of evaluating all things through one’s own individual consciousness (I think, therefore I am; cogito ergo sum). Instead, John Paul asserts the unity of our interior sense of subjectivity with the concrete reality of the “objective” physical world and our presence in it (focus on the ens cogitans, the “being who thinks”). This recognition puts a break on the supremacy of experience and enables us to navigate between different experiences. See Kenneth L. Schmitz, At the Center of the Human Drama 121–46 (1993).

135. Simply put, phenomenology is a sustained effort to bring back into philosophy everyday things, concrete wholes, the basic experiences of life as they come to us. It wishes to recapture these quotidian realities from the empiricists, on the one hand, who analyze them into sense data, impressions, chemical compositions, neural reactions, etc., and from the idealists, on the other hand, who break them up into ideal types, categories and forms.

Novak, supra note 134, at 12.
most effectively address racist hate speech in contemporary America.

1. Nazi and Soviet Regimes

John Paul lived through World War II; he saw firsthand the totalitarianism and racism of the Nazi and Soviet regimes while living in Poland, and the experience marked him profoundly. He spoke particularly forcefully about the role that speech played in creating conditions for violence, referring to the racist and xenophobic propaganda promoted by fascist and communist regimes as "another deadly instrument of war." John Paul II identified the creation of propaganda designed to provoke race-based violence as a "characteristic of all totalitarian regimes." He contrasted this culture of violence and repression of totalitarianism with the "culture of peace" which is built by "rejecting at the outset every sort of racism and intolerance [and] by withstanding racist propaganda."

136. Speaking on the 50th anniversary of the Second World War, John Paul pointed to the constricting of civil liberties in European nations prior to 1939, and specifically pointed out the racist dimensions of the pre-war propaganda. At the time, unfortunately, people failed to understand that when freedoms are trampled on, the foundations are laid for a dangerous decline into violence and hatred. This is precisely what happened: It was not difficult for leaders to induce the masses to make that fatal choice by spreading the myth of the superman, by applying racist or anti-Semitic policies, by showing contempt for the lives of people considered useless because they were sick or asocial, by religious persecution and political discrimination, by the progressive stifling of all freedom through police control and the psychological conditioning resulting from the unilateral use of the media.

Pope John Paul II, Message of Pope John Paul II on the Fiftieth Anniversary of the End of the Second World War in Europe para. 6 (May 16, 1995) [hereinafter Fiftieth Anniversary].

137. John Paul II said: During the Second World War, in addition to conventional, chemical, biological and nuclear weapons, there was widespread use of another deadly instrument of war: propaganda. Before striking the enemy with weapons aimed at his physical destruction, efforts were made to annihilate him morally by defamation, false accusations and the inculcation of an irrational intolerance, by means of a thorough programme of indoctrination, directed especially to the young.

Id. at para. 10.

138. "It is in fact characteristic of all totalitarian regimes to create an enormous propaganda machine in order to justify their own crimes and to provoke ideological intolerance and racial violence against those who do not deserve?it is claimed?to be considered an integral part of the community." Id.

139. "The culture of peace is built by rejecting at the outset every sort of racism and intolerance, by withstanding racist propaganda, by keeping eco-
John Paul ended with an exhortation to the generation which was born after the war, reiterating the connection between intolerance and violence: “I ask you... to be particularly alert to the signs that the culture of hatred and death is growing. ... Renounce every form of extreme nationalism and intolerance. It is along these paths that the temptation to violence and war slowly but surely appears.”

John Paul told his listeners that the moral responsibility to work for not just tolerance but love between different groups arises from a universal moral law that is known to each person. At the same time, by placing this duty within the concrete historical reality of the Second World War, he acknowledged that this knowledge is fragile and may be obscured by totalitarian propaganda. He went to great lengths to emphasize the power of speech to affect this knowledge, obscure the truth of our common humanity and lead to violence on a massive scale.

2. The Catholic Church’s Response to Postwar Racism

John Paul repeatedly acknowledged the persistence and destructiveness of racism in modern democracies and called it one of the greatest challenges facing the United States. John Paul also called racism “a negation of the human being created in the image and likeness of God.” For John Paul, racism was

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140. Fiftieth Anniversary, supra note 136, at para. 15.
141. John Paul II said:
You have been given the mission of opening new paths to fraternity among peoples, building a single human family and coming to understand more deeply the ‘law of reciprocity in giving and receiving, of self-giving and of the acceptance of others.’ This is demanded by the moral law written by the Creator in the heart of every person, a law confirmed by God in the Revelation of the Old Testament and then brought to perfection by Jesus in the Gospel: ‘You shall love your neighbor as yourself;’ ‘just as I have loved you, you also should love one another.’
Id. (emphasis added).
142. When speaking to Australian indigenous peoples, he noted, “[t]he discrimination caused by racism is a daily experience.” Pope John Paul II, Address of John Paul II to the Aborigines and Torres Strait Islanders in “Blatherskite Park” para. 7 (Nov. 29, 1986). He identified racism as among the greatest challenges facing America today: “As the new millennium approaches, there remains another great challenge facing [the United States]: to put an end to every form of racism, a plague which your Bishops have called one of the most persistent and destructive evils of the nation.” Pope John Paul II, Homily, Papal Mass at the Trans-World Dome para. 5 (Jan. 27, 1999), available at http://www.nccbuscsc.org/pope/mass.htm.
an evil which assaults our deepest identity, which is not our ethnic or racial identity but our identity as God's creations, each of us individually willed by him.144 His strong views on the deep spiritual harms caused by racism adds urgency and importance to the contemporary American debate about how to combat racist hate speech.

In 2001, at John Paul II's request, the Pontifical Council for Justice and Peace expanded and reissued a 1988 document called *The Church and Racism*.145 This document emphasized that racism, first and foremost, has its origin in the human heart: "[r]acial prejudice, which denies the equal dignity of all the members of the human family and blasphemous the Creator, can only be eradicated by going to its roots, where it is formed: in the human heart."146 It emphasized two obligations upon those who oppose racism: first, to strengthen respect for equal dignity by example and education, and second, to defend the victims of racism.147 "Doctrines and examples by themselves are not sufficient. The *victims of racism*, wherever they may be, must be *defended* by bringing to light and denouncing racist acts, with the goal of promoting just laws and social structures."148

144. This understanding of racism is grounded in John Paul's anthropology. For a discussion of that anthropology, see *infra* Part III.C.2. John Paul II placed the onus for resisting racism on each person's recognition of the human dignity of those around her: "To oppose racism we must practice the culture of reciprocal acceptance, recognizing in every man and woman a brother or sister with whom we walk in solidarity and peace. There is need for a vast work of education to the values that exalt the dignity of the human person and safeguard his fundamental rights." Pope John Paul II, *Angelus*, para. 3 (Aug. 26, 2001).


In addition, the Vatican is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, which contains broad provisions requiring state signatories to pass laws punishing advocacy of ideas based on racial discrimination. On the Convention, see *The Church and Racism*, supra, at para. 30; on the ICCPR and its analogous article, see *supra* note 1. *But see* Nowak, *supra* note 1 (interpreting Art. 20(2) of the ICCPR to include only "public incitement of racial hatred and violence within a state.").


147. *Id.* at para. 25–26.

148. *Id.* at para. 26. The paragraph goes on to say that "[a]cts of discrimination amongst persons . . . [for racist reasons] which lead to contempt and to the phenomena of exclusion, must be denounced and brought to light without
On the other hand, the statement also refers to the need to continue to treat the perpetrators of racist acts as human beings. The statement stresses the need to prevent victims of racism from "having recourse to violent struggle and thus falling into a racism similar to that which they are rejecting."\(^{149}\) It expresses the Roman Catholic Church's goal of producing a heart change on the part of the racist, saying "[j]ust as God does not take pleasure in the death of a sinner, the Church aspires more to helping [the perpetrators of racist acts] if they consent to remedy the injustice committed."\(^{150}\) By referring to a predicate "consent to remedy the injustice committed," the statement makes it clear that reconciliation must be based on the truth about human dignity and a willingness to renounce racism, not some kind of peace for peace's sake.

For John Paul II and the church he led, the very nature of another person as a creation of God ruled out the acceptability of racist speech and attitudes, and created a reciprocal duty on the part of each person to actively protect the dignity of other persons victimized by racism. At the same time, respect for human dignity required a rejection of violence towards perpetrators of racism and a commitment to bringing about change of heart and reconciliation between the perpetrators and victims of racism, based firmly on a mutual understanding of the truth about human dignity.

3. *Centesimus Annus* and *Sollicitudo Rei Socialis*: Human Dignity as Solidarity

The need to protect the victims of racism while seeking a change of heart on the part of the perpetrators of racist acts grows out of John Paul's teaching on solidarity. The encyclicals *Centesimus Annus* and *Sollicitudo Rei Socialis* critique the major socio-economic systems of their era (capitalism and socialism) and exhort modern societies to embrace solidarity regardless of their political structure. *Centesimus Annus* states that in the Catholic tradition, it is "an elementary principle of sound political organization" that "the more that individuals are defenseless within a given society, the more they require the care and concern of others, and in particular the intervention of governmental authority."\(^{151}\) In one of his major contributions to Catholic

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\(^{149}\) Id. at para. 27.

\(^{150}\) Id.

Social Teaching, John Paul II identified this principle of concern for the weak as "solidarity." He defined solidarity by saying that:

[Solidarity] is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all.

This commitment to the common good means that issues such as the persistence of assaultive racist speech in modern America cannot be dismissed as the concern of a few. Instead, as a problem which has been repeatedly pointed out by the members of racial minorities who are its most frequent victims, it is something which deserves the attention of national decisionmakers and scholars.

C. Human Dignity as Freedom from Coercion in Matters of Conscience

1. Dignitatis Humanae. Human Dignity as the Grounding Conscience Rights Against the State

Dignitatis Humanae is important because it laid out the vision of human dignity as the source of human rights which John Paul II would later build upon in his teaching as pope. Dignitatis Humanae was a Vatican II document which John Paul strongly supported while he was still a Bishop in Poland. It also provides a moral and anthropological justification for respecting the free expression of those whom one believes to be deeply mistaken about ultimate issues of life—including, in our day, racist speakers. Any legal response to racism which directly limits the important freedom to speak one’s mind should be carefully scrutinized.

Dignitatis Humanae recognized the central place of human dignity as the ground for freedom of conscience and religious

152. See id. at para. 10; see also Novak, supra note 134, at 11.


154. "Wojtyla 'saw the Decree on Religious Liberty as a weapon that could be used against the Communist regime under which he grudgingly lived. He brought the Eastern bishops to support the decree, which helped . . . to enable it to achieve a conciliar majority . . . ." Leslie Griffin, Commentary on Dignitatis Humanae (Declaration on Religious Freedom), in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS 258 (Kenneth R. Himes ed., 2005).
expression.\textsuperscript{155} The objective basis for religious freedom in the dignity of the person is what justifies the state's obligation to respect the free exercise rights of all people, even those who have beliefs which are deeply wrong.\textsuperscript{156} Dignitatis Humanae states "the right to [immunity from external coercion in matters of conscience] continues to exist even in those who do not live up to their obligation of seeking the truth . . . ."\textsuperscript{157} Further, this right is not limited to a right to hold wrong beliefs in the privacy of one's mind; it extends to the free exercise of one's religion, including public worship, the education of one's children, free association with others, and "public teaching and witness to [one's] faith."\textsuperscript{158}

\textsuperscript{155} John Courtney Murray, one of the principal architects of Dignitatis Humanae, explained that in contrast to some earlier formulations, in the final version of the document "[the] basis for the right to religious freedom became the objective dignity of each human person, not the subjective freedom of conscience." See id. at 253. This shift was necessary because "one person's right to follow his or her erroneous conscience could not obligate another person to respect or honor it. A subjective belief in rightness could not provide the objective foundation for legal rights against the state." Id. at 252-53.

\textsuperscript{156} Dignitatis Humanae clearly states that the "one true religion subsists in the Catholic and Apostolic Church" (implying that those who follow other religions are, at least in some sense, wrong). Pope Paul VI, Dignitatis Humanae: Declaration on Religious Freedom para. 1 (1965) [hereinafter Dignitatis Humanae]. Wojtyla consistently urged the drafters of Dignitatis Humanae to emphasize the close relationship between freedom and truth. Griffin, supra note 154, at 257.

\textsuperscript{157} Dignitatis Humanae, supra note 156, at para. 2.

\textsuperscript{158} Id. at paras. 3, 4, 5. The right to free exercise is limited throughout the document by reference to the concept of "public order." See id. at para. 2 ("the exercise of this right is not to be impeded, provided that just public order be observed."). Dignitatis Humanae elaborates the concept of public order by saying that it arises "out of the need for the effective safeguard of the rights of all citizens and for the peaceful settlement of conflicts of rights, also out of the need for an adequate care of genuine public peace . . . . and finally out of the need for a proper guardianship of public morality." Id. at para. 7. Outsider jurisprudges and others in favor of racist hate speech regulation could be taken to make the argument that permitting such speech allows a serious disruption of public order. Matsuda and Shiffrin argue that racist hate speech infringes on the participation rights of its victims. See supra Part II.B.2 and Part II.B.3. Lawrence discusses the way racist hate speech is frequently intended to "silence" its targets and focuses on verbal assaults as a precursor to violence (disrupting the public peace). See supra Part II.B.1.

Wojtyla was very skeptical of the somewhat vague "public order" language in Dignitatis Humanae because he believed that it opened the door to state repression of religious expression. Griffin, supra note 154, at 258. "The Poles did not like this criterion of 'public order' because it was precisely what their government used as a cloak for its arbitrary acts of repression." Id. (internal quotes omitted). But see Gerald J. Beyer, Freedom, Truth and Law in the Mind and Homeland of John Paul II, 21 Notre Dame J. L., Ethics & Pub. Pol'y 17 (2007). Beyer argues that "public order" can be a useful principle when it is adequately
Dignitatis Humanae, while not directly addressed to the topic of free speech, is important because it lays out the theological, anthropological, and moral justification for John Paul's toleration of the beliefs and religious practices of those he regarded as deeply mistaken.


John Paul's major contribution to the idea of human dignity was his emphasis on the relationship between human freedom and truth. "John Paul II stressed freedom in the service of the truth about the human person. . . . When the truth about the dignity of every human person is silenced, as it was by the Nazis and the Soviet regime, the very basis for human rights is undercut."159 Because this Note is about freedom of speech, I will focus on John Paul's statements about the nature and goals of intellectual inquiry.

Anthropologically, John Paul II said that "[o]ne may define the human being . . . as the one who seeks the truth."160 Because of the impossibility of personally investigating every truth-claim she encounters, "the one who seeks the truth . . . is also the one who lives by belief."161 He asserted that each person was capable of coming to the knowledge of the truth regardless of "race, social status and gender,"162 but he also acknowledged that one's search for truth could be distorted or obscured by "[t]he natural limitation of reason and the inconstancy of the heart . . . ."163 The freedom to seek the truth and embrace it is the freedom to be fully human.

John Paul II also emphasized the relationship between morality and freedom. Echoing the seminal documents of the Second Vatican Council, he said "there can be no morality without freedom: 'It is only in freedom that man can turn to what is good.'"164 He also said that "[a]lthough each individual has a grounded in the anthropological truth about the dignity of the human person articulated by John Paul II. See id. at text accompanying notes 102-21.

159. See Beyer, supra note 158, at 31-32 and text accompanying notes 56-57.
161. Id. at para. 31.
162. Id. at para. 38 (commenting on early "Christianity's contribution to the affirmation of the right of everyone to have access to the truth" in contrast to "[t]he elitism which had characterized the ancients' search for truth . . . .").
163. Id. at para. 28.
right to be respected in his own journey in search of the truth, there exists a prior moral obligation, and a grave one at that, to seek the truth and to adhere to it once it is known." Nevertheless, he reiterated that coercion in matters of conscience is wrong: even in the crucial area of religious truth, "[t]he Church proposes; she imposes nothing. She respects individuals and cultures, and she honours the sanctuary of conscience." For John Paul II, the negative liberty of freedom from coercion in matters of conscience was a consequence of the positive duty of each person to seek the truth. Nevertheless, he recognized the right of even those whom he believed to be deeply wrong to hold and express their beliefs in freedom.

John Paul's deep-seated commitment to human freedom should give us pause. John Paul II believed that our deepest fulfillment and only true liberation could come through surrender to Jesus Christ. Even so, he rejected attempts to impose this truth, which he viewed as absolute, on others. If John Paul II remained committed to invite and persuade instead of coerce in the face of absolute certainty about absolute truths, then we who are equally certain of the rightness of our anti-racism project ought to be at least equally humble. On the other hand, understanding the destructive nature of racist hate speech, we should be skeptical of responses to hate which leave its victims without redress and which allow for the growth of the kind of toxic racist propaganda which flourished before and during the Second World War.

IV. APPLICATION: DIGNITY AS FREEDOM FROM RACIST HATE SPEECH AND DIGNITY AS FREEDOM TO SPEAK

A. "What would John Paul do?" Some Reflections on Racist Hate Speech Regulation in the United States

What are the implications of John Paul's moral philosophy for the regulation of racist hate speech in the United States? John Paul's teaching on solidarity and human-dignity-as-freedom-of-conscience pull in opposite directions—and they can provide a useful balance to each side of the racist hate speech debate.

165. *Veritatis Splendor*, supra note 164, at para. 34.1.
167. See *Veritatis Splendor*, supra note 164, at para. 34 ("As Cardinal John Henry Newman... forcefully put it: 'Conscience has rights because it has duties.")
First, we have a moral obligation to act out of love-based solidarity with the victims of racist speech. We should actively seek to listen to their voices and find ways to address the harm they have suffered. We should also at least consider the appropriateness of a legal remedy for the injustice they have experienced. Although the examples raised by Donald Lively show that not all victims of contemptuous racist speech are interested in legal remedies, many are—and their voices deserve our serious, sustained attention. This concern is closely related to the responsibility, in a democracy, to ensure that all members of society are able to participate in the public realm as fundamental equals. On a more visceral level, the close historical connections between certain kinds of speech and violence make the demands for legal regulation against racist hate speech both comprehensible and urgent. Such connections are clearly drawn in John Paul's observations on the effects of racist Nazi propaganda on Europe prior to and during the Second World War, and the Supreme Court's finding that the history of Ku Klux Klan activity in this country can make the burning of a cross with intent to intimidate a proscribable "true threat."

Second, we cannot abandon the commitment to freedom of conscience, because it is essential to human dignity. Out of the concern not to silence, and to rely on persuasion, and to respect the human dignity of even deeply wrong racist speakers, arises a push against regulating most kinds of speech, particularly speech where a reasoned response is possible. This category would include, paradoxically, most public speech because the public square is the arena in which counterspeech is most likely to occur, and where the opportunity to persuade and oppose racist hate speech is most available to us. This creates a significant obligation on the part of those of us who reject racist hate speech, namely, to take advantage of this opportunity to speak clearly, repeatedly and forcefully against it. If a legal approach is chosen, it also sets our sights on regulations which are very limited in scope.

Knowing the harm caused by contemptuous racist speech, we cannot refuse to give justice to those who have been its target. The question becomes not whether we should act on their behalf, but how. Outsider jurisprudences like Matsuda and Lawrence urge us to use the tool of the law. Civil libertarians like Nadine Strossen reply that increasing the power of the state will cause more harm than good, and that real progress can be made

168. See generally Fiftieth Anniversary, supra note 136.
169. See Virginia v. Black, 538 U.S. 343, discussed supra Part I.D.
using the tools of civil society. Because the stakes are so high on both sides of the discussion, it is worthwhile to continue to revisit the proposed legal solutions to see if they can be crafted to accommodate both the demands of the American Constitutional system and the moral obligations of free speech.

B. Legal Approaches to Racist Hate Speech Revisited: Content-Neutral Fighting Words and Miller-type Obscenity Laws

A thorough review of the Supreme Court’s free speech jurisprudence is beyond the scope of this Note. However, no racist hate speech regulation proposal can be properly crafted without a deep understanding of the concerns and doctrines which animate this area of the law. This is so not just for pragmatic reasons (whether this Supreme Court at this point in time would be likely to sustain such a law), but for principled ones as well. The United States has a unique and cohesive constitutional tradition, and even as we seek a deeper understanding of the (in)equities of racist hate speech it is important to respect the contours and insights of the particular legal tradition within which we function. This is a principle recognized implicitly in John Paul’s phenomenology and in the tradition of moral reasoning in which he stands. The question with regard to hate speech becomes: Is it possible to achieve legal redress for this injustice within our constitutional tradition? To answer, each proposal must be evalu-

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170. See, e.g., Pope John Paul II, Christifideles Laici: On the Vocation and the Mission of the Lay Faithful in the Church and in the World (1988). “The lay faithful given a charge in public life certainly ought to respect the autonomy of earthly realities properly understood . . . .” Id. at para. 42. See also Romans 13. Of course, when a law is manifestly unjust it ceases to command obedience; however, at the same time, “public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause more serious harm . . . .” Pope John Paul II, Evangelium Vitae: Gospel of Life para. 71 (1995) (citing St. Thomas Aquinas). The Supreme Court seems to regard hate speech regulation as an example of the latter. For an example of this kind of reasoning, see R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), discussed supra Part I.C.

171. Cf. Michael McConnell, America’s First “Hate Speech” Regulation, 9 Const. Commentary 17 (1992). McConnell discusses the Maryland Toleration Act of 1649, which contained a list of religion-based insults which could not be used in the state, including “Popish priest.” Id. at 18. He remarks: “[O]ur early history shows that lawmakers no less committed to a free society than most of us came to the conclusion that a free, equal, and tolerant society must protect its principles from the forces of intolerance, even when they manifest themselves in speech.” Id. at 23. At the same time, McConnell notes the difficulties in drafting modern speech codes that are “broad enough without being vague” and the ever-present possibility that government officials will “use their power over speech to advance their own ideological causes at the expense of dissenters.” Id.
ated not only on its own merits but also for how it fits into the larger picture of American free speech jurisprudence.

The Supreme Court addressed the issue of hate speech most directly in *R.A.V. v. City of St. Paul*. The Court struck down a city ordinance banning hate speech because the law had the effect of specifically banning some viewpoints and not others. Despite its very broad language, the ordinance had been construed by the courts below to apply only to so-called “fighting words,” a category of speech that is not protected by the First Amendment. Nevertheless, the Supreme Court held that laws which regulate speech based on its content are always subject to strict scrutiny, even when the kind of speech they regulate is otherwise unprotected.

Given the current state of free speech jurisprudence in America, the face-to-face assaultive speech rules proposed by Shiffrin and Lawrence are unlikely to pass constitutional muster. They, like the St. Paul ordinance struck down in *R.A.V.*, regulate speech based on state hostility to the underlying message being expressed—in this case racism or bias against others based on certain enumerated grounds. It is important to note that although both proposals contain language which references the fighting words doctrine in *Chaplinsky*, this facial similarity was not sufficient to save the St. Paul ordinance. The proposals advanced by Shiffrin and Lawrence are not content-neutral and are unlikely to be upheld as constitutional.

1. Fighting Words Statutes

One way of addressing the harms of racist speech would be to simply write and enforce more statutes banning all “fighting words” without distinction as to content. Such a law could run the risk of capturing large amounts of speech many Americans would find only marginally offensive, such as non-racist obscenities. A well-drafted law would also capture many racist epi-

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172. 505 U.S. 377, discussed *supra* Part I.D.
173. See *Chaplinsky*, 315 U.S. 568.
174. For a discussion of the way that Germany and other European countries which ban some forms of racist hate speech use the same or similar legal mechanisms to ban much milder incivilities, see Whitman, *supra* note 2 (pointing out that in the law of insult, the Franco-German system “balances the value of free speech against the value of honor, [while U.S.] law balances the value of free speech against nothing at all—unless it is the value of the suppression of violence (and sometimes the value of the suppression of indecency).”).
thets which meet the definition of fighting words and which are capable of causing tremendous harm. 175

One obvious drawback to a content-neutral approach is that it does not directly address the ideological and historical dimensions of racism which Matsuda, Lawrence, and others find so crucial. Another outsider jurisprude, Richard Delgado, has proposed an approach that addresses some of these concerns while respecting the constitutional framework of R.A.V. 176 Delgado suggests that adding a content-neutral Chaplinsky-based fighting words statute to a legislative scheme which already includes a general bias-motivated crimes law would enable authorities to punish racist fighting words more severely without violating the content-neutrality required by R.A.V.

Heeding the mandate of the cross-burning case [R.A.V.], the campus ought to enact a code that is neutral on its face and punishes all types of severe interpersonal insult and invective equally. Then, elsewhere in the code, the campus should enact a provision that all campus offenses ... carried out with racial motivation are subject to enhanced penalties. That way, the campus can end up punishing insults based on ... race ... more severely. 177 This approach maintains the content-neutrality mandated by R.A.V. while permitting enhanced penalties for the kinds of race-based crimes that Matsuda, Shiffrin and Lawrence are concerned with.

Delgado’s approach is technically appealing in part because it avoids some of the subjectivity of laws which try to define “hate speech” directly. Instead of defining what counts as “hate speech,” Delgado relies on the uncontroversial (and fully constitutional) criminal law notion that the government may choose to punish a crime committed with a discriminatory motive more harshly than the same crime committed without the impermissible motive. 178 Further, from a practical standpoint, the drafters

175. Lawrence has done a good job of articulating why the “breach of the peace” element of the fighting words doctrine, read in isolation, penalizes women and minorities who have historically been the victims of violence or who are frequently faced with an interlocutor who is more physically powerful than themselves. See Lawrence, supra note 4, at 454. Indeed, he bases his argument in favor of the Stanford code in part on the allegation that racist fighting words have been traditionally excluded from the doctrine in practice.


177. Id.

178. See supra Part I.B (discussing bias-motivated crime laws). See also R.A.V., where Justice Scalia notes that the defendant was charged under two different laws and that he did not challenge his charge under the Minnesota
of the underlying fighting words statute will have strong democratic incentives to make their definition of "fighting words" narrow because it will apply to all speech, even speech with popular or widely accepted content. Delgado's fighting-words/bias-crimes proposal successfully incorporates the concerns of outsider jurists within the constitutional framework of R.A.V.

2. Obscenity-Type Statutes

Another possible approach to regulating racist hate speech would be to enact a statute similar to the sexual obscenity laws permitted in Miller v. California. Sexual obscenity is in some ways a special case in free speech jurisprudence. It is admittedly regulated based on its sexually prurient content. This content is considered harmful because it has "a tendency to exert a corrupting and debasing impact leading to antisocial behav-

racially motivated assault law, which is similar to the bias-motivated crime laws in Delgado's proposal. 505 U.S. 377 at 381.

179. 413 U.S. 15 (1973). The first prong of the Miller test requires that the average person find that the obscene work appeals to the prurient interest, establishing a reasonable person standard. Id. at 24. An analogous test for racist hate speech might, for example, require that a reasonable person find that the speech appeals to the desire to show hatred and contempt or to act violently towards another on the basis of race. Similar to Miller, this prong would be deliberately designed to leave large areas of speech readily identified as racist untouched, and only target the most egregious forms of racist hate speech.

The second prong of Miller requires that the obscene work contain "sexual conduct specifically defined by the applicable state law." Id. This prong goes to concerns about vagueness and requires states to be as clear as possible in their legislation so that all concerned are aware of what is and is not considered obscene. In the hate speech context, where vagueness is a serious concern, the requirement that states explicitly define what would and would not be regulated under the law, using specific examples of unacceptable speech acts, would be crucial in order to avoid chilling vast areas of otherwise protected speech.

The final prong in Miller requires that "the [obscene] work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. In the racist hate speech context, an analogous prong would protect works of literature like Huckleberry Finn and comedy, music, or political commentary addressing racism. Mark Twain, Adventures of Huckleberry Finn (Victor Fischer et al. eds., 2003). It would also undoubtedly exempt much overtly racist speech and literature from regulation.

The Miller test also includes a community standards prong which allows for regional variations in the level of obscenity that will be tolerated. A community standards prong does not seem relevant in the context of racist speech, particularly given the historic variations in state-sponsored racism throughout the country. Coming at it a different way, those who, like Shiffrin and Matsuda, argue for different standards based on the identity of the speaker may find a different kind of "community standard" prong (allowing lawmakers to draw a distinction between intra- and inter-group speech) appropriate.
Unlike the many other kinds of speech which could have a harmful impact on its hearers or induce them to engage in "antisocial behavior," obscenity is unprotected because it is considered of little or no "value" for First Amendment purposes. In fact, in order to be considered obscene under the Miller test, expression must lack "serious literary, artistic, political, or scientific value." 

Certainly racist speech has been shown over and over again to have a "corrupting and debasing impact leading to antisocial behavior." John Paul's lessons drawn from the hard school of pre-war Europe, coupled with the testimony of African-Americans and others who have endured the legacies of racist speech in this country, tell us this story. However, much speech that has been called "racist" has a very high idea content and takes the form of political, literary, or (pseudo-)scientific commentary.

In theory, though, it seems possible to regulate racist speech which lacks "serious merit" much in the same way that sexual depictions which lack such merit are regulated, by imposing the four requirements of Miller on any anti-hate speech law.

However, a Miller-style racist speech regulation faces the same kinds of obstacles as the Chaplinsky-style hate speech regulations proposed by Shiffrin, Lawrence, Matsuda, and others. Miller is somewhat unique among free speech doctrines in American law because it regulates expression based on its (sexual) content. As an outlier, it is an unlikely candidate for expansion to the whole new category of racist speech. Perhaps more importantly, a Miller-based racist speech law would run into the same obstacle faced by Chaplinsky-based hate speech laws: R.A.V. As noted above, R.A.V. specifically forbids the government from regulating speech, even low-value speech, based on its content. A Miller-type test aimed at racist speech is not content-neutral within the meaning of R.A.V because it bans racist speech and not other kinds of speech.

It is unlikely that either the fighting words approach or the obscenity-type approach to regulating racist hate speech will be considered constitutional in U.S. courts. The speech codes passed on college campuses in the 1980s and 1990s did not fare well before the courts. Federal district court decisions striking down university speech codes roughly similar to the Stanford

181. Miller, 413 U.S. at 24.
182. For a discussion of the need to respond to "academic" racist speech with counterspeech rather than regulation, see Matsuda, supra note 4, at 2563–65.
183. See supra Part I.C.
code supported by Lawrence continue to show the extreme difficulties in crafting constitutionally valid speech regulations. What is clear is this: the truths of human dignity and equality cut two ways, calling us to restore those who have been silenced by racist hate speech and to respect the conscience of even the most deeply wrong speakers.

CONCLUSION

At the beginning of this Note, racist hate speech was likened to a junkyard filled with dangerous objects. Current First Amendment jurisprudence requires the state to treat even the junkyard of racist hate speech with the utmost care when enacting speech regulations. A hate speech regulation targeted at racist speech in particular, or indeed any speech motivated by a particular animus, is unlikely to withstand constitutional scrutiny after the Supreme Court’s decision in \( R.A.V. v. City of St. Paul \). However, the government is not the only actor in the fight against the ideology of racial supremacy. This Note has focused on racist hate speech regulations because of their ubiquity in democracies outside of the United States and because of the persistent arguments for regulation made by scholars like Matsuda and Lawrence. The struggle to come to grips with racist hate speech has social, moral, economic, and spiritual dimensions as well as legal ones. These cannot be ignored, and at the end of the day, they may be the most important dimensions of all.

The moral philosophy of John Paul II tells us the importance of continuing to seek ways of recognizing the harm caused by racist speech and establishing mechanisms for both practical and symbolic justice for its victims. Our responsibilities in this regard do not end if our government cannot or will not act in law. Echoing the message of Jesus in the Sermon on the Mount that the wellspring of contempt is the human heart, the Vatican issued the following statement towards the end of John Paul’s papacy:

It is not through external means—legislation or scientific proofs—that racial prejudice can be uprooted. It is indeed not enough that laws prohibit or punish all types of racial discrimination: these laws can easily be gotten around if the community for which they are intended does not fully accept them. To overcome discrimination, a community must interiorize the values that inspire just laws and live out,

185. \( R.A.V. \), 505 U.S. 377.
in day-to-day life, the conviction of the equal dignity of all.\textsuperscript{186}

Living out "the conviction of the equal dignity of all" is a non-delegable responsibility which belongs to each of us as part of the human community and as members of the political and social community of the United States. In his final World Day of Peace message, delivered in January 2005, John Paul said, "[n]o man or woman of good will can renounce the struggle to overcome evil with good. This fight can be fought effectively only with the weapons of love. When good overcomes evil, love prevails, and where love prevails, there peace prevails."\textsuperscript{187}

\textsuperscript{186} The Church and Racism, supra note 145, at 54.
