As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society

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[W]hat should experience be but a future implicated in a present!

—John Dewey[1]

[Humanity's] capacity for justice makes democracy possible; but [humanity's] inclination to injustice makes democracy necessary.

—Reinhold Neibuhr[2]

Introduction

This Article will argue that liberty, free speech and equality are not separate independent norms. Instead, they are related and must be evaluated based on the requirements of justice.[3] Mortimer Adler asserts that the amount of liberty or equality permitted be as much as justice requires.[4] Just as there is no one concept of justice, I will also argue that our conception of the self is anemic and needs to be enriched. Much of our thinking about law, liberty and equality is based on an enlightenment view of a unitary stable self that is not plausible. I will suggest that the self is multiple,

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1. JOHN DEWEY, *The Need For a Recovery of Philosophy, in* ON EXPERIENCE, NATURE, AND FREEDOM 27 (Richard Bernstein ed., 1960).

2. REINHOLD NEIBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENSE xi (1944).

3. This is similar to John Rawls' argument asserting that liberty and equality are contextualized in the norm of "justice as fairness." *See* JOHN RAWLS, A THEORY OF JUSTICE 13 (1973). While one might argue for different notions of justice, the notion precedes the question of the appropriate amounts of liberty and equality afforded to individuals by society. *See* MICHAEL WALZER, SPHERES OF JUSTICE 31-32 (1983).

4. *See* Mortimer J. Adler, We Hold These Truths: Understanding the Ideas and Ideals of the Constitution 97 (1987).

fractured and interdependent, and that this has important implications for how we should think about speech and equality as part of a democratic project. Our approach to the self in general and racial categories in particular may be reconceptualized. This reconception has important implications for law. I will also assert that popular slogans such as "more speech" as a remedy for injurious speech are counter-factual and normatively wrong. My goal in this Article is to sketch a normative and pragmatic view of free speech and equality that is grounded in participatory democracy as justice and a more realistic view of the self.

Like a richer view of the self, racial categories are not static, natural or coherent. Race is a social construct, and powerful social forces operate to render racial classifications opaque. Language materializes racial constructions. Epithets and similar linguistic constructions seriously harm minority members of society, individually and collectively, because of what such constructions suggest about the described individual's place within our social fabric. Yet when society debates the issue of how to regulate hate speech, the focus is primarily on the infringement of liberty interests. Unfortunately, we often overlook or misunderstand abuses of free speech, such as the tendency of free-speech advocates to portray their opinions in a way that precludes others' ideas.[5] Most Americans, including scholars and judges, take it as self-evident that we are free to "speak our minds."[6] Yet as Professor Fish observes, "restriction, in the form of an underlying articulation of the world that necessarily (if silently) negates alternatively possible articulations, is constitutive of expression. Without . . . an inbuilt sense of what it would be meaningless . . . or wrong to say, there could be no assertion and no reason for asserting it."[7] Nonetheless, the assertion that free speech in fact is not "free," and should not be free, involves for many a degree of cognitive dissonance.[8]

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5. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH (AND IT'S A GOOD THING, TOO) 102 (1994) [hereinafter FISH, SPEECH]. "'Free speech' is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors *that* name when we can . . . because in the rhetoric of American life, the label 'free speech' is the one you want your favorites to wear." *Id.*

6. *See* john a. powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 11 (1996) [hereinafter powell, *Worlds Apart*] (offering anecdotal evidence of this perception).

7. FISH, SPEECH, *supra* note 5, at 103.

8. In one sense, there is nothing terribly provocative about the notion that free speech isn't "free." This fact has always been recognized to some extent, as evidenced by the famous dissents of Holmes and Brandeis in *Gitlow v. New York*, 268 U.S. 652 (1925). In *Gitlow*, Holmes eloquently states that "[e]very idea is an incitement. It offers itself for belief and if believed it is acted on unless some other

This discomfort occurs precisely because our tradition purports to embrace unconstrained expression.[9] First Amendment discourse traditionally forms part of the larger, more general narrative of liberty. Within this liberty narrative exists a rich but incoherent array of values that scholars often invoke to support an expansive notion of free speech.[10] Free expression occupies a privileged position in our democratic society because many feel that *any* suppression would stifle the liberty and autonomy interests of the speaker, listeners and society in general.

In recent years, courts and scholars have begun to question to what extent and under what conditions speech actually promotes individual autonomy,[11] checks censorship[12] or ensures the attainment of truth and knowledge[13] in an uninhibited marketplace of

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belief outweighs it . . . ." *Id.* at 673. Holmes goes so far as to suggest that if the price of free speech to a free society is the overthrow of that society, that price must be paid. *See id.*

9. *See* FISH, SPEECH, *supra* note 5, at 115 ("Absent some already-in-place and (for the time being) unquestioned ideological vision, the act of speaking would make no sense, because it would not be resonating against any background understanding of the possible courses of physical or verbal actions and their possible consequences.").

10. *See* ADLER, *supra* note 4, at 140-44; LEE C. BOLLINGER, THE TOLERANT SOCIETY 57 (1986) [hereinafter BOLLINGER, TOLERANT SOCIETY]; Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 979-80 (1990) [hereinafter Bollinger, *Response*]. The genealogy of liberty's privileged position can be found most apparently in Lockean and Enlightenment notions of individualism, although Calvinist Protestantism, incipient consumer capitalism, and even the claims of republicanism contributed to what became by the mid-nineteenth century a rights mentality. *See* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 365-67 (1986). Tyrannies are perceived to share the essential attribute of evil, but the value emphasized in response to this evil is a function of zeitgeist, rather than an absolute antidote. Thus, although liberty was the value emphasized by the founders as the antidote to the evil of tyranny, *see* ADLER, *supra* note 4, at 140-44, there is a consanguine, if not wholly overlapping, genealogy with respect to the role of liberty in vitiating specific tyrannies. *See* Kenneth L. Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME LAW. 183, 183-99 (1980).

11. *See* Rosenbloom v. Metromedia, 403 U.S. 29, 41 (1971) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)) ("Freedom of discussion . . . must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

12. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (discussing the First Amendment as a check on governmental abuse of power through restriction of critical expression).

13. *See* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1941) (Hand, J.) (The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963). The attempt to develop a comprehensive theory of the First Amendment encompasses many years and many commentators. Professor Emerson, a noted proponent of free speech, nonetheless ad-

ideas.[14] To promote these values, orthodox proponents of free speech argue that suppression of expression cannot be justified unless the speech falls within a recognized category of harmful speech.[15] Therefore, orthodox free speech advocates refuse to ex-

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mits that the effort has not been adequate. *See id.* at 878-87. His own effort, in turn, continues to be criticized as inadequate. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47-50 (1989) (discussing Emerson's second and fourth values, the advancement of knowledge and the achievement of an adaptable and stable community); BOLLINGER, TOLERANT SOCIETY, *supra* note 10, at 43-103 (discussing the classical model of free speech); OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996) (characterizing the free speech controversy as not only a conflict between liberty and equality, but also a conflict between liberty of individual expression and liberty of access to public debate).

14. *See, e.g.*, BOLLINGER, TOLERANT SOCIETY, *supra* note 10, at 18 (noting that society views free speech based on the "marketplace of ideas" principle); RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS pt. I (1997) (providing a chapter each on hate speech and pornography and legal responses to the issue of harm); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); THE PRICE WE PAY (Laura J. Lederer & Richard Delgado eds., 1995). Each of these works posits that, to a greater or lesser extent, much of the expression protected under the First Amendment cannot be brought under the shelter of conventional justifications, such as truth seeking. Each also suggests that the cost of responding to expression which is harmful often remains an unexamined aspect of justification; that is, the cost to liberty is presumed to be too high, but this is never discussed. *See* Bollinger, *Response*, *supra* note 10, at 981-82.

Commentators and courts increasingly recognize that speech can be, and often is, not just offensive but harmful. Hateful forms of expression, such as racist aspersion and pornographic imagery, can inflict concrete injuries that do not fall readily into traditional speech justifying frameworks. For a discussion of psychological harm in the context of hate-speech and pornography see GORDON ALLPORT, THE NATURE OF PREJUDICE (1954) (also noting that racism harms the perpetrator by inhibiting mental development); DELGADO & STEFANCIC, *supra*, at pt. I; James V. P. Check, *The Effects of Violent Pornography, Nonviolent Dehumanizing Pornography, and Erotica: Some Legal Implications from a Canadian Perspective*, *in* PORNOGRAPHY: WOMEN, VIOLENCE & CIVIL LIBERTIES 351-54 (Catherine Itzin ed., 1992) (noting the legal issues of obscenity); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 591 (arguing that "pornography is 'low-value' speech, entitled to less protection from government control than most forms of speech . . . [and] can be regulated consistently with the first amendment").

Although the harm stemming from speech acts often suggests notions such as intentional infliction of emotional distress, and other tort-style injuries, inhibition of the opportunity to participate fully in one's community is perhaps the greater harm. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, 17 HARV. C.R.-C.L. REV. 133, 143 (1982). It is commonly noted that harm is difficult to quantify. However, this is true throughout tort law, as for example, in wrongful-death cases. The mere fact that speech can inhibit participation suggests that it is a democratic harm and thus partially undermines utilitarian arguments. *See generally* Bollinger, *Response*, *supra* note 10, at 981 (discussing the sources of law's frequent inadequacy in dealing with future harm); powell, *Worlds Apart*, *supra* note 6, at 56-66 (discussing responses to utilitarian justifications for free speech)

15. *See* KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE 143-48 (1989) (providing a list of free speech exceptions).

amine harms from speech falling outside of the recognized categories.

This approach is exemplified by the Supreme Court's decision in *R.A.V. v. City of St. Paul.*[16] This case examined the constitutionality of a city ordinance which allowed the prosecution of an individual who burned a cross on the front yard of an African-American family.[17] The Court determined that the city ordinance proscribing speech that insulted, injured or provoked violence on the basis of race, color, creed, religion or gender was unconstitutional because its prohibition discriminated against disfavored subjects.[18] Rather than view the case as one that posed the equality interest in participatory access to one's community against another individual's interest in free expression, the Court treated the case as one involving solely issues of free speech and censorship.[19] The Court's one-sided treatment of conflicting values highlights the failure of the dominant narrative to encompass any argument asserting that expression not only serves to cultivate personal autonomy, but can also undermine it. At the same time, *R.A.V.* vividly illustrated that very little falls within the doctrinal category of "harmful speech that can be regulated."[20] Justice Scalia, while repeating a litany of categories that had been said to exist outside "the area of constitutionally protected speech,"[21] nonetheless observed that no category of speech "is entirely invisible to the Constitution."[22] In other words, *R.A.V.* epitomizes the dominant narrative insofar as it privileges the act of expression over any other consideration, even when other constitutional norms are at issue.

While the exalted status of the First Amendment among liberal values is understandable,[23] history teaches that no one value

16. 505 U.S. 377 (1992).

17. For an extended treatment of the facts of the case, see Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992).

18. *See R.A.V.*, 505 U.S. at 378.

19. *See id.* (lacking any discussion of equality or participation).

20. *Id.* at 382-83 (discussing categories of harmful speech).

21. *Id.* at 383 (quoting Roth v. United States, 354 U.S. 476, 483 (1957) (referring to obscenity)).

22. *Id.*

23. *See* ADLER, *supra* note 4, at 140 (observing that our deeply ingrained appreciation of liberty values in the American tradition stems from overthrow of tyranny, and that the founding fathers were "first and last, proponents of liberty, with either no thought about an equality of conditions for all or, worse, with obstinate prejudices against it."); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 25-43 (1967) (contending that the founders were primarily concerned with the threat of corrupt and arbitrary uses of power, and by exten-

supporting democratic society remains static, either in importance or in application.[24] The reverence the First Amendment has traditionally been accorded as a means of vitiating multiple tyrannies should not mean that classic doctrinal formulations are sacrosanct.[25] This Article suggests that a democratically valid judicial decision must clearly enunciate a conception of justice informed by an awareness of the multiple values within our society and the multiple identities within ourselves.[26] Reformulation of identity in

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sion, with accountability and legitimacy in the exercise of political authority); Blasi, *supra* note 12, at 528-38 (explaining the importance of free expression because it checks the abuse of power); *cf.* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1146 (1991) (suggesting that the First Amendment was not intended to be "first" in a foundational sense, but rather worked in concert with two other proposed amendments to provide a structural barrier against pursuit of self-interested agendas).

24. The history of equal protection law provides an obvious example of a change in the degree of valuation over time. At the time of *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court was unable or unwilling to see that the stigma of alienating treatment undermined the value of equality. By the time of *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court was able to recognize that the psychic harm of segregation undermined Black students' sense of equality. As Professor Schauer notes, arguments for limiting free speech during the middle part of this century were primarily based on concern for conflict of the right to expression with accepted values such as national security and public order. *See* Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1285 (1983). Changes in First Amendment doctrine can largely be attributed to changes in the relative values accorded to these competing interests over time.

25. The purpose of this Article is not to weigh in favor of either free speech or equality at the expense of the other, but to suggest that the inclination to privilege absolutely one set of values, principles, and metaphors over the other is too often a function of misunderstanding and myopia infused with power. This problem can be described as one of "rational prejudgment," a concept which suggests that legal judgment is largely if not wholly indeterminate. *See* RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 124-25 (1990) (observing that conflict of interest recusals and divisive appointment politics support the common-sense notion that judges analyze fact patterns from their own, usually unconscious, narrative framework). It is only when narratives are largely coterminous that legal decision-making takes on the trappings of neutrality and inevitability, and the appearance of an autonomous discipline capable of applying valid rules to reach determinate results. *See id.* at 430-33 (discussing the legacy and demise of the Legal Process school).

26. What is already clear is that recourse to justice cannot be grounded on an objective and transcendental claim. This Article follows Professor Torres in applying to legal analysis the insight that there is not justice, rather there are justices. *See* Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993, 994 (1991). The divergent conceptions of justice can be viewed as strategies to achieve particular results, to either transform or perpetuate racist society. Professor Fish notes that the absence of neutrality compels the conclusion that First Amendment doctrine is purely a matter of politics, and that is why George Bush could support a constitutional amendment prohibiting desecration of the flag while at the same time opposing hate speech regulation. *See* FISH, SPEECH, *supra* note 5, at 110. However, justice represents more than just strategy. We also resort to the concept on the basis of a

light of the insights proffered by critical race and post-modern theorists suggests that the classic remedy for harmful speech—that is, more speech—will, in some instances, perpetuate disparities of power and destabilize our sense of self. The marketplace of ideas cannot self-regulate so long as objections to lack of participatory access are subsumed by claims that the liberty interest in expression is primary to the equality interest in participatory access. A self-regulating marketplace presupposes an equal starting line—an assumption that has never been a reality in American political life.[27]

Although much has been written on the topic of the harmful aspects of speech, too little attention has been given to the ways that racial identity informs and constrains society's ability to engage in productive dialogue. This impediment in turn undermines the efficacy of more speech as an antidote to expression that harms the participation interests of marginalized members of society as well as distort the participation of the majority. This Article attempts to identify some of the psychological and social constructions that hamper efforts to mediate between the reality and the formalism of First Amendment jurisprudence. Part I briefly describes the traditional narrative of the First Amendment, focusing on the argument that more speech serves as a panacea for any injury stemming from harmful expression. In addition, Part I examines the psychological concepts of participatory empathy and multiplicity and suggests that these concepts undermine a basic assumption of the "more speech" remedy—that all members of society have the ability to participate meaningfully in democratic institutions. Part II develops links between philosophical pragmatism and theories of justification and participatory access, emphasizing the implications of pragmatic insight into the profound constructedness of our institutions. Part III cautions that the values that are at stake when we talk about regulating hate

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belief that consulting a collective sense of justice substantiates and legitimizes a particular result. *See generally* john a. powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481 (1997) [hereinafter powell, *Multiple Self*] ("[T]here was a concurrent need to construct an ideology to justify certain practices, such as slavery and colonialism, which clearly violated norms emanating from an equal and essential self . . . [y]et the very manner in which modernists defined the self justified those practices.").

27. As Cass Sunstein points out, the First Amendment currently languishes in a sort of pre-New Deal torpor, in which existing distributions of power are considered inviolable. *See* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 264 (1992) (noting the applicability to the First Amendment of President Roosevelt's reference to "'this man-made world of ours' and his insistence that 'we must lay hold of the fact that economic laws are not made by nature. They are made by human beings'").

speech may be preserved through an adoption of a democratically pragmatic conception of participatory justice. This Article concludes by examining *Keegstra v. Regina*,[28] a Canadian Supreme Court case that serves as an example of how lucid reasoning concerning the fundamental interest in participatory access is capable of balancing the values of both liberty and equality.

This Article also concludes that in recognizing participation as a value superior to any significant experience of or aspiration to liberty or equality, authentic democratic foundations presuppose that all actors share a common narrative grounding. Recourse to the regulative ideals of democracy will not, of course, prove to be a panacea. Rather, by recognizing the plasticity and multiplicity embedded in a mature democratic vision, we can identify and work toward resolving unnecessarily pronounced tensions. Contextualized discussions of opposing narratives demonstrate that in many ways the referents are the same—the demand for equal liberty is also a demand for democratic equality.

I. Many Voices—One First Amendment

A. More Speech: The Traditional First Amendment Narrative

Free speech exists generally to promote personal and political autonomy, but scholars offer differing formulations of which specific values are significant.[29] Professor Emerson, for instance, has identified four principle values: "(1) individual self-fulfillment and self-realization, (2) truth finding, (3) participation in decision-making, and (4) balance between stability and change."[30] This framework has led to increasingly nuanced formulations,[31] but has proved incapable of providing a workable explanation about whether

28. [1991] 2 W.W.R. 1.

29. *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) (asserting that freedom of speech guarantees religious beliefs and ownership of property); Emerson, *supra* note 13, at 878-79 (examining the function of free speech in a democratic society); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (setting out justifications for free speech).

30. For a more complete discussion of the various criticisms and reformulations of Emerson's values, see powell, *Worlds Apart*, *supra* note 6, at 44-48. This Article focuses on how the value of participation may be inhibited or promoted by speech. When Professor Emerson discusses participation, he refers exclusively to the formal notion that as long as there are no overt constraints on participation, the autonomy, or liberty, interest in being permitted to participate in the laws one must adhere to is met. *See id.* at nn.150-51.

31. *See* BAKER, *supra* note 13, at 47.

each value is equally important, and how to resolve inevitable tensions resulting from situations in which these values conflict.[32]

In this traditional narrative, any limitation on the freedom of the speaker threatens her autonomy and self-development. While it is apparent that privileging the value of unrestrained expression will conflict with the value of participation, particularly in the sense that this choice will compromise the ability of disempowered groups to constitute themselves socially, society views the right to say whatever one chooses as primary.[33] The traditional claim is that free expression is privileged not only because it is necessary to the pursuit of truth and self-development, but also because free expression does not cause "real or substantial harm."[34] Even among those commentators who recognize that hateful speech can cause substantial harm, the value of expression in promoting autonomy and individual development invariably trumps the desire to limit speech.[35] Of course, it is impossible to ignore the paradox that a right designed to foster autonomy can have the effect of undermining others' autonomy.[36] Nonetheless, theorists attempt to finesse this point by adopting the position that only a narrow category of "coercive" speech warrants restriction.[37]

The classic formulation of the "marketplace of ideas" appears in Justice Holmes' dissent in *Abrams v. United States*.[38] The mar-

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32. Some commentators believe that the essence of free speech is the liberty right of the speaker. *See id.* at 47-51. Others suppose that the essence of free speech is its social and political force. *See* BOLLINGER, TOLERANT SOCIETY, *supra* note 10, at 46. It is clear that limitations on speech affect the autonomy of the speaker and that certain speech acts can compromise the rights of the listener. Few commentators believe that this tension can ultimately be resolved. *See* Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 289 (1991); *see generally* BOLLINGER, TOLERANT SOCIETY, *supra* note 10 (discussing the insufficiency of rationales proffered in support of the First Amendment).

33. *See* Post, *supra* note 32, at 273.

34. powell, *Worlds Apart*, *supra* note 6, at 58. Of course, the law of libel provides an obvious example of exceptions to the assertion that speech does not cause real harm. *See id.* at 58-59. Nonetheless, commentators often trivialize the harm that racist speech causes by claiming that it is only an insult or a harm to civility. *See id.* at 60.

35. *See* BAKER, *supra* note 13, at 50 (arguing that the foundational status of autonomy and individual liberty militates against utilitarian balancing of First Amendment rights).

36. *See* Frank A. Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339, 353 (1992) (noting that racist speech impairs communicative autonomy as well as participatory access to democratic institutions).

37. *See* BAKER, *supra* note 13, at 56. For a more extended discussion of this argument, see powell, *Worlds Apart*, *supra* note 6, at 62-64.

38. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth

ketplace of ideas is premised on the belief that the non-intervention of the state is the best guarantor of identifying truth and falsehood.[39] This premise has been challenged on several grounds. John Stuart Mill believed that there was a causal link between freedom of speech and attainment of knowledge.[40] The view that truth is self-evident, needing only expression to be recognized, however, assumes the existence of an objective truth that is identifiable.[41] It also assumes that the public will eventually identify what is true within a "marketplace of ideas."[42] If either of these assumptions is flawed in some way, as Professor Schauer observes, the proper response is an empirical inquiry into whether an open market does in fact maximize the attainment of truth.[43] One might ask why the same insights that law applies to economic markets—that disparities of power based on race, class, and gender discrimination are reproduced in an open market—should not also be applied to speech.[44]

In addition one may ask whether the basic assumptions of the marketplace of ideas might not also be faulty on psychological grounds, and if so, what might be the appropriate response within a pluralistic democratic framework. The ongoing debate regarding the permissibility of proscribing hateful speech to vindicate equality interests invites us to explore these issues.

The discourse about the relationship between free speech and equality arose in reaction to both psychological research confirming the dangers of pornography and a rash of incidents, including cross-burnings, racist graffiti in dormitories and residential areas, and physical attacks.[45] The corresponding promulgation of hate-speech regulation continues to occasion incisive law review articles

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is the power of the thought to get itself accepted in the competition of the market").

39. *See generally* KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (5th ed. rev. 1966) (chronicling a history of attacks upon free discourse).

40. *See* JOHN STUART MILL, *Of the Liberty of Thought and Discussion, in* ON LIBERTY 15, 33-52 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859).

41. *See generally* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 19-29 (1982) (discussing the relation of knowledge to open expression).

42. *See id.* at 16. "Freedom of speech can be likened to the process of cross-examination. As we use cross-examination to test the truth of direct evidence in a court of law, so should we allow (and encourage) freedom to criticize in order to test and evaluate accepted facts and received opinion." *Id.*

43. *See id.*

44. *See generally* FISS, *supra* note 13, at 12-17 (noting that media centralization skews the politics of scarcity); Sunstein, *supra* note 27, at 261 (arguing for a "New Deal" for speech).

45. *See* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 1-15 (1993).

and books,[46] but has produced little genuine dialogue. Instead, much of what passes for discourse may be better described as parallel debates or serial monologues.[47]

The debate is more complex than the predilection for absolutist solutions would suggest. This problem of complexity, however, is mostly one of perspective. That is, our narratives delimit our capacity for empathetic dialogue.[48] Unfortunately, we are usually unaware of the extent to which we operate within a particular conceptual framework or even that there are other, competing frameworks. This oversight impedes our ability to anticipate the response that a particular action will likely create in a person with a different perspective.

Journalists offer an excellent example of the way our narratives construct and constrict our interests and responses. I often receive calls from reporters after racist incidents on college campuses. They are almost always interested in whether explicitly racist incitements might lead to the consideration of policies to limit speech by the college. Very few are interested in the rise of explicit racism and the consequent threat to equal opportunity for minority groups on college campuses. To the extent that they recognize these issues, they see them as trumped by free speech concerns.[49] There is both a failure to seriously engage other perspectives and to see free speech as more than a unitary concept. There is an assumed harm associated with anything less than an absolutist view of speech and a trivialization of the serious harm that speech can and does cause. After speech is situated in a primary

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46. *See, e.g.*, FISS, *supra* note 13; HATE SPEECH AND THE CONSTITUTION: VOLUME 2: THE CONTEMPORARY DEBATE: RECONCILING FREEDOM OF EXPRESSION AND EQUALITY OF CITIZENSHIP (Steven J. Heyman ed., 1996) (collecting law review articles and other commentary on the topic).

47. *See* powell, *Worlds Apart*, *supra* note 6, at 27 (noting that even the most thoughtful works attempting to reconcile the values of liberty and equality end up privileging one or the other).

48. By "narratives" I do not mean to suggest that each of us has a story to tell, but that each of us is in fact our stories. As Oliver Sacks states,

> We have, each of us, a life-story, an inner narrative—whose continuity, whose sense, *is* our lives. It might be said that each of us constructs and lives a 'narrative', and that this narrative *is* us, our identities. If we wish to know about a [person], we ask 'what is [that person's] story . . . .'

OLIVER SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES 105 (1985). A significant implication of this view is that no language is merely descriptive. This has enormous ramifications for the study of law. *See generally* Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (noting that "[t]he experience of justice is intimately connected with one's perception of 'fact,' just as it is connected with one's beliefs and values").

49. This point is developed more fully in powell, *Worlds Apart*, *supra* note 6, at 11-12.

position, concern about racist hate speech and White domination through speech is seen as no more than a move to censor, or at least chill, speech. This happens without serious consideration of the chilling and more destructive effects of speech that maintain exclusion and racial dominance. Professor Fish similarly observes that when journalists reflexively complain that hate speech regulations may have a potentially "chilling effect," they focus on the right of expression to the detriment of other rights.[50] That is, they fail to consider how the chilling effect of hate speech impacts upon targeted minorities constitution of self or participation.

Of course, the world only makes sense because we have an orientation to it, and it is inimical to our social psychology not to identify with that perspective.[51] In ignoring or suppressing the subjectivity of our perspective, we fail to examine the multiple and various functions of speech that are at times in conflict with the values underlying freedom of speech. Problems occur when the lens through which we see the world destroys our ability to recognize that what is peripheral for us may be central or defining for others. Through this failure to notice and examine that which is outside the dominant perspective, the harm caused by the free speech regime is either undetected, or when detected, seen as negligible.

The self-absorbed focus exacerbates the perpetual nature of narrative structure. Divergent premises lead to ever more divergent solutions. Professor MacIntyre suggests that this problem of incommensurability makes many contemporary issues seem intractable:

> We thus inhabit a culture in which an inability to arrive at agreed rationally justifiable conclusions on the nature of justice and practical rationality coexists with appeals by contending social groups to sets of rival and conflicting convictions unsupported by rational justification . . . . Disputed questions concerning justice and practical rationality are thus treated in the public realm, not as matter for rational enquiry, but rather for the assertion and counter-assertion of alternative and incompatible sets of premises.[52]

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50. In recounting the story of a journalist writing for a university newspaper who complained that in the wake of hate speech regulation there would always be something in the back of his mind, Professor Fish comments that we respond by reminding him that there's always been something in the back of his mind, and his complaint merely begs the question of whether "it might be better to have this code . . . than whatever was in there before." FISH, SPEECH, *supra* note 5, at 111-12.

51. *See* HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS 3-8 (David E. Ling ed. & trans. Univ. of Cal. Press 1976).

52. ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 5-6 (1988).

The implications of this assessment are not as dire as they first appear. Professor MacIntyre does not mean that incommensurable narratives cannot be compared, but only that there is no neutral or natural vantage point from which to do this.[53] Rather, the challenge is to develop self-conscious heuristic devices which are capable of teasing out commonalities or, when necessary, fusing separate horizons.[54] Professor MacIntyre's observations undermine the objectivist argument for the marketplace of ideas. If there is no Archimedian point from which to compare assertions, then the various interpretive communities that constitute a democratic society ought to agree upon a framework in which to engage in dialogue. It seems obvious that the mere assertion of one narrative perspective, with no attendant concern for understanding competing world views, does little to promote social or political dialogue. Yet our free speech jurisprudence analyzes each individual act of expression independently, with little regard for how that expression fits into the complex web of social discourse. In a democratic system, which presupposes engaged citizens capable of discovering truth through debate and interaction, the marketplace of ideas might always serve the purpose of fostering political debate by providing a forum in which all participants have meaningful access. Denial of access in one situation or sphere may be less troubling if access were available in others. But many in our society are consistently denied meaningful access in a number of critical sites. This distorts the democratic process and our identities. Most free speech advocates do not even acknowledge this systemic problem, let alone offer remedies for it.

B. Participatory Empathy as a Function of Democratic Values

When speech exacts an injury, the call for more speech rings hollow and is often clearly wrong. It also obscures the fact that much harmful speech is designed to hurt and to undermine the autonomy of the victim. A threatening phone call, a cross burned on the lawn of a Black family or a swastika placed on the home of a Jewish family cannot be explained adequately in terms of the autonomy and expression rights of the speakers. Nor do remedies for property damage capture the harm to the recipient. Where

53. *See generally* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY (1989) (attempting to show that self-creation and human solidarity are equally valid, but incommensurable).

54. *See* RICHARD A. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM 162-63 (1983).

speech takes place in a larger community and causes offense, it might be more plausible to ameliorate the injurious effects with more speech, but only if certain conditions prevail.

For example, in *R.A.V.*, the cross-burner presumably intended to impress upon the Jones family that the Jones were not welcome in the community. That other community members do not share that sentiment does little to detract from the powerful alienating force of the statement. While the members of the Jones family may in fact have formal access to their community, perhaps through a letter in their community newspaper, they may presume correctly that such a response does little to engage the cross-burners in a dialogue. The cross burners have already conveyed the fact that they do not care to hear what the Jones family has to say.

The unfortunate reality is that the "more speech" remedy is ineffectual where one party to an exchange lacks the capacity for empathetic and respectful dialogue and the other lacks the power to mandate engagement. Where parties to an exchange share little in the way of overlapping narratives, assertions and counter-assertions are likely to remain parallel, passing each other without ever engaging the intended listener. This does not mean that members of a democratic society should not strive to gain an understanding of perspectives outside their own experience. Nonetheless, the current reality, ignored by the traditional First Amendment narrative, is that the marketplace of ideas is not only skewed, but by its nature incapable of neutrality. The marketplace of ideas excludes and thus reproduces disparities in power. Disparities in power lead to disparities in participatory access. It is clear that in many hate speech cases the purpose and the effect is to injure and exclude, not to find the truth or engage in mere self expression.

The marketplace of ideas metaphor became popular when society still believed in an objective truth. As this belief has been undermined, the apparent power of the metaphor is called into question. Some commentators have recognized this and have suggested a foundation based on a weaker claim of objective truth. Bollinger has argued for more speech based on a tolerance rationale instead of a truth rationale, and Baker has used liberty as his foundation.[55] I have suggested that the function and values related to speech are varied and multiple, which suggests that the

55. *See* BOLLINGER, TOLERANT SOCIETY, *supra* note 10, at 140-44; BAKER, *supra* note 13, at 67-69.

foundation and justification for speech must also be varied and multiple. But because of the unstable and multiple nature of speech values and truth, I assert that participation in the democratic self-constitutive process is prior to liberty and tolerance in many sites.

While the value of respect has received significant attention,[56] too little commentary exists discussing the uneasy relation between empathy and law.[57] As used in this Article, empathy refers to an experientially defined emotional response to the situation of another, the capacity to dance lightly in another's reality. Empathy requires consideration and effort and thus presupposes an experiential component[58] insofar as it is evocative of a desire to transform[59] the necessarily limited bounds of one's experiential reality.[60] Genuine empathy is an active process, rather than a passive statement of principle.[61]

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56. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA (1989) (discussing the ideals, perceptions and realities of equality in America).

57. For a detailed discussion of empathy in the legal context, see Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987), which attempts to reconcile empathy, understanding people's experiences through interpretation or intersubjectivity, with legality, or rule-based law.

58. It is important to note that much, and likely the majority, of human experience is internal and consists of reflection and judgment. Too often we think of experience as simply a collection of sensations and external encounters.

59. In employing the term "transform" in the textual sentence, rather than "transcend," I mean to emphasize that when change and insight occur, we are always already in another context. Drucilla Cornell similarly suggests that the boundary between "transcend" and "transform" can be located by reference to reciprocity. *See* Drucilla Cornell, *Beyond Tragedy and Complacency*, 81 NW. U. L. REV. 693, 697 (1987) [hereinafter Cornell, *Beyond Tragedy*]. *See also* Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 295 n.15 (1985) [hereinafter Cornell, *Ethics*] (observing that Unger's philosophy, *see supra* notes 50-53 and accompanying text, fails to account for the necessity of validating one's world-view through dialogue with others).

60. The extent to which one can hope to realize this desire is the subject of much debate. *See, e.g.*, Cornell, *Beyond Tragedy*, *supra* note 59, at 697 (arguing against Roberto Unger's idea that "the individual's striving must culminate in the recognition of her own fundamental interconnectedness with others"—that is, in reciprocity); Lawrence Lessig, *Plastics: Unger and Ackerman on Transformation*, 98 YALE L.J. 1173 (1989) (exploring the meaning of the term "transformation" in critical race theories). Professor Kohlberg has utilized the concept of "reversibility," or "reciprocity of perspectives," as a tool to be employed in confronting competing perspectives. *See* MICHAEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE 249 (1991). This concept requires that conflicts be resolved by "subjecting all the competing claims" to each perspective involved, in order to ensure "the claims that can be justified from all the relevant perspectives." *Id.* This theory requires the actors to place themselves imaginatively in the place of the other actor. *Compare id.* at 249-50 (quoting Lawrence Kohlberg, *Justice as Reversibility*, *in* PHILOSOPHY, POLITICS AND SOCIETY 269 (Peter Laslett & James Fishkin eds., 1979)) (suggesting that the competing claims be reconciled through "moral musical chairs") *with* sources cited *supra* note 59 (questioning our ability to achieve transformation by

The conception of empathy as experiential conflicts with Professor Delgado's critique of empathy.[62] Delgado discusses the prevalent notion of empathy as a means by which marginalized peoples can identify with each other, and dominant cultures can identify with those who are marginalized. This concept, he suggests, is counter-productive.[63] Singled out for special censure in this critique are public interest lawyers.[64] According to the pro-

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recourse to imaginative displacement, without more). Professor Rosenfeld notes that the ambiguities implicit in the concept of reversibility suggest a distinction between different perspectives and different worlds. *See* ROSENFELD, *supra*, at 250.

61. Reliance on empathy must avoid the danger of idealizing language, thereby deepening the gulf between rhetoric and action. *See* powell, *Worlds Apart*, *supra* note 6, at 11 n.3. Instead, a participatory system should understand empathy to be a pragmatic, experiential avenue for weakening the centripetal forces of an insular narrative structure. The regulative pull of genuine dialogue can thus serve as a catalyst for breaking out of our little worlds.

62. *See* RICHARD DELGADO, THE COMING RACE WAR? 4-36 (1995) [hereinafter DELGADO, RACE WAR]. This critique is presented in a more developed form in DELGADO & STEPAHNIC, *supra* note 14, at 115; Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996). The term "empathetic fallacy," coined by Delgado and Stefancic, has its corollary in literary criticism. In their view, both the "pathetic fallacy," a critique of anthropomorphism in poetic imagery, and the empathetic fallacy similarly stem from hubris, the belief that through "speech and remonstrance we can surmount our limitations of time, place and culture, can transcend our own situatedness." DELGADO & STEFANCIC, *supra* note 14, at 72. This definition locates the shortcomings of empathy in the linguistic and formative constraints on our ability to overcome our own interested narratives. However, empathy does not, as I try to develop below, require an idealization of language in order to effectuate shifts in consciousness. That is, while empathy does not insist on the possibility of transcending our selves, neither does it reject the possibility of being transformed through engaging in dialogue. Rather it recognizes that we are both constrained and redefined by the values we embrace and the conversations in which we engage. *See* GADAMER, *supra* note 51, at 59-69; ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS 111-13 (1975).

63. *See* DELGADO, RACE WAR, *supra* note 62, at 10. Delgado's conviction that reliance on empathy is counterproductive may stem from acceptance of the less than sanguine vision of prospects for equality forwarded by Derrick Bell. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 377-78 (1992) (arguing that a "realistic" assessment of current racial conditions brings about a release from despair). *Cf.* john a. powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533, 545-49 (1992) [hereinafter powell, *Racial Realism*] (arguing that a pragmatic and hopeful notion of equality is "self-evident" and transformative). Indicative of Delgado's orientation is his instructive metaphor of a computerized judicial system, used to suggest that people don't really want an empathetic society. *See* DELGADO, RACE WAR, *supra* note 62, at 9. Even if a computer could simulate judicial decision making, we wouldn't want it, because the machine would not permit preferential treatment. *See id.* at 10. That is, investment bankers and suburban teenagers wouldn't receive disproportionately lighter treatment by virtue of their status. *See id.* Society would rebel, demanding preferential treatment for the economically privileged. The metaphor is instructive, but has less to do with empathy than it does with the propensity to maintain and perpetuate privilege. *See id.*

64. *See id.* at 25.

tagonist in Delgado's book, "[t]o be both a lawyer and an empathetic human is practically an impossibility."[65] The protagonist believes that people think they are more empathetic than they really are.[66] The character states that "a sentimental, breast-beating kind [of empathy] is common among White liberals."[67] This argument regarding empathy reverses the Gramscian notion of false consciousness, in which marginalized peoples adopt their oppressors' values and perspectives, thereby becoming complicit in their own oppression.[68] That is, White attorneys attempting to articulate the experience of their minority clients co-opt their clients' experiences and become complicit in their clients' oppression. This contrast between false consciousness and articulation of a client's story, while superficially attractive, seems to miss the mark. Delgado actually seems to be describing a semiconscious falseness masquerading as empathy. While Professor Delgado identifies a problem that should give us pause, it should not detract from the possibility of real empathy.

The reasons given for this gap between intentions and reality are twofold. First, the empathy claimed by clinicians is not genuine empathy, but rather "sentimental breast-beating"[69] resulting from cognitive and narrative theory barriers and from most White folks not possessing "double consciousness," defined as the ability to view the world from two perspectives simultaneously.[70] Second, there are institutional barriers: lawyers cannot tell their client's

65. *Id.* at 27.

66. *See id.* at 18.

67. *Id.* at 12.

68. Gramsci actually used the term "juridical problem" to describe the coerced "adaptation" of the masses in accordance with the requirements of the goal to be achieved. According to Gramsci, the law of the State performed this function by creating an ostensibly neutral site of desirable homogeneity. *See* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS, 195-97 (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1971); *see also* GEORG LUKACS, HISTORY AND CLASS CONSCIOUSNESS (Rodney Livingstone trans., 1971) (interpreting and applying Karl Marx's methods as Marx understood them); Theodore W. Adorno, *Introduction, in* THE POSITIVIST DISPUTE IN GERMAN SOCIOLOGY 21-22 (Glyn Adey & David Frisby trans., 1969) (discussing false consciousness as it relates to true consciousness and objective truth). Milan Kundera describes a phenomenon similar to "false consciousness" with the phrase "the brilliant ally of one's own gravediggers." MILAN KUNDERA, IMMORTALITY 118 (Peter Kussi trans., 1990). By this he intends to decry a cavalier acquiescence to post-modern pastiche, implicitly recognizing that empathy and relativism are two very different things.

69. DELGADO, RACE WAR, *supra* note 62, at 12.

70. *Id.* at 13 (citing W.E.B. DUBOIS, THE SOULS OF BLACK FOLKS 16-17 (1903); RALPH ELLISON, THE INVISIBLE MAN 1-7 (1952)).

story other than in the desiccated, stylized form required by the system.[71]

The first, cognitive, barrier aspect of this claim is predicated on "norm theory," a social-psychological hypothesis which holds that empathy varies in proportion to our perception of the "normalcy" of a situation. That is, the situation of starving Ethiopians appears "normal" to wealthy North Americans, but that of an upper-middle-class family losing their home seems "abnormal." Wealthy North-Americans' ability to identify with the distress of each party correlates with this perceived normalcy.[72] Thus, empathy dissipates in proportion to the extent to which inequalities are structurally ingrained and normalized.

The second strain of the false empathy claim rests on institutional barriers. Here we stand on well-traveled ground.[73] As I suggested above, the journalist reflexively privileges the First Amendment precisely because the legal narrative resonates with her own. Similarly, the lawyer will be constrained by the narrative of legal storytelling because she was trained to represent her client's interests within the parameters of that institution. That the institution disallows the telling of a contextualized, coherent story is a cliché. The law can be viewed as a story and a fiction but because of its central role in our institutional structure is reified so that the fiction becomes opaque.

While Delgado's claims of the empathetic fallacy are insightful and instructive, he seems to be describing bathos[74] rather than empathy. In current usage, bathos has two primary meanings. The first is a strained or insincere pathos (understood as an emotion of pity over suffering of oneself or another), which is what Delgado's character seems to describe when he attributes to public interest lawyers a solipsistic liberal empathy. In this scenario, the attorney rails against the injustices done to her client not out of a deeply felt sense of pathos, but rather because the attorney wants

71. *Cf.* Monroe H. Freedman, *Atticus Finch: Right and Wrong*, 45 ALA. L. REV. 473 (1994) (offering a reassessment of Atticus Finch, the much heralded lawyer from Harper Lee's *To Kill a Mockingbird*, on several grounds, including that he failed to tell Tom Robinson's story largely because of unquestioning adherence to extant legal structures; nonetheless Finch is largely perceived as empathizing with his client).

72. *See id.* at 17; *see also* EZRA STOTLAND ET. AL., EMPATHY AND BIRTH ORDER 124 (1971) (suggesting that we do in fact empathize more easily with people similar to ourselves).

73. *See generally* Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

74. The term 'bathos' is derived from the Greek word for depth. *See* Webster's II New College Dictionary 94 (1995).

the audience to empathize with her hopeless cause.[75] This describes false depth, a common fault among those seeking to promote or attain a conception of justice to the exclusion of material reward.[76] Having dispensed with monetary gain, a particularly conspicuous and ubiquitous reward system, public interest attorneys may ascribe pure intentions to themselves for the purpose of self-aggrandizement.[77] This phenomenon also resonates with the definition of bathos as the unexpected appearance of the vulgar or base in otherwise elevated language. Although bathos is primarily a term of literary criticism, Delgado's empathetic fallacy describes an analogous situation with the appearance of less than admirable motives in an otherwise irreproachable moral stance. Delgado's critique is thus one of bathos and does not preclude reliance on empathy as a basis for fostering participation as a societal value.

Of course, to avoid the problem of false empathy raised by Delgado is no easy task. The move toward real empathy may require more than just listening. It may also require a willingness to identify constraints, including power and hierarchy. While Delgado warns of false empathy, he pushes us toward the problematic space of the infinite other.

Wittgenstein suggests a less direct critique of empathy. He suggests that in the act of empathizing, we may attribute to the objects of our empathy emotional reactions that they do not really experience. Asking whether "such a thing as 'expert judgment' about the genuineness of expressions of feeling" actually exists, Wittgenstein answers that "[c]orrecter prognoses will generally issue from the judgments of those with better knowledge of mankind."[78] The sort of knowledge that informs those "better judgments" will be a product of experience.[79] Knowledge gleaned

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75. *See* DELGADO, RACE WAR, *supra* note 62, at 28.

76. *See id.* at 27-28.

77. *See, e.g.*, SOREN KIERKEGAARD, PURITY OF THE HEART IS TO WILL ONE THING (Douglas V. Steere trans., 1935) [hereinafter KIERKEGAARD, PURITY] (one of Kierkegaard's so called edifying addresses, arguing that pure intention requires superhuman effort and making an unconditional demand of decisive activity); THOMAS MERTON, NO MAN IS AN ISLAND 52 (1955) (alluding to the prevalence of this phenomena in the priesthood); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (decrying self-righteous behavior in the legal environment); *see also* Freedman, *supra* note 71, at 479-82 (using *To Kill a Mockingbird* as a vehicle for critiquing the unintentionally solipsistic and paternalistic character of many White civil rights lawyers).

78. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 227e (G.E.M. Anscombe trans., 3d ed. 1968).

79. *Id.* Experience can be guided, but what one learns is not a technique but correct judgments. There are rules, Wittgenstein observes, but they do not form a system, and only experienced people can correctly apply them. *See id.*

through a wide range of experience and human interaction is thus a necessary precondition to empathy because knowledge informs judgments.

The "better knowledge" that Wittgenstein has in mind implies a particular attitude toward experience, an attitude that embraces the porousness inherent in our interactions with the world. Acceptance of our particular orientation as provisional encourages us to exist outside of carefully constructed safe harbors where experimentation does not entail risk.[80] This suggestion to let our guard down, and to adopt vulnerability and openness as an orientation toward experimentation, is voiced by Roberto Unger. Unger asserts that because the "gesture of self-exposure lacks a predetermined outcome"[81] —a situation in stark contrast to the range of possibilities yielded by the shared claims of pre-existing communities—it emphasizes the power inherent in the individual to treat character as open and revisable.[82]

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80. *See* ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY 95-99 (1984) [hereinafter, UNGER, PASSION] (acknowledging the risk of failure attendant in the exposure of our habits and modes of self-expression to reinvention). This type of risk, understood as a positive openness to "endured vulnerability," should be distinguished from the type of "risk" involved in violent opposition to the forces that threaten our physical selves. *See also* SIMONE DE BEAUVOIR, THE SECOND SEX 72 (H.M. Parshley trans. & ed., 1968) (1949) (suggesting that this type of "risk" is more consonant with Western notions of genuine autonomy than the more relational risks involved in embracing vulnerability).

81. UNGER, PASSION, *supra* note 80, at 98.

82. *See id.* Unger's vision of human psychology owes much to what he describes as "two different and even antagonistic traditions," that of the Christian-romantic view of human nature and the revolutionary modernism of the early twentieth century. *Id.* at 22-23. The former tradition also embraces vulnerability, though not always in the secular guise presented by Unger. *See* SOREN KIERKEGAARD, FEAR AND TREMBLING *passim* (Alastair Hannay trans., 1985) (locating in the theistic "leap of faith" the only possible resolution to the anguished choice between rival goods). Less pietistic, though no less existential, is the romantic aspect of human nature embedded in the embrace of vulnerability. This vision complements the Christian tradition by prescribing "personal confrontations that escape the limits of any instrumental calculus" as the necessary precursor to self-knowledge and self-transformation. UNGER, PASSION, *supra* note 80, at 29. These sources of existential ideals find their common denominator in Kierkegaard, who viewed his superhuman confrontations with faith as capable of removing the obstacles standing in the way of achieving temporal love. *See* WILLIAM BARRETT, IRRATIONAL MAN 151-55 (1958). Thus the Christian-romantic view of human nature reconciles the "primacy of personal encounter and of love as its redemptive moment, and the commitment to a social iconoclasm expressive of man's ineradicable homelessness in the world." UNGER, PASSION, *supra* note 80, at 24.

The modernist aspect of Unger's philosophy lies in that movement's recognition that "the personality makes and discovers itself through its experience of not fitting into the given settings of its existence." *Id.* at 34. This axiomatic modernist insight is beautifully explicated in Lionel Trilling's distinction between sincerity and authenticity:

Sincerity, a congruence between avowal and feeling, can be achieved when

Professor Unger believes that an essential attribute of experiential revision is "a subjection of the self to situations and encounters that shake the routines of . . . outward life and the routinized expressions of . . . passions."[83] Our personal capacity to explore the psyche has its methodological and pedagogical analogue in a scholastic willingness to experiment with structures of discourse.[84] Although our self-knowledge remains necessarily ephemeral, it serves as justification for action and revision, only so far as experience recommends. To some extent our willingness to experiment will depend on the degree to which we believe that problems such as racism and sexism cannot be eradicated without a fundamental alteration of our norms, our psychology and even our identity.

One commentator believes that the solutions proffered by liberalism for our most disruptive social problems are mere tinkering on the surface, and that racism is coterminous with the ideals of the Enlightenment project.[85] The truth in this position is a necessary adjunct to the imposition of a convenient legal formalism with respect to issues of race. But it is difficult to know how liberalism and racism will be linked in the future even if they were coterminous at their inception. Professor Unger suggests a way out of this negative dilemma in his admonition that precisely because our instincts and analyses may deceive us, we never know if a particular maneuver will be major or minor.[86] This inherent ambiguity should not cause despair,[87] but rather insist on deeply experiential methodology reliant for its normative prowess on the persuasive

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> there is no problem of form: it is based on the Romantic ideal of truth to the self and it presupposes a definite identity which it becomes the task of a lifetime to be true to. Authenticity is a more excruciating modern demand, which begins with the admission that there is a problem of form, and that this makes the congruence between avowal and feeling difficult: it recognizes that the issue is not truth to the self but the finding of the many selves that one might wish to be true to. It makes the liberating concession that a person, or a nation, has a plurality of identities, constantly remaking themselves as a result of perpetual renewals.

Declan Kiberd, *Introduction, in* JAMES JOYCE, ULYSSES ix, ixxvii (Penguin 1992) (quoting Lionel Trilling).

83. UNGER, PASSION, *supra* note 80, at 98.

84. The limits, and even the efficacy, of this experimentation have been the subject of much debate in the legal academy. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH L. REV. 2411 (1989); Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

85. *See, e.g.*, DAVID THEO GOLDBERG, RACIST CULTURE (1993) (analyzing race, its social expressions and implications and the understanding of these in contemporary social analysis).

86. *See* UNGER, PASSION, *supra* note 80, at 98.

87. *See* powell, *Racial Realism*, *supra* note 63, at 550.

capacities of perspectives arising from endured vulnerability and radical openness.

This pragmatic epistemology suggests that a revisioning of empathy as a core democratic value requires that the concept be re-described in a way that embraces the openness that bathos or false empathy so notably lack. We are not hopelessly constrained by our perspectives—rather through engagement and vulnerability we can be influenced in a way that incrementally transforms our character.[88] Engagement does not entail becoming the other but rather requires possible openness to meaningful, contextualized encounters. This is not an idealist stance that ignores structural or institutional arrangements but asserts that structure once visible can be rearranged to allow for empathy and democracy.

C. Multiplicity as Participatory Empathy

A common response to the assertion that knowledge is provisional and thus undeserving of an uncritical dominance is to invoke the negative aspects of post-modernism.[89] In one form, the post-modern world view perceives fundamental cultural fragmentation and collapse, a pathological splintering in all spheres of life. More particularly, certain post-modern theorists have characterized modern culture as ironically degraded or bemusedly crisic, or as kitsch laden.[90] Presented in this manner, post-modernism

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88. *Cf.* Jody Armour, 83 CALIF. L. REV. 733 (1995). Professor Armour, drawing on recent research in cognitive psychology, distinguishes between stereotypes and personal beliefs. She argues that there is no necessary congruence between these mental attributes, but rather that stereotypes are a form of habit that may be overcome through conscious awareness. *See id.* at 734. It should be noted, however, that if stereotypes exist at a largely unconscious level, an enormous amount of vigilance and self-awareness will be necessary for their extirpation. *See id.* at 746-47 (citing Charles Lawrence, *The Ego, the Id, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987)).

89. As a general matter, post-modernism may be understood as an attitude rather than a full-blown philosophy, and within the confines of theoretical discourse has been employed to signify divergent phenomena such as late-capitalist cultural logic, *see* FREDRIC JAMESON, POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM 1-6 (1991), and a "struggle over the technology of the human body." *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION (1978). Post-modernism also signifies a complete collapse of the relation between theory and its object. *See* JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (1984).

90. *See* JAMESON, *supra* note 89, at 55-57. In attempting to tie post-modern sensibilities to a Marxist teleology, Jameson refuses to either celebrate or disavow the entire jumbled concept. Though avowedly tendentious, his text provides a simultaneously comprehensive and accessible introduction to the post-modern and its antecedents in various current spheres. Other useful texts include DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE (1989) (providing a denser, more rigorously economic approach

seems only to tear down or denigrate the achievements of liberal modernity without offering an alternative.

One alternative to the negative definitions so prevalent in post-modern discourse can be found in the psychological and theological concept of multiplicity. Multiplicity, most notably represented in the work of the neo-Jungian psychologist James Hillman, holds that the "crisis" of cultural fragmentation results from our psychological insistence on unity and singularity.[91] Borrowing from Greek mythology and Jungian traditions, Hillman counsels against a psychology of exclusion. In his view, psychological "polytheism" implies an essential and profound division of the soul.[92] Rather than viewing this fragmentation as a pathology, however, Hillman suggests that society would benefit from an alternative definition of the psyche. Hillman prescribes a restructuring of our view of the psyche as naturally multiple—in other words, altering our definitions instead of expanding our notion of disorder. It is no accident of history, he suggests, that the term "schizophrenia" and the number of cases of pathological multiple personalities appear at around the same time as the First World War, a time when the definition of the ego as a unifying force stood in stark contrast to the existential dissociations of early cultural modernism.[93] Hillman also refers to William James, who recognized psychological and cultural fragmentation nearly a century ago, noting that "[r]eality MAY exist in distributive form, in the shape not of an all but of a set of eaches, just as it seems to be."[94]

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to the subject) and UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM (Andrew Ross ed., 1988) [hereinafter UNIVERSAL ABANDON] (providing representative takes on the subject from an array of disciplines).

91. *See* JAMES HILLMAN, A BLUE FIRE: SELECTED WRITINGS 36-49 (Thomas Moore ed., 1989) [hereinafter HILLMAN, BLUE FIRE]; JAMES HILLMAN, RE-VISIONING PSYCHOLOGY 26-27 (1975) [hereinafter HILLMAN, RE-VISIONING]. As I have argued elsewhere, the assertion that the modern, Western, unitary, and autonomous conception of the self is wrong and does not entail a necessary abandonment of structure. *See* powell, *Multiple Self*, *supra* note 26, at 1485.

92. *See* HILLMAN, RE-VISIONING, *supra* note 91, at 26 ("Polytheistic psychology refers to the inherent dissociability of the psyche and the location of consciousness in multiple figures and centers."); *cf.* JOSEPH CAMPBELL, MYTHS TO LIVE BY 10-11 (1972) (noting that the identity constitutive aspect of shared symbols and myths creates ethical and social order).

93. *See* HILLMAN, RE-VISIONING, *supra* note 91, at 25; *see also* JAMESON, *supra* note 90, at 305-13 (discussing political and cultural undercurrents of early modernism).

94. HILLMAN, BLUE FIRE, *supra* note 91, at 43. James further notes that absolute notions of reality have only appeared to a few mystics, and to them only ambiguously. *See id.*

The multiplicity of the self has long been applied to problems of identity outside of the American, Western tradition.[95] The concept of "selflessness" in Buddhist philosophy denies "a self described in terms of its structure rather than its story."[96] This structural self, initially perceived as "permanent, unitary, and under its own power," diminishes in importance once the Buddhist practitioner begins to understand emptiness.[97] This process requires a thorough familiarity with the "ordinary experience of self,"[98] which, once achieved, permits the insight of "emptiness"—the recognition of persons and things as "dependent arisings," existing interdependently rather than independently.[99] In this philosophy, the self that people tend to see as concrete exists only as an illusion, but an illusion with ethical consequences. Though consideration of such views moves us seemingly far afield from prevailing legal discourse, the tenets of Buddhist philosophies and neo-Jungian psychology suggest that perhaps the conceptions of self-identity embedded in legal structures leave us predisposed to attach ourselves to the illusory narrative of the unitary self. Both show us how the constructed and unessential phenomena of language and concepts create the patterns that we perceive as static, natural and neutral.[100]

One of the central insights of psychological multiplicity is the notion that many liberal paradigms rest on faulty psychological premises. As illustrated below, multiplicity explains some of the ways in which the psychological phenomenon of "projection"[101] serves to mask power disparities that undermine the traditional First Amendment narrative's remedy of "more speech." The central point to be derived from the following discussion is that psy-

95. *See generally* powell, *Multiple Self*, *supra* note 26, at 1484 n.9 (citing recent scholarship on post-modern and post-liberal conceptions of the self).

96. ANNE CAROLYN KLEIN, MEETING THE BLISS QUEEN: BUDDHISTS, FEMINISTS, AND THE ART OF THE SELF 124 (1995); *see also* powell, *Multiple Self*, *supra* note 26, at 1505-09 (discussing Buddhist conceptions of the self and noting that Buddhism does not attempt to construct a unitary, coherent sense of self).

97. KLEIN, *supra* note 96, at 124.

98. *Id.* at 125.

99. *Id.* at 127.

100. Of course, both Buddhist philosophy and Jungian psychology suppose that there is an "essential" consciousness that goes beyond concepts and language. *See* JEREMY W. HAYWARD, SHIFTING WORLDS, CHANGING MINDS: WHERE THE SCIENCES AND BUDDHISM MEET 132 (1987); THE PORTABLE JUNG 23 (Joseph Campbell ed. & R.F.C. Hull trans., Viking Press 1971) [hereinafter PORTABLE JUNG] (providing a succinct overview of Jung's understanding of the psyche and the self).

101. Projection refers to a psychological mechanism whereby we project onto others aspects of our own unconscious qualities and mistake these imaginings for reality. *See* JUNE SINGER, BOUNDARIES OF THE SOUL 361-62 (1994).

chological phenomena camouflage acts in which the dominant culture vilifies and silences minorities, thereby blocking meaningful access to democratic institutions. The argument that the marketplace of ideas perpetuates disparities in power does not, as Cass Sunstein notes, suggest that free speech is a myth.[102] Rather, it means that "what seems to be government regulation of speech might, in some circumstances, promote free speech . . . . [and] that what seems to be free speech in markets might, on reflection, amount to an abridgment of free speech."[103] The discourse within the marketplace of ideas may, in some instances, permit a position that is not only unpopular, but hateful, to limit the participation interest of other individuals. After exploring the more abstract insights of multiplicity, I will examine its utility in First Amendment jurisprudence.

In one of several law review articles that explore the implications of psychological multiplicity for the law, Gerald Torres writes that the term multiplicity "implies a decentralized ideology and economy and, ultimately, a non-hierarchical culture."[104] Similarly, Robert Chang notes that "each social agent is inscribed in a multiplicity of social relations," including sex, race, nationality, and vicinity.[105] Each agent represents multiple subject positions, positions which are themselves "the locus of multiple possible constructions, according to the different discourses that can construct [those] position[s]."[106] Angela Harris argues that a jurisprudence based on "multiple consciousness" can overcome what she views as the dangers of essentialism in feminist legal theory; namely, that "the attempt to extract an essential female self and voice from the diversity of women's experience" merely reinforces socially constructed norms and minimizes the educative value of experiences that fall outside that framework.[107] While none of the

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102. *See* Cass R. Sunstein, *A New Deal for Speech*, 17 HASTINGS COMM. & ENT. L.J. 137, 139 (1994).

103. *Id.*

104. Torres, *supra* note 26, at 1005.

105. Robert S. Chang, *Essays: The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687, 690-91 (1996).

106. *Id.* (citing Chantal Mouffe, *Hegemony and New Political Subjects: Toward a New Concept of Democracy*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 89-90 (Cary Nelson & Lawrence Grossberg eds., 1988)). Professor Chang presumes that essentialism is always a proxy for coalition, or identity, politics and thus always a pseudonym for continued marginalization.

107. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 613-15 (1990) [hereinafter Harris, *Race and Essentialism*]; *see also* Angela P. Harris, *Foreward: The Unbearable Lightness of Identity*, 11 BERKELEY WOMEN'S L.J. 207 (1996); CYNTHIA OZICK, *Innovation and Redemption: What Literature Means*, *in* ART AND ARDOR 238 (1983); Mari Matsuda, *When the*

above definitions precisely coincides with psychological multiplicity, particularly with reference to the antecedent and essential aspects presupposed by the latter, the view of multiplicity as a strategic method is common to both legal and psychological scholarship. As the positions taken by the above commentators indicate, the notion of multiplicity has profound implications for the static identity categories that have long been presumed in legal thinking, and have too often resulted in cursory dismissal of claims falling outside recognized narrative structures.

We might also take this view of multiplicity as strategy a step further by asking what a multiple conception of the self conveys analytically about race relations and resistance to proscriptions of hate speech. Jung understood the Self to contain many autonomous but intimately related components that tend toward wholeness or unity.[108] One of these components, which he calls the "shadow," represents "unknown or little known attributes and qualities of the ego" that people prefer to deny the existence of in themselves.[109] Through denial of their existence, these little known ego attributes are frequently projected onto political others, although the same attributes reside in ourselves, because we prefer to convince ourselves that the "other" is wrong.[110] Without thinking, we accept that if the "other" would only behave in a certain manner, everything would be better. These attributes are characterized as subconscious because they are integral components of our personality that emanate from our personal past but have been repressed, thus obtaining an inferior and primitive quality.[111] This absence of consciousness gives rise to a moral resentment, because the psyche tends toward equilibrium and psychic deficiencies demand to be addressed.[112] Our capacity for mo-

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First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN'S RTS. L. REP. 7 (1989).

108. *See generally* THE PORTABLE JUNG, *supra* note 100, at 23 (providing a succinct overview of Jung's understanding of the psyche and the self).

109. *See* M.-L. vonFranz, *The Process of Individuation*, *in* MAN AND HIS SYMBOLS 158 (Carl Gustav Jung et al. eds., 1964).

110. *See* Carl Gustav Jung, *Approaching the Unconscious*, *in* MAN AND HIS SYMBOLS, *supra* note 109, at 85; *see also* Lawrence, *supra* note 88, at 322 (noting that the human mind defends itself against the discomforts of guilt by excluding unattractive beliefs and ideas from consciousness); powell, *Multiple Self*, *supra* note 26, at 1502-05 (1997) (discussing how the unconscious projects "racial" traits onto the "other").

111. *See* THE PORTABLE JUNG, *supra* note 100, at 80-81 (postulating that incompatible psychological elements are subject to repression, becoming an unconscious part of our conscious personality, rather than an aspect of the unconscious, itself a separate sphere of the psyche).

112. *See id.* at 81. Experience is not only how we relate to the world, creating categories to deal with perceptions, but also a set of internal structures and expe-

rality compels us, despite the pain of unmasking these less than salutary aspects of personality, to assimilate this unconscious part of the conscious self.[113] Though such analysis is unpleasant, it tells us something important not only about each of our characters as they presently are, but about what they want to be.

A Jungian interpretation of the Biblical story of Job offers an instructive example of how awareness of the shadow aspect of the personality can lead to a profound psychological transformation.[114] The opening of the story finds Job as a seemingly well-adjusted, successful and happy individual blissfully unaware of a plot between God and Satan to test Job's renowned faith in his God.[115] In order to test this faith, God permits Satan to subject Job to a variety of calamities, until Job has lost virtually everything to which he has accorded any value.[116]

Job's initial response is one of despair and alienation, yet influenced by his friends, he remains convinced of his innocence and righteousness.[117] According to this interpretation, Job's outlook reflects his "one-sided conscious attitude of purity and goodness."[118] At this point in the story, Job is only vaguely aware that his experience has something to do with his past and with a larger reality that he refuses to comprehend.[119] As Edinger notes, Job does not say what the iniquities of his youth were, but Job makes it clear that he no longer considers himself responsible for them: "[t]hose past sins [represent] repressed contents which he does not

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riences that we project into the world, and onto objects or persons. This isn't to negate outer reality, which is very real, but only to recognize that our reality has an equally real "inner" component. According to Jungian psychology, reality is "objective" insofar as we all experience similar archetypes in ways that allow us to empathize with each other's inner experience and perceptions of the world. This presupposes, however, a fairly high level of awareness and serious engagement in dialogue with the meaning of internally produced images. *See* HILLMAN, BLUE FIRE, *supra* note 91, at 26 (providing axiomatic criteria for interpreting images, and suggesting that all images, if subjected to these criteria, obtain the status of archetype).

113. *See* SINGER, *supra* note 101, at 165 (quoting Jung for the proposition that uncovering the shadow side of personality is an essential act of self-knowledge and meets with considerable resistance from the ego).

114. *See* EDWARD F. EDINGER, EGO AND ARCHETYPE 76-96 (1972); *see also Answer to Job*, *in* THE PORTABLE JUNG, *supra* note 100, at 519-650 (providing a different, but also psychologically useful, reinterpretation of the Job story).

115. *See Job* 1:1-5 (Revised Standard Edition).

116. *See id.* at chs. 1-2.

117. *See id.* at chs. 3-4. Job's friend Eliphaz attempts to console him, stating: "Is not your fear of God your confidence, and the integrity of your ways your hope? Think now, who that was innocent ever perished? Or where were the upright cut off?" *Job* 4:6-7.

118. EDINGER, *supra* note 114, at 85.

119. *See Job*, *supra* note 115, at ch. 6.

want to make conscious since they would contradict his self-righteous image of himself."[120]

Job's friends try to give him advice.[121] His friends contend that he should continue down his former path, sure of his righteousness—in other words, they counsel Job to maintain the status quo in ignorance that all has collapsed around him.[122] Job's ultimate response is to avoid both extremes; instead, he refuses to accept his fate without ascertaining the meaning of these events.[123] By confronting God, Job is made aware of the meaning underlying his ordeal: a transformation of his own psychic orientation to the world.[124] Through his confrontation with the powerful numinosity of God, Job is forced to recognize that his former attitude was one of blind arrogance.[125] During the encounter, God reveals Himself to Job as an awesome totality, combining all dimensions of good and evil.[126] From this, Job gains an awareness of his own shadow side, which he had been repressing for so long.[127] That is, "God reveals his own shadow side and since man participates in God as the ground of his being, he must likewise share his darkness."[128] Whereas Job previously projected what he perceived as weak and unenviable attributes onto others, he now recognizes that they are an inevitable dimension of his own personality.[129]

This experience of the shadow operates at the level of racial politics as in all interpersonal relationships. Angela Harris parallels Hillman in observing that for groups denominated as racially "other" the "experience of multiplicity is also a sense of self-contradiction, of containing the oppressor within one self."[130] In much the same way, the White oppressor also contains the other within him or herself. The contrast between Hillman and Harris occurs only to the extent that Hillman locates the shadow of ra-

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120. EDINGER, *supra* note 114, at 86. For examples of Job's self-righteous attitude, see *Job*, *supra* note 115, at chs. 29-30 (nostalgizing his privileged place in the community and concluding: "But now they make sport of me, men who are younger than I, whose fathers I would have disdained to set with the dogs of my flock.").

121. *See Job*, *supra* note 115, at chs. 32-37.

122. *See id.* at ch. 34.

123. *See* EDINGER, *supra* note 114, at 85.

124. *See id.* at 91. The language in this chapter is a powerful explication of the difference between God and humans. *See Job*, *supra* note 115, at 38:1-33.

125. *See* EDINGER, *supra* note 114, at 91.

126. *See id.* at 89-91

127. *See id.* at 91.

128. *Id.*

129. *See id.*

130. Harris, *Race and Essentialism*, *supra* note 107, at 608.

cism as being "essentially present in 'white' consciousness itself and not, as usually claimed, only projected outward into 'black.'"[131] A concrete example of the external and internal function of the "other" as a disembodied yet integral part of the self occurs in the process of exclusions by race and socioeconomic status. As Zora Neale Hurston's character Janie, from *Their Eyes Were Watching God*, painfully recalls, being placed in a social context of "Whiteness" changed her experience of self:

> So when we looked at de picture and everybody got pointed out there wasn't nobody left except a real dark little girl with long hair standing by Eleanor. Dat's where Ah wuz s'posed to be, but Ah couldn't recognize dat dark chile as me. So Ah ast, 'where is me? Ah don't see me.'[132]

In order to understand the ontology of the fractured self, it is important to question the construction of categories. Law as a rule does not have the dubious luxury, promoted in Hillman's image of psychology, of allowing psychological polytheism to erupt without attempting to achieve insight.[133] The law's view of the self has nudged forward, but it is still largely based in an eighteenth century notion of the self that cannot withstand critical review from psychological, anthropological, or popular perspectives. Yet the multiple self is shadowed in the work of Freud and Jung and is in full bloom in Hillman's. Law loves stable categories, even if they are in conflict with reality, and to reconcile this need with an essentially multiple conception of the self requires that we undertake an examination of how categories are articulated and become culturally intelligible and legally manageable. The burgeoning literature on the social construction of race and the renaissance of interest in the work of authors such as James Baldwin and Zora Neale Hurston assist in this endeavor.[134]

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131. HILLMAN, BLUE FIRE, *supra* note 91, at 8.

132. ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD 21 (1937).

133. *See* HILLMAN, BLUE FIRE, *supra* note 91, at 9 ("There is no need, in a polytheistic psychology, to integrate, to 'get it all together,' or to find some ultimate blending of the many impulses and directions that erupt from the soul. A variety of gods and goddesses are to be honored, the tensions among them sustained and enjoyed.").

134. *See generally* GOLDBERG, *supra* note 85 (demonstrating that social subjects have been conceptualized foremost in racial terms since the institution of modernity and that these racisms change over time to reflect prevailing social conceptions); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (exploring the social and legal origins of White racial identity); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S (1995) (exploring the creation and change of racial concepts and how they become the focus of political conflict); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994) (asserting that equivocation, which stems from a dichotomous conception of

Both the Buddhist concept of the self, or no permanent self, and Hillman's concept of the multiple self are in sharp contrast to the nineteenth century notion of an independent, unitary, autonomous self. Instead both of these selves share substantial similarities with concepts of the self suggested by many late modernists and feminists. The latter groups tend to view the self as interdependent, interconnected, and constantly being reconstituted through social interaction.

If any of these views of the self are taken seriously as contrasts to the pre-given, unconstituted, liberal self, then systematic exclusion through hate speech not only threatens participation, but threatens both the construction and maintenance of the whole notion of an autonomous self.[135] Furthermore, the diminished selves that result from exclusion cannot be healed through more speech. The self that requires the exclusion of other potential selves through hate speech and other practices is not simply an independent self, but a self that requires the subordination of others, a direct conflict with our democratic norms.

What this suggests is that restrictions on speech should be challenged to the extent that they undermine the self, as well as to the extent that they undermine our participation in democratic processes. This is no less true of other values, however, such as equality.[136] Racist speech, however, is often practiced for the purpose of distorting participation and is part of a racial discourse that not only maintains racial hierarchy and exclusion, but also helps to create and maintain the racial subject. In fact, the very categories of Whiteness and racial Other are part of racial exclusion and racial discourse.[137] The political legacy that flows from racist speech is constitutive of both the racial self and White supremacy. If one is then seriously concerned about self expression, participation and autonomy, then one must be willing to examine how and where speech disrupts these values. There must be a self,

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political space as either administrative conveniences or autonomous entities, underlies the American law of local governments); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (arguing that American law protects entrenched White power); Martha R. Mahoney, *Segregation, Whiteness and Transformation*, 143 U. PA. L. REV. 1659 (1995) (exploring the connections between residential segregation and White privilege).

135. *See* powell, *Multiple Self*, *supra* note 26, at 1509-11. It should be noted that this way of viewing autonomy does not rest on the notion that the self is pregiven to social constitution and structures. Rather these alternative conceptions suggest an autonomous self that is at least in part defined by, and acting within, a larger social context and discourse.

136. *See generally* powell, *Worlds Apart*, *supra* note 6.

137. *See generally* sources *supra* note 134, with special attention given to GOLDBERG, OMI &WINANT and HANEY-LÓPEZ.

for self-expression to have meaning. One can easily imagine circumstances where speech or equality diminishes the self and participation, just as in some circumstances speech or equality will support these values. When speech undermines the self, however, it is difficult to articulate how it can be justified by democratic norms.

It seems clear that the existing categories of free speech jurisprudence do not comport with the reality of the socially constructed racial self as illuminated by an empathetic understanding of our multiple identities. Arguments concerning the persistence of racism in insidious and subtle forms are rendered mutely inarticulate by the correct categories. Our propensity to project undesirable characteristics onto a political other serves to perpetuate and reify deeply embedded structural disparities in the marketplace of ideas. As Professor Sunstein points out, while constitutional jurisprudence has long since abandoned the Lochner-era view of the Constitution as a prohibition of governmental interference with the distribution of rights, this laissez-faire attitude persists in the area of free expression.[138] Within the First Amendment framework, pre-New Deal notions of neutrality still predominate.[139] On one hand, the First Amendment's defiance of New Deal insights into the nature of unregulated marketplaces serves the important value of checking myopic governmental restrictions on individual liberties.[140] On the other hand, however, the persistence of laissez-faire attitudes toward the marketplace of ideas is a function of our inability to recognize the prevalence of unconscious racist attitudes and practices. Because these attitudes persist beneath the surface of American life, the occasional eruption of hateful forms of expression is treated as anomalous. This position, while psychologically soothing, fails to recognize the severe harm to the minority cultures' participatory interests that occurs when an overtly threatening act of racial hatred supplements the structural de facto racism by the majority culture of our society.

As Professor Delgado notes, the experience of racism in contemporary America is analogous to the way a seeing eye dog identifies a clumsy footfall on the part of its master—much prejudicial behavior is unconscious and only registers to someone attuned to it through an aggregation of experience. Moreover, subtle and un-

138. *See* Sunstein, *supra* note 102, at 138.

139. *See id.* at 139.

140. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (finding unconstitutional a statute proscribing flag burning).

conscious forms of racist behavior, because of their ephemeral nature, are often purposefully overlooked. No one wants to accuse another of being racist if it is at once clear that the person's behavior is unconscious. This leads to another aspect of the frustration voiced through narrative: the inability of legal doctrine to identify structurally important but diffuse and subtle racism.

In a recent work, Professor Delgado, a prominent Critical Race Theorist, provides a fascinating compendium of "images of the outsider in American law and culture."[141] His historical survey shows that racial depiction throughout American history has been predominantly negative and that the dominant stereotype changes to reflect society's needs.[142] The historical depiction of Asians in film, literature, cartoons, and popular humor provides an instructive example: scapegoats during depressions, cunning and savage when war threatened, and treacherous or not-quite human when the exigencies of military action demanded.[143] While these images strike contemporary observers as clearly wrong, current stereotypes are passed off as unexceptionable, trivial or a valid generalization based on the common attributes of a particular group.[144] The reason for this, according to Delgado, is that racist views are always embedded in the dominant interpretive structure.[145]

While this structure both valuates and makes the racial other, it also normalizes White supremacy, which can be seen in a discourse of neutrality and colorblindness.

1. Objections to Multiplicity as Empathy: Relativism

I have offered an alternative to the liberal concept of the self that has implications for how we view equality and free speech. As an initial matter, one can imagine a number of objections in response to a conception of the psyche, and by extension, identity, as multiple. Two which seem particularly potent are the charges of relativism and essentialism. Hillman himself anticipates the issue of perceived relativism when he alludes to an apparent "paradise of seductions and escapades," but notes that from within any particular narrative structure those of another appear as unrestricted vagaries.[146] This observation comports with the epistemic structure upon which Professor Fish predicates his deconstructionist

141. DELGADO & STEFANCIC, *supra* note 14, at 41-45.
142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.*
146. HILLMAN, BLUE FIRE, *supra* note 91, at 56.

philosophy.[147] According to Fish, the proposition of a socially constituted subject simply means that all knowledge is interpretation and belief. Far from suggesting that knowledge can be acquired without limit, however, this view focuses on the cultural and institutional practices of interpretive communities. The existence of interpretive communities suggests that although each narrative is unique, we are all subject to social and cultural constraints which can organize our experience and our selves.[148] The very ability to formulate a decision in terms that are recognizable to a particular community "depends on one's having internalized the norms, categorical distinctions, and evidentiary criteria that make up one's understanding" of that community.[149]

This view remains susceptible to the charge of relativism because it rejects the possibility of any neutral perspective, thereby exposing the contingent bases for all judgments. The impossibility of neutrality becomes a problem, for instance, when the idiom utilized by one party necessarily marginalizes the idiom dominant in another narrative structure;[150] however, Fish points out that once we become cognizant of the fact that neutral perspectives are unattainable, we can realize the implications of radical constructivity.[151] That is, our individual perspectives are imbued with the preferences, assumptions, and conventions of particular communities, with the result that the internal constraints and standards of those communities circumscribe any judgments we make.[152]

This description of particular communities as establishing norms explains why transformation in juridical culture is incremental and at times intolerably slow. In fact, the notion that social reality is constructed leads some commentators to suggest that there are no longer any incentives for political activism.[153] If we cannot escape the conventions that by definition constrain us, how can we act in a critical and transformative capacity? Multiplicity's

147. *See generally* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989) [hereinafter FISH, DOING WHAT COMES NATURALLY] (discussing interpretation resulting from paradigm-specific criteria). For a succinct and accessible overview of Fish's philosophy as it relates to legal scholarship, see Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2541-72 (1992).

148. *See* FISH, DOING WHAT COMES NATURALLY, *supra* note 147, at 141-42.

149. Schanck, *supra* note 147, at 2546.

150. *See* Torres, *supra* note 26, at 1002-03.

151. *See* STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 319 (1980).

152. *See id.*

153. *See* Schanck, *supra* note 147, at 2548 n.172.

answer to the charge of relativism is that a de-constructed, experiential conception of identity formation succeeds precisely because it recognizes the circumscribed and structured nature of human agency.[154]

Mere cognizance, of course, is not sufficient. As Professor Torres notes, a version of multiplicity which satisfies itself with awareness will fail to alter patterns of dominance, if only because even a critical evaluation of privileges associated with membership in a particular group reinforces membership in that group.[155] Implicit in this limitation is that the central problem for marginalized people, the "need to reform conceptions of democratic representation in a way that supports the underlying legitimizing justifications of democracy without systematically repressing the capacity for minority self-determination,"[156] is no less complex when viewed from within a post-modern paradigm. Reformulation of the problem requires a complex understanding of the numerous demands made upon those who are disproportionately the victims of harmful speech, among other inequalities, and an approach which recognizes group differences, complex equalities and multiple forms of justice.

2. Objections to Multiplicity as Empathy: Essentialism

The answer to the charge of essentialism follows a similar course. In its simplest form, essentialism describes the belief that among diverse life experiences there exist commonalities which are reducible to claims concerning shared realities. It is possible, in this vein, to claim that multiplicity will only serve to mask the perpetuation of dominant cultural narratives and will reaffirm the privileged position of current standards. Robert Chang appears to make this argument when he vilifies coalition politics because the identification of articulable common interests remains dependent on political exigency;[157] however, his version of multiplicity is

154. This position borrows somewhat from Fish's notion of "overlapping communities." *See* FISH, DOING WHAT COMES NATURALLY, *supra* note 147, at 141. Against the charge of not being able to transcend one's own contingent identity, it is sufficient to note that Fish "is not suggesting a monolithic community with rigid and uniformly held conventions." Schank, *supra* note 147, at 2549 (responding to the charge that Fish is a conservative). Because each community is pluralistic, and because communities overlap, change is in fact inevitable. Change is constrained because of a lack of interaction. Transformation then becomes a matter of exploration and exposure whereby some possibilities are rejected and others enjoined.

155. *See* Torres, *supra* note 26, at 1005.

156. *Id.* at 1006.

157. *See* Chang, *supra* note 105, at 690.

predicated on establishing, and maximizing the length of "the chain of equivalences set up between the defense of the rights of one group and those of other groups."[158] What Chang ignores, then, is the necessity of exploring our identities in order to locate these sites of intersection and commonality.

The total absence of categories would effectively debilitate this enterprise. Accepting the notion of multiplicity does not establish an alternative hegemonic structure so much as it establishes a strategic method of locating and developing commonalities. As Joan Chalmers Williams notes, "[c]laims of sameness are not mere assertions of pre-existing similarity; they are a way of carrying on discussions about social ethics."[159] In contrast to Chang, Patricia Williams has located the inefficacy of coalition or identity politics, not in political exigency, but in apathy. In her view, it is not the assertion of rights that has done the most harm to the struggle to end racial and sexual domination, but the lack of commitment to rights.[160]

The self-conscious use of identification as a political strategy is nonetheless subject to attack. Angela Harris's "nuance theory" of essentialism posits that even where sensitivity to differences, contexts and magnitudes of experience exist, these subtle nuances are merely footnotes to the general account, leaving an essential experience that is equivalent to the dominant narrative.[161] It would be difficult not to sympathize with this account of how dominant narratives replicate themselves. Harris goes on, however, to favorably describe Zora Neale Hurston's conception of identity as "a construction, not an essence—something made of fragments of experience, not discovered in one's body or unveiled after male domination is eliminated."[162] The recognition that reality is constructed, it seems, limits any recourse to essentialism.

This description of identity as mere fragments of experience begs the question of how one is to struggle against oppression. On one level, the dissection of essentialism is certainly important, due to the insights it affords us into the constitutive power and indeterminate oppression of identity. Wholesale rejection of essentialism in every aspect of existence is counterproductive, however, to

158. *Id.*

159. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 299.

160. *See* Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

161. *See* Harris, *Race and Essentialism*, *supra* note 107, at 595.

162. *See id.* at 613.

the extent that this strategy disregards our need for psychological regularity. Professor Harris, recognizing the intractability of the essential in legal theory, enumerates its useful components. Among these are intellectual convenience, emotional safety, provision of a relatively safe arena for engaging in power struggles and cognitive necessity.[163] Of course, an internal tension lies within this criticism. As Martha Minow points out, some unifying categories are necessary to organize experience; even at the cost of denying some of it, some essentialism remains strategically indispensable.[164]

Rather than continue to debate essentialism as an either/or proposition, we should attempt to remain mindful of the power of simplifying categories to perpetuate unconscious, oppressive social pathologies, while simultaneously remaining vigilant with respect to the complexity and anomaly of experience. Such an approach does not yield a practical complacency, but rather would take advantage of the insight that "the eclecticism of theory mirrors the historical specificity of the project of building a post-modern politics,"[165] a politics which both challenges distributions of power and accounts for the ways in which we view the world. Similarly, Professor Unger admonishes us to retain the aspect of modernist culture that "advocate[s] a relentless recombination of the experiences traditionally identified with distinct roles, genders, classes, or nations," and "support[s] both a particularizing and universalizing discourse about our experience of life with other people. The

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163. *See id.* at 605-07. This list was formulated with feminist theory in mind, but serves also to describe the effect of essentialism in arenas such as civil rights or union organizing.

164. *See* Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 51 (1988). Minow notes that the existence of certain categories is a result of "psychodynamic development," and thus built into our psyches. *Id.* Similarly, Cornel West admonishes that even if one accepts the post-structuralist claim that nothing exists outside social practices, "[w]ithout totality, our politics become emaciated, our politics become dispersed, our politics become nothing but existential rebellion. Some heuristic (rather than ontological) notion of totality is in fact necessary if we are to talk about mediations, interrelations, interdependencies, about totalizing forces in the world." Anders Stephanson, *Interview with Cornel West*, *in* UNIVERSAL ABANDON, *supra* note 90, at 269.

In many ways the issues of essentialism and relativism reflect what Bernstein refers to as Cartesian anxiety: there is either an objective essential reality or there is only radical, skeptical, relativist anti-essentialism. *See* BERNSTEIN, *supra* note 54, at 18. This choice is left as the single possibility and is one of the common mistakes of late and post-modernity. *See id.* at 23. In fact, we may be essential through one lens and not through another. *See id.* And, of course, the lack of objective formalism does not entail relativism or complete subjectivity. *See id.*

165. Torres, *supra* note 26, at 1005.

point is not to choose one over the other but to change the way we understand and practice both."[166]

In recounting a story by Zora Neale Hurston, Professor Harris shows that "questions of difference and identity are always functions of a specific interlocutionary situation—and the answers, matters of strategy rather than truth."[167] The central insight of multiplicity in legal theory is that our democratic tradition calls for a synthesizing, rather than a unifying, voice. Instead of displacing the great, liberal normative values of empathy/respect, autonomy/connectedness, participation/membership, human dignity/justice and liberty/equality, we should work to intertwine them in such a way that these values are hollow for no one. That tensions exist within and between these sets of values bespeaks our varied stories, and reminds us to envision a more encompassing notion of democracy. Despite the danger of importing modes of dominance, multiplicity recognizes that change always occurs on the foundation of previous narratives and transformation is available through meaningful experience.

II. The Pragmatic Case for Democracy

The futility of locating a neutral vantage point from which to compare and mediate between conflicting values has failed to dissuade critics and commentators from advocating for change.[168] Nor has the indeterminacy of language or the non-inclusiveness of dominant narratives relieved contestants from the need for considering the persuasive force of their arguments.[169] To the extent that we insist that theory resolve tension instead of a more modest goal of informing how we think and talk about these tensions, we are likely to find theory of very little use. This may be one reason that post-modernists have weighed so heavily against a grand narrative. But it would also be a mistake to believe that we can or

166. UNGER, PASSION, *supra* note 80, at 79-80.

167. Harris, *Race and Essentialism*, *supra* note 107, at 611.

168. *See* MACINTYRE, *supra* note 52, at 1-11.

169. Nor should it. Stanley Fish argues that the success of any claim should depend on the skill of its proponent. *See* Schanck, *supra* note 147, at 2550. Schanck states that Fish goes so far as to suggest that the descriptive accuracy (which depends, of course, on the assumptions of the community) of an argument shouldn't matter as much as "how successfully the proponent utilizes the rhetorical conventions of the community." *Id.* at 2551. *See also* FISH, DOING WHAT COMES NATURALLY, *supra* note 147. That his "solution" should idealize language in spite of himself shouldn't be surprising, given Fish's illustrious career as a Professor of Literature.

should try to exist without a narrative. Indeed, the anti-narrative itself has been charged with being the latest grand narrative.[170]

The failure to articulate a workable theory both creates confusion and reflects the confusion that results from attempts to fit a round narrative through a square framework.[171] Because we tend to reify even flawed theories over time, we should revisit the assumptions that underlie cherished values. Through this process we may agree that some assumptions are no longer valid. The important point is that agreements and underlying assumptions should be viewed as provisional, and as effective only to the extent that they promote and extend the democratic ideal.[172]

The critique of traditional First Amendment doctrine developed in the previous section presupposes an acceptance of a pluralist democracy as the appropriate institutional framework for application of the First Amendment. In a pluralist democracy, participatory access is a primary societal value within which exist intertwined strains of liberty and equality. Where democracy is viewed as paramount, constitutional jurisprudence balances the significant interplay between the values of liberty and equality. Without question, the history of the Constitution, and particularly the First Amendment, has privileged liberty interests over equality interests. The nascent democratic leanings of the American experience were identified by de Tocqueville,[173] at a time when liberation from tyranny was of principal concern. The idea began to germinate in the twentieth century, with the advent of universal suffrage and the inception of substantive equality. Today, the aspiration to full and meaningful access to participation remains unfulfilled, and for too many democracy is a dream continually deferred.[174] This is partially because we have little practical experience with equality relative to liberty. If genuine democracy, with its concern for participatory equality, remains as an ideal, we

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170. *See* HARVEY, *supra* note 90, at 8, 339.

171. *See supra* note 14 (providing examples of theories of the First Amendment and subsequent criticisms).

172. Of course, one might question whether the democratic ideal, as I, or any other commentator, define it, should be accepted as an admirable goal. Uncritically, no. However, a comprehensive answer to this question lies outside the scope of this Article. The notion of a democracy that is predicated on substantive notions of participation, on institutions which evince a commitment to membership and ownership for all participants, and that seeks to maximize liberty and equality through a shared sense of justice is presumed throughout this piece to be an admirable and attainable ideal.

173. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835).

174. *See* Langston Hughes, *Harlem*, *in* Crossing the Danger Water: Four Hundred Years of African-American Writing 508 (Deirdre Mullane ed., 1993)

need to take seriously Dewey's pragmatic insight that our future is implicated in our present choices.[175] Instead of allowing for our continued descent into racial and class-based social anomie, we need to overcome the academic and practical hesitancy that creates inviolable structures through inertia. This section provides a pragmatic formal justification for democracy as a primary value by highlighting its experiential, experimental and participatory strains. In order to justify a mode of First Amendment analysis that relies on balancing, the multiple interpretive communities that constitute our society must accept democracy as a mediating principle.

The view of experience as not only made up of present choices, but constitutive of our future selves, is most vividly set forth in the tradition of American pragmatism,[176] beginning with great independent thinkers such as Jefferson, Lincoln, and Emerson, reaching its height in the works of Dewey, James, and Pierce, and continuing today as a common underpinning to the divergent work of Seyla Benhabib, Richard Rorty and Cornel West. In the legal academia such diverse scholars as Daniel Farber, Richard Posner, Martha Nussbaum, J.M. Balkin, Stanley Fish and Drucilla Cornell invoke the tools of pragmatism.[177] Though much separates these thinkers, they notably share a preference for "shaping the future [compared] to maintaining continuity with the past."[178]

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175. *See* DEWEY, *supra* note 1, at 33.

176. Pragmatism, though largely an American phenomenon, by definition is open-ended and susceptible to a broad range of influence. Among non-Americans often identified as pragmatists or as important to the pragmatist tradition, are Wittgenstein, Habermas, Nietzche, and Bentham. *See generally* CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 4 (1989) ("chart[ing] the emergence, development, decline and resurgence of American pragmatism"); SIDNEY HOOK, PRAGMATISM AND THE TRAGIC SENSE OF LIFE (1974) (collection of essays about pragmatism).

177. *See, e.g.*, FISH, SPEECH, *supra* note 5 (discussing the pragmatic jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin); POSNER, *supra* note 25 (arguing that "American law really is, and also should be, pragmatic, and that it can be improved by greater awareness of its pragmatic character); J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131 (1994) (discussing a pragmatic interpretation of essays written by Jacques Derrida); Cornell, *Ethics*, *supra* note 59 (discussing pragmatism in the context of Roberto Unger's view of liberalism); Daniel Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, U. ILL. L. REV. 163, 164 (1995) (asserting that the examples set by Justice Brandeis "can teach much about how legal pragmatism can be translated from jurisprudence to practice"); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 717 (1994) (using ancient-modern analogy and asserting that ancient skepticism, rather than modern skepticism, is similar to "several kinds of modern anti-normative arguments, or pragmatism").

178. POSNER, *supra* note 25, at 28. Judge Posner also notes that pragmatism,

They also share an adherence to the belief that "a fallibilist theory of knowledge emphasizes, as preconditions to the growth of scientific and other forms of knowledge, the continual testing and retesting of accepted 'truths,' the constant kicking over of sacred cows—in short, a commitment to robust and free-wheeling inquiry . . . ."[179] This philosophy is disruptive to traditional modes of thinking within legal institutions. Judge Posner artfully explains that:

> Although American lawyers have made significant contributions to the theory of free speech, their attitude toward law itself is pious and reverential rather than inquiring and challenging. Law is not a sacred text, however, but a usually humdrum social practice vaguely bounded by ethical and political convictions. The soundness of legal interpretations and other legal propositions is best gauged, therefore, by an examination of their consequences in the world of fact . . . . [T]here is a tendency in law to look backward rather than forward—to search for essences rather than to embrace the experiential flux.[180]

The challenge posed by pragmatism is to recognize the extent to which the past, as represented by the present, implicates the future.

John Dewey acknowledged the profound constructedness of pragmatism when he noted that "[s]ociety not only continues to exist *by* transmission, *by* communication, but it may fairly be said to exist *in* transmission, *in* communication."[181] Community building occurs through a process of communication that results in shared aims, beliefs, aspirations and knowledge.[182] According to Dewey, this process must ensure participation in a common understanding, in such a way as to secure a common manner of responding to expectations. In this way, communication is always instructive, both for the recipient and for the one communicating an experience. Communication is educational because to communicate one must formulate an experience: "[t]o formulate requires getting outside of it, seeing it as another would see it, considering what points of contact it has with the life of another so that it may

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properly understood, is an attitude rather than a dogma. Quoting Professor West, Posner describes pragmatism as "an attitude whose 'common denominator' is 'a future-oriented' instrumentalism that tries to deploy thought as a weapon to enable more effective action." *Id.*

179. *Id.* at 466.

180. *Id.* at 467-68.

181. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 4 (Free Press Paperback ed. 1966).

182. *See id.*

be got into such form that he can appreciate its meaning."[183] In the end, the process of community building through communication not only educates, but "creates responsibility for accuracy and vividness of statement and thought."[184]

This last phrase bears strong similarities to the "ideal speech situation" propounded by Habermas[185] insofar as it shows a lack of concern for metaphysical inquiry, and a pronounced bias for participatory equality in an experientially inclined democracy.[186] Reformulated less abstractly, Dewey's belief in the force of experience leads one to inquire about the communities which are confined, if not in spirit, then in fact. The fortress domesticity currently holding sway in large segments of society marginalizes narratives by removing them from the mix that will eventually culminate in a set of shared values, assumptions, and methods for extracting these norms from experience.[187] Society is undermined by our practice of power and hegemony.

Increasing residential polarization in our largest cities exacerbates the isolation of narrative structures. Empirical evidence shows that the systematic exclusion of minority populations from White neighborhoods and their attendant opportunity structures does not result from natural forces or individual preferences; rather discriminatory practices and racial perceptions impose and perpetuate our increasing residential and intellectual apartheid.[188]

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183. *Id.* at 5-6.

184. *Id.* at 6.

185. *See* SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA 285 (1986) (discussing Habermas' "ideal speech situation").

186. While the notion of the ideal speech situation is useful as a regulative ideal, the efficacy of language as a heuristic tool is limited because it is intrinsically tied up in the operations of power within social practices. The analysis of language is useful for examining how narrative forms are produced and acquired, but should not be mistaken for or extend to a recrudescence of metaphysicality. *See* Stephanson, *supra* note 164, at 273-74.

187. *See* FISH, SPEECH, *supra* note 5, at 103-04 (discussing how in traditional free speech theory the extirpation of narratives that fall outside the bounds of the dominant discourses is reinforced by the very primacy of those dominant values).

188. *See* Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1612-14 (1995) (stating that past practices of overt discrimination produce the entrenched segregation prevalent in urban areas today); *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS, 160-61, 118-25 (1993) (stating that negative perceptions and associated phenomena such as racial "tipping," where White middle-class populations flee neighborhoods out of concern for property values and reduced quality of services when minority populations reach a certain level, explain the increasing severity of segregation to the point where some inner city residents live their entire lives without leaving the confines of their neighborhood, and explaining how segregation concentrates poverty in an endless downward spiral of

Isolation of minority communities in turn exacerbates the racial stereotypes that inform White decisions to flee urban centers for suburban enclaves of convenience and affluence.[189] Even though many minorities and Whites prefer more integrated neighborhoods, White practices, coupled with the greater mobility attendant to higher income levels, dictate residential segregation.[190] We have structured the market so that it is rational for nondiscriminatory actors to isolate poor minorities. All but the most progressive Whites are unwilling to risk the decrease in property values and in quality of services in order to live in an integrated community.

Such experiential complacency stands in stark contrast to the spirit of experimentalism which characterized the thinking of early participatory democrats. In defending before Congress his policies of federally-sponsored internal improvements, Lincoln rejected a policy of "do nothing at all, lest you do something wrong."[191] He went on to chastise his opponents for focusing on the negative aspects of change, stating his viewpoint:

> [t]he true rule, in determining to embrace, or reject any thing, is not whether it have *any* evil in it; but whether it have more of evil, than of good. There are few things *wholly* evil, or *wholly* good. Almost every thing, especially of governmental policy, is an inseparable compound of the two; so that our best judgment of the preponderance between them is continually demanded.[192]

Lincoln was not promoting an aimless experimentalism. His belief in teleology, and the prospects of the American people, drove his vision of democracy. The famous phrase denoting the consent of the governed, "of the people, by the people, and for the people," was borrowed by Lincoln from his close friend, the minister Theo-

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economic and social isolation); Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 866 (1996) (attributing White flight to a desire on the part of the White middle-class to avoid integrated schools).

189. *See* John Charles Boger, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1289, 1299 (1993) (noting that isolation also impacts minority students' self-perception and contributes to low achievement taking away any sense of "destiny control"); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1659 (1995) (emphasizing that isolation from opportunity structures influences the construction of racial stereotypes).

190. While Black preferences are largely for integrated neighborhoods, *see* John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. Rev. 1573, 1577 (1993), White preferences are for minority populations of less than 20%, *see* MASSEY & DENTON, *supra* note 188, at 93.

191. LINCOLN ON DEMOCRACY 38 (Mario M. Cuomo & Harold Holzer eds., 1990).

192. *Id.* at 39.

dore Parker, whose brand of transcendentalism influenced Lincoln's brand of pragmatic democracy.[193] Parker's theology hinged on contrasting "the *ideal* Jesus with all the provisional expressions of that ideal in biblical texts or church doctrines."[194] Similarly, Parker's, and Lincoln's, political theology held that the vision of the Declaration of Independence represented the ideal democracy, in contrast to provisional expressions of that ideal in the Constitution or the body politic.[195] This is the Lincoln Cornel West speaks of when he says: "Lincoln's profound wrestling with a deep sense of evil that fuels struggle for justice endeavors to hold at bay facile optimisms and paralyzing pessimisms by positing unique selves that fight other finite opponents rather than demonic foes."[196]

Lincoln's conception of human agency and democratic possibility, maintaining a direct lineage to the Jeffersonian insistence on "the irreducibility of individuality within participatory communities," was a maneuver intended "to sidestep rapacious individualisms and authoritarian communitarianisms."[197] A maneuver intended, in other words, to mediate between variable conceptions of liberty as license and equality as imposition. Lincoln was not an idealist, and never believed that complete equality of existence could be achieved, or was even desirable, but he was a regulative idealist, believing that participatory equality was a procedural imperative to democracy.[198] In his political world, a pragmatic perspective warranted activism.

Lincoln's view—activism without idealism—foreshadowed the current recognition that even an ideal speech situation will always be distorted by power relationships. Contemporary pragmatists debate about the extent to which "unconstrained dialogue" and "discourse free from domination" are possible.[199] The need for such discourse stems from our aspiration of attaining "'a rationally motivated consensus' on controversial claims."[200] According to Habermas, conditions necessary to achieving a valid consensus of this type can be reduced to four: first, an equal opportunity to ini-

193. Garry Wills, Lincoln at Gettysburg: The Words That Remade America 106-08 (1992).

194. *Id.* at 108.

195. *See id.* at 108-10; *cf.* ADLER, *supra* note 4, at 35-41 (discussing the ideals embodied in the Declaration of Independence).

196. CORNEL WEST, KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA 108 (1993).

197. *See id.* at 107.

198. *See* WILLS, *supra* note 193, at 96-97.

199. *See, e.g.*, BENHABIB, *supra* note 185, at 282-301.

200. *Id.* at 284.

tiate and continue communication; second, an equal chance to contribute and participate, as by making assertions and clarifying; third, an equal opportunity to express one's feelings and desires, intentions and motivations; and fourth, "the speakers must act *as if* in contexts of action there is an equal distribution of chances 'to order and resist orders, to promise and to refuse, to be accountable for one's conduct and to demand accountability from others.'"[201] The result of consensus reached under this suspension of "untruthfulness and duplicity on the one hand, and of inequality and subordination on the other"[202] would be an agreement that is dependent solely upon the force of the better argument. In other words, adherence to this set of rules may reduce the impact of power relations on the outcome of dialogue.

While not a panacea, Habermas' vision, as refined by Benhabib and others, works to expose the structures of speech situations and assists in reconstructing presuppositions attendant to argumentation and debate. Going further, we might also see the attempt to integrate constrained dialogue as a necessary first step in the pragmatic project of imaginatively experimenting with the possible reconstruction of democratic society. Roberto Unger notices that one weakness in Habermas' ideal is the assumption that certain beliefs are authoritative simply because they are likely to thrive in a modern democracy.[203] In his view, this merely continues the futile search for "a speculative simulacrum of impartiality of judgment," allowing us a provisional set of rules for doling out rights while leaving the structural presuppositions unchallenged.[204] As an alternative, Unger suggests "the working out, in imagination and practice, of institutional variations on the realization and reshaping of our interests and ideals."[205] This insistence on the provisional nature of structure is not radical, but mirrors one of the basic premises of nineteenth century pragmatism—that well-developed senses of experimentalism and fallibility were necessary to the success of the American experience.

If our capacities stem from minimizing external constraints to full participation in the social environment, the continuing reformulation of particular social environments will become neces-

201. *Id.* at 285 (translating a quote from JÜRGEN HABERMAS, *Wahrheitstheorien, in* WIRKLICHKEIT UND REFLEXION (H. Fahrenbach ed., 1973).

202. *Id.*

203. *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 177 (1996).

204. *Id.* at 182.

205. *Id.*

sary. Dewey, providing a developed philosophical framework for Lincoln's observations, understood experience as having specific consequences for the future.[206] Experience for Dewey involves both an act and a passive reception of that act's consequence: "[w]hen an activity is continued *into* the undergoing of consequences, when the change made by action is reflected back into a change made in us, the mere flux is loaded with significance. We learn something."[207] In this understanding of education, the "unconscious influence of the environment" plays a significant role. The operations of our interpretive community establish the trajectory and ultimately delimit the parameters of our education.[208]

From the centrality of consequences and the contingency of truth springs the realization that all our opinions and beliefs have ethical consequences. Dewey argues that "[a]n empiricism which is content with repeating facts already past has no place for possibility and for liberty."[209] The future has significance because human agency can make a difference—actions and opinions transform future aims and purposes. Belief in transformation and evolving notions of justice is an integral part of the American ideology, dating from Emerson to the present day.[210] Although that belief can be challenged by despair over the still remote approximation to the promise of authentic democracy,[211] pragmatism admonishes us to retain the belief that notions such as "justice" and "liberty" can be assessed through the actual, substantive results of the law.

III. Liberty and Justice for All

Although analytical frameworks are indeterminate on an epistemological and metaphysical level, there are at least two ways in which our beliefs, opinions and actions are determinate. Josiah Royce, responding to the pragmatist axioms of contingency and

206. *See* DEWEY, *supra* note 181, at 140.

207. *Id.* at 139.

208. *See* Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1687-88 (1990). Dewey conceived of democracy as an "empirical hypothesis" that ordinary people are capable of utilizing "social intelligence" to solve social problems. *Id.* A precondition to this conception of politics is an extirpation of the myopia caused by privilege and monopolistic access to critical institutions (those institutions which generate and define social values). In other words, participatory opportunity and a sense of ownership of one's lived reality are essential to the production of a genuine democracy.

209. JOHN DEWEY, PHILOSOPHY AND CIVILIZATION 25 (1968). *See* WEST, *supra* note 196, at 111 (giving a summation of Dewey's pragmatism).

210. *See* WEST, *supra* note 196, at 107.

211. *See* Bell, *supra* note 63, at 373-75.

fallibility, suggested that "if any one wants to be in touch with the 'Absolute' . . . let [that person] simply do any individual deed whatever and then try to undo that deed . . . . Let the truths which that experience teaches any rational being show [that person] also what is meant by absolute truth."[212] In other words, the fact that our actions have ethical consequences imbues them with a sense of urgency, despite the fallibility of all facts and the contingency of all experience.

On a second, distinct level, Professors Sunstein and MacIntyre each make reference to the fact that pragmatic, contingent accounts of human possibility "seem[ ] inspired by the Enlightenment commitment to human liberation."[213] Any theory or philosophy is the product of individuals inescapably involved in the conflicts central to the development of their own community. The extent to which any set of narratives overlaps with those of another community may be said to speak to the resolution of common conflicts.[214] Thus any system can be said to attain determinacy to the extent that first, all actions taken within that system have ethical consequences, insofar as they irrevocably work to establish contingent truths, and second, that all human agents are inextricably bound up in the central narratives of a time and place.

Because it may be impossible or undesirable to escape the narrative of liberalism completely, we examine its ability to actually achieve an authentic justice. There is no simple meaning of liberalism, but many evolving strains. It may be useful to consider Ronald Dworkin's distinction between neutrality-based liberalism and equality-based liberalism.[215] The former opposes any limitations on personal liberty because of moral skepticism toward the claim that any particular mode of being is better than any other mode. The latter version holds as fundamental the proposition that governments treat all citizens as equals, and insists on moral neutrality only to the extent that this notion of equality permits. Neutrality-based liberalism contains internal flaws which recommend against its maintenance. The first, and most obvious flaw, is the conviction that a hands-off approach with regard to personal

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212. JOSIAH ROYCE, THE SOURCES OF RELIGIOUS INSIGHT 154 (1912).

213. Cass R. Sunstein, *Democracy Isn't What You Think: Between Facts and Norms*, N.Y. TIMES, Aug. 18, 1996, at 29; *cf.* MACINTYRE, *supra* note 52, at 392 (concluding that each narrative claim concerning the boundaries of justice (e.g. Humean tradition or Augustinian tradition) is advanced "within an institutionalized framework largely informed by the assumptions of liberalism, so that the influence of liberalism extends beyond the effects of its explicit advocacy.").

214. *See* MACINTYRE, *supra* note 52, at 389.

215. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 205 (1985).

liberties is somehow "neutral." In fact, this approach permits a form of privileging that denies alternative definitions of liberty, allowing liberty to be confused with license.

Second, neutrality-based liberalism provides no moral basis for claims against injustice. Embedded in the idea of a government which abstains from regulating liberties is the concomitant conviction that the status quo adequately represents the subdivisions of social contract. In this way, moral skepticism can produce an uncritical acceptance of dominant narratives, with the implicit suggestion that alternative conceptions lack merit. This leads Dworkin to state that neutrality-based liberalism "is a negative theory for uncommitted people."[216]

Even within the framework of equality-based liberalism there are alternative conceptions of what justice requires.[217] Most immediately familiar is the distinction between substantive and formal equality.[218] Aristotle based his theory of justice upon this distinction, stating that "justice is thought to be equality; and so it is, but for equals, not for everybody. Inequality is also thought to be just; and so it is, but for unequals, not for everybody. They omit the 'for whom' and judge badly."[219] In order to see that differences justify different treatment, we need to recognize that people judge poorly "because each side is really saying something true about justice and hence thinks it is saying the whole truth."[220]

Aristotle suggests that society will behave justly, sometimes because a person is just, at others because a person, though not just, respects the laws or fears obloquy.[221] But in either case, the person has learned to act in accordance with the precepts of justice

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216. *Id.*; *cf.* Putnam, *supra* note 208, at 1688 (identifying as the fundamental principle of Dewey's democratic theory that "the use of 'social intelligence' . . . is incompatible, on the one hand, with denying the underprivileged the opportunity to develop and use their capacities, and, on the other hand, with the rationalization of entrenched privilege.").

217. *See* ROSENFELD, *supra* note 60, at 13 (noting that justice has been equated with equality since antiquity), 340 n.2 (acknowledging disagreement between philosophers as to whether these concepts can be equated).

218. *See* Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. J. 381, 384 (1994) (likening the plurality of meanings in "equality" to the Greeks' distinction between geometric and arithmetic equality). Arithmetic equality occurs when a first number exceeds a second by the same amount that the second exceeds a third, yielding a constant numerical distance. *See id.* at 421 (quoting F.D. HARVEY, *Two Kinds of Equality*, *in* CLASSICA ET MEDIAEVALIA 101, 103-04 (1965)). Geometric equality occurs when the ratio between the first and second numbers is the same as that between the second and third, so that, for instance, one item is always twice the other. *See id.*

219. *Id.*

220. *Id.*

221. *See* MACINTYRE, *supra* note 52, at 113.

though experience. Education ensures that the *polis* operates to achieve all the good for all of its citizens.[222] Rawls asserts that to assess whether a society is just, it is inadequate to look only at whether the individuals are just. One must look at the structure and practices of the society.[223] In examining the issue of hate speech in a democratic society, one must look at the underlying institutional structure and arrangement; and in particular, at the inclusiveness or exclusiveness of the institutional arrangements.

The consequence of what it might entail to achieve the good for all citizens in a modern society is a subject of considerable debate. What is clear, however, is that an assessment of the good requires that all citizens be accorded equal opportunity to participate in the discourse of world-making. A concern for membership remains one of the defining characteristics of the liberal tradition. There nonetheless exists a gulf between labeling someone as a nominal member of society and giving that member an ownership role in shaping the community's priorities. Without a sense of ownership, there can be no reasonable expectation that the Jones family will be willing to accept the burden of tolerating a cross burning on their yard.[224] Only if the Jones family can identify themselves as owners within a community and rightfully perceive themselves as having power to shape their community's values should they be expected to self-identify as members, thus according tacit approval to the judgment that justice requires their tolerance of an act intended to convey the message that they are emphatically not a part of the community. Of course the very purpose and effect of hate speech is to deny and disparage the marginal membership of the less-favored subject.

What is at stake when St. Paul prohibits hate speech and racist acts under penalty of criminal sanctions?[225] Opinions such as that of Justice Scalia would have us believe that what is at stake is free speech itself.[226] Those who strike down prohibitions

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222. *See* DEWEY, *supra* note 181, at 90.

223. *See* RAWLS, *supra* note 3, at 7-11.

224. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 379-80 (1992) (presenting a skeletal outline of the facts of the case); Lawrence, *supra* note 17, at 787 (examining the facts of the case in detail).

225. St. Paul prosecuted R.A.V. under the city's Bias-Motivated Crime Ordinance, the constitutionality of which was the subject of the decision. *See R.A.V.*, 505 U.S. at 380. After presenting the facts, Justice Scalia backhandedly chastised the City of St. Paul for prosecuting the case under this ordinance. *See id.*

226. Contrary to Justice Scalia's suggestion, there are numerous competing notions of equality and different ways in which members of a free society may weigh these notions. Judge Alex Kozinski, in a recent speech at the University of Minnesota, argued that each member of a community has a responsibility to mitigate the

on hate speech insist that the Jones family assimilate, accepting the values of the larger society, even as society rejects their capacity for ownership.[227] Free speech is not at stake; what is at stake is a particular application of a particular notion of equality. This is the notion of equal individual rights before the state, understood as a limitation on the state's power to restrict expression.

Rather than characterize the debate over regulation of racist speech as one of liberty versus equality, we should characterize it as one concerning "domains of equality."[228] "[D]omains of equality refers to the classes of things that are to be allocated equally."[229] This definition begs the question of why certain classes of things, and not others, are to be allocated equally. I have suggested that the breadth of a particular domain of equality may be ascertained by reference to the endured experience of participants in a democratic society. The expansiveness or narrowness in a particular domain of equality exists at a level of abstraction of a degree less than that underpinning all of liberal theory. Instead, the notion of breadth queries whether justice requires that we move beyond the narrowest possible construction of equality. In any event, these questions exist prior to any confrontation with liberty claims. That is, a narrow conception of equality will obviously be less compatible with regulation of speech than will a more expansive definition.[230] Of course, this raises the question of why a more expan-

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harm done by racist or otherwise egregiously insensitive and psychologically harmful speech, by assuring the victim that they do not share the feelings of hatred or ill-will that informed the harmful act. Drawing on a Jewish tradition in which each member of the community, without stopping to inquire into blame or individual responsibility, joins together with other members in offering prayers of atonement to God when the Torah accidentally touches the floor, Judge Kozinski asserted that individual community members should take responsibility for ensuring that victims of racist speech feel membership in the community. The harm, as his speech recognized, is that racist speech indicates that a certain, unknowable proportion of the population wishes to exclude minority citizens from participating fully in society. It is this anti-democratic sentiment that must be weighed against the liberty interests represented by the First Amendment.

227. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 296 (1995) (noting that the law "can unsettle expectations and destabilize the status ordering of groups"); CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 218-19 (1983).

228. *See* DOUGLAS RAE ET AL., EQUALITIES 45-49 (1981); ROSENFELD, *supra* note 60, at 16-17.

229. ROSENFELD, *supra* note 60, at 16 (quoting RAE, *supra* note 228, at 45).

230. *See id.* at 17. Rosenfeld also notes the importance of the distinction between a "domain of allocation" and a "domain of account" in Professor Rae's structural grammar of equality. The former comprises the class of things controlled for the purpose of allocation, and the latter the class of things for which a given actor seeks equality. In a claim for equality, the agent for the domain of allocation must assess the extent to which available resources overlap with the request. This dis-

sive notion of equality is appropriate. In this Article, I have posited that justice and participation are the values that should inform this question. Such an inquiry is a programatic and experiential question as well as a normative one.[231]

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tinction has repercussions for regulation of speech insofar as the state may fairly be said to be the only agent capable of structuring a dispensation of participatory interests.

231. Substantive equality has the potential to serve a transformative role for lessening racial domination in today's world much in the same way that formal (narrow) equality played a transformative role during the Jim Crow period. Professor Crenshaw, for instance, has identified in the rhetoric of formal equality transformative *and* legitimating, sustaining *and* undermining aspects. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti Discrimination Law*, 101 HARV. L. REV. 1331, 1347-48 (1988). Although today formal equality seems limited in its ability to improve the lives of those victimized by racism, the notion of the equality of our worth as human beings remains a pinnacle of philosophical achievement, a lofty position that perpetually engenders hope for realization; and therein lies its transformative potential. *See* powell, *Racial Realism*, *supra* note 63, at 549-51. While this potential provides a pragmatic justification for a heightened emphasis on substantive equality, there will be questions of whether such an emphasis will positively impact the lives of the victims of hate speech, and if so, whether the benefit is worth the chink in the armor of the First Amendment.

Professor Elena Kagan worries that a shift in First Amendment doctrine allowing for some regulation of racist speech and pornography may prove detrimental to the cause of anti-subordination. *See* Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 882 (1993). While recognizing that judicial identification of viewpoint-based regulation "may well depend on the decisionmaker's viewpoint," and that these decisionmakers are "least likely to recognize (or count as relevant) viewpoint regulation when the regulator's viewpoint lines up with [their] own," *id.* at 880-81, Keegstra nonetheless believes that allowing legislators to take this reality into account amounts to an impermissible "imposition of an official orthodoxy." *Id.* at 882 (quoting The Hon. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1304 (1993)). Professor Kagan, although willing to partially acknowledge the problems associated with viewing the world exclusively through one's own narrative structure and unconsciously adopting positions in accordance with that structure, seems unconvinced that the law has any transformative capacity. Instead, she suggests that women and minorities should argue for retaining the current conception of viewpoint neutrality because it ensures that legislative decisionmakers cannot impose an orthodoxy which excludes them. Professor Kagan thus acknowledges both the harm that stems from pornography and racist speech, as well as the tendency of purportedly neutral rules to perpetuate a contingent status quo, but stops short of recognizing that the connection between these two phenomena recommend searching out transformative capacities in the law. While some commentators question whether the law is a proper or efficacious vehicle for transformation, *see* POSNER, *supra* note 25, at 213-15, there can be little question that law can and does presage the acceptance by society of some fundamental change. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022-25 (1996) (noting that particular positive laws make statements in support of or against a particular proposition, thereby (sometimes subtly) altering social norms, and behavior).

A. A Case Study in Mediation

Against the charge that inclusiveness at the expense of what many members of society consider our most basic freedom signals the decline of liberal democratic society, one might present the example of *Regina v. Keegstra*.[232] This Canadian Supreme Court case, which serves as an example of an alternative way of using democratic principles to valorize liberty and equality, involved the prosecution of an Alberta high school teacher, charged with communicating anti-Semitic statements to his students and requiring them to reproduce these views on exams. Mr. Keegstra was prosecuted under § 319(2) of the Canadian Criminal Code, which generally prohibits "communicating statements, other than in private conversation, [which] willfully promote hatred against any identifiable group."[233] Claiming that the law violated his right to free expression under section 2(b) of the Canadian Charter of Rights and Freedoms, roughly equivalent to the First Amendment of our Constitution,[234] Mr. Keegstra appealed his conviction. In upholding his conviction, the Canadian Supreme Court determined that this expression was not protected, as it was not expression that "'serves individual and societal values in a free and democratic society.'"[235] The Court determined that although the hate speech law limited Mr. Keegstra's right to free expression, it was a justifiable delimitation in a free and democratic society. What was at stake turned out not to be the core of free expression in a democratic society. What was at stake, for the Canadian Supreme Court, was an ideal: meaningful democracy.

This decision offers a profound contrast to American case law on the same subject. The analysis follows a path within the bounds of a commitment to both liberty and equality, and mediates between these values by recourse to a collective concern for the underlying values and principles of the society, including social justice.[236] In determining what limitations on universal rights are

232. [1991] 2 W.W.R. 1. Professor Fish also cites *Regina v. Keegstra* as an example of a permissible restriction of free expression, noting that the Canadian court's reasoning *starts* from the premise that the right of expression must always be balanced against the principles of membership in a society. *See* FISH, SPEECH, *supra* note 5, at 104-05.

233. *Regina*, 2 W.W.R. at 18.

234. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §2(b) (stating that everyone has "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication").

235. 2 W.W.R. 27 (quoting CAN. CONST., *supra* note 234, at §1).

236. *See id.* at 34 (quoting R. v. Oakes [1986] 1 S.C.R. 103, 136).

permitted or required by a free and democratic society, the court notes that "the proper judicial perspective under [Section One] must be derived from an awareness of the synergetic relation between two elements: the values underlying the Charter and the circumstances of the particular case."[237]

More significantly, the Canadian Supreme Court asserted that Mr. Keegstra's expression bears only a tenuous relationship to the values embedded in section 2(b), commenting that:

> one's conception of the freedom of expression provides a crucial backdrop to any [section 2(b)] inquiry; the values promoted by the freedom help not only to define the ambit of [section 2(b)], but also come to the forefront when discussing how competing interests might co-exist with the freedom under [Section One] of the Charter.[238]

Commenting that it is destructive of free expression values themselves, as well as other democratic values, "to treat all expression as equally crucial to those principles at the core" of free expression,[239] the Court suggested that democratic principles recommend viewing free expression as a function of three underlying goals. These goals are truth attainment, ensuring self-fulfillment and the development of self-identity, and most importantly, from the Court's perspective, the guarantee that the opportunity for *participation in the democratic process is open to all.*[240] The Court simultaneously supports these rationales with the observations that hate speech can impede the search for truth, impinge on the autonomy necessary to individual development and subvert the democratic process. Cognizant that the regulation "muzzles the participation of a few individuals in the democratic process,"[241] the Court remains certain that the loss of that voice is not substantial.[242] Any decision that inhibits participation should bear a very

237. *Id.* at 35.

238. *Id.* at 26.

239. *Id.* at 53.

240. *See id.* at 55.

241. *Id.* at 56.

242. Superficially, in light of the dominant stature of the "more speech" solution in American jurisprudence, this solution appears hypocritical. However, a more nuanced and rational exploration of the distinction between the interests of Mr. Keegstra and those harmed (the students and Jews with whom they come into contact) reveal that a notion of justice infused with participation supports this choice. *See* ROSENFELD, *supra* note 60, at 249-51 (suggesting the concept of reciprocity, or justice as reversibility, as a means of testing competing claims). When competing claims stem from incompatible ideological systems, justice as reversibility offers no reason for one claimant to subordinate his or her interests to the other. *See id.* By this logic, a racist may admit that his views are harmful, but claim that his position is religiously mandated. Such a radical variance of perspective, while rendering claims incommensurable, does not, however, mean anything

heavy burden of justification. What is most instructive about the decision is that the Court was willing to employ a democratic calculus.

The outcome of the decision, however, is less important than the reasoning.[243] This case cogently demonstrates that an interpretive methodology that recognizes the shared attributes of justice and equality will be less likely to privilege liberty interests. We have seen that the concept of justice is not monolithic, but rather depends for its substance on the perspectives of its explicators. This decision has less to do with a conflict between liberty and equality than it does with the adoption of a "domain of equality" capable of grasping the importance of participation to the exercise of democratic prerogatives.[244]

The Canadian Supreme Court felt that the objectives of the hate-speech regulation were clear, and included minimizing the impact of emotional, psychological, and participatory consequences arising from hate speech as well as protecting against the potential for hate speech to gain credence, thereby contributing to discrimination.[245] There must be a fine line guarding the government's capacity to impose an orthodoxy concerning what obtains toward truth, but on this view, the damage to individual possibility and democratic probability crosses that line. This decision turns on the unwillingness of the Canadian Supreme Court to accept abstract justifications for free expression. Instead, they exhibit tolerance only for free expression which comports with co-equal values.

Section One of the Canadian Constitution requires that the specific rights granted to each member of that society not impinge on the society's identity as a democracy.[246] Although our Constitution contains no such provision, Professor Adler has suggested that

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for the adjudication of competing claims within a coherent and just system of governance. Because Mr. Keegstra implicitly accepts the requisites of democratic society, his refusal to abide by the dictates of that system provides no defense.

243. *Cf.* Farber, *supra* note 177, at 189 (suggesting that a "Brandeis-ian'" solution to the problem of hate speech would involve imaginative efforts at framing the fundamental issues involved and would expand the parameters of debate and dialogue to identify ultimate goals; this approach similarly counsels not for or against one constituency, but rather attempts to delve beneath the antagonisms of superficial debate).

244. *See* ROSENFELD, *supra* note 60, at 16-21 (discussing the view that identification of a domain of equality is prior to engaging questions of liberty).

245. *See* Regina v. Keegstra [1991] 2 W.W.R. 1, 43.

246. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §1 ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits proscribed by law as can be demonstrably justified in a free and democratic society.").

the Declaration of Independence fulfills this role.[247] The Declaration sets forth the political principles which underlie the Constitution. That the Constitution failed to represent those principles, and required the Civil War and amendment to do so should not divert our attention from that pledge. Despite the self evidence of the truths contained in our version of Section One, we continue to permit obfuscation to yield doctrinaire and decontextualized solutions to difficult legal and ethical dilemmas. When values are at odds, we would do well to follow the Canadian example and admit the clash. Only then will it be possible to say what justice requires.

Conclusion

Projecting the decision in *Keegstra* onto an American screen, we might say that the First Amendment is slow in heading toward the confluence of liberty and equality, slow in accepting the intersectionalities of the American voice.[248] This is perhaps in part because we succumb to the loudest of American voices which proclaim the evil of tyranny in the modern guise of state censorship to an ever credulous society. The threat of silencing great poetic voices and placing facades of intolerance in front of great art elicit immediate and vociferous responses. But when the response inevitably fails to consider that the silence and invisibility which lie in the wake of oppression are also the stuff of limits, we fail to achieve the ideal of "a free and democratic society."[249]

What is at stake when we regulate forms of hate speech? Not "free expression," however that may be defined at the moment (consider the powerful implications of social inertia embedded in *O'Brien*, *Texas v. Johnson*, and *Abrams*). *Keegstra v. Regina* admonishes us to accept that the First Amendment, like any guiding principle, will always be infused with a set of values, that no holy writ exists to which we can appeal for a definitive or doctrinaire solution. The First Amendment is only a set of words, "*inherently* nothing,"[250] to which we bring our provisional judgments. Though

247. *See* ADLER, *supra* note 4, at 37-38.

248. *See* Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737 (1993) (identifying in recent commentary on the First Amendment a nascent shift in thinking, away from doctrinaire constructions, and toward a more nuanced and complex set of formulations that comport more closely with the realities of our lived experience).

249. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

250. FISH, SPEECH, *supra* note 5, at 113.

dialogue will eventuate alteration and transformation,[251] any shift in contexts must be constrained by the dictates of justice in a democratic society. This delimitation is no mere imposition of a personal preference, but rather an observation culled from employing experience as a metaphor for transformation.[252] You can't just decide you are going to change the behavior of a nation. But you can decide that in making difficult judgments about what justice should require or permit, a nation may be asked to adhere to its basic values, and if these are in tension, seek recourse in a judgment infused with the ideals of pragmatic democracy.

251. *See supra* notes 80-88 and accompanying text (discussing the intersection of transformation and experience).

252. *See* DELGADO & STEFANCIC, *supra* note 14, at 70-94 (discussing how the slow transformation in White American "images of the outsider" yields a "how could they" reaction in response to yesterday's racist depiction).