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## Sticks and Stones Will Break My Bones, but Will Racist Humor: A Look Around the World at Whether Police Officers Have a Free Speech Right to Engage in Racist Humor

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# NOTES AND COMMENTS

## Sticks and Stones Will Break My Bones, but Will Racist Humor?: A Look Around the World at Whether Police Officers Have a Free Speech Right to Engage in Racist Humor

- “*Batten down the hatches, several thousand Zulus approaching from the North.*”<sup>1</sup>
- “*We have his oriental buddy for 11364.*”  
“*Great . . . make sure u burn him if he’s on felony probation . . . by the way does he need any breaking.*”<sup>2</sup>
- “*Hi . . . just got mexercise for the night.*”<sup>3</sup>

### I. INTRODUCTION

Above are just a few examples of what police call “blue humor.” Covering the gamut of racist, sexist, and homophobic speech,<sup>4</sup> blue

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1. Los Angeles Police Department Computer Message (July 9, 1990), *quoted in* Geraldine Baum et al., *What Does Cop Talk Really Say?*, L.A. TIMES, Sept. 11, 1991, at A1.

2. REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 51 (July 1991) [hereinafter REPORT]. The Independent Commission, also known as the Christopher Commission, was created by Los Angeles Mayor Tom Bradley to investigate the use of excessive force following the initial public outcry in response to the Rodney King beating. For a detailed description of the events leading up to and following the King beating, see *infra* note 7.

3. REPORT, *supra* note 2, at 72.

4. Although blue humor also includes sexist and homophobic speech, this Comment will concentrate exclusively on racist blue humor. See REPORT, *supra* note 2, at 87-89. The first two can be evidenced by statements such as

- “U wont believe this . . . that female call [sic] again said susp returned . . . I’ll check it out then I’m going to stick my baton in her.”
- “No but I left a 14 year old girl that I me [sic] yesterday handcuffed naked o [sic] my chin-up bar wearing nothing but a blind-fold and salad oil . . . I’d like to ck on her.”
- “No. 1600 how many homosexuals did you give orals to today.”  
“That’s a touchy subject . . . not fit for MDting.”
- “Houston PD has a new chief—Elizabeth Watson 40 yrs old.”  
“I bet that’s going over reeeeeeaaalll good with the troops dude . . . they have some dyke bleding [sic] heart for a mayor.”

*Id.*

humor constitutes the "grosser aspects of cop joking."<sup>5</sup> Apparently, police funny bones are "hooked up a little differently than those of the rest of the world."<sup>6</sup> However, it was not until the investigations following the infamous Rodney King beating that the rest of the world discovered just how different.<sup>7</sup>

Although graphic, the King beating constituted only a symptom of a larger problem of abuse,<sup>8</sup> and was merely one "example of widespread, racially motivated 'street justice' administered by some in the LAPD."<sup>9</sup> The beating elicited a huge public outcry, in response to which Los Angeles Mayor Tom Bradley created the Independent Commission on the Los Angeles Police Department ("Commission") to investigate the use of excessive force by police.<sup>10</sup> The Commission conducted a computerized study of complaints filed against specific

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5. *Id.*

6. Baum et al., *supra* note 1, at A1.

7. On March 3, 1991, three uniformed officers of the Los Angeles Police Department ("LAPD") beat Rodney G. King, a 25-year-old African-American, while their sergeant and a large group of LAPD, California Highway Patrol ("CHP"), and Los Angeles Unified School District officers watched. REPORT, *supra* note 2, at 3. The officers clubbed King with 56 baton strokes, and kicked him in the head and torso. *Id.* Unbeknownst to the officers, an amateur videographer, George Holliday, taped the vicious beating. *Id.*

The beating followed a high-speed automobile chase in which King had refused to stop. *Id.* at 4. By the time he did stop, 11 LAPD units and a helicopter had joined the CHP's original pursuit. *Id.* at 5. The LAPD officers ordered King and his two companions to exit the car and lie flat on the ground. *Id.* at 6. King's two passengers, Bryant Allen and Freddie Helms, complied with the officers' commands. *Id.* at 7. King, however, only lowered himself to his hands and knees. *Id.* at 6. For King's failure to obey, Sergeant Stacey Koon shocked King twice with a Taser electric stun gun. Sergeant Koon considered King "disoriented and unbalanced" and under the influence of narcotics. *Id.* In response to King's attempt to rise, the Holliday video shows one of the officers clubbing King in the head, and then striking him several more times after King fell. *Id.* When King again tried to rise, a second officer joined the first in repeatedly striking King with baton blows. *Id.* at 7. Sergeant Koon ordered the two officers to use "power strokes" aimed at King's joints, wrists, elbows, knees, and ankles. *Id.* Fifty-six baton blows and six kicks later, a group of officers swarmed over King and physically restrained him with both handcuffs and cordcuffs. They then dragged King on his stomach to the roadside and awaited the arrival of an ambulance. *Id.*

The ambulance transported King to Pacifica Hospital of the Valley, where he received 20 stitches, including five on the inside of his mouth. *Id.* at 8. Medical records indicated he also suffered fractures in his cheekbone and right ankle. *Id.* King's blood-alcohol level of 0.075% was below the California intoxication level of 0.08%. See CAL. CIV. CODE § 23152(b) (West Supp. 1992). Although other test results indicated "traces" of marijuana, no evidence of any other illegal drug surfaced. REPORT, *supra* note 2, at 8. The police charged King with evading arrest and held him for four days, releasing him only after prosecutors found insufficient evidence to proceed. *Id.*

8. REPORT, *supra* note 2, at 14.

9. *Id.* at 16.

10. *Id.* at ii.

police officers and examined over 3.6 million Mobile Digital Terminal (“MDT”) communications made by Los Angeles Police Department (“LAPD”) officers over a sixteen-month period from November 1989 to March 1991.<sup>11</sup> The Report revealed that a significant number of LAPD officers repeatedly used excessive force, in violation of LAPD guidelines.<sup>12</sup> The MDT communications contained brazen references to beatings and other excesses, providing graphic confirmation of improper attitudes and practices regarding the use of force.<sup>13</sup> Some officers used the MDT system to voice their excitement of pursuit, viewing the chase as an opportunity for violence.<sup>14</sup> Others eagerly communicated their desire to be involved in shooting incidents: “I almost got me a Mexican last night but he dropped the dam [sic] gun to [sic] quick, lots of wit.”<sup>15</sup> Many MDT transmissions revealed the speakers’ twisted enjoyment derived from beating suspects: “Capture

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11. *Id.* at iii, x.

12. *Id.* at iii.

13. *Id.* Although the majority of the police communications were routine, the contents of some MDT transmissions were indicative of officers’ tolerance for violence:

- “Did U educate him.”  
“Take 1 handcuff off and slap him around.”  
“He is crying to [sic] hard and there is [sic] 4 detectives here.”  
“Well dont [sic] seatbelt him in and slam on the brakes a couple times on the way to the sta . . . .”
- “U missed out bro, we backed 2x53 [a patrol unit] on a poss shots fired from veh. [S]ome of the susps had some big boot marks on their heads, once they were in custody.”
- “The last load went to a family of illegals living in the brush along side the pas fwy . . . I thought the woman was going to cry . . . so I hit her with my baton.”
- “Did U arrest the 85yr old lady of [sic] just beat her up.”
- “We just slapped her around a bit . . . she/s getting m/t [medical treatment] right now.”

*Id.* at 49-51.

14. *Id.* at xi, 53-54. The MDT transmissions included the following statements:

- “Im gonna bk my pursuit susp. Hope he gets ugly so I can vent my hate. Hrr hrr . . . A-H”
- “Getting energy for the foot pursuit and shooting . . . I won’t lose the susp.”

*Id.* at 53, 54.

15. *Id.* at xi, xii, 52-53. Other examples of officer eagerness to shoot include the following:

- “Go get em my-man, and shoot him twice for me.”
- “Looking to end 1990 with a good shotgun killing ruggg”  
“Raa a full moon and a full gun make for rewards from god”  
“A full moon and a full gun makes for a night of fun”  
“Everybody you kill in the line of duty becomes a slave in the afterlife”  
“Then U will have a lot of slaves . . . [.]”
- “I shoulda shoot [sic] ’em huh, I missed another chance dammmmm.”  
“I am getting soft.”
- “If I find it itl [sic] be ois [officer-involved shooting] time. God I wanna to kill something o so bad . . . .”

*Id.* at 52, 53.

him, beat him and treat him like dirt . . . ."<sup>16</sup>

The MDT communications also revealed that racism and bias exist alongside the LAPD's excessive force problem.<sup>17</sup> The Commission found an appreciable number of disturbing and recurrent racial slurs.<sup>18</sup> Some statements described minorities by using animal analogies, while others derided their ethnic origins.<sup>19</sup> Overall, the Commission found 1450 instances of objectionable language in the MDT communications.<sup>20</sup> Indeed, shortly before the King incident, the patrol unit involved in the beating transmitted that a domestic dispute between an African-American couple was "right out of 'Gorillas in the Mist,'"<sup>21</sup> a reference to a motion picture about the study of African gorillas.<sup>22</sup> In addition, although the officers involved in the King beating denied any use of racial epithets or slurs, an "enhanced au-

16. *Id.* at x-xi, 49-52. Examples from the MDT transmissions illustrate just how much some officers enjoy beating suspects:

- "No problemmm . . . we R hungry . . . we got a little physical w/a [name omitted] on Columbus . . . it was fun . . . we had to teach him a little respect . . . for the police . . . hahahahaha . . . we had fun . . . no stick time though."
- "[Name omitted] wanno go over to Delano later and hand out some street justice . . . ."
- "[It] was fun . . . [.] but no chance to bust heads . . . [.] sorry."  
"Oh well . . . maybe next time."

*Id.* at 49, 51.

17. *Id.* at iv, xii.

18. *Id.* at 72.

19. *Id.*

20. Baum et al., *supra* note 1, at A1. Other examples of racist MDT messages include the following:

- "Well . . . I'm back over here in the projects, pissing off the natives."
- "I would love to drive down Slauson with a flame thrower . . . we would have a barbeque."
- "Sounds like monkey slapping time."
- "Oh always dear . . . what's happening . . . we're huntin wabbits."  
"Actually, muslim wabbits."  
"Just over here on this arson/homicide . . . be careful one of those rabbits don't bite you."  
"Yeah I know . . . Huntin wabbits is dangerous."
- "Don't be flirting with all ur cholo girlfriends."

REPORT, *supra* note 2, at 72.

It is impossible to determine how widespread this language is among the LAPD's 8300 officers. Baum et al., *supra* note 1, at A1. Although an aide to former Los Angeles Police Chief Daryl F. Gates pointed out that the offensive messages represented only 0.04% of all transmissions, most of the transmissions were "informational," such as officers telling each other that they had arrived at a scene or were on their way somewhere. *Id.* Because only a minority of the messages were "conversational," the offensive communications constituted a much higher percentage of the conversational transmissions than of the total. *Id.*

21. REPORT, *supra* note 2, at 14, 71.

22. GORILLAS IN THE MIST: THE ADVENTURE OF DIAN FOSSEY (Warner Brothers & Universal Pictures 1989).

dio" version of the Holliday videotape<sup>23</sup> indicates that during the beating, an officer yelled, "[N]igger, hands behind your back—your back."<sup>24</sup>

Conduct and statements directed at minority officers also illustrate the racism and bias found within the LAPD.<sup>25</sup> MDT messages and other evidence demonstrate that minority officers are still frequently subjected to racial slurs, comments, and discriminatory treatment.<sup>26</sup>

The MDT transmissions show complete disregard for the LAPD policy prohibiting the dissemination of racist messages.<sup>27</sup> In fact, the officers made the statements despite being fully aware that their statements were monitored.<sup>28</sup> Further, few complaints against racial comments have been sustained by the LAPD,<sup>29</sup> and those that were sustained resulted in only minor penalties.<sup>30</sup> While only a small

23. This enhanced audio version of the videotape was aired by a Los Angeles public television station, KCET. *By the Year 2000: "Policing the Police"* (KCET television broadcast, May 7, 1991).

24. REPORT, *supra* note 2, at 14, 71. However, the Los Angeles County District Attorney's enhanced audio version was described as "inconclusive." *Id.* In addition, attorneys from both sides have debated the value of a second video recording taken by an apartment complex security guard standing across the street from the King beating. See Jerry Seper, *Value of Second Rodney King Tape Debated*, WASH. TIMES, Jan. 23, 1992, at A5. The attorney initially representing King in his suit against the LAPD, Steve Lerman, insisted the second video clearly substantiates that the officers shouted racial epithets at King while beating and kicking him. *Id.* In contrast, attorneys representing the defendant officers believed that the second video tape "shows absolutely nothing" and is "curious at best." *Id.*

25. REPORT, *supra* note 2, at xiii, 78.

26. *Id.*

27. The LAPD policy against racist messages states:

This Memorandum reaffirms the Department policy concerning racially or ethnically oriented remarks, slurs, epithets, terminology, or language of a derogatory nature. These remarks are an inappropriate form of communication which becomes a destructive wedge in relationships with peers and members of the community. The deliberate or casual use of racially or ethnically derogatory language by Department employees is *misconduct* and will not be tolerated under *any* circumstances.

Unacceptable Remarks of a Racial Nature, Memorandum No. 1 (Apr. 24, 1987), *quoted in* REPORT, *supra* note 2, at 73.

28. REPORT, *supra* note 2, at 52.

29. *Id.* at 73-74.

30. *Id.* During the seven-year period between 1984 and 1990, the LAPD sustained only two complaints for the transmission of improper messages over the MDT. In one case, the officer was admonished. In the second case, the verbal assailant and his victim, both police officers, received suspensions. The second case involved a Caucasian male officer who transmitted a vulgar sexual and racial remark to an African-American female officer who responded over the MDT with angry profanities. While the commanding officer recommended a four-day suspension for the Caucasian male officer and a two-day suspension for the African-American female officer, the Chief of Police reduced both suspensions to one day. *Id.*

number of LAPD officers are openly racist, their attitudes and behavior have greatly impacted the LAPD due to its failure to enforce anti-racial policies consistently.<sup>31</sup> This failure conveys to both the public and the officers themselves that the LAPD condones such conduct.<sup>32</sup>

However, even if the LAPD were to enforce its policies, an issue exists as to whether police officers have a free speech right to make such statements. In addressing this issue, this Comment first considers the perspectives of both the officers and their victims. It then analyzes racist blue humor within the framework of the First and Fourteenth Amendments, and concludes that police officers have neither a First nor a Fourteenth Amendment right to engage in such humor. After examining the international condemnation of racist speech and providing an overview of several foreign legislative prohibitions against it, this Comment then determines that police officers do not have an international right to engage in racist humor. Finally, this Comment proposes an enforceable regulation designed to eliminate racist blue humor.

## II. THE PERSPECTIVE OF POLICE OFFICERS AND THEIR VICTIMS

### A. *The Police Officers' Perspective*

Police officers defend the crassness of their humor. They argue that "although [their comments] are unacceptable when directed against private citizens, . . . such language is a necessary evil, a slang, meant to cement bonds between co-workers in a grisly and dispiriting job and to exclude everybody else."<sup>33</sup> A typical reaction

is to consider the incidents isolated pranks, the product of sick-but-harmless minds. This is in part a defensive reaction: a refusal to believe that real people, people just like us, are racists. This dissociation leads logically to the claim that there is no institutional or state responsibility to respond to the incident. It is not the kind of real and pervasive threat that requires the state's power to quell.<sup>34</sup>

One detective, a ten-year LAPD member and women's coordinator whose job includes training officers to avoid sexual harassment, concurred, stating, "We don't have 8,300 bigots on this job."<sup>35</sup>

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31. *Id.* at xiii.

32. *Id.*

33. Baum et al., *supra* note 1, at A14.

34. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2327 (1989).

35. Baum et al., *supra* note 1, at A14.

Although she considered some of the transmissions unprofessional and stupid, she also believed they merely reflected “dark humor and a lot of mouthing off.”<sup>36</sup> To this detective, “Capture him, beat him and treat him like dirt” signified nothing more than an attempt to imitate “Superman talk”:<sup>37</sup>

It’s ego, bragging, a musical pattern in language, coming from some guy who probably has spent all day in court, hasn’t seen his family, hasn’t slept, just got exposed to a suspect with syphilis, had to search a female between her crotch for drugs, saw a baby thrown against a wall. . . . It’s occupational joking, but not something you act on.<sup>38</sup>

Similarly, one former police officer characterized the Commission report as “inherently” trivial because it ignored the psychology underlying the offensive remarks.<sup>39</sup> He stated,

We have in police work, not just in Los Angeles but everywhere . . . super-aggressive 22-year-olds full of testosterone, full of energy, absolutely immortal and unable to admit fear, unable to verbalize fear—even to themselves. . . . Hence, they get caught in all this damn silly defense-mechanism business, this dehumanizing gallows humor and all of that—and don’t even understand that they are doing it most of the time.<sup>40</sup>

However, even this former officer acknowledged that some of the humor went too far: “Can I define when it goes beyond that, what the dominant group does in joking ethnically with his fellow officers? No. But I know it when I see it. Some of this definitely goes beyond the pale. . . . It should not be tolerated.”<sup>41</sup>

One Caucasian thirty-year veteran of the LAPD even proffered an inoffensive context for the *Gorillas in the Mist* comment transmitted the evening of the King beating.<sup>42</sup> Noting that the movie showed naturalist Dian Fossey suddenly surrounded by a group of apes while she was observing one gorilla, the detective conjectured that while investigating the domestic dispute, the officers were similarly sur-

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See REPORT, *supra* note 2, at 14, 71; see also *supra* notes 21-22 and accompanying text.



rounded by people.<sup>43</sup> Thus, the reference ostensibly could be viewed as having no racial implication.<sup>44</sup> However, the detective conceded that interpreting “gorillas” to mean African-Americans was “the more obvious interpretation,” but found it unfair and inflammatory “to seize on it and call it racist.”<sup>45</sup>

Defenders of blue humor recognize that racist messages are unacceptable. Nevertheless, they contend that blue humor is a necessary evil, serving to bond co-workers in the grueling fight against crime. They argue that forcing officers to censor their language polarizes the races within the LAPD.

Defending blue humor, however, ignores the racial polarity such comments create and disregards minority officers' feelings. Many minority officers perceive no benefits resulting from the crude language, not even the camaraderie that allegedly arises from its use.<sup>46</sup> In addition, it is hard to understand how a Caucasian officer calling an African-American officer “nigger,” an Hispanic officer “wetback” or “cholo,” or an Asian-American officer “chink,” “jap,” or “gook,” builds camaraderie among the races. It is also difficult to imagine how these terms are “humorous.”

Blue humor defenders argue that the racial comments do not reflect racial animus, but instead provide officers with a method of letting off steam after a long, hard day on the streets. People recognize and certainly appreciate that police work is extremely dangerous and that many routine arrests can suddenly turn into violent confrontations. However, a stressful work environment does not justify vicious verbal assaults on the very people, including minorities, whom officers have sworn to serve and protect.

In addition, blue humor defenders contend that racist humor becomes dangerous only “when it conveys to a young cop that these people—a whole class of people, victims and criminals alike—are not to be served, not to be taken seriously.”<sup>47</sup> However, that statement betrays the very problem at hand: Certain officers not only believe

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43. Baum et al., *supra* note 1, at A14.

44. *Id.*

45. *Id.*

46. One retired officer stated that his complaints resulted in a lecture. Although he found nothing amusing about being called a “nigger” while serving in the Hawthorne Police Department, the officer was specifically told not to be offended, “because [he] was not black, [he] was blue.” *Id.* at A15. With regard to the argument that racial insults cement the bond between officers, this retired officer stated, “That is a lot of garbage. Anyone who knows what black people and Latinos have experienced in this country historically wouldn't say that.” *Id.*

47. Baum et al., *supra* note 1, at A14.

that minorities are not to be taken seriously, but also that minorities should bear the brunt of the officers' physical aggressions, resulting in police brutality.<sup>48</sup>

Even adamant defenders of blue humor admit that officers must tone down the basest "cop talk" and develop a better rapport with the public and among themselves.<sup>49</sup> Yet some police argue that eliminating blue humor entirely would "force them to sound like high school English teachers, which would cost them stature with their peers."<sup>50</sup> Verbally harassing a minority group, however, cannot be the only method available to an officer wishing to increase his or her stature among fellow officers.

### B. *The Victims' Perspective*

Undoubtedly, "mere words, whether racial or otherwise, can cause mental, emotional, or even physical harm to their target."<sup>51</sup> Because of the long and unattractive history of racial discrimination in the United States,<sup>52</sup> racial insults are qualitatively different and potentially more harmful than other types of insults.<sup>53</sup> Accordingly, two major arguments exist for limiting racist speech. One argument adopts the premise that restricting racist speech will curtail the spread of racist ideas.<sup>54</sup> The second argument views limitations on racist speech as protecting the victims from further mental and physical

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48. See *supra* notes 13-16 and accompanying text for examples of MDT transmissions revealing officer eagerness to engage in physical brutality.

49. *Id.*

50. *Id.*

51. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143 (1982) (citing *Wilkinson v. Downton*, [1897] 2 Q.B. 57 (Eng.) (plaintiff suffered permanent physical harm as a result of defendant falsely telling plaintiff that her husband had broken both legs in an accident)); see also *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952) (threats of physical assault on plaintiff caused him to become ill and vomit); *Slocum v. Food Fair Stores of Florida*, 100 So. 2d 396 (Fla. 1958) (insulting language caused plaintiff to suffer mental or emotional distress, an ensuing heart attack, and aggravation of a pre-existing heart disease); *Alcorn v. Anbro Eng'g Inc.*, 468 P.2d 216 (Cal. 1970) (plaintiff suffered emotional and physical distress, became sick for several weeks, was unable to work, and sustained shock, nausea, and insomnia after his superintendent intentionally disparaged his race in a rude, violent, and insolent manner).

52. See, e.g., GILBERT OSOFSKY, *THE BURDEN OF RACE* (1968); ANTI-SEMITISM IN AMERICAN HISTORY (Daird Gerber ed., 1986); RICHARD DUNNON, *KEEPER OF CONCENTRATION CAMPS* (1987); GEORGE M. FREDRICKSON, *THE ARROGANCE OF RACE* (1988); DERRICK BELL, *AND WE ARE NOT SAVED* (1987).

53. Delgado, *supra* note 51, at 143, 157.

54. David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 455 (1987).

harm.<sup>55</sup>

### 1. Curtailing Racism

As the primary means of human communication, speech influences ideas, beliefs, and attitudes.<sup>56</sup> Thus, racist speech can influence the thinking of nonracists and racists alike.<sup>57</sup> Racist messages color society's institutions and are passed on to succeeding generations with the result that "[n]ot only the victim of a racial insult but also his or her children, future generations, and our entire society are harmed by racial invective and the tradition of racism which it furthers."<sup>58</sup> Thus, racist speech contributes to discrimination and other racial problems.<sup>59</sup>

Racism persists because society tolerates or encourages it.<sup>60</sup> The "confrontation theory" suggests that overt signs of racism may be curtailed when offenders know punishment will follow.<sup>61</sup> According to this theory, the mere existence of laws prohibiting certain racist acts will prevent most people from engaging in them.<sup>62</sup> Also, the threat of public censure and denouncement will lead many potential racists to restrain themselves.<sup>63</sup> Moreover, this change will not be merely external. Over time, racists will internalize the rules, and their desire to engage in racist behavior will eventually weaken.<sup>64</sup> Therefore, curbing racial speech could inhibit or perhaps eliminate the spread of racist ideas, actions, and prejudices.<sup>65</sup>

55. *Id.* at 456.

56. *Id.* at 462.

57. *Id.*

58. Delgado, *supra* note 51, at 173.

59. Kretzmer, *supra* note 54, at 462.

60. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 374 (1991) (citing GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 337-38 (25th anniversary ed. 1979)); PIERRE L. VAN DEN BERGHE, *RACE AND RACISM* 20-21 (2d ed. 1978)).

61. For a more thorough analysis of the confrontation theory, see generally IRWIN KATZ, *STIGMA—A PSYCHOLOGICAL ANALYSIS* 16, 109 (1981); Frank R. Westie, *The American Dilemma: An Empirical Test*, 30 AM. SOC. REV. 527, 529 (1965).

62. Delgado, *supra* note 60, at 374.

63. *Id.*

64. *Id.*; ALLPORT, *supra* note 60, at 470-71; Westie, *supra* note 61, at 529, 533; see also Irwin Katz & Patricia Gurin, *Race Relations and the Social Sciences: Overview and Further Discussion*, in *RACE AND THE SOCIAL SCIENCES* 342, 473 (Irwin Katz & Patricia Gurin eds., 1969).

65. Kretzmer, *supra* note 54, at 456; Delgado, *supra* note 60, at 374; ALLPORT, *supra* note 60, at 337-38; KATZ, *supra* note 61, at 16, 109.

## 2. Protecting Victims

## a. Verbal Violence

*everywhere the crosses are burning,  
 sharp-shooting goose-steppers around every corner,  
 there are snipers in the schools . . .  
 (I know you don't believe this.  
 You think this is nothing  
 but faddish exaggeration. But they  
 are not shooting at you.)  
 I'm marked by the color of my skin.  
 The bullets are discrete and designed to kill slowly.  
 They are aiming at my children.  
 These are the facts  
 Let me show you my wounds: my stumbling mind, my  
 "excuse me" tongue, and this  
 nagging preoccupation  
 with the feeling of not being good enough.<sup>66</sup>*

One of the most direct harms suffered by victims of racist speech is severe mental or emotional distress, which results because "[r]acist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group."<sup>67</sup> The psychological and physiological symptoms of emotional distress include fear, rapid pulse rate leading to breathing difficulties, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.<sup>68</sup> Other effects include displaced aggression, avoidance, retreat, withdrawal, and alcoholism.<sup>69</sup> The severity of the emotional distress has led one commentator to refer to the blow of racist messages as "spirit murder," alluding to the effect of such speech on a victim's psyche.<sup>70</sup>

Racist speech destroys self-esteem and sense of personal security.<sup>71</sup> Victims often restrict their personal freedom to avoid receiving

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66. Lorna Dee Cervantes, *Poem for the Young White Man Who Asked Me How I, an Intelligent Well-Read Person Could Believe in the War Between Races*, in MARTA ESTER SÁNCHEZ, *CONTEMPORARY CHICANA POETRY: A CRITICAL APPROACH TO AN EMERGING LITERATURE* 90 (1985).

67. Matsuda, *supra* note 34, at 2332.

68. *Id.* at 2336.

69. *Id.* at 2336 n.84.

70. Patricia Williams, *Spirit-Murdering the Messenger, The Discourse of Fingerpointing as the Law's Response to Racism*, 42 *MIAMI L. REV.* 127, 139 (1987).

71. Matsuda, *supra* note 34, at 2337. "To be hated, despised, and alone is the ultimate fear of all human beings." *Id.* at 2338.

hate messages.<sup>72</sup> Many have terminated employment, forgone education, left their homes, avoided certain public places, curtailed their own exercise of free speech, and otherwise modified their behavior.<sup>73</sup> Often, hate speech acts as a self-fulfilling prophecy, creating "in the victim those very traits of 'inferiority' that [the message] ascribes to him."<sup>74</sup>

Government toleration of racist speech intensifies the loneliness and alienation experienced by its victims.<sup>75</sup> When police officers protect racist marchers<sup>76</sup> and courts refuse redress for racial insult,<sup>77</sup> victims are left with no recourse.<sup>78</sup> The pain is markedly augmented

72. *Id.*

73. *Id.* at 2337 & n.86. For examples of such withdrawal from society, see *Sambos Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 703 (6th Cir. 1981) (Keith, J., dissenting) (noting that African-Americans tend to avoid public facilities with racially offensive names); GEORGIA STATE ADVISORY COMM. TO THE U.S. COMM. ON CIVIL RIGHTS, PERCEPTIONS OF HATE GROUP ACTIVITY IN GEORGIA 20 (1982) (case of a 14-year-old boy who was the subject of a Ku Klux Klan leafleting campaign and became so frightened that he dropped out of school); Richard Blake Dent, *Klanwatch Threatens Hate Groups with a Frightening Prospect—Exposure. Even Bullies Can Be Afraid Sometimes*, STUDENT LAW., Dec. 1984, at 48 (describing how an African-American Naval Reserve ensign resigned from officers' school after threats from the "Navy KKK"); Matsuda, *supra* note 34, at 2337 n.86 (recounting Professor Judith Weightman's findings that Japanese-Americans avoid discrimination by avoiding places, organizations, and events that perpetuate an anti-Japanese philosophy); HARRY H.L. KITANO, RACE RELATIONS 65-79 (3d ed. 1985) (discussing ways minorities avoid situations where they expect to encounter prejudice).

74. Delgado, *supra* note 51, at 146 (quoting MARTIN DEUTSCH ET AL., SOCIAL CLASS, RACE AND PSYCHOLOGICAL DEVELOPMENT 175 (1968)); Matsuda, *supra* note 34, at 2339 ("[A]t some level, no matter how much both victims and well-meaning dominant-group members resist it, racial inferiority is planted in our minds as an idea that may hold some truth.")

75. Matsuda, *supra* note 34, at 2338.

76. See, e.g., 6 *Protesters Arrested at Houston Klan March*, N.Y. TIMES, Apr. 3, 1983, at 23 (600 police in riot gear protected approximately 50 Ku Klux Klan marchers in Houston). The United States Supreme Court has ruled that Nazis must be permitted to march in public streets. See *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (per curiam) (reversing the Illinois Supreme Court's denial of a stay of an injunction prohibiting the National Socialist Party from demonstrating); *Smith v. Collin*, 439 U.S. 916 (1978) (denying certiorari to the Seventh Circuit decision invalidating Skokie ordinances that attempted to block Nazi demonstrations). However, as Justice Blackmun correctly observed, "each court dealing with [this] precise problem [has felt] the need to apologize for [that] result." *Smith v. Collin*, 439 U.S. at 918 (Blackmun, J., dissenting).

77. See, e.g., *Howard v. National Cash Register Co.*, 388 F. Supp. 603 (S.D. Ohio 1975) (holding that the use of the word "nigger" and other race-related language by fellow employees did not constitute employment discrimination). The *Howard* court noted, "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law ever could be." *Id.* at 606 (quoting Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936)).

78. See Matsuda, *supra* note 34, at 2338.

when the government goes beyond merely tolerating racism to actively promoting it.<sup>79</sup> Therefore, when police officers not only protect the messages promulgated by racist marchers, but engage in racial "humor" themselves, victims become defenseless and alienated.

The alienation affects not only the minority public but also the minority officers within a police department. The harm to these minority officers who hear such racial insults on a daily basis is arguably more severe because minority officers have even fewer avenues for redress than minority civilians. Most are pressured into accepting derogatory comments by fellow officers.<sup>80</sup> In fact, many of the minority officers interviewed after the Rodney King beating feared retaliation if it became known that they spoke to the Commission.<sup>81</sup> These officers feared being ostracized by their peers and worried that their careers would suffer.<sup>82</sup> After being interviewed, one LAPD officer found a hangman's noose on a station telephone he used every morning to call home.<sup>83</sup> The officer did not report the incident to his supervisor because he was certain that nothing would be done in response to his complaint.<sup>84</sup>

In addition, given the rarity of registered complaints and the minor penalties imposed when such complaints are registered,<sup>85</sup> the LAPD policy prohibiting racist messages has proven ineffective.<sup>86</sup> This failure to enforce the LAPD policy adversely influences intradepartment acceptance and treatment of minority officers. It also affects the way LAPD officers interact with the public, since "[t]o the extent there is the perception of tolerance of racist behavior toward other officers, it is likely to engender a greater acceptance of similar behavior toward minority citizens."<sup>87</sup>

As a result of this tolerance of hate speech, minority officers may view themselves in a negative light.<sup>88</sup> To deal with the racial insults

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79. See *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979). In *Harris*, an African-American police officer sued a Caucasian judge for conducting a "racially motivated campaign to discredit and damage" the officer. *Id.* at 338. As part of this racial campaign, the judge referred to the officer as a "black bastard." *Id.* at 333-36.

80. Baum et al., *supra* note 1, at A14.

81. REPORT, *supra* note 2, at 78.

82. *Id.*

83. *Id.*

84. *Id.*

85. See *supra* notes 29-30 and accompanying text.

86. For the text of the LAPD policy, see *supra* note 27.

87. REPORT, *supra* note 2, at 78, 79.

88. Baum et al., *supra* note 1, at A14.

and perhaps to fit in with the Caucasian majority, minority officers may even reject their own ethnic identity.<sup>89</sup> Should this identity rejection occur, the price of disassociation may be sanity itself.<sup>90</sup>

### b. *Physical Violence*

*These comments are a justification for all types of misconduct that will follow. . . . It's almost like they are psyching themselves up for the violence and the mistreatment.*<sup>91</sup>

Justice Holmes once observed that "[e]very idea is an incitement" to action.<sup>92</sup> This observation is supported by psychological and sociological theorists who "stress that racist expression is 'a precondition for acts of racial violence.'" <sup>93</sup> The example most often cited in support of the connection between racist speech and racist action is that of German Naziism.<sup>94</sup> Adolf Hitler's anti-Semitic propaganda ignited and inflamed existing anti-Semitic attitudes and beliefs in Germany.<sup>95</sup> Without the freedom to disseminate his anti-Semitic propaganda, it is unlikely that Hitler would have come to power. Thus, the suppression of Hitler's hate speech likely would have spared the lives of millions of Jews.<sup>96</sup> Although one may argue that the extremes of the Nazi regime are unlikely to recur,<sup>97</sup> racist speech perpetuates racist attitudes and beliefs, which in turn lead to extreme actions in times of turmoil.<sup>98</sup> As stated by one commentator, "[E]very epithet . . . heightens racial tensions and contributes to a climate which often degenerates into violence."<sup>99</sup>

Several examples in United States history demonstrate how racist speech and racial violence are inextricably intertwined.<sup>100</sup> In 1982, anti-Japanese propaganda led to the death of a twenty-seven year old

89. See Matsuda, *supra* note 34, at 2337.

90. *Id.* (citing Joseph A. Baldwin, *African Self-Consciousness and the Mental Health of African-Americans*, 15 J. BLACK STUD. 177 (1984) (a concept of "alien self" in African-Americans results from identifying with Europeans)).

91. Baum et al., *supra* note 1, at A14.

92. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

93. Deborah R. Schwartz, Note, *A First Amendment Justification for Regulating Racist Speech on Campus*, 40 CASE W. RES. L. REV. 733, 764 (quoting Kretzmer, *supra* note 54, at 463).

94. Kretzmer, *supra* note 54, at 463.

95. *Id.* at 464.

96. *Id.*

97. *Id.*

98. *Id.*

99. Schwartz, *supra* note 93, at 764.

100. See Matsuda, *supra* note 34, at 2330; Kretzmer, *supra* note 54, at 465 & n.79.

Chinese-American, Vincent Chin, on the eve of his wedding.<sup>101</sup> Using baseball bats, two furloughed auto workers beat Chin to death, crushing his skull.<sup>102</sup> While attacking Chin, the two assailants yelled, “[I]t’s because of you motherfucking Japs that we’re out of work!”<sup>103</sup>

In addition, a recently released two-year investigation by the United States Commission on Civil Rights concluded that when politicians engage in “Japan-bashing” to justify the United States’ economic problems, their comments often trigger violent acts toward Asian-Americans.<sup>104</sup> On February 9, 1992, an unemployed United States worker who had lost his job “because of the Japanese” stabbed a Japanese businessman to death.<sup>105</sup> Although authorities tried to dispel the notion that the murder was racially motivated, they could not eliminate the possibility.<sup>106</sup> The attack renewed fears within the Asian-American community sparked originally by the Chin murder.<sup>107</sup>

Finally, racist speech has an alarming influence on psychopathic killers.<sup>108</sup> Many murders by such individuals have been precipitated by racist propaganda.<sup>109</sup> For example, in New York, an attacker who “feared Asians” pushed a pregnant, nineteen year old Chinese immi-

101. ATTORNEY GENERAL’S ASIAN AND PACIFIC ISLANDER ADVISORY COMMITTEE FINAL REPORT 43 (Dec. 1988) [hereinafter ATTORNEY GENERAL’S REPORT]; see also Christopher Pummer, *Anti-Japanese Threat is Only Lead in Killing; Crime: Deputies Say They Have Little to Go on in Stabbing of Camarillo Businessman. The Murder Fuels Concern Among Japanese-Americans*, L.A. TIMES, Feb. 26, 1992, at A3.

102. ATTORNEY GENERAL’S REPORT, *supra* note 101, at 43. A similar incident occurred in 1983, when a Vietnamese-American high school student was stabbed to death, following months of racial taunts and harassment. *Id.*

103. *Id.*

104. U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S (1992); see also Sam Fulwood III, *Japan-Bashing Condemned by Rights Panel*, L.A. TIMES, Feb. 29, 1992, at A1 (“Japan-bashing is on the rise across this nation . . .”); Alicia Brooks, *Recent Japan-Bashing Could Increase Crimes Against Asians; Group Urges Victims to Report to Police*, SNS, Feb. 21, 1992, available in LEXIS, Nexis Library, SNS File. Japan-bashing by politicians was reinforced by the 50th anniversary of the Japanese attack on Pearl Harbor, December 7, 1991. Steve Marantz, *Asians Fear Pearl Harbor Hostility*, BOSTON GLOBE, Dec. 7, 1991, Metro/Region, at 29. “Remember Pearl Harbor” has become a war cry for many people who use it as a license for anti-Asian violence. *Id.* These people make no distinction in their attacks on Japanese, Japanese-Americans, and other Asian-Americans. *Id.* In this manner, “anti-Japan sentiment results in violence against all Asian-Americans on the basis of race.” *Id.*

105. Pummer, *supra* note 101, at A3.

106. *Id.*

107. *Id.*

108. Matsuda, *supra* note 34, at 2332 n.70.

109. *Id.* at 2330.



grant into the path of an oncoming subway train.<sup>110</sup> In a similar manner, a schizophrenic murderer thought African-Americans were "like animals, to be eaten."<sup>111</sup>

The racist messages described in the Commission report further illustrate the link between speech and violence.<sup>112</sup> As previously discussed, MDT messages transmitted by the LAPD over a sixteen month period revealed that while most messages were routine, some officers, using racist language, spoke of beating and mistreating criminal suspects and other members of the public.<sup>113</sup> The prejudicial attitude communicated by those officers often led them to verbally harass minorities, detain African-American and Latino men simply because they fit generalized suspect descriptions, employ unnecessarily invasive or humiliating tactics in minority neighborhoods, and use excessive force.<sup>114</sup> In a recent survey of LAPD officers, nearly twenty-five percent of the responding officers indicated that they believed racial bias exists in the police force and contributes to "negative interaction between police and community."<sup>115</sup> Over twenty-seven percent agreed that "an officer's prejudice toward the suspect's race may lead to the use of excessive force."<sup>116</sup> One former police officer asserted, "I think most people know your mouth is the window to your heart, and these comments are not lighthearted. . . . These comments are a justification for all types of misconduct that will follow. . . . It's almost like they are psyching themselves up for the violence and the mistreatment."<sup>117</sup>

### III. BALANCING THE FIRST AND THE FOURTEENTH AMENDMENTS

As a sub-category of racist speech, blue humor must be analyzed within the context of racist speech in general. It follows that any restrictions potentially limiting blue humor necessarily implicate First and Fourteenth Amendment principles.

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110. *Id.* at 2332 n.70; ATTORNEY GENERAL'S REPORT, *supra* note 101, at 44.

111. Aric Press & Pamela Abramson, *A Law for Racist Killers*, NEWSWEEK, Feb. 23, 1981, at 80.

112. REPORT, *supra* note 2, at 48.

113. *Id.* at 49, 53. For examples of such messages, see *supra* notes 13-16, 20.

114. REPORT, *supra* note 2, at xii.

115. *Id.*

116. *Id.*

117. Baum et al., *supra* note 1, at A14 (quoting Don Jackson, a retired officer of the Hawthorne Police Department who left the Department in 1987 after complaining of racism).

### A. *The First Amendment*

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."<sup>118</sup> Throughout the history of the United States, freedom of expression has been considered one of the most fundamental rights protected under the Constitution.<sup>119</sup> It has been said that a "[d]emocratic, representative government presumes that people are free to think and say whatever they might, even the unthinkable."<sup>120</sup> Justice Holmes immortalized this concept in his famous dissent in *Abrams v. United States*:<sup>121</sup>

[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."<sup>122</sup>

Any limitation of speech based upon content presumptively violates the First Amendment.<sup>123</sup> At a minimum, the right to free speech means that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."<sup>124</sup> Because any regulation of racist speech is inherently content-based, it carries a heavy presumption of invalidity.<sup>125</sup>

Although the prohibition against content-based regulations is stringent, it is not absolute.<sup>126</sup> If the government can show that a regulation is necessary to further a compelling state interest, the regulation may pass constitutional muster.<sup>127</sup> The Supreme Court has

118. U.S. CONST. amend. I.

119. Matsuda, *supra* note 34, at 2349.

120. *Id.*

121. 250 U.S. 616 (1919) (Holmes, J., dissenting).

122. *Id.* at 630-31.

123. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 790 (2d ed. 1988).

124. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (holding invalid an ordinance that prohibited picketing in the vicinity of a school because, in allowing an exception for labor union picketing, the state had not been content neutral).

125. Schwartz, *supra* note 93, at 749.

126. TRIBE, *supra* note 123, § 12-2, at 790 n.10; *see also* *Finzer v. Barry*, 798 F.2d 1450, 1468 (D.C. Cir. 1986) (noting that "a total ban on content-based regulations of any sort" would require that First Amendment law be "revolutionized").

127. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (holding

found compelling state interests in some cases, holding that the First Amendment does not protect certain inherently harmful categories of expression.<sup>128</sup> These categories include group libel,<sup>129</sup> incitement of violence,<sup>130</sup> and fighting words.<sup>131</sup> If racist blue humor can be characterized as fitting within one of these categories, it may be regulated based on its content.

## 1. Exceptions to Absolute Freedom of Expression

### a. *Group Libel*

According to Thomas Emerson,

Group libel laws are designed to promote internal order by eliminating or reducing friction among racial, religious, national or similar groups. In general, they seek to prohibit, through criminal or civil process, communications that are abusive, offensive, or derogatory with regard to a group, or that tend to arouse public contempt, prejudice, or hatred toward the group.<sup>132</sup>

In 1952, the Supreme Court, in *Beauharnais v. Illinois*,<sup>133</sup> upheld the validity of group libel statutes by affirming the conviction of a white supremacist under an Illinois law prohibiting the defamation of groups on the basis of race or religion.<sup>134</sup> In so doing, the Court considered the state's history of violent racial strife, and concluded that the state had a legitimate interest in maintaining its "peace and well-

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that "the government [must] show that the regulation is a precisely drawn means of serving a compelling state interest").

128. See *TRIBE*, *supra* note 123, § 12-8, at 837.

129. *Beauharnais v. Illinois*, 343 U.S. 250, 264-67 (1952) (holding that group defamation based on race and religion can be regulated).

130. *Feiner v. New York*, 340 U.S. 315, 321 (1951) (holding that the police can prevent a breach of the peace when "the speaker passes bounds of argument or persuasion and undertakes incitement to riot").

131. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining "fighting words" as words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace").

132. THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 391-92 (1970).

133. 343 U.S. 250 (1952).

134. *Id.* at 264-67. The Illinois statute read, in pertinent part:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, or any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .

ILL. REV. STAT. ch. 38, para. 471 (1949).

being."<sup>135</sup>

However, the *Beauharnais* decision was the product of a five-to-four split among the Justices.<sup>136</sup> Additionally, the Supreme Court's subsequent holdings in *New York Times Co. v. Sullivan*<sup>137</sup> and its progeny have established clear limitations on a state's freedom to define and punish libel and slander.<sup>138</sup> As a result, courts and commentators question whether *Beauharnais* remains good law.<sup>139</sup> Indeed, the Supreme Court in *Beauharnais* questioned the wisdom and efficacy of group libel laws.<sup>140</sup>

Despite the Court's conflicting treatment of group libel laws, *Beauharnais* has never been explicitly overruled.<sup>141</sup> Also, eight of the

135. *Beauharnais*, 343 U.S. at 258-61. The Court noted that

[i]n the face of this history . . . of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented.

*Id.* at 261.

136. *Id.* at 267 (Black, J., dissenting), 277 (Reed, J., dissenting), 284 (Douglas, J., dissenting), 287 (Jackson, J., dissenting).

137. 376 U.S. 254 (1964) (holding that damages for libel of public figures require a showing of actual malice).

138. See, e.g., *Milkovich v. Loraine Journal Co.*, 497 U.S. 1, 19 (1990) (stressing that a statement is actionable in a defamation suit only if a reasonable factfinder could conclude that it implied an assertion of fact).

139. See *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring) (arguing that *Beauharnais* is a "misfit" and should be overruled); *Collin v. Smith*, 578 F.2d 1197, 1205 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (citing cases sharing "doubt . . . that *Beauharnais* remains good law . . . after the constitutional libel cases"); *United States v. Handler*, 383 F. Supp. 1267, 1277-78 (D. Md. 1974) (questioning whether *Beauharnais* is still good law); see also *TRIBE*, *supra* note 123, § 12-17, at 926-27 (noting that *New York Times v. Sullivan* "seemed to some to eclipse *Beauharnais*' sensitivity to . . . group defamation claims"); *Delgado*, *supra* note 60, at 376-77 (noting that "some commentators and courts have questioned whether *Beauharnais* today would be decided differently"); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 219 (1991) (noting that cases subsequent to *Beauharnais* "cast serious doubt upon whether that decision remains good law"); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 518 ("*Beauharnais* is widely assumed no longer to be good law . . .").

140. See *Beauharnais*, 343 U.S. at 261-62. The Court in *Beauharnais* noted, "It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-Nothings." *Id.* The Court further stated, "[I]t bears repeating . . . that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others." *Id.* at 267.

141. *Beauharnais* is the only case in which the Supreme Court has expressly addressed group libel. Strossen, *supra* note 139, at 518.

Justices who decided the *Beauharnais* case expressly agreed that states may regulate speech that defames a group if the statute is narrowly drawn and appropriately applied.<sup>142</sup> Subsequent Supreme Court holdings demonstrate continuing judicial approval of *Beauharnais*.<sup>143</sup> Furthermore, libelous statements targeting private individuals, as opposed to public figures, still fall within the sphere of permissible state regulation.<sup>144</sup>

Yet, problems remain. Group libel laws cannot adequately protect victims when the defamatory speech contains no falsehoods.<sup>145</sup> Defamation only encompasses false statements of fact made without a good faith belief in their veracity.<sup>146</sup> Therefore, although racial insults may be considered defamation, truth serves as a complete defense, and racial groups "would hardly have their reputations or psyches enhanced by a [judicial] process in which the [defendant] sought to prove his good faith belief in [the truth of his statements] and [the plaintiffs] were required to demonstrate the absence thereof."<sup>147</sup>

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142. Justices Vinson, Burton, Clark, and Minton joined in Justice Frankfurter's majority opinion. *Beauharnais*, 343 U.S. at 250. Although Justice Jackson dissented, he agreed that "a State has power to bring classes 'of any race, color, creed or religion' within the protection of its group libel laws, if indeed traditional forms do not already accomplish it." *Id.* at 299 (Jackson, J., dissenting) (quoting section 224a of the Illinois Criminal Code, ILL. REV. STAT. ch. 38, § 471 (1949)). Justice Douglas adopted a near-absolute position against the constitutionality of state group libel laws, although he noted that extreme situations exist where group libel may be punishable, namely when there is a conspiracy to defame a group or when clear and present danger exists. *Id.* at 284-85 (Douglas, J., dissenting). Justice Reed assumed that states have the power "to pass group libel laws to protect the public peace," even though he objected to the statute in *Beauharnais* on vagueness grounds. *Id.* at 283 (Reed, J., dissenting).

143. See, e.g., *New York v. Ferber*, 458 U.S. 747, 763-64 (1982) (citing *Beauharnais* to illustrate the legitimacy of content-based restrictions where "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake"); *Garrison*, 379 U.S. at 70 (approving of group libel statutes "designed to reach speech, such as group vilification, 'especially likely to lead to public disorders'" (quoting MODEL PENAL CODE § 250.7 cmt. (Tent. Draft No. 13, 1961))).

144. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974) ("States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehoods injurious to the reputation of a private individual."); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 35 (1985) (arguing that *Sullivan* is "expressly limited to actions brought by public officials against critics of their official conduct," and does not extend to libel suits by private citizens).

145. Delgado, *supra* note 51, at 158.

146. *Id.*

147. *Id.*

b. *Incitement*

In 1919, Justice Holmes introduced the doctrine of "clear and present danger" in *Schenck v. United States*.<sup>148</sup> The *Schenck* test considers "whether the words used are used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>149</sup> Fifty years later, in *Brandenburg v. Ohio*,<sup>150</sup> the Supreme Court adopted the clear and present danger standard in establishing the test for incitement.<sup>151</sup>

In *Brandenburg*, the defendant, a leader of an Ohio Ku Klux Klan group, was convicted of violating Ohio's Criminal Syndicalism Statute. This statute forbade the advocacy of crime or violence as a means of accomplishing industrial or political reform.<sup>152</sup> In a unanimous *per curiam* opinion, the Court struck down the Ohio statute without considering whether the defendant's particular speech could have been proscribed.<sup>153</sup> In doing so, the Court articulated new requirements for limiting speech that advocates the use of force or crime.<sup>154</sup> First, the advocacy must be "directed to inciting or producing imminent lawless action";<sup>155</sup> and second, the advocacy must be "likely to incite or produce such action."<sup>156</sup>

As it relates to preventing racist speech, the *Brandenburg* clear and present danger test suffers from several shortcomings. First, it only protects against imminent physical violence, not psychological injury.<sup>157</sup> Second, the *Brandenburg* test "targets only the trigger of violence instead of all the events that may have contributed to heightened racial tension."<sup>158</sup> This is a problem because, although immediate danger is not always present, every racial insult and epithet exacerbates racial tensions.<sup>159</sup> Third, physical violence is often unlikely where the target of the racist speech is a minority, thereby making the second half of the *Brandenburg* test often impossible to

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148. 249 U.S. 47 (1919).

149. *Id.* at 52.

150. 395 U.S. 444 (1969) (*per curiam*).

151. *Id.* at 447.

152. *Id.* at 444-45.

153. *Id.* at 449.

154. *Id.* at 447.

155. *Brandenburg*, 395 U.S. at 447.

156. *Id.*

157. Schwartz, *supra* note 93, at 759.

158. *Id.* at 764.

159. *Id.*

meet.<sup>160</sup> This occurs because, rather than reacting with violence, many minority victims of racist speech attempt to avoid racist encounters and instead internalize the harm.<sup>161</sup> By doing this, "self-defensive withdrawal erects a constitutional wall that isolates minorities from state protection."<sup>162</sup> These reasons show that the clear and present danger test is not a satisfactory response to the problems created by racist blue humor.

### c. *Fighting Words*

The "fighting words doctrine" originated in *Chaplinsky v. New Hampshire*,<sup>163</sup> a case in which the defendant called the city marshall a "God damned racketeer" and "a damned fascist."<sup>164</sup> In doing so, Chaplinsky violated a statute providing that "[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place."<sup>165</sup> The Supreme Court unanimously upheld Chaplinsky's conviction under the state statute, noting that

such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."<sup>166</sup>

Thus, the Court held that the First Amendment does not protect fighting words, defined as words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>167</sup> This test, unlike the others, recognizes that words, like conduct, can cause injury.

There is no question that racial insults inflict injury by their very utterance: "Words such as 'nigger' and 'spick' are badges of degrada-

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160. *Id.* at 765 (citing *Matsuda*, *supra* note 34, at 2337).

161. *Id.* Although not necessarily true for all minority victims, the withdrawal syndrome is definitely true for some. To avoid racist attacks, victims have quit jobs, interrupted their educations, left their homes, avoided certain public places, curtailed their own speech rights, and have otherwise modified their behavior and demeanor. *Matsuda*, *supra* note 34, at 2337. For specific examples of such withdrawal from society, see *supra* note 73.

162. *Matsuda*, *supra* note 34, at 2337.

163. 315 U.S. 568 (1942).

164. *Id.* at 569.

165. *Id.*

166. *Id.* at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296 (1940)).

167. *Id.*

tion even when used between friends; these words have no other connotation."<sup>168</sup> Thus, initially it would appear that racist speech falls within the fighting words exception. Unfortunately, the first part of the fighting words definition, prohibiting words that "by their very utterance inflict injury," was merely dicta.<sup>169</sup> *Chaplinsky's* actual holding was limited to justifying the state statute as reflective of the state's interest in preserving the peace by prohibiting "words likely to cause an average addressee to fight."<sup>170</sup> This is supported by the fact that the Supreme Court, in *Gooding v. Wilson*,<sup>171</sup> narrowed the *Chaplinsky* fighting words definition by ignoring the earlier dicta and limiting the definition of fighting words to include only those words that "tend to incite an immediate breach of the peace."<sup>172</sup>

Despite the *Gooding* limitation, Professor Laurence Tribe has noted that the Supreme Court "has not foreclosed the possibility of imposing costs on those whose words inflict injury by their very utterance [and that t]he Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard."<sup>173</sup> Thus, although Professor Tribe believes that the Seventh Circuit appropriately rejected a Skokie, Illinois village ordinance that prohibited a planned neo-Nazi march,<sup>174</sup> he nonetheless concludes that a more narrowly drawn statute might have passed constitutional muster.<sup>175</sup>

As the law now stands, however, fighting words are limited to those that "tend to incite an immediate breach of the peace."<sup>176</sup> Therefore, while the harm that results from racial insults can be analogized to a breach of the peace, whether it be severe emotional distress or the feeling of social inequality,<sup>177</sup> it appears that the fighting

168. Delgado, *supra* note 51, at 173-74.

169. See *Chaplinsky*, 315 U.S. at 572.

170. *Id.* at 573.

171. 405 U.S. 518 (1972).

172. See *id.* at 532.

173. TRIBE, *supra* note 123, § 12-10, at 856.

174. See *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

175. TRIBE, *supra* note 123, § 12-10, at 856.

176. *Gooding*, 405 U.S. at 523.

177. J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 407 (1991) (citing Kent Greenawalt, *Insults and Epithets, Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990)). However, the common law does not permit tort recovery for racial insults without proof of aggravating circumstances. See *Dawson v. Zayre Dep't Stores*, 499 A.2d 648, 650 (Pa. 1985).



words exception applies only to *physical* breaches of the peace.<sup>178</sup> As such, racial insults may still constitute fighting words if they are targeted at a victim who is able and inclined to answer with violence.<sup>179</sup> The problem, however, is that minority victims of racist speech generally are unlikely to respond with violence.<sup>180</sup> In addition, some commentators argue that racist speech should never be considered part of the fighting words exception to freedom of expression because racist speech is so common that people are generally expected to tolerate it.<sup>181</sup>

In any event, it appears that racist speech does not fit comfortably into the group libel, incitement, or fighting words categories. However, that is not the end of the analysis, as the theories of free speech must also be considered.

## 2. Theories of Free Speech

The Supreme Court, in deciding whether content-based regulations withstand First Amendment scrutiny, next considers "the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the [F]irst [A]mendment."<sup>182</sup> Therefore, assessing the validity of regulating racist police humor requires an examination of such speech to determine whether it furthers the search for truth, self-government, or self-fulfillment.

### a. Truth

According to one theory, free speech is essential to the pursuit of truth because "the best test of truth is the power of the thought to get

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178. See *Chaplinsky*, 315 U.S. at 573.

179. Byrne, *supra* note 177, at 406-07.

180. See *supra* notes 160-62 and accompanying text.

181. See Matsuda, *supra* note 34, at 2344; see also *Howard v. National Cash Register Co.*, 388 F. Supp. 603, 606 (S.D. Ohio 1975) (noting that "[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law ever could be") (quoting Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1061 (1936)).

182. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983). For example, the Supreme Court in *Beauharnais* stated that [i]t has been well observed that such utterances [i.e., lewd, obscene, profane, libelous, insulting, or fighting words] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Beauharnais*, 250 U.S. at 256-57.

itself accepted in the competition of the marketplace."<sup>183</sup> Because no one is infallible, no one is qualified to decide what is a true opinion.<sup>184</sup> In light of this, the Supreme Court, in *Gertz v. Robert Welch, Inc.*,<sup>185</sup> held that "there is no such thing as a false idea."<sup>186</sup> Rather,

when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favourable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it.<sup>187</sup>

However, the likelihood of some views being true is so minute that, "even grant[ing] human fallibility, the risk of suppressing truth cannot be a serious reason for disallowing their suppression."<sup>188</sup> Indeed, racism is one of those ideas that has been collectively rejected by the international community.<sup>189</sup> Even adamant supporters of absolute free speech avoid claiming possible truth as a basis for protecting racial insults, arguing instead that racist speech must be protected in order to ensure free speech for all.<sup>190</sup>

In addition, racial slurs do not contribute to the discovery of truth.<sup>191</sup> Such insults are different from classroom discussions of race because academic discussions and informal criticisms invite response, thus furthering the search for truth.<sup>192</sup> In contrast, racial insults invite no thoughtful response and therefore do not further the search for truth. Rather, such comments "are like a slap in the face."<sup>193</sup> "Racial insults . . . do not attempt to establish, improve, or criticize

183. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See generally JOHN STUART MILL, *ON LIBERTY* (D. Spitz ed., 1975) (1859) (arguing that free speech is essential to the pursuit of truth).

184. MILL, *supra* note 183, at 18 ("All silencing of discussion is an assumption of infallibility.").

185. 418 U.S. 323 (1974).

186. *Id.* at 339.

187. MILL, *supra* note 183, at 29.

188. Kretzmer, *supra* note 54, at 471.

189. See *infra* notes 291-375 and accompanying text.

190. See generally ARYEH NEIER, *DEFENDING MY ENEMY* (1979); LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

191. Delgado, *supra* note 60, at 379; see also KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 297-99 (1989); Schwartz, *supra* note 93, at 740 (arguing that racist speech "does not contribute to an understanding of our society any more than the argument that the world is flat").

192. Schwartz, *supra* note 93, at 742.

193. Delgado, *supra* note 60, at 379; see also GREENAWALT, *supra* note 191, at 289-99.

any proposition or object of inquiry. . . . Racial insults communicate only scorn or hatred irrationally based on immutable characteristics of the target. Their goal can only be to diminish the victim . . . ."<sup>194</sup> Victims of racial insults rarely utilize additional speech as a solution to the attacks, because the insults "strike suddenly, immobilizing their victim[s] and rendering [them] speechless."<sup>195</sup> Thus, the pursuit of truth may actually be impeded rather than advanced by the expression of racist speech.<sup>196</sup>

### b. Democracy

The democratic concept holds that the right to freedom of expression is necessary to ensure a free flow of ideas and information among the people.<sup>197</sup> Democracy itself means that the government's authority is derived "from the consent of the governed."<sup>198</sup> All members of the community must be given an equal opportunity to participate in decision-making through the open discussion of ideas.<sup>199</sup> The key to democracy is "that all persons participate."<sup>200</sup>

Conversations about race that encourage a thoughtful response do not infringe on the participatory rights of others, and therefore contribute to the concept of self-government.<sup>201</sup> The notion of equal participation, however, is not furthered by speech that encourages racial inferiority and exclusion.<sup>202</sup> Rather, the principle of democracy is undermined when some voices are permitted to silence others through intimidation.<sup>203</sup>

In addition, attempts by racial minorities to participate in the democratic process often meet with hostility.<sup>204</sup> For example, in

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194. Byrne, *supra* note 177, at 419.

195. Delgado, *supra* note 60, at 379. Also, "talking back" to a person who has just hurled a racial slur at a minority victim is usually not feasible. *Id.* at 379 n.311. Nothing has quite the same emotional impact as a racial epithet such as, "Go home, Nigger, you don't belong here." As stated by Professor Richard Delgado, "What word has the impact of Nigger—you white?" *Id.* (emphasis in original).

196. Kretzmer, *supra* note 54, at 476.

197. *Id.* at 476. For the classic presentation of the democracy argument, see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

198. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 883 (1963).

199. *Id.* at 882.

200. *Id.*

201. Schwartz, *supra* note 93, at 745.

202. *Id.* at 743-44.

203. *Id.* at 746.

204. *Id.* at 745.

1988, black students at the University of California at Berkeley requested that the school radio station play rap music.<sup>205</sup> A student disc jockey responded over the air by telling the students to “[g]o back to Oakland,”<sup>206</sup> a predominantly black community located between San Francisco and Berkeley.<sup>207</sup> According to one writer, that racial insult sent “a message to all black students that if they attempt to have a voice in campus organization, they will be treated with hostility.”<sup>208</sup>

Excluding citizens from participating in society on the basis of their race results in inequality.<sup>209</sup> Racial epithets promote alienation and inequality by excluding members of certain racial groups. The result contradicts the self-government justification for free expression in a participatory democracy.<sup>210</sup>

### c. *Individual Fulfillment*

The theory of self-fulfillment as a justification for free expression begins with individual realization of character and potential.<sup>211</sup> To achieve self-fulfillment, all individuals must have the right to form and express their beliefs and opinions, “[f]or expression is an integral part of the development of ideas of mental exploration and of the affirmation of self.”<sup>212</sup> Limiting a person’s right to expression subjects that individual to the arbitrary control of society.<sup>213</sup>

Uttering racial slurs, however, “hardly seems essential to self-fulfillment in any ideal sense.”<sup>214</sup> To the contrary, racial insults stifle the moral and social growth of the speaker by reinforcing myopic thinking.<sup>215</sup> Furthermore, a person’s search for self-realization may

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205. For a general overview of this event, see *id.* at 745 & n.52. “Rap music” is a popular form of music associated with black culture. See Patrick Goldstein, *Pop Eye: A Rappin’ Big Year for Little Jive Records*, L.A. TIMES, June 19, 1988, at 90; Robert Hillburn, *Rap—The Power and the Controversy*, L.A. TIMES, Feb. 4, 1990, at 78.

206. See Schwartz, *supra* note 94, at 745 & n.53.

207. THE WORLD ALMANAC 1991, at 558 (1991) (racial composition based on 1980 census figures).

208. Schwartz, *supra* note 93, at 745.

209. *Id.* at 744.

210. *Id.*

211. Emerson, *supra* note 198, at 879.

212. *Id.*

213. *Id.* at 880.

214. Delgado, *supra* note 60, at 379.

215. See Delgado, *supra* note 51, at 140, 176; see also ALLPORT, *supra* note 60, at 170-86, 371-84.

be curtailed when it harms another.<sup>216</sup> In this regard, “[t]he idea that my liberty to swing my arm ends where the next person’s nose begins applies to freedom of speech, as well as to freedom of movement.”<sup>217</sup> Since racial insults, like blue humor, injure their victims mentally, psychologically, and even physically,<sup>218</sup> they should not be allowed to stand as an avenue for self-fulfillment.

### 3. The Dangers of Suppression

Although racist speech does not further the search for truth, self-government, or self-fulfillment, dangers exist in attempting to regulate it. These dangers, including possible administrative abuse, definitional, and other problems, must be examined to establish whether the hazards in regulating racist speech outweigh the benefits.

#### a. *The Possibility of Administrative Abuse*

Administrative abuse could occur when legal restrictions on speech transform states into censors with no way to ensure that “good” speech will not be condemned along with “bad” speech.<sup>219</sup> States would be in a position to silence speech whenever they disagreed with its content.<sup>220</sup> In this respect, it has been said that “[o]ur insistence on free speech stems not so much from optimism about the emergence of truth from open debate as from realistic pessimism about the character of representative government.”<sup>221</sup>

Also problematic is the possibility that members of minority groups could themselves become the unintended targets of the regula-

216. Kretzmer, *supra* note 54, at 454.

217. *Id.* For example, “although one may dress in Nazi uniforms and demonstrate before the city hall in Skokie, Illinois, one may not paint swastikas on one’s neighbor’s doors.” Delgado, *supra* note 51, at 176 (referring to *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978)); *see also* *Healy v. James*, 408 U.S. 169 (1972) (holding that while student groups cannot be punished for their philosophies, they can be punished for acting on those philosophies in a way that infringes upon the rights of others).

218. *See supra* notes 66-117 and accompanying text.

219. Matsuda, *supra* note 34, at 2351.

220. Kretzmer, *supra* note 54, at 490; Matsuda, *supra* note 34, at 2351. As stated by Professor Nadine Strossen,

Once we acknowledge the subtle discretion that anti-hate speech rules will vest in those who enforce them, then we are ceding to the government the power to pick and choose whose words to protect and whose to punish. Such discretionary governmental power is fundamentally antithetical to the free speech guarantee. Once the government is allowed to punish any speech based upon its content, free expression exists only for those with power.

Strossen, *supra* note 139, at 539.

221. Byrne, *supra* note 177, at 404.

tions.<sup>222</sup> For example, an African-American speaker sponsored by the African-American student organization, Black Power Serves Itself, was the first person charged under Trinity College's new policy prohibiting racial harassment.<sup>223</sup> Likewise, during the year in which the University of Michigan enforced its anti-hate speech rule,<sup>224</sup> more than twenty complaints were filed against African-Americans, charging them with racist speech.<sup>225</sup> The only student subjected to a full disciplinary hearing was an African-American student accused of homophobic and sexist expression.<sup>226</sup> Others punished under the University of Michigan rule included a group of Jewish students accused of making anti-Semitic expressions<sup>227</sup> and an Asian-American student accused of making an anti-African-American comment.<sup>228</sup> Similarly, at the University of Connecticut, an Asian-American was penalized under the university's hate speech policy for an allegedly homophobic remark.<sup>229</sup>

However, the potential for abuse alone should not excuse the LAPD's responsibility to prohibit the use of racist speech by its police officers. As stated by the Supreme Court in *Beauharnais*, "Every power may be abused, but the possibility of potential abuse is a poor

222. Strossen, *supra* note 139, at 512 ("[The] record substantiates the risk that . . . speech restriction[s] will be applied discriminatorily and disproportionately against the very minority group members whom it is intended to protect."); Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 566 (1980) (stating that one very real danger is "that the penal law will be selectively invoked against members of racial or other minority groups and speakers who espouse ideological views unpopular with enforcement officials"); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 38 (1975) ("[S]tatutes . . . proscribing abusive words are applied to members of racial and political minorities more frequently than can be wholly explained by any special proclivity of those people to speak abusively.").

223. *Black Talks Prompt Protest and Complaint*, N.Y. TIMES, Dec. 10, 1989, § 1, at 67.

224. See generally *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

225. See Stephen F. Rohde, *Campus Speech Codes: Politically Correct, Constitutionally Wrong*, L.A. LAW., Dec. 1991, at 24. The only two instances where sanctions were imposed involved speech by or on behalf of African-American students. Strossen, *supra* note 139, at 557 (citing Plaintiff's Exhibit Submitted in Support of Motion for Preliminary Injunction at 1, *University of Mich.*, 721 F. Supp. at 852).

226. Strossen, *supra* note 139, at 557.

227. *Id.* at 558. The students wrote graffiti, including a swastika, on a classroom blackboard, asserting later that it was done as a practical joke. *Id.*

228. *Id.* After being punished for questioning why African-Americans perceive themselves as the target of discrimination, the student explained that the African-American students in his dormitory tended to socialize together, leaving him socially isolated. *Id.*

229. *Id.* In a suit challenging the University of Connecticut's anti-hate speech policy, the Asian-American student claimed that although other students had engaged in similar expressions, she was singled out because of her race. *Id.* (citing *Wu v. University of Conn.*, No. Civ. H89-649 PCD (D. Conn. 1989)).

reason for denying [a state] the power to adopt measures against criminal libels . . . ."<sup>230</sup> In addition, although there are no foolproof methods of avoiding selective enforcement, abuse of these rules can be restricted by taking certain legal precautions. For example, enforcement powers can be vested in the state Attorney General,<sup>231</sup> rather than in the LAPD itself. In this capacity, the Attorney General can act as "a nonpolitical appointee who has attained almost quasi-judicial status and has built a tradition of prosecuting decisions free of political considerations and pressures from the executive branch."<sup>232</sup> Thus, the Attorney General is likely to be more sensitive to both free speech issues and the rights of victims of racist speech.

### b. *Definitional Problems*

Concomitant with the problem of censorship lies the problem of defining which groups deserve protection. The issue is whether racial and ethnic groups alone deserve protection, or whether religion, women, homosexuals, and disabled people should also be included within the protected circle.<sup>233</sup> Selecting among deserving groups may subject protection to political whim.<sup>234</sup>

In addition, there remains the problem of classifying and defining racially-based speech in a way that avoids treading on constitutionally-protected speech.<sup>235</sup> For example, should the definition of insulting speech include only speech that employs derogatory terms, or should it include speech that articulates insulting ideas as well?<sup>236</sup> Also, should statistics indicating that some ethnic groups have a higher crime rate than others constitute insulting speech?<sup>237</sup> Although a broad definition of prohibited speech may include all racist speech, it may also encompass speech not intended to be restricted.<sup>238</sup> On the other hand, a narrow definition may leave a whole

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230. *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1951). See *supra* notes 132-44 for a discussion of the *Beauharnais* case.

231. Vesting the power of enforcement in the Attorney General would be consistent with the racist speech laws of other countries, such as Great Britain and Canada. For a more detailed discussion of these laws, see *infra* notes 330-47 and accompanying text.

232. Kretzmer, *supra* note 54, at 491.

233. Strossen, *supra* note 139, at 537-38.

234. Byrne, *supra* note 177, at 412.

235. Strossen, *supra* note 139, at 538.

236. Kretzmer, *supra* note 54, at 488-89.

237. *Id.*

238. *Id.* at 488.

host of racist speech unrestricted.<sup>239</sup>

The overbreadth problem inherent in prohibiting certain speech stems largely from attempts to regulate all racist speech. However, regulating only racist blue humor avoids the problem of overbreadth because it specifically addresses racial insults by police officers. While such a narrow application will leave most racist speech unprohibited, the purposes of anti-hate speech laws—protecting the dignity of individuals, preventing breaches of the peace, and maintaining a symbolic affirmation of society's rejection of racism—nonetheless will be served.<sup>240</sup>

### c. Other Dangers

Another problem with suppression is that the prohibition of racist speech is unlikely to eliminate racism itself.<sup>241</sup> According to this theory, since racist speech is only a symptom of racism, banning the symptom presumably will not eliminate the larger problem.<sup>242</sup> In fact, there is no direct evidence persuasively demonstrating that punishment changes deeply held attitudes.<sup>243</sup> To the contrary, punishment may render racist speech an attractive tool for racists seeking martyrdom, self-glorification, and publicity.<sup>244</sup>

With respect to racist blue humor, however, prosecution for engaging in racist speech is unlikely to glorify a police officer. Indeed, citizens were so shocked at the racist MDT transmissions disclosed following the Rodney King beating that Mayor Tom Bradley created the Commission to address both the use of excessive force by officers and racism in the LAPD.<sup>245</sup> More importantly, however, prohibiting racist blue humor will serve to shield the victims from both the verbal and the physical violence inflicted upon them by the officers charged with protecting them.<sup>246</sup>

As can be seen, racist speech does not further the search for truth, self-government, or individual fulfillment. In addition, the benefits of suppressing racist police humor outweigh the possible dangers.

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239. *Id.*

240. Kretzmer, *supra* note 54, at 489.

241. Rohde, *supra* note 225, at 24. For a contrasting view, see *supra* notes 56-65 and accompanying text.

242. Strossen, *supra* note 139, at 554.

243. *Id.* at 554-55.

244. *Id.* at 554-55, 559.

245. See *supra* notes 8-32 and accompanying text.

246. See *supra* notes 66-117 and accompanying text.



Even more compelling, however, is that the Supreme Court has held that public sector employees do not enjoy an absolute right to the First Amendment guarantee of free expression.<sup>247</sup>

#### 4. The Government Employee Exception to the First Amendment

In *Connick v. Myers*,<sup>248</sup> Sheila Myers, an assistant district attorney in New Orleans, Louisiana, objected to her pending transfer to another section of the criminal court, and criticized certain intra-office policies.<sup>249</sup> When informed by superiors that others in the office did not share her views, Myers distributed a questionnaire to her fellow employees to determine if this was in fact the case.<sup>250</sup> The distribution of the questionnaire resulted in Myers' termination for both refusing to accept the transfer and for "insubordination."<sup>251</sup> In upholding the termination, the Court held that a public employee's speech is not covered by the First Amendment unless it embraces a

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247. See *Connick v. Myers*, 461 U.S. 138, 149 (1983) (holding that government officials can fire employees with impunity for speech that is not "a matter of public concern").

248. See *id.*

249. *Id.* at 140-41.

250. *Id.* at 141. The questionnaire asked the following:

1. How long have you been in the Office? \_\_\_\_\_
2. Were you moved as a result of the recent transfers? \_\_\_\_\_
3. Were the transfers as they effected [*sic*] you discussed with you by any superior prior to the notice of them being posted? \_\_\_\_\_
4. Do you think as a matter of policy, they should have been? \_\_\_\_\_
5. From your experience, do you feel office procedure regarding transfers has been fair? \_\_\_\_\_
6. Do you believe there is a rumor mill active in the office? \_\_\_\_\_
7. If so, how do you think it effects [*sic*] overall working performance of A.D.A. personnel? \_\_\_\_\_
8. If so, how do you think it effects [*sic*] office morale? \_\_\_\_\_
9. Do you generally first learn of office changes and developments through rumor? \_\_\_\_\_
10. Do you have confidence in and would you rely on the word of:
  - Bridget Bane \_\_\_\_\_
  - Fred Harper \_\_\_\_\_
  - Lindsay Larson \_\_\_\_\_
  - Joe Meyer \_\_\_\_\_
  - Dennis Waldron \_\_\_\_\_
11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates? \_\_\_\_\_
12. Do you feel a grievance committee would be a worthwhile addition to the office structure? \_\_\_\_\_
13. How would you rate office morale? \_\_\_\_\_
14. Please feel free to express any comments or feelings you have.

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*Id.* at 155-56.

251. *Id.* at 141.

matter of public concern *and* does not disrupt the workplace.<sup>252</sup> Therefore, even if employee speech involves matters of public concern, and even if the state cannot show that the speech actually impedes office operations, the state can nonetheless punish an employee when it believes that the speech *may* undermine workplace discipline, morale, or efficiency.<sup>253</sup> It is not necessary for the state to wait "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."<sup>254</sup>

Police officers, as public employees, do not have a First Amendment right to engage in racist speech unless it embraces a matter of public concern, an improbable event. In defining "public concern," the Ninth Circuit has stated that

[s]peech by public employees may be characterized as not of "public concern" when it is clear that such speech deals with individual . . . disputes and grievances and that the information would be of no relevance to the public's evaluation of their performance of governmental agencies. . . . On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of [F]irst [A]mendment protection.<sup>255</sup>

Matters of public concern are determined by the "content, form, and context" of the speech.<sup>256</sup>

The content, form, and context of racist blue humor are racial inferiority, racial insult, and racism by a government agency, respectively. If Myers' questionnaire only "touched upon matters of public concern in . . . a most limited sense,"<sup>257</sup> then police officers' racial insults do not even approach touching matters of public concern.<sup>258</sup> Even if racial insults do involve a matter of public concern, they unquestionably undermine the workplace discipline and morale of minority officers, and therefore may be regulated.<sup>259</sup> A government employer must be given "wide discretion and control over the man-

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252. *Connick*, 461 U.S. at 140, 147.

253. *Id.* at 151-52.

254. *Id.* at 152.

255. *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983).

256. *Connick*, 461 U.S. at 147-48.

257. *Id.* at 154.

258. *See Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987).

259. *See Connick*, 461 U.S. at 151-52; *see also supra* notes 25-26, 80-90 and accompanying text.

agement of its personnel and internal affairs,"<sup>260</sup> including the ability to discipline or even remove an unruly officer if necessary.<sup>261</sup> In this regard,

courts must give weight to the nature of the employee's job in assessing the possible effect of his action on employee morale, discipline or efficiency. In doing so, it must be recognized that such effect may vary with the job occupied by the employee. In analyzing the weight to be given a particular job in this connection non-policy-making employees can be arrayed on a spectrum, from university professors at one end to policemen at the other. State inhibition of academic freedom is strongly disfavored. . . . *In polar contrast is the discipline demanded of, and freedom correspondingly denied to[,] policemen.*<sup>262</sup>

Thus, due in part to the paramilitary nature of police forces,<sup>263</sup> courts have held that a police department's interests in discipline, *esprit de corps*, and uniformity outweigh an individual officer's interest in making disrespectful and disparaging remarks.<sup>264</sup> It is clear, therefore, that police officers do not have a First Amendment right to engage in disrespectful and disparaging racist blue humor. The next question is whether the Fourteenth Amendment mandates the prohibition of racist police humor.

### B. The Fourteenth Amendment

The Fourteenth Amendment provides, in relevant part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>265</sup> Inherent in this clause is the principle of equal citizenship,<sup>266</sup> that "every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member."<sup>267</sup> Because speech supporting racial prejudice

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260. *Connick*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

261. *Id.*

262. *Jurgensen v. Fairfax County*, 745 F.2d 868, 880 (4th Cir. 1984) (emphasis added) (citations omitted).

263. *Gasparenetti v. Kerr*, 568 F.2d 311, 321 (2d Cir. 1977) (Rosenn, J., dissenting in part), *cert. denied*, 436 U.S. 903 (1978).

264. *See, e.g., Kannisto v. City and County of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

265. U.S. CONST. amend. XIV.

266. Kenneth Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 1 (1988); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-39.

267. Karst, *supra* note 266, at 1.

treats citizens unequally, it contravenes the Fourteenth Amendment's principle of equal protection.<sup>268</sup>

### 1. Racist Speech Versus Equality

Racist speech encroaches upon the Fourteenth Amendment principle of equal protection because it contains a message of inferiority.<sup>269</sup> In fact, "[v]iolent expressions of bigotry are particularly damaging to the preservation of equality, because they focus on superficial characteristics which victims are powerless to change and which do not relate to individual accomplishments or other common criteria of self-worth."<sup>270</sup>

Professor Charles Lawrence has argued that the landmark case of *Brown v. Board of Education*<sup>271</sup> supports the regulation of racist speech.<sup>272</sup> According to Professor Lawrence, when the Supreme Court in *Brown* held that segregation is inherently unconstitutional, it did so primarily because segregation conveys a message of inferiority.<sup>273</sup> By holding segregation to be unconstitutional, the Court necessarily intended to erase the message of inferiority contained in the practice of segregation.<sup>274</sup> Although Professor Lawrence notes a distinction between discriminatory conduct and speech, he nevertheless maintains there is no purpose for outlawing segregation that is unrelated to speech.<sup>275</sup> Professor Lawrence concludes that *Brown* invokes the Fourteenth Amendment and prohibits states from engaging in racist speech and denying citizens equal protection.<sup>276</sup> In fact, the

268. Kretzmer, *supra* note 54, at 456.

269. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 272 (1991); Matsuda, *supra* note 34, at 2357. But see Justice Brennan's observation in *United States v. Eichmann*, 496 U.S. 310 (1990), that "virulent ethnic and religious epithets" ought to receive constitutional protection because of the "bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 319 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

270. HOGAN & HARTSON, *STRIKING BACK AT BIGOTRY: REMEDIES UNDER FEDERAL AND STATE LAW FOR VIOLENCE MOTIVATED BY RACIAL, RELIGIOUS, AND ETHNIC PREJUDICE* 2 (Supp. 1988).

271. 347 U.S. 483 (1954) (holding that segregated schools are inherently unequal).

272. See generally Lawrence, *supra* note 266.

273. *Id.* at 439.

274. *Id.* at 439-40.

275. *Id.* at 440; see also *TRIBE*, *supra* note 123, § 12-7, at 827 ("[A]ny particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit.").

276. Lawrence III, *supra* note 266, at 440 n.41. On its face, the Fourteenth Amendment

Fourteenth Amendment requires the suppression of racist speech by government employees, including police officers.

## 2. Racist Speech and Government Employees

The post-Civil War amendments to the United States Constitution<sup>277</sup> charge the government with the power and obligation to eradicate all "badges and incidents of slavery," including racial discrimination.<sup>278</sup> By its very terms, the Fourteenth Amendment precludes state governments from denying any person the equal protection of the laws.<sup>279</sup> This absolute obligation "to counter racism clearly is incompatible with racist speech tolerated by the government itself."<sup>280</sup>

Accordingly, the law has recognized that the use of racist language by government officials is intolerable.<sup>281</sup> Courts and administrative bodies have required prison officials,<sup>282</sup> judges,<sup>283</sup> and police

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applies only to states or state actors, and not to private citizens. In general, this "state action doctrine" provides that

although someone may have suffered harmful treatment of a kind that one might ordinarily describe as a deprivation of liberty or a denial of equal protection of the laws, that occurrence excites no constitutional concern unless the proximate active perpetrators of the harm include persons exercising the special authority or power of the government of a state.

Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 306 (1989). However, Professor Lawrence extends his analysis of *Brown* to prohibit racist speech by private individual citizens as well as by the state. Lawrence, *supra* note 266, at 444. Although he acknowledges the private/public distinction, Professor Lawrence argues that "reliance on the state action doctrine in this context avoids the real issue." *Id.* at 440 n.41. This part of Professor Lawrence's analysis is inapposite to the argument presented in this Comment, which argues for the restriction of racial insults by police officers, who are government employees.

277. See U.S. CONST. amends. XIII, XIV, XV.

278. The Civil Rights Cases, 109 U.S. 3, 20 (1888).

279. U.S. CONST. amend XIV, § 1.

280. Strossen, *supra* note 139, at 544.

281. See *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 200 (Minn. 1976) ("The use of the term 'nigger' has no place in the civil treatment of a citizen by a public official."). The international arena concurs that racist language by public officials is impermissible. See *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 4(c), G.A. Res. 2106A(XX), U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965) [hereinafter *Convention*] (State Parties "[s]hall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."). For a discussion of international treatment of racist speech, see *infra* notes 291-375 and accompanying text.

282. *Holt v. Hutto*, 363 F. Supp. 194, 205, 214 (E.D. Ark. 1973), *rev'd on other grounds sub nom.*, *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974).

283. *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1976), *cert. denied*, 445 U.S. 938 (1980) (holding that a Caucasian judge's racially motivated campaign to discredit an African-American police officer and seek his termination, including calling the officer a "black bastard," was

officers<sup>284</sup> to avoid racial language. For example, in *City of Minneapolis v. Richardson*,<sup>285</sup> the Minnesota Supreme Court held that

[w]e cannot regard use of the term "nigger" in reference to a black youth as anything but discrimination against that youth based on his race . . . . When a racial epithet is used to refer to a [black] person . . . an adverse distinction is implied between that person and other persons not of his race. The use of the term "nigger" has no place in the civil treatment of a citizen by a public official. We hold that use of this term by police officers coupled with all of the other uncontradicted acts described herein constituted discrimination because of race.<sup>286</sup>

Some states have even enacted anti-discrimination statutes that prohibit police officers from engaging in racial insults.<sup>287</sup>

Moreover, as a government agency, a police department, such as the LAPD, has a duty to restrict such racist speech. Failure to do so may constitute state action under the Constitution.<sup>288</sup> The Supreme Court has held that state action occurs when a state significantly encourages private discrimination<sup>289</sup> or delegates authority to private parties to make discriminatory decisions.<sup>290</sup> By failing to enforce its policy against racial insults, the LAPD has encouraged and authorized individual officers to engage in racist blue humor. Thus, the

"such an intentional tort inspired by racial animus and perpetrated under color of state law [that it] constitute[d] a denial of equal protection"); see also *In re Stevens*, 645 P.2d 99 (Cal. 1982) (holding that a judge's use of the racial terms "jig," "dark boy," "colored boy," "nigger," "coon," "Amos and Andy," and "jungle bunny," in reference to African-Americans, and "cute little tamale," "spick," and "bean," in reference to Hispanics, constituted conduct "prejudicial to the administration of justice that brings the judicial office into disrepute").

284. *Allen v. City of Mobile*, 331 F. Supp. 1134, 1150 (S.D. Ala. 1971), *aff'd*, 466 F.2d 122 (5th Cir.) (per curiam), *cert. denied*, 412 U.S. 909 (1973).

285. 239 N.W.2d 197 (Minn. 1976).

286. *Id.* at 203. In *Richardson*, a crowd of people observed the police making an arrest. The police used dogs to disperse the crowd. One of the dogs bit the hand of a man standing next to an African-American youth. When the dog leapt at the youth, he struck it down with a rolled-up poster. The youth was arrested, dragged face down to the police car, and called a "nigger" by the police. *Id.*

287. See, e.g., *City of Minneapolis v. State*, 310 N.W.2d 485, 487 (Minn. 1981) (holding that a Minnesota anti-discrimination statute prohibits police officers from calling a Caucasian person a "nigger lover").

288. See *The Civil Rights Cases*, 109 U.S. at 9-10; see also TRIBE, *supra* note 123, § 18-2, at 1693. For a definition of "state action," see *supra* note 276.

289. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding state action in the judicial enforcement of racially discriminatory restrictive covenants).

290. *Reitman v. Mulkey*, 387 U.S. 369 (1967) (finding state action where a state authorized private individuals to discriminate in the sale or lease of real property by amending the state constitution to prohibit government interference).

LAPD has violated the principles of equal protection contained in the Fourteenth Amendment by not effectively enforcing its ban on racial insults.

#### IV. INTERNATIONAL CONDEMNATION

The proper measure by which any personal liberty must be gauged, particularly freedom of speech, is the degree to which it allows an individual to *impose* his speech on someone else, and the *deleterious effect* his actions might have on others. If either is excessive, the liberty must be restricted. The effect of racial defamation is demonstrably deleterious to all persons within the scope of its contempt. It lacks constitutional value; its imposition is the verbal counterpart of a body blow to all persons swept within the scope of its contempt, as well as to the social fabric of American democracy. The ultimate liberty, after all, is not freedom of speech, but the right to live in peace, secure from harassment.<sup>291</sup>

In recognition of this principle, the international arena has officially condemned racist speech.<sup>292</sup> When the Allies uncovered the atrocities of World War II's Nazi regime, fighting racism became a top priority shadowing even the importance of free speech.<sup>293</sup> Shocked by the revelation of the inhumane genocide practices of the Third Reich, "nations agreed on the necessity of establishing general standards for the respect of persons and minorities."<sup>294</sup> Resulting international condemnation of discrimination and racial violence appears in both multilateral instruments<sup>295</sup> and individual domestic

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291. Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 53 (1985).

292. See, e.g., Racial Discrimination Act of 1975, 1975 AUSTL. ACTS P. 349; Canadian Criminal Code, R.S.C., ch. C-46, §§ 319(1)-319(3) (1985), amended by ch. C-42, § 319(2) (1988); Public Order Act, 1986, ch. 64, §§ 17-18 (Gr. Brit.); Race Relations Act of 1971, no. 150, 4 N.Z. Stat. 3590 (amended 1977); *Convention, supra* note 281, art. 4; *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter *Covenant*]; *Universal Declaration of Human Rights*, art. 7, G.A. Res. 217, U.N. Doc. A/810, at 73 (1948) [hereinafter *Universal Declaration*].

293. Kretzmer, *supra* note 54, at 447.

294. LAW REFORM COMMISSION OF CANADA, HATE PROPAGANDA 6 (Working Paper No. 50, 1986).

295. See, e.g., *Convention, supra* note 281, art. 4 (State Parties are required to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred" while giving "due regard to the principles embodied in the Universal Declaration of Human Rights [including free speech]"); *Covenant, supra* note 292, arts. 19, 20 (while article 19 of the Covenant guarantees the right to freedom of expression, article 20 provides, "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law"); *Universal Declaration, supra* note 292, art. 7 ("All are

legislation.<sup>296</sup>

### A. International Instruments

The most important and specific piece of multilateral antiracism legislation is the International Convention on the Elimination of All Forms of Racial Discrimination ("Convention").<sup>297</sup> The Convention, with 128 signatories as of 1989,<sup>298</sup> condemns and criminalizes racist speech while recognizing a free speech right.<sup>299</sup>

Article 4 of the Convention requires member states to adopt immediate and positive measures to eradicate all incitement to racism.<sup>300</sup> These measures require criminalizing all dissemination of materials premised on racial superiority or racial hatred.<sup>301</sup> Significantly, article 4(c) mandates the prohibition of all racist speech by public authorities, which includes police officers.<sup>302</sup> At the same time, however, article 4 implicitly recognizes the right to free speech by requiring

entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.").

296. See, e.g., Racial Discrimination Act of 1975, 1975 AUSTL. ACTS P. 349; Canadian Criminal Code, R.S.C., ch. C-46, §§ 319(1)-319(3) (1985), amended by ch. C-42, § 319(2) (1988); Public Order Act, 1986, ch. 64, §§ 17-18 (Gr. Brit.); Race Relations Act of 1971, no. 150, 4 N.Z. Stat. 3590 (amended 1977).

297. *Convention*, *supra* note 281.

298. U.N. CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS—STATUS OF INTERNATIONAL INSTRUMENTS, 1987, at 12, U.N. Doc. ST/HR/5, U.N. Sales No. E.87.XIV.2 (Sept. 1, 1989).

299. *Convention*, *supra* note 281, art. 4.

300. *Id.* Article 4 provides,

State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination and shall recognize participation in such organizations or activities as an offence punishable by law; [and]

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

*Id.*

301. *Id.* art. 4(a) (States "[s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, [or] incitement to racial discrimination . . .").

302. *Id.* art. 4(c).



states to give "due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention,"<sup>303</sup> including freedom of speech, association, and conscience.<sup>304</sup> Nonetheless, the Convention espouses the principle that freedom from racist hate speech is a right deserving greater protection than the right to engage in such speech.<sup>305</sup>

The conflict between freedom of speech and freedom from racist hate speech created considerable discord when delegates debated the adoption of article 4 as part of the final version of the Convention.<sup>306</sup> The United States argued in favor of banning the direct incitement to acts of racial violence section.<sup>307</sup> The United States also sought to explicitly include free speech rights within the text of the Convention.<sup>308</sup> The final decision<sup>309</sup> rejected the United States' view and adopted article 4 as it now reads, banning acts of violence and the dissemination of racist ideas, while giving due regard to freedom of speech.<sup>310</sup>

As stated by one author, "[t]he survival of article 4, in spite of the controversy, indicates the overriding strength of the basic idea that promotion of racism is a serious threat to the protection of human rights."<sup>311</sup> Notably, all countries, including the United States, agreed on the basic goal of eliminating racism and were unwilling to abandon the effort notwithstanding the problems surrounding the free speech issue.<sup>312</sup>

Unanimously adopted by the General Assembly on December 21, 1965,<sup>313</sup> the Convention became effective on January 4, 1969.<sup>314</sup> Although some democratic countries have retained reservations regarding article 4,<sup>315</sup> most have ratified the Convention and enacted

303. *Id.* art. 4; see also Matsuda, *supra* note 34, at 2341.

304. *Convention, supra* note 281, arts. 4, 5.

305. Matsuda, *supra* note 34, at 2341-42.

306. See generally *id.* at 2344.

307. NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 44 (2d ed. 1980). This view is consistent with United States case law. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

308. LERNER, *supra* note 307, at 46.

309. The vote was 16 in favor and 5 abstaining. Matsuda, *supra* note 34, at 2343.

310. See LERNER, *supra* note 307, at 45.

311. Matsuda, *supra* note 34, at 2344-45.

312. *Id.*

313. U.N. GAOR, 20th Sess., 1406th mtg., at 7, U.N. Doc. A/PV.1406 (1965).

314. U.N. CENTRE FOR HUMAN RIGHTS, *supra* note 298, at 97.

315. For example, Belgium stated that article 4 obligations "must be reconciled with the right to freedom of opinion and expression." LERNER, *supra* note 307, at 156-62. Similarly,

legislation limiting racist speech.<sup>316</sup> The one major exception is the United States.<sup>317</sup> Despite being an early signatory to the Convention,<sup>318</sup> and despite its free speech reservation,<sup>319</sup> the United States has not yet ratified the Convention.<sup>320</sup> The reservation and failure to ratify the Convention illustrate the United States' extreme commitment to First Amendment principles at the expense of anti-discrimination goals, and separates the United States from the international community.<sup>321</sup>

Other international human rights documents also recognize the necessity of limiting racist hate messages. Both the Universal Declaration of Human Rights<sup>322</sup> and the International Covenant on Civil and Political Rights<sup>323</sup> protect against discrimination based on na-

France interpreted article 4 as "releasing the States Parties from the obligation to enact anti-discriminatory legislation which is incompatible with freedom of opinion and expression and of peaceful assembly and association." *Id.* at 158. Italy likewise declared that the measures adopted under article 4 must not "jeopardize the right to freedom of opinion and expression." *Id.* at 159.

316. Kretzmer, *supra* note 54, at 448-49 & n.17; Delgado, *supra* note 60, at 363.

317. Kretzmer, *supra* note 54, at 448-49.

318. Ambassador Arthur Goldberg signed the Convention for the United States on September 28, 1966. Peter W. Schroth & Virginia S. Mueller, *Racial Discrimination: The United States and the International Convention*, 4 HUMAN RTS. 171, 177 (1975).

319. The reservation reads as follows:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.

55 DEP'T ST. BULL. 653 (1966).

320. Matsuda, *supra* note 34, at 2345; Kretzmer, *supra* note 54, at 450; Delgado, *supra* note 60, at 363 n.158.

321. Matsuda, *supra* note 34, at 2346.

322. *Universal Declaration*, *supra* note 292, at 71. The Universal Declaration of Human Rights provides, in part: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and *against any incitement to such discrimination.*" *Id.* (emphasis added).

323. *Covenant*, *supra* note 292. Although the Covenant on Civil and Political Rights was signed by the United States on October 5, 1977, it has not been ratified. U.N. CENTRE FOR HUMAN RIGHTS, *supra* note 298, at 12. When submitting the Covenant to the Senate for possible ratification, Warren Christopher, head of the Department of State when Jimmy Carter was President of the United States, suggested the following reservation to article 5(1), which indirectly affected freedom of speech:

The Constitution of the United States and Article 19 of the International Covenant on Civil and Political Rights contain provisions for the protection of individual rights, including the right to free speech, and nothing in this Covenant shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States.

tional, racial, or religious grounds.<sup>324</sup> Additional international anti-racism instruments include the United Nations Charter,<sup>325</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>326</sup> and the American Declaration of the Rights and Duties of Man.<sup>327</sup> All of these documents recognize the importance of the right to equality and freedom from racism.<sup>328</sup>

### B. Domestic Legislation in Individual Countries

In addition to international instruments, the existing laws of several nations, including those that accept the western notion of free expression, proscribe certain forms of racist speech.<sup>329</sup> Great Britain's Race Relations Act of 1965<sup>330</sup> ("Act") criminalizes the incitement of discrimination and racial hatred by anyone who,

with intent to stir up hatred against any section of the public . . . distinguished by colour, race or ethnic or national origins[,] . . . publishes or distributes written matter which is threatening, abusive or insulting; or . . . uses in any public place or at any public meeting words which are threatening, abusive or insulting, being matter or words likely to stir up hatred.<sup>331</sup>

The Act was the culmination of several earlier attempts to conform British law to international trends. The final version represents a

DEPARTMENT OF STATE, FOUR TREATIES PERTAINING TO HUMAN RIGHTS, MESSAGE FROM THE PRESIDENT, S. DOC. NO. 385-3, 95th Cong., 2d Sess. x (1978).

324. *Universal Declaration*, *supra* note 292, art. 7 ("All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."); *Covenant*, *supra* note 292, art. 20 (while article 19 of the Covenant guarantees the right to freedom of expression, article 20 states, "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law").

325. See U.N. CHARTER art. 55(c).

326. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (*as amended by* Protocol No. 3 and Protocol No. 5).

327. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. XXX, *adopted by* the Ninth Int'l Conf. of American States, Bogota, Columbia, Mar. 30-May 2, 1948, at 38 (Pan American Union 1948), O.A.S. Off. Rec. OEA/Ser. L/V/II.23/Doc. 21/Rev. 6 (English 1979), *reprinted in* 43 AM. J. INT'L L. SUPP. 133 (1949).

328. See Delgado, *supra* note 60, at 362.

329. See, e.g., Racial Discrimination Act of 1975, 1975 AUSTL. ACTS P. 349; Canadian Criminal Code, R.S.C., ch. C-46, §§ 319(1)-319(3) (1985), *amended by* ch. C-42, § 319(2) (1988); Public Order Act, 1986, ch. 64, §§ 17-18 (Gr. Brit.); Race Relations Act of 1971, no. 150, 4 N.Z. Stat. 3590 (*amended* 1977).

330. Race Relations Act, 1965, ch. 73, § 6(1), *amended by* Race Relations Act, 1976, ch. 74, § 70, *and* Public Order Act, 1986, ch. 64, §§ 17-18 (Gr. Brit.).

331. *Id.*

compromise between the drafters and civil libertarians who insisted on provisions to prevent unreasonable infringements on speech.<sup>332</sup>

As originally enacted, the Act led to few prosecutions.<sup>333</sup> Written materials that appeared fairly scientific and employed no threatening language could avoid prosecution.<sup>334</sup> In response, Great Britain removed the Act's intent requirement in 1975.<sup>335</sup> In 1986, Great Britain amended the Act once more.<sup>336</sup> As it now reads, the Act prohibits the use, publication, or distribution of threatening, abusive, or insulting words that are intended or likely to arouse racial hatred.<sup>337</sup> Under

332. Delgado, *supra* note 60, at 364. Civil libertarians insisted on provisions stating that (1) the Attorney General must consent to any prosecutions; (2) only public speech or distribution of materials would be prohibited; (3) prohibited speech must be "threatening, abusive or insulting"; (4) intent must accompany the speech; and (5) the victim must be a member of a minority group residing within Great Britain. *See id.* at 364-65. The Attorney General provision was included because "[t]he Attorney General is likely to be more sensitive to the potential threat to freedom of speech stemming from the law's liberal application than local police, who are likely to be more concerned with public peace considerations." Kretzmer, *supra* note 54, at 502.

333. Delgado, *supra* note 60, at 365 (citing Kenneth Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161, 170 (1987)).

334. *See* Race Relations Act, 1965, ch. 73, § 6(1) (amended 1976 & 1986) (Gr. Brit.).

335. Race Relations Act, 1976, ch. 74, § 70 (amended 1986) (Gr. Brit.).

336. Public Order Act, 1986, ch. 64, §§ 17-18 (Gr. Brit.).

337. *Id.* The sections of the 1986 Act pertaining to racism read as follows:

§ 17 Meaning of "racial hatred":

In this part "racial hatred" means hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

§ 18 Use of words or behaviour or display of written material:

(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

(2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling.

(3) A constable may arrest without warrant anyone he reasonably suspects is committing an offence under this section.

(4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling.

(5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

(6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme broadcast or included in a cable programme service.

the revised Act, a constable can arrest, without a warrant, "anyone he reasonably suspects is committing an offense under this section."<sup>338</sup> In addition, the 1986 Act prohibits private as well as public behavior.<sup>339</sup> Accused individuals can defend themselves by proving that they did not intend the words or written materials to be viewed by others, or were unaware that the words or written materials were threatening, abusive, or insulting.<sup>340</sup> Prosecution requires the consent of the Attorney General.<sup>341</sup>

Like Great Britain, Canada has enacted legislation protecting minorities from racist propaganda.<sup>342</sup> Sections 318 and 319 of the Canadian Criminal Code prohibit the promotion of genocide and communications inciting hatred against any identifiable group where a breach of peace is likely.<sup>343</sup> The Canadian law also bans the expression of ideas inciting hatred if such expression threatens public order.<sup>344</sup> However, the Canadian Criminal Code also includes provisions designed to protect free expression, including defenses such as truth, good faith, and fair comment on a public subject.<sup>345</sup> Further, the Attorney General's consent to prosecute is required.<sup>346</sup> Conviction under this law subjects an accused to the possibility of imprisonment for up to two years.<sup>347</sup>

Similar to the Canadian statute, the German Penal Code prohibits the advocacy of genocide,<sup>348</sup> incitement against minority groups in

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*Id.*

338. *Id.* § 18(3).

339. *Id.* § 18(2).

340. *Id.* §§ 18(4), 18(5).

341. *Id.* § 27(1).

342. See Canadian Criminal Code, R.S.C., ch. C-46, §§ 318, 319 (1985). As early as 1970, Canada's criminal code contained provisions outlawing hate speech. See An Act to Amend the Criminal Code, R.S.C., ch. 11 (1st Supp. 1970) (amending R.S.C., ch. C-34 (1970)). A 1985 Report of the Special Committee on Hate Propaganda determined that freedom of expression did not include the right to vilify, thereby prompting the provisions that outlawed hate speech. HOUSE OF COMMONS, REPORT OF THE SPECIAL COMM. ON HATE PROPAGANDA IN CANADA 14 (1986). The Report found that race-hate speech serves no valid public purpose and represents a "clear and present danger to the function of a democratic society." *Id.* at 24-25.

343. R.S.C., ch. C-46, §§ 318, 319 (1985).

344. *Id.*

345. *Id.* § 319(3).

346. *Id.* § 319(6).

347. *Id.* § 319(1)(a).

348. STRAFGESETZBUCH [StGB] § 220(a), translated in THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY 182 (Joseph J. Darby trans., 1987). Section 220(a), entitled "Genocide," reads,

a manner that tends to breach the peace,<sup>349</sup> and organization of unconstitutional political parties such as the neo-Nazis,<sup>350</sup> as well as the dissemination of such parties' propaganda<sup>351</sup> and the use of their emblems.<sup>352</sup> In addition, the German Penal Code forbids the distribution of writings that "incite racial hatred or which depict cruel and otherwise inhumane acts of violence against persons in such a manner as to glorify or deny the wrongfulness of such acts of violence."<sup>353</sup>

France outlaws the defamation of persons or groups on the basis of their origin or relationship to an ethnic group, nation, race, or specified religion.<sup>354</sup> In the Act of July 1, 1972,<sup>355</sup> France eliminated the requirement of deliberate intent to incite hatred for the crimes of defamation and racial insult.<sup>356</sup> Instead, under the Act, an offense occurs when the victim is actually defamed or insulted.<sup>357</sup>

Italy has enacted one of the most stringent laws implementing the Convention's mandate. Upon ratification of the Convention, Italy adopted a statute that provides a one to four year prison sentence for "[a]ny person, who, in any way whatsoever, disseminates ideas based on racial superiority or racial hatred."<sup>358</sup> Pursuant to this statute, on

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(1) Whoever, with the intention of wholly or partially destroying a national, racial, religious or ethnically distinct group as such,

1. kills members of a group;
2. inflicts serious physical or mental injury . . . on members of a group;
3. subjects the group to living conditions likely to cause death to all or some of the members;
4. imposes measures designed to prevent births within the group;
5. forcibly transfers children from one group to another, shall be punished by imprisonment for life.

(2) Not less than five years' imprisonment shall be imposed in less serious cases falling under subparagraph (1), numbers 2 to 5.

*Id.*

349. *Id.* § 130.

350. *Id.* § 84.

351. *Id.* § 86.

352. *Id.* § 86(a).

353. *Id.* § 131. German law further makes it a crime to deny the occurrence of the Holocaust. LAW REFORM COMMISSION OF CANADA, *supra* note 294, at 22.

354. LAW REFORM COMMISSION OF CANADA, *supra* note 294, at 20.

355. Act of July 1, 1972, No. 72-546, 1972 D. 328 (Fr.). The law imposes a punishment of imprisonment of one month to one year and a fine of 2000 to 300,000 francs on anyone who "incites discrimination against or hatred or violence towards a person or group of persons because of their origin or their belonging or not belonging to an ethnic group, a nation, a race or a specified religion." *Id.*, translated in LAW REFORM COMMISSION OF CANADA, *supra* note 294, at 21 n.75.

356. *Id.*

357. LAW REFORM COMMISSION OF CANADA, *supra* note 294, at 21.

358. Act of Oct. 13, 1975, No. 654, art. 3 (Italy), reprinted in Annex and the Initial Report of Italy (CERD/C/R.95/add. 1). Article 3 states:

October 3, 1980, a judge imposed a sentence of three years and four months on eleven Italian youths who had carried wooden crosses and shouted "Jews to the ovens" and "Hitler taught us it's no crime to kill Jews" during a basketball game between Israel and Italy.<sup>359</sup>

Other European countries, including the Netherlands and Finland, have adopted statutes modeled after Italy's.<sup>360</sup> For example, in ratifying the Convention, Finland inserted article 6 into its penal code, which states that

anyone disseminating to the public statements and other information in which a section of the population is threatened, slandered or insulted on account of being a certain race, colour, national or ethnic origin or confession of faith shall be sentenced for discrimination against that section of the people to imprisonment for two years at most or to pay a fine.<sup>361</sup>

Although the Scandinavian countries generally protect individual liberties, Sweden's constitution allows punishment for hate speech<sup>362</sup> and acts of persecution against national or ethnic-origin groups.<sup>363</sup> Sweden's criminal law also proscribes hate speech and acts of persecution against ethnic and racial groups.<sup>364</sup> Section 8 of the Swedish Penal Code mandates up to two years of imprisonment for persons who threaten or express contempt for racial, ethnic, or religious minority groups.<sup>365</sup> Likewise, Norway amended its penal code

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Save where the Act constitutes a more serious offence, for the purposes of implementation of the provisions of Article 4 of the Convention, a penalty of imprisonment for a period from one to four years shall be imposed on:

- (a) Any person who, in any way whatsoever, disseminates ideas based on racial superiority or racial hatred;
- (b) Any person who, in any way whatsoever, instigates discrimination or inspires the commission of or commits, acts of violence or incitement to violence against persons because they belong to a national, ethnic, or racial group.

*Id.*

359. *Around the World; 11 Youths Sentenced in Italy for Anti-Semitic Acts*, N.Y. TIMES, Oct. 29, 1980, at A5.

360. See J. INGLÉS, STUDY ON THE IMPLEMENTATION OF ARTICLE 4 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, U.N. Doc. A/Conf. 119/10 (1983).

361. FIN. PENAL CODE art. 6(a).

362. INSTRUMENT OF GOVERNMENT, reprinted in 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD ch. 2, art. 13 (Albert P. Blaustein & Gisbert H. Flanz eds., 1985).

363. *Id.*

364. SWED. PENAL CODE ch. 16, § 8, reprinted in *The Penal Code of Sweden as Amended January 1st, 1972* (Thursten Sellin trans., 1972).

365. *Id.* Section 8 provides as follows:

If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for an ethnic group or other such group with allusion to race, skin color, national or ethnic origin or reli-

to read as follows:

Anyone who threatens, insults, or exposes any person or groups of persons to hatred, persecution or contempt on account of their religion, race, colour, or national or ethnic origin by means of a public utterance or by other means of communication brought before, or in any other way disseminated among the general public, shall be punished by fines or imprisonment [of] up to two years.<sup>366</sup>

Australia and New Zealand also have enacted laws restricting racist speech. Australia's Racial Discrimination Act of 1975<sup>367</sup> makes it unlawful to publish or display an advertisement or notice that indicates an intention

to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise . . . of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.<sup>368</sup>

Similarly, New Zealand's Race Relations Act of 1971, as amended in 1977,<sup>369</sup> criminalizes incitement to racial disharmony.<sup>370</sup> This includes the publication or distribution of written or spoken material likely to incite hostility or ill-will against any group.<sup>371</sup>

Notwithstanding the problems associated with suppression of speech, these countries have not been deterred in their attempts to eradicate racist speech.<sup>372</sup> On the contrary, "[t]he experience of countries with anti-hate laws shows [that] while these difficulties exist, and should not be ignored, they do not undermine either the rule of law, or the possibility of restraining certain types of racist speech."<sup>373</sup> While both the Convention and many nations' domestic laws criminalize the most egregious forms of racist speech, they do not ban all ideas about differences among races. Rather, prosecution results

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gious creed, he shall be sentenced for *agitation against ethnic group* to imprisonment for at most two years, or, if the crime is petty, to pay a fine.

*Id.* (emphasis added).

366. NOR. PENAL CODE ch. 15, reprinted in Initial Report (CERD/C/R.24/Add.3), amending ch. 15 of the Penal Code.

367. Racial Discrimination Act of 1975, 1975 AUSTL. ACTS P. 349.

368. *Id.* §§ 9(1), 16.

369. Race Relations Act of 1971, no. 150, 4 N.Z. Stat. 3590 (amended 1977).

370. *Id.*

371. *Id.*

372. See *supra* notes 329-71 and accompanying text.

373. Kretzmer, *supra* note 54, at 490.



only if there is discrimination, connection to violence, or messages of inferiority, hatred, or persecution. According to one author, this view constitutes "the emerging global standard,"<sup>374</sup> which, "in a world bereft of agreement on many things, is a mark of collective human progress."<sup>375</sup>

The United States stands alone among democratic countries in its refusal to accept this evolving world standard.<sup>376</sup> This refusal stems from the United States' extreme commitment to First Amendment principles.<sup>377</sup> Yet even the United States must concede that, as government employees, police officers do not enjoy an absolute and unequivocal right to freedom of expression.<sup>378</sup> In fact, by condemning racist speech in general, the Convention and the laws of other nations clearly demonstrate the international view that police officers *do not* have the right to engage in racist speech, even if that speech is characterized as "blue humor." Thus, in accordance with article 4 of the Convention, the LAPD must "adopt immediate and positive measures designed to eradicate all incitement to, or acts of . . . discrimination . . . [including declaring as] an offense punishable by law all dissemination of ideas based on racial superiority or hatred, [or] incitement to racial discrimination."<sup>379</sup>

## V. A REGULATION WITH A BITE

Although the LAPD's policy against racism disapproves of racially and ethnically-oriented remarks, referring to such messages as "inappropriate,"<sup>380</sup> the policy is not enforced.<sup>381</sup> Indeed, the officers' blatant disregard for the policy is apparent in the content of their MDT transmissions.<sup>382</sup>

This Comment proposes that the LAPD implement a new regulation—one with a bite. An example of such a regulation is the 1980 San Francisco Civil Service Policy, under which city officials and employees can be demoted, suspended, or dismissed for uttering racial slurs while on duty.<sup>383</sup>

374. Matsuda, *supra* note 34, at 2348.

375. *Id.* at 2359.

376. *See id.* at 2346; Kretzmer, *supra* note 54, at 449.

377. Matsuda, *supra* note 34, at 2348.

378. *See supra* notes 247-64, 277-90 and accompanying text.

379. *Convention, supra* note 281, art. 4(a).

380. For the text of the LAPD's policy against racist messages, see *supra* note 27.

381. *See supra* notes 28-30 and accompanying text.

382. *See supra* notes 1-3, 18-24 and accompanying text.

383. Philip Hager, *Employees Could be Fired: S.F. Civil Service Panel Bans Use of Slurs on*

The new regulation could employ elements of both Professor Matsuda's idea of criminalizing racist speech<sup>384</sup> and Professor Delgado's proposal of a separate tort,<sup>385</sup> and incorporate parts of Great Britain's Public Order Act of 1986. To be actionable under the proposed LAPD regulation, the racial insult should be one that (1) demeans through reference to race;<sup>386</sup> (2) is either directed at an individual<sup>387</sup> or against a definable group that has been historically oppressed;<sup>388</sup> (3) is prosecutorial, hateful, and degrading;<sup>389</sup> and (4) is of such a nature that a reasonable person would recognize it as

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*Job*, L.A. TIMES, Aug. 20, 1980, § I, at 1; see also *Thompson v. City of Minneapolis*, 300 N.W.2d 763 (Minn. 1980) (upholding dismissal of city employee, under city civil service commission rule prohibiting language "wantonly offensive" to the public, for making subsequently published racist remarks in presence of newspaper reporter).

384. Professor Mari Matsuda has proposed formal criminal and administrative sanctions for the most egregious forms of racist hate messages. Matsuda, *supra* note 34, at 2321. While recognizing the necessity for a narrow definition of what constitutes racist speech in order to preserve First Amendment values, she argues that

[r]acist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.

*Id.* at 2357. Professor Matsuda also identifies three characteristics of the most offensive forms of racist speech: (1) messages that convey racial inferiority; (2) messages directed against historically oppressed groups; and (3) messages that are persecutorial, hateful, and degrading. *Id.*

385. In contrast to Professor Matsuda's proposed criminalization, Professor Richard Delgado has advanced the idea of a separate tort action for victims of racist speech. Delgado, *supra* note 51, at 134. Professor Delgado argues that an independent tort action is both appropriate and necessary, because it would eliminate the problems of existing tort remedies and would protect all victims of racial insults. *Id.* at 134, 165. Specifically, he proposes that a plaintiff should be required to prove the following facts in order to prevail in an action for racial insult:

Language was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood as intended to demean through reference to race; and that a reasonable person would recognize as a racial insult.

*Id.* at 179.

386. See *id.*

387. See *id.*

388. See Matsuda, *supra* note 34, at 2357. The LAPD regulation should include this requirement because the racist comments found in the MDT transmissions were generally not directed at the victims. For examples of blue humor, see *supra* notes 1-3, 13-15, 20 and accompanying text. See also Schwartz, *supra* note 93, at 774. Commentator Deborah Schwartz notes that "[r]acial epithets aimed at groups may have an even more deleterious effect than individual insults since they paint negative stereotypes with a 'broader brush.'" *Id.* (quoting Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281, 292).

389. See Matsuda, *supra* note 34, at 2357.

a racial insult.<sup>390</sup> As set out in San Francisco's Civil Service Policy, a racial insult can be defined as a word that "by its very utterance inflicts injury, offers little opportunity for response, appeals not to rational faculties or is an unessential or gratuitous part of any exposition of fact or opinion."<sup>391</sup>

Under this rule, both the epithets "you damn nigger" and "those damn Japs" would be actionable. In contrast, "you incompetent fool" would not be actionable because, although insulting, the epithet lacks a racial component.<sup>392</sup> Racist blue humor, such as that found in the MDT transmissions, would be actionable whether or not directed at a particular victim. Although typically one is not harmed by what one does not know, racist blue humor can lead to racist behavior, including excessive force by police officers against minorities. In this situation, one might well be harmed by what one does not know.

Punishment for police officers' use of racial slurs, epithets, and jokes could include demotion, suspension, or dismissal, similar to the San Francisco Civil Service Policy.<sup>393</sup> In addition, to ensure against restricting protected speech, the regulation should incorporate the British model, which prohibits only threatening, abusive, or insulting language.<sup>394</sup> In contrast to the British statute, however, an accused should not be able to defend on the basis that he or she had no reason to believe the words used would be heard by another.<sup>395</sup> Even if the remark is made privately, such racial slurs can influence the offending officer's behavior in public, perhaps leading to excessive force against racial minorities. On the other hand, a person should not be prosecuted if the words were unintentional or the speaker was unaware that the words were threatening, abusive, or insulting.<sup>396</sup> In this situation, enlightening the officer as to his or her offense may be sufficient to foreclose future offending comments. If the offending comments continue, however, then clearly the speaker is no longer acting ignorantly, and should be prosecuted to the fullest extent. Finally, the consent to prosecute of the state Attorney General or another neutral agency should be required, in accordance with the anti-hate speech

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390. See Delgado, *supra* note 51, at 179.

391. Hager, *supra* note 383.

392. See Delgado, *supra* note 51, at 180.

393. See Hager, *supra* note 383.

394. Public Order Act, 1986, ch. 64, § 18(4) (Gr. Brit.). For the text of Great Britain's anti-hate legislation, see *supra* note 337.

395. See Public Order Act, 1986, ch. 64, § 18(4) (Gr. Brit.).

396. See *id.* § 18(5).

regulations of several nations, including Great Britain and Canada,<sup>397</sup> to help protect against discriminatory enforcement.

## VI. CONCLUSION

It has been said that “[f]reedom of speech would be illusory if it did not extend to the expression of views of whose falsity we are convinced and which we find objectionable and possibly dangerous.”<sup>398</sup> Therefore, the fact that racism is an internationally condemned social evil is not, in itself, a sufficient reason for banning racist speech.<sup>399</sup>

However, racism is unique because of its extensive history and the involuntary nature of membership in racial groups.<sup>400</sup> Added to this is the evidence that racial insults and “blue humor” cause serious physical and emotional damage to its victims.<sup>401</sup>

The international community has officially condemned racist speech.<sup>402</sup> In the United States, First Amendment guarantees in this context are minimal and the Fourteenth Amendment requires the elimination of all badges of racial inferiority, especially when dealing with a governmental entity. Thus, there can be no doubt that police officers have no free speech right to engage in racist blue humor. The LAPD must affirmatively act to eliminate racist police humor within the Department. Although racism may never be completely eliminated, public authorities such as police officers, charged with protecting society from the physical harms of racial hatred, cannot be allowed to promote or incite racial discrimination themselves.

*Josephine Chow\**

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397. *See id.* § 27(1); R.S.C., ch. C-46, § 319(6) (1985) (Can.).

398. Kretzmer, *supra* note 54, at 458.

399. *Id.*

400. *Id.* at 467.

401. *See supra* notes 66-117 and accompanying text.

402. *See supra* notes 291-375 and accompanying text.

\* To my parents and Johnny for their constant love and support throughout my every endeavor, and with special thanks to Professor Laurie Levenson who sparked the idea for this Comment.

