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Should Racially Biased Hate Speech Be Treated Differently Than Other Forms of Speech?

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SHOULD RACIALLY BIASED HATE SPEECH BE TREATED DIFFERENTLY THAN OTHER FORMS OF SPEECH?

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In popular memory and most published accounts, The First Amendment of the US Constitution promises that, among other things, "Congress shall make no law… abridging the freedom of speech, or of the press."[1] At face value, the meaning of the First Amendment appears self-evident: the US Government cannot pass any law that in any way restricts what people can say or publish in the United States. But this interpretation, and support for complete freedom of speech, becomes more difficult when one considers the wide variety of shocking, offensive, cruel and appalling things people can come up with to say to and about each other. Interestingly, early in United States history the First Amendment was not seen by the government as the binding agreement to refrain from restricting all speech that it is viewed as today; in fact, within just a few years of the First Amendment becoming part of the Constitution, there were successful (albeit, unpopular and quickly overturned) attempts to criminalize certain unfavorable speech directed at the government. Anthony Lewis

[1] Note: For the purposes of this essay, *speech* includes both direct and symbolic speech–so, not only spoken and written words, but also actions taken in order to communicate a message. This follows the meaning of the word as it is used by the Supreme Court of the United States.

notes that, although this early speech law never went to the Supreme Court, "if it had been, the Court would almost certainly have upheld the law."[2] Today, the interpretation of the First Amendment accepted by the United States Supreme Court has shifted closer to the face-value reading of the First Amendment, and both state governments and the federal government are held to high standards of speech protection. Currently, restrictions on speech must pass strict scrutiny tests, meaning that those defending the law must demonstrate both that the speech issue could not be handled some other way and that the problem is pressing enough to warrant legal restriction.[3] This is a test that is extremely difficult to pass, and most restrictions targeted at speech fail to pass this test, resulting in a legal culture in which legislators rarely attempt to make restrictions on speech and in which people are free to say more or less whatever they want to (and any brief survey of social media will reveal that many are quite happy to take full advantage of this freedom).

In this paper, I will discuss two Supreme Court cases concerning legislation with which state and local governments attempted, and ultimately failed, to punish a specific category of speech: racially biased hate speech. My goal is to demonstrate that, although current United States Supreme Court doctrine holds that laws specifically targeting racially biased hate speech are unconstitutional, the nature of racially biased hate speech is such that it should be a legitimate exception to the rule that law cannot proscribe the expression of certain ideas.

In the first section of this paper, I will overview the court cases, providing the arguments the Court gave for each

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[2] Anthony Lewis, *Freedom for the Thought That We Hate* (New York: Basic Books, 2007), 11, 15.

[3] John T. Bennett, "The Harm in Hate Speech: A Critique of the Empirical and Legal Bases of Hate Speech Regulation," *Hastings Constitutional Law Quarterly* 43: 456–458, https://advance-lexis-com.libproxy.furman.edu/api/permalink/57c4e61b-1f10-416a-bf13-9586bf0beb9e/?context=1516831.

decision. In the second section, I will compare these arguments to the classic argument in favor of free speech presented by John Stuart Mill. In the third section, I will present arguments in favor of hate speech regulation from critical race theorists. In the fourth section, I will present responses to these critical race theorists from modern scholars who oppose hate speech regulation. And in the final section, I will present my own critique of the Supreme Court's decisions and counterarguments to the arguments presented by Mill and those opponents of hate speech regulation discussed in the third section. I will also attempt to present a version of hate speech law that would allow hate speech to be legally recognized as unacceptable, while avoiding some of the consequences that those opposed to hate speech regulation fear.

Supreme Court Cases

The United States Supreme Court cases I will focus on are *R.A.V. v. City of St. Paul* and *Virginia v. Black* (referred to throughout the rest of this paper as *R.A.V.* and *Virginia*, respectively). The first case, *R.A.V.,* concerns a teenager who was charged under the St. Paul Bias-Motivated Crime Ordinance for burning a cross in a black family's front yard.[4] The United States Supreme Court found that the St. Paul ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[5] That is to say, the law was unconstitutional because it proscribed speech based on its content—it specifically targeted speech that "arouses anger... on the basis of race, color, creed, religion, or gender" as legally unacceptable, but left speech that arouses anger on other bases protected. The court explained that, while the ordinance only applied to bi-

[4] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
[5] R.A.V. v. City of St. Paul.

ased speech that constituted "fighting words," which the Supreme Court has recognized as proscribable, it was unconstitutional because it effectively allowed the government to pick and choose which topics of fighting words were acceptable and which were not. ("Fighting words" is a term for a category of speech first recognized as proscribable by the Supreme Court in *Chaplinksy v. New Hampshire* and is defined by the Court as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace.")[6] As Justice Antonin Scalia explained in his opinion for the Court, this law could create a situation in which one side of a debate could say whatever it wanted to, whereas the other side could not—he explains this by presenting a hypothetical situation in which a person could say "that all 'anti-Catholic bigots' are misbegotten; but not that all 'papists' are"; and so Catholics would be permitted to use whatever language they like, but anti-Catholics would be limited to tamer speech.[7]

In the second case, *Virginia*, the Court examined a law which "makes it a felony 'for any person … , with the intent of intimidating any person or group … , to burn … a cross on the property of another, a highway or other public place,' and specifies that '[a]ny such burning … shall be prima facie evidence of an intent to intimidate a person or group.'"[8] The Supreme Court held that intimidation is a legitimate exception to First Amendment protection, as well as that states could specifically ban cross burning when the intent of the cross burning is to intimidate; however, the Court found the statute unconstitutional as it was written, because of its *prima facie* assumption that cross burning was always intended to intimidate.[9] In

[6] Chaplinsky v. New Hampshire, 315 US 568 (1942).
[7] R.A.V. v. City of St. Paul.
[8] Virginia v. Black, 538 US 343 (2003).
[9] Note: *prima facie* comes from the Latin for "at first sight," and means that something is taken to be true unless proved otherwise.

her opinion for the court, Justice Sandra Day O'Connor explained that "the act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech."[10] In other words, to assume that cross burning in every case is intended to intimidate could be to punish someone who burned a cross not in order to intimidate, but rather to make a point that contributes to political discussion. Interestingly, the court held that cross burning could be specifically banned because of the historical association of cross burning with the Ku Klux Klan, known for its extreme racial violence and hate speech, but that this was consistent with the decision in *R.A.V.* because the *Virginia* statute did not specify that cross burning was illegal when intended to intimidate based on religion, race or sex; it simply restricted cross burning in all cases in which it was intended to intimidate.

The *Virginia* decision could be seen as a victory for supporters of hate speech regulation, and it is certainly more of a victory than *R.A.V.,* but, as we will see below, its failure to specifically condemn racially biased hate speech and the Court's rejection that cross burning can be taken to always imply intimidation, despite the fact that the Court acknowledged its association with racial violence and intimidation, means that it is not the direct kind of restriction on hate speech that hate speech regulation advocates desire.

A Classic Free Speech Argument

As mentioned above, in the United States' infancy the Supreme Court likely would not have been as opposed to specific content discrimination in either state or federal law as it

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For more clarification, see the entry on Prima facie in the Wex legal dictionary from Cornell Law School's Legal Information Institute, https://www.law.cornell.edu/wex/prima_facie.

[10] Virginia v. Black

is today. While it might seem unbelievable to us now, in 1798 the Senate passed a bill which criminalized "any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress… or the President."[11] Called the Sedition Act, this law was a direct content restriction on negative writings about the government. The arguments used in the United States for shifting away from laws such as the Sedition Act echo arguments found in John Stuart Mill's book *On Liberty*, published in 1859. In this book, Mill argues that (almost) no speech should be regulated, because all speech, even speech that is considered "false and pernicious," can contribute to the exchange of ideas and pursuit of truth.[12] Mill sees three reasons not to regulate speech in general. First, he argues that "all silencing of discussion is an assumption of infallibility";[13] that is to say, when the government chooses to punish certain speech or ideas, it is assuming that it knows what the correct opinion should be. Mill notes that throughout history, historical figures that in Mill's day were considered great teachers, such as Jesus and Socrates, were executed for spreading supposedly bad ideas in the time periods in which they lived.[14] Another reason Mill provides to not regulate even negatively-viewed speech is that often, the so-called false opinion and so-called true opinion both contain part of the truth; he claims that it is rare that one is completely true and the other completely false and, therefore, access to both sides of an argument are necessary in order to come to the truth.[15]

Mill's next reason not to regulate any kind of speech is that any opinion, "however true… if it is not fully, frequently, and fearlessly discussed… will be held as a dead

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[11] Lewis, *Freedom for the Thought That we Hate*, 11.
[12] John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Hackett, 1978), 18–19.
[13] Mill, *On Liberty*, 17.
[14] Mill, 23.
[15] Mill, 44.

dogma, not a living truth."[16] Mill explains that, in order for an idea not to become a dead dogma (that is, a kind of blindly, unquestioningly accepted catechism, rather than a compelling intellectual idea), those who hold that idea must be exposed to objections to that idea. What's more, he argues, in order for the hearer to receive the "most plausible and most persuasive form" of the opposing argument, the objections must be presented by those who believe the so-called false view, rather than by someone who simply knows the argument but does not believe it.[17] This would require those holding the false idea to be allowed to speak their beliefs exactly as they believe them, rather than presenting the idea in a tame, third-person kind of way.

Mill was specifically concerned with the kind of silencing of religious and political discussion present in England and the early United States. Historical speech laws often included what would be categorized as content-based restrictions on speech that today we recognize as valuable, such as political and religious dissent. By restricting certain content, these laws regulated the ideas presented in the speech, rather than simply the aggressive nature or fighting-word status of such speech, and were legitimized by arguments that the regulated speech was either untrue or of such offensive nature that it should not be permitted in public discourse. Understanding this context of speech repression is important to understanding why Mill argued in favor of nearly total freedom of speech and why it is now so difficult to argue for regulation directed at a specific subject of speech in the United States, even when the speech is deeply offensive and recognized to be based on untruth, as racially-biased hate speech is.

It should be noted that Mill allows for some speech (or actions in general) to be regulated when such action or speech

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[16] Mill, 34.

[17] Mill, *On Liberty,* 35.

would cause specific harm to others.[18] This idea is often called the *harm principle*. (It can be argued that hate speech directly causes harm to others, both physically and mentally, although, since Mill's focus was not on hate speech, he does not address this possibility; I will address this idea further in the subsequent sections of this paper.) Mill's only example of a case in which speech causes justly regulable harm is the case of a man inciting an angry mob by declaring that "corn dealers are starvers of the poor." [19] Mill explains that, in this case, the speech is not regulable because of the idea it expresses, but rather because it occurs in front of an angry mob gathered at the house of a corn dealer and will most likely incite them to harm the corn dealer; to Mill, such speech would be acceptable if it did not occur in that specific context.[20] Because much of what is considered hate speech by its broadest definition (which would include not only angry incitements to violence but also racist speech in general) is not presented in a directly comparable manner to this example, it would seem that Mill would only support regulating hate speech that can be seen as a direct incitement to harm, if he were to enter the discussion today. Mill's harm principle is similar in many ways to the fighting-words doctrine discussed in *Chaplinksy, R.A.V.* and *Virginia*, because the nature of fighting words is to either incite or inflict harm.

An Argument from Critical Race Theory

Those who support regulation of racially charged hate speech, whether embodied in state legal codes or in the rules of public colleges, find themselves in a tight spot in the face of the reversal of historical speech laws and current legal doc-

[18] Mill, 9.
[19] Mill, *On Liberty*, 53.
[20] Mill, 54.

trine on hate speech. Although advocates of hate speech restrictions want such restrictions not to end political discussion, but rather to protect those people who have historically been subject to extreme discrimination and violence based on their membership in minority groups (for example, race, gender, religion, and sexual orientation), such advocates are often designated as "thought police" by opponents, a designation that implies that they do not support open discussion.[21] In this section, I want to examine the view held by some of the most outspoken supporters of hate speech regulation, the critical race theorists, and why they think that racially biased hate speech can be treated as an exception to the rule that government cannot implement content-based restrictions on speech.

Critical race theory is based on six "defining elements," presented in *Words That Wound* as follows:

> Critical race theory recognizes that racism is endemic to American life…. Critical race theory expresses skepticism toward dominant legal claims of neutrality, objectivity, color blindness, and meritocracy…. Critical race theory challenges ahistoricism and insists on a contextual/historical analysis of the law…. Critical race theory insists on recognition of the experiential knowledge of people of color… in analyzing law and society…. Critical race theory is interdisciplinary and eclectic…. [and] Critical race theory works toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression.[22]

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[21] Charles R. Lawrence III et. al, eds., introduction to *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, (Boulder: Westview Press, 1993), 2.

[22] Lawrence et. al, introduction to *Words that Wound*, 6.

Based on these beliefs and goals, critical race theorists argue that racially biased hate speech can be legitimately singled out for restriction, despite the fact that this would create a content-based restriction, because of the long history of racial discrimination such speech embodies and because eliminating such speech would help alleviate the still-existing problems faced by racial minorities today. The critical race theorists often provide personal examples of being subjected to hate speech in order to support their claims; one such example is a "rash of hate tracts [that]… appeared in [their] mail," an experience which caused them to "[walk] more quickly to [their] cars after late nights at the office and [to glance] more often over [their] shoulders as [they] jogged the trails around [their] campuses."[23] Charles Lawrence III provides another personal example, writing about a hate speech incident directed at his own family members in which racist drawings, slurs and threats were written at the school where his sister and nephews worked and attended classes, respectively.[24] Though some may argue that crude, slur-filled drawings or anonymous tracts may not constitute a true threat, or may only happen rarely and therefore not be a widespread enough issue for laws to be specifically directed at racially biased speech, for critical race theorists, the association of such speech with lynching and racial discrimination, and the extreme fear caused by being targeted by such speech, warrants laws that explicitly target racial hate speech. Lawrence notes that hate speech has a silencing effect on those it targets; although supposedly still free to speak, the shock of being the target of hate speech renders the person targeted unable to respond or participate in the discussion at hand, as was the case for one of Lawrence's students, who

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[23] Lawrence et. al, 7.

[24] Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" in *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, ed. Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw (Boulder: Westview Press, 1993), 73.

found himself unable to respond when being verbally attacked for being gay.[25] This demonstrates another side of the critical race theorists' argument for hate speech regulation, which is that the regulation of hate speech may actually be more conducive to a culture of free, open discussion.

Critical race theorists do not necessarily agree on the extent to which hate speech should be regulated by law; Mari J. Matsuda, for example, argues that hate speech restriction should focus on speech where "the message is of racial inferiority… the message is directed at a historically oppressed group… [and] the message is persecutory, hateful, and degrading."[26] Such a definition of hate speech, although appealing to those who support the critical race theorists' goals, would naturally create the problem of one-sided debate that Justice Scalia warned of in *R.A.V.* and would likely be too broad a definition of hate speech to successfully use for legislation. On the other hand, Charles R. Lawrence III advocates legislation that defines proscribable speech simply as "face-to-face racial vilification."[27] Lawrence's description of such speech echoes the "fighting words" doctrine mentioned above, which was first presented by the United States Supreme Court in *Chaplinsky v. New Hampshire*, but focuses it directly at racially biased hate speech. In fact, Lawrence's definition of hate speech would support a law almost exactly like the law thrown out in *R.A.V.*; it seems that in response to the court's decision, Lawrence would counter that racially biased hate speech can be specifically targeted as long as the law is worded in a way that allows both sides of any race debate to have protection. Based on Lawrence's definition, it does not

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[25] Lawrence, "If He Hollers Let Him Go," 53.

[26] Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" in *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, ed. Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw (Boulder: Westview Press, 1993), 36.

[27] Lawrence, "If He Hollers Let Him Go," 87.

matter if one is a member of a racial group that has been historically ostracized or has historically been the one that ostracizes—Lawrence, unlike Matsuda, does not specify that hate speech regulation should punish only hate speech directed at members of historically oppressed racial groups, and in this way better avoids the one-sidedness that Scalia lamented in *R.A.V.* while still advocating for law that restricts racial hate speech as a category.

Modern Counter-Arguments to Critical Race Theorists

Modern defenders of free speech who oppose critical race theorists present a number of reasons not to legislate against racially biased hate speech beyond those provided in the Supreme Court's decisions and by Mill.

First, some opponents of hate speech regulation counter that government regulations on racist hate speech are unwarranted because such regulations deny respect for the autonomy of the speaker, which is a key foundation for the legitimacy of our government. As C. Edwin Baker argues, "the legitimacy of the state depends on its respect for people's equality and autonomy and… as a purely formal matter, the state only respects people's autonomy if it allows people in their speech to express their own values – no matter what these values are."[28] That is to say, a government is only legitimate if it allows people to speak their mind completely and to make choices for themselves in what to think, even if their ideas are hateful and offensive. It follows from this that to restrict hate speech, although it may appear to be a good decision, would be to destroy the legitimacy of the government. Baker agrees with critical race theorists that the government must also protect the equality of its citizens, but he adds that this does not

[28] C. Edwin Baker, "Autonomy and Hate Speech," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein, (Oxford: Oxford University Press, 2009), 142.

mean that the government should punish private citizens for saying things that "[do] not respect others' equality and dignity."[29] Such speech is, to Baker, a matter of choice and personal belief, rather than a substantial infringement on the rights of minorities, and therefore the government should not have a say in what people say and believe. The tendency of past governments to dictate what people could or could not say and believe is the reason we have today developed such a strong aversion to speech regulation, and to Baker there is more substantial ground to argue that the governments' restriction of hate speech infringes on a person's right to autonomy than to argue that an individual's use of hate speech infringes on the rights of the individual (or group) targeted by the hate speech.

Another opponent of hate speech regulation, John T. Bennett, also addresses critical race theorists' arguments for hate speech regulation. In addition to arguing that government should not dictate what can or cannot be said, Bennett questions the evidence of harms from hate speech. Bennett does not deny that there is any evidence whatsoever of harm from hate speech; however, he denies that this evidence is so strong as to warrant hate speech regulation. Bennett asserts that one such harm attributed to hate speech, which is social inequality, is not attributable to hate speech and racism after all, but rather to "cultural norms that are unrelated to racism."[30] Bennett calls this view the "cultural perspective" and explains that "the cultural perspective finds that…various inequalities are caused in large part by the distinct norms, habits, and lifestyles of different people within different communities."[31] Bennett claims in

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[29] Baker, "Autonomy and Hate Speech," 143.

[30] John T. Bennett, "The Harm in Hate Speech: A Critique of the Empirical and Legal Bases of Hate Speech Regulation," *Hastings Constitutional Law Quarterly* 43 (2016): 478, https://advance-lexis-com.libproxy.furman.edu/api/permalink/57c4e61b-1f10-416a-bf13-9586bf0beb9e/?context=1516831.

[31] Bennett, "The Harm in Hate Speech," 468.

opposition to critical race theorists that inequality as it exists in the United States today is not caused by inherent structural racism, but rather by "varying norms, habits, preferences, and conscious decisions" taken by members of the minority racial groups that currently experience unequal outcomes compared to members of the majority racial group.[32] Put more simply, Bennett argues that the inequality experienced today by people who have historically been discriminated against because of their race is not because of the lingering effects of racism in society; instead, he argues that minorities have caused the current inequality through their own decisions, and implies that blaming these problems on racism, and specifically racist speech, is to shift the focus onto the wrong problem.

Bennett explains further that another harm attributed to hate speech, psycho-emotional harm, is also problematic, because it is a difficult harm to measure, because it is inherently subjective, and because, according to him, research into this harm does not show that hate speech causes long-term psychological harm.[33] He writes, in an explanation of a study which attempted to determine whether hate speech negatively impacts self-esteem of young Blacks in the long term using data gathered between 1960 and 1998, "if hate speech in American society is causing psycho-emotional harm, this has not led to a measurable impact on self-reported self-esteem."[34] Bennett does not deny that those who are targeted by hate speech experience any harm whatsoever, but rather argues that the evidence of long-lasting harm is not strong enough to warrant the level of strict hate speech regulation some critical race theorists want.

Bennett also notes that critical race theorists use empirical data which is gathered by academics who "suffer from

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[32] Bennett, 469.
[33] Bennett, "The Harm in Hate Speech," 487.
[34] Bennett, 487.

deeply rooted and longstanding ideological bias."[35] Bennett explains that this bias takes two forms: first, he claims that many proponents of hate speech regulation "exaggerate the prevalence of racism and sexism in American life," even as racism itself has declined and anti-racism has become the norm.[36] Second, Bennett notes that this bias results in the exclusion of conservative academics, who (like Bennett) might question the prevalence of hate speech and the necessity to regulate it.[37] According to Bennett, the currently accepted opinion on hate speech among academics has already created a culture of speech where, even though certain ideas and speech may not be illegal, people are afraid to speak their minds because of the possibility of being socially punished—not for using racially-charged hate speech, but rather for arguing that such speech may not need to be regulated.

Both Baker and Bennett also address the argument that hate speech causes harm, and must therefore be regulated, by countering that hate speech regulations may worsen the problems that proponents of hate speech regulations want to fix. For example, Bennett notes that hate speech regulations would be likely to negatively impact racial harmony in the United States. He explains that "if hate speech laws were enacted, reasonable people would perceive racial favoritism in their implementation," meaning that hate speech regulation would be likely to increase animosity between racial groups, because such regulations, as presented by scholars such as Matsuda, would likely favor one racial group over another.[38] Baker agrees with this, noting that "speech prohibitions can increase… racist individuals' or groups' sense of oppression and, thereby, sense that they must act."[39] He also asserts that

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[35] Bennett, 471.
[36] Bennett, 474.
[37] Bennett, 473.
[38] Bennett, ""The Harm in Hate Speech," 531.
[39] Baker, "Autonomy and Hate Speech," 152.

regulation of hate speech will make it more difficult to identify potential perpetrators of racial violence, because such regulations will force proponents of hate speech to go underground and thereby become harder to trace.[40] So, instead of hate speech regulation protecting minority groups from harm, Baker and Bennett argue that hate speech regulations will ultimately cause more harm.

My Response to the Above Arguments

My own view on hate speech regulation recognizes that freedom of speech is a necessary and important freedom in any country that claims to value the rights of the people who live there; however, I agree with the critical race theorists that racially biased hate speech should be an exception to the rule and that states can legitimately write laws that punish extreme racial hate speech.

Before completely laying out my own view, I need to respond to the arguments against hate speech restriction that were presented above. First, in response to Mill: Mill argues that all speech must be allowed in order to pursue truth. Although I agree that the search for truth is important, I think it is difficult to argue that hate speech seriously contributes to the pursuit of truth. Of course, there is a possibility of discriminatory, racist speech which may appear to contribute to this search for truth, such as in a story that Mari Matsuda calls "The Case of the Dead-Wrong Social Scientist," in which a racist argument is portrayed as having scientific backing and is presented in a classroom or lecture setting, thereby bearing resemblance to actual academic debate and pursuit of truth.[41] However, I think even Mill would be hard-pressed to show what benefit or hint of the truth could be found in yelling derogatory names, burning crosses in black families' yards, or

[40] Baker, 152.
[41] Matsuda, "Public Response to Racist Speech," 40-41.

drawing pictures of swastikas outside dorm rooms. At least the social scientist, in presenting his racially biased views in an academic manner, puts forth his argument in the kind of setting that allows for discussion; that is to say, by presenting his views in an academic setting, he seems to invite the possibility of the kind of discussion of ideas Mill wants us to have. On the other hand, racist speech that takes the form of a slur, a display of a hateful symbol, or an act of vandalism does not ask for engagement; it seeks to intimidate others into fear and silence.

Also, banning hate speech and banning disagreement are not necessarily the same thing. Or, they do not have to be. Part of the fear addressed above is that hate speech will be so broadly defined as to include speech that should be protected, including speech that is merely in opposition to the prevailing view. This is one of the potential problems with Matsuda's definition of hate speech. A number of claims made specifically by Bennett could be considered racist by his readers, regardless of whether he is trying to be racist or not, and there are those would argue that all even vaguely racist speech is hate speech. Such an argument would make it possible for these readers to accuse Bennett of hate speech, even though it seems a stretch to call what he says hate speech compared to the more extreme examples of hate speech already mentioned. This reveals a need to define hate speech specifically, in order to avoid creating a culture where those who may not intend to cause harm feel like they cannot speak, because they cannot ask questions or challenge prevailing views without being accused of hate speech. For this reason, I find myself leaning toward Lawrence's definition of hate speech as "face-to-face racial vilification."[42] However, I would ensure the definition included acts that might not be strictly face-to-face, such as posting up a poster with demeaning racial images, or displaying symbols, such as the swastika or a burning cross, which

[42] Lawrence, "If He Hollers Let Him Go," 87.

would likely cause emotional harm by their proximity to members of minority groups. Either way, a narrower definition of hate speech would allow those with unpopular, and even potentially racist, opinions to still speak their opinions—they just would not be able to use words that inherently harm or silence others in order to express these opinions.

Of course, narrowly defining hate speech and recognizing that hate speech does not contribute to a pursuit of truth does not seem enough to satisfy Baker and Bennett. Baker says that the government must respect its citizens' autonomy by allowing them to speak their opinions freely and argues that this respect must be maintained "irrespective of how this expressive content harms other people."[43] This may just be an unfortunate wording, although it is interesting that, when presenting possible evidence that might convince him that hate speech regulation would be beneficial, Baker only suggests that he would be convinced by evidence showing that hate speech incites racist acts (by racists), and he does not mention that he would be convinced if he was shown evidence that hate speech harmed its targets in and of itself.[44] Allowing someone to speak even if it causes harm to another person seems to go directly against the purpose of government. I agree with Baker that the government must respect the autonomy of its citizens; however, the law must put some limits on a person's autonomy in order to protect other people; this is, of course, why there are laws against stealing and murder, and why pedophiles cannot use the argument of sexual autonomy to justify sexual acts with minors. A person's freedom of choice to act ends when their action harms another person.

Hidden within Baker's statement that speech must be freely allowed regardless of harm, is the argument that speech does not cause true harm in the same way that murder, stealing, and sexual abuse cause harm. This is interesting, as Baker

[43] Baker, "Autonomy and Hate Speech," 142.
[44] Baker, "Autonomy and Hate Speech," 146-150.

seemingly disagrees with the Supreme Court's decision in *Chaplinsky*, because the Court's definition of fighting words, as quoted above, recognizes that certain words can cause harm.

Bennett's specific arguments against hate speech, on the other hand, are somewhat more controversial. First, his argument that inequality is not caused by racism seems quite false; even if it is true that not all current inequality is caused directly by racism, there are cases where racism can be shown to underly situations of inequality. This can be seen specifically in the higher incarceration rates of Blacks for drug crimes, despite whites being a larger portion of the drug user population, as well as in more severe sentences for Blacks versus whites when similar crimes are committed.[45] Second, Bennett, unlike Baker, allows that hate speech may cause actual harm to those targeted by it, but he denies that it is enough harm to warrant restriction. It is interesting to note that the study Baker uses to demonstrate that hate speech does not cause long-term harm focuses on the impact of hate speech on self-esteem, and does not address other long-term psychoemotional harms that may occur, such as fear of going to certain locations (such as a classroom or a dorm where one was subject to hate speech). It seems both Bennett and Baker reject the personal experience of those targeted by racist hate speech. If you ask the Black family who was directly targeted by the burning cross at the heart of the controversy in *R.A.V. v. St. Paul*, would they say there was no long-term psychological harm? In the example mentioned above, in which Lawrence's family was targeted by racist drawings, he writes that, on vis-

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[45] Kenneth B. Nunn, "Race, Crime and the Pool of Surplus Criminality: Or Why the 'War on Drugs' was a 'War on Blacks,'" *The Journal of Gender, Race & Justice* 6 (2002): 393-398, advance-lexis-com.libproxy.furman.edu/api/document?collection=analytical-materials&id=urn:contentItem:483S-8KK0-00CW-G060-00000-00&context=1516831.

iting his family after the incident, the pain and injury was obvious, that "their faces betrayed the aftershock of a recently inflicted blow and a newly discovered vulnerability."[46] Could Bennett and Baker deny that such an experience would not have long-term effects on Lawrence's family, especially the children who realized they went to school with people who were willing to say such things about them? It is possible that more commonplace, subtle racist speech may not have measurable long-term effects (although I am not totally convinced this is true), but it seems difficult and wrong to deny the individual experience of those targeted directly by the most violent and direct instances of hate speech.

The question also arises of why it matters to have racially biased hate speech regulation specifically, if such hate speech could fall under legislation, such as the law in *Virginia*, that regulates fighting words in general. Simply proscribing hate speech within more general fighting words laws might appeal to Bennett, since, as discussed above, he says that reasonable people will see restrictions that specifically regulate hate speech as favoring one side over another, and that academics who support such legislation are deeply biased. Bennett is probably right in saying that racial hate speech ordinances will tend to favor one side over another, even if not written in a way that asks for such one-sided application, seeing as it likely would be more difficult (but not impossible) for a white person to show that she is the victim of hate speech than it would be for a Black person, Jewish person, or person of any other minority group. It is also more likely that people of color will bring up allegations of hate speech and win, because people of color are more often targeted by hate speech and hate crimes (however, it should be noted again that whites would also be able to be recognized as victims of hate speech under the kind of hate speech laws I am arguing for, just as whites can and have been recognized as victims of hate crimes

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[46] Lawrence, "If He Hollers Let Him Go," 73.

under current hate crime laws).[47] This seemingly unfair application comes about because derogatory speech and symbols directed at a white person do not carry with them the same history of oppression that such speech directed at a person of another race would. However, this same history of oppression is exactly what motivates those academics who support hate speech regulation. They may appear to be biased, but this is because most critical race theorists are themselves members of minority groups who have experienced extreme discrimination in United States history; in a sense, regulation specifically directed at hate speech is a small way of making up for the hundreds of years in which people of color were excluded from government, openly discriminated against, enslaved, and beaten all because of their ethnicity and skin color.

Again, I admit that this sort of argument can be viewed as biased against a specific category of disfavored speech; however, I do not think there is inherently something wrong with different treatment of disfavored speech in this case. Hate speech is different from other sorts of disfavored speech, such as anti-government and anti-war speech, which have also been historically been targeted by speech regulation in the United States.[48] The latter two forms of speech are political speech which attack the government and can reasonably be seen to contribute to the search for truth because of their nature as political speech. However, racially biased hate speech specifically attacks people based on nothing other than their race, and, as mentioned above, cannot reasonably be considered a part of the search for truth.

I need to also address Baker and Bennett's arguments that hate speech regulation will unintentionally cause more

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[47] See Wen Cheng, William Ickes, and Jared B. Kenworthy, "The Phenomenon of Hate Crimes in the United States," *Journal of Applied Social Psychology* 43, no. 4 (2013): 761–794, https://doi-org.libproxy.furman.edu/10.1111/jasp.12004.

[48] Lewis, *Freedom for the Thought That We Hate*, 24–27.

harm. Bennett's reason for this argument relates to the argument just mentioned, which is that "reasonable people would perceive racial favoritism in their implementation."[49] As I already said, I think this is true, but I also think many *reasonable* people are capable of recognizing that the problem addressed by hate speech regulation carries with it a history that allows for an exception to the rule that law cannot be biased against certain ideas. And even if reasonable people disagree with this (I will not claim that Bennett or Baker are unreasonable people), they are unlikely to lash out at minority groups if hate speech laws are enacted. The problem, then, seems to lie with *unreasonable* people; that is to say, those who want to use the most violent hate speech: hate groups, such as Neo-Nazis and white supremacists. As mentioned before, Baker says that hate speech regulation will cause such unreasonable people to feel attacked and "increase… [their] sense that they must act," as well as force them to move underground where their ideas can fester.[50] This is a difficult argument to counter. First, I argue that hate speech regulation would not necessarily force these groups entirely underground, because, as I have already admitted, I do not think that hate speech regulation can be worded to include every instance of racist speech, but only the most hurtful forms of direct racial vilification. Second, if by increasing the sense that they must act, Baker means that these groups will be prompted to use more violence, then that simply goes to show that racist ideas in fact are still prevalent enough to cause concern, which disproves Bennett's assertion that racism is no longer a big enough issue to warrant hate speech legislation. Also, even though hate groups might claim that being targeted by hate speech regulation is a legitimate reason to use violence, such an argument would not hold up in any court. This may show that the government needs to do a better job of

[49] Bennett, "The Harm in Hate Speech," 531.
[50] Baker, "Autonomy and Hate Speech," 152.

identifying and monitoring those who might be likely to commit hate crimes, but it does not show that we should not protect the victims of hate speech by directly punishing hate speech through legislation. It seems more important to protect those that are actually harmed by hate speech, rather than those who might perceive that they are somehow harmed by its regulation.

Conclusion

Ultimately, the debate over hate speech regulation is difficult to resolve, and it is admittedly likely that racism will find ways to persist even if we accept the need for hate speech regulation and enact laws restricting such speech. Despite these difficulties, the battle to criminalize hate speech is worthy to be fought, as it provides a way for the United States and its state governments to both protect minorities from the very real harm that comes from being targeted by hate speech and to legally recognize the crimes such speech has historically encouraged and embodied as wrong. The goal of hate speech restriction is not to end debate; hate speech regulation, specifically limited to racially-biased fighting words and "face-to-face vilification," will still allow for free expression of even racist ideas; but it will require that the expression of such ideas not occur in such a way to inflict harm on the minority groups who have already suffered so much harm throughout United States history. I would love to live in a world where hate speech regulation is not necessary, but as I have shown, we do not yet live in such a world. It is for these reasons that I not only argue we need hate speech regulation, but that I also disagree with the Court's decisions in *R.A.V.* and *Virginia* and conclude that the Court should allow future such laws to remain in place, rather than declare them unconstitutional.

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