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Restricting Hate Speech against Private Figures: Lessons in Power-Based Censorship from Defamation Law

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RESTRICTING HATE SPEECH AGAINST "PRIVATE FIGURES": LESSONS IN POWER-BASED CENSORSHIP FROM DEFAMATION LAW

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I. THE PROBLEM: THE GROWING, SEAMLESS WEB OF HATE

Last fall, the quiet town of Carlisle, Pennsylvania was the scene of a Ku Klux Klan (Klan) rally.[1] Although the Klan is now but a shadow of its former self,[2] the prospect of a Klan rally in the

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1. *See* David Blymire, *Officials: Klan Disappointed*, Sentinel (Cumberland, Penn.), Sept. 24, 2000, at A1 ("With hoods covering their faces, 22 robed members of the Ku Klux Klan rallied on the steps of Cumberland County Courthouse in Carlisle in front of a maximum crowd of 350 people Saturday."); Elizabeth Gibson & Joe Elias, *Community Unites Against Hate; Ridge Joins Thousands at Celebration That Counters KKK Rally in Carlisle*, Sunday Patriot-News (Harrisburg), Sept. 24, 2000, at A01, 2000 WL 9362227.

2. "The Ku-Klux-Klan, upon which President Johnson has declared war, is no longer the powerful, monolithic group of the 1920s, whose membership ran in the millions and whose political influence in the south was total. There are now a number of splinter organizations competing for legitimacy." *On This Day, March 29, 1965: Last-Ditch Struggles of the Ku-Klux-Klan*, Times (London), Mar. 29,

community galvanized residents to respond. While not many relished the fact that the Klan's right to rally was protected by the First Amendment's freedoms of speech and assembly,[3] in the end, the community's own exercise of its free speech and assembly rights appeared to sufficiently blunt any message the Klan had for it that day. In addition to a counter-demonstration at the rally site, many Carlisleans helped stage a "Unity Rally" at a separate location to celebrate the values of diversity and community.[4] Those opposing the Klan were also aided by "time, place and manner" restrictions limiting the Klan to a specific location for a fixed time period.[5] Finally, a local ordinance permitted the borough of Carlisle to not only seek reimbursement from the Klan for, among other things, the

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1996, at 21. Various KKK groups have been further weakened by litigation efforts, most notably by the Southern Poverty Law Center. *See, e.g.*, *Carolina Klan Loses Suit Over Church Arson*, Nat'l L.J., Aug. 31, 1998, at A9; *$37.8M Verdict In Church Burning*, Newsday, Jul. 25, 1998, at A13. *See also The Year in Hate: Race-Based Nationalism, Black as Well as White, is on the Rise as the Number of American Hate Groups Swells*, Intelligence Rep. (S. Poverty Law Ctr., Montgomery, Ala.), Spring 2001, at 34, 35 [hereinafter *The Year in Hate*]

> (The Klan continued a long decline, dropping from 138 groups in 1999 to 110 in 2000. The most active group, the American Knights of the Ku Klux Klan, lost chapters as its leader, Jeff Berry, faced new criminal charges and lost a civil suit filed by the Southern Poverty Law Center.).

3. The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ." U.S. Const. amend. I.

4. *See* Christopher Maier, *United We Stand*, Dickinson Mag., Winter 2001, at 13 (describing Unity Celebration). Another positive outgrowth of the Klan rally was the revitalization of the Carlisle Area Chapter of the National Association for the Advancement of Colored People (NAACP), which had been dormant for over thirty years. *See* Jennifer Vogelsong, *Residents Gather to Restart NAACP*, Sentinel (Cumberland, Penn.), Nov. 5, 2000, at B1; Elizabeth Gibson, *Carlisle Pursues NAACP Chapter: Nearly 200 People Sign Petitions Circulated by Unity Event Organizers*, Patriot-News (Harrisburg), Oct. 13, 2000, at B16.

5. Joe Elias, *Carlisle Trying to Ignore KKK Rally*, Sunday Patriot-News (Harrisburg), Sept. 17, 2000, at F02 ("The KKK asked for two hours for its protest. The demonstration will be restricted to the steps of the courthouse and Klan members won't be permitted to parade on the streets or sidewalks."). *See also* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647–48 (1981) (noting that the Supreme Court has often approved reasonable time, place, and manner content-neutral restrictions on speech); Erwin Chemerinsky, Constitutional Law: Principles and Policies 924–25 (1997) (describing the development of the "time, place and manner" doctrine).

police protection required at the rally, but also to deny any further rally permits to the Klan should it be unable to foot the bill.[6] In sum, the First Amendment did not allow the Klan to promote its racist agenda in any manner it saw fit. Certain values of equality and community in the guise of content-neutral "time, place, and manner" ordinances allowed the larger public to contain and neutralize the Klan's hate speech—"expression that abuses or degrades others on account of their racial . . . identity."[7]

However, while effective at combating real-time, physical manifestations of hate speech in the form of Klan rallies, our current First Amendment jurisprudence is ill-equipped to stop the proliferation of white supremacist websites,[8] which provide everything from first-person shooter video games in which recruits can gun down minorities,[9] to music filled with racist invective and propaganda.[10] Unlike with the Carlisle Klan rally, it is difficult to

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6. *See* David Blymire, *Bill on Way to Klan: Officials Want $18K from KKK*, Sentinel Weekly (Cumberland, Penn.), Oct. 10, 2000, at A4; Joe Elias, *Ensuring KKK its Rights Costs Taxpayers $18,103: Parade Ordinance Lets Carlisle Send Klan $11,235 Bill*, Patriot-News (Harrisburg), Oct. 5, 2000, at B01.

7. *See* Steven J. Heyman, Hate Speech and the Constitution ix (1996). Like Professor Heyman, I acknowledge that a broader definition of hate speech can be used to encompass expression targeting individuals based on their ethnicity, gender, religion, sexual orientation, or some other characteristic. *Id.* at lxviii n.4. I limit my comments here, however, to hate speech based on race.

8. Although certainly not a scientific survey, I conducted a search of the term 'white power' on http://www.google.com on January 26, 2001, which produced "about 24,700" hits. As for hate groups generally, the Intelligence Project of the Southern Poverty Law Center has identified 602 hate groups in the United States as of 2000, forty-eight of which it categorizes as Black Separatist. (The other categories are KKK, Neo-Nazi, Racist Skinhead, Christian Identity, Neo-Confederate, and Other.). *See Active Hate Groups in the United States in the Year 2000*, Intelligence Rep. (S. Poverty Law Ctr., Montgomery, Ala.), Spring 2001, at 36. Interestingly, the Center does not include solely web-based hate groups because its research suggests that many of these are individuals who like to portray themselves as powerful organizations. *Id.*

9. *See* Julie Salamon, *"Hate.com": The Web as Home for Racism and Hate*, N.Y. Times, Oct. 23, 2000, at E8 (review of "Hate.Com" documentary describing availability of "video games on the Internet where black people are the targets"). *See also HBO Center Document Hate on Net*, SPLC Rep. (S. Poverty Law Ctr., Montgomery, Ala.), Sept. 2000, at 1 (describing "Hate.Com" documentary).

10. *See Listening In: 'National Socialist Black Metal' Music Isn't Available in Most Record Stores, But It's on the Net—if It Hasn't Sold Out Already*, Intelligence Rep. (S. Poverty Law Ctr., Montgomery, Ala.), Fall 2000, at 11; Kate

apply current "time, place, and manner" restrictions to racist websites because, among other things, the assumed harm to the community is less tangible and the speech of the purveyor (without any accompanying act) more pure, and therefore, more worthy of protection. Indeed, any content-neutral restrictions aimed at burdening such communication might be viewed as pretexts for censorship. As most libertarians and absolutists would contend, to place content-based restrictions on this web-based speech simply because we disagree with it would undermine the very foundation of the First Amendment's commitment to free expression.

Despite these arguments, racist hate speech is like no other. It is a powerful force, especially when unleashed across the web. My concern about the proliferation of racist websites parallels the music industry's concern over Napster.[11] Just as the music industry loses control over its ability to market its intellectual property because Napster facilitated the exchange of music for free, white supremacist websites provide the steady growth of an underground cottage industry of hate, thereby perpetuating white privilege. The obvious difference between these two cases is that the music industry asserts a property right protected through copyright laws which provide

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Millar, *Internet Racists Find US a Safe Haven, Seminar Told*, Agence France-Presse, Feb. 17, 2000, 2000 WL 2735490 ("[M]usic featuring racist and violent lyrics not found in music shops is increasingly carried on the Internet . . . ."). *See also The Year in Hate*, *supra* note 2, at 35 (describing other methods of outreach by hate groups, including the Internet, concerts, and mailings). As neo-Nazi National Alliance leader William Pierce explains:

> [W]e have evidence now that there are a lot more people out there who like us than we may have thought; we know that we are on the right course by continuing to put most of our efforts into developing our ability to communicate with the public; and the hold the Jews [have] on power can be challenged, shaken, and broken.

Id. (quoting William Pierce).

11. *See, e.g.*, John Gibeaut, *Facing the Music*, A.B.A. J., Oct. 2000, at 37, 41 ("It's perhaps not surprising that some elements of the Internet culture view free music as a matter of right. Copyright stands in the way of that entitlement."). More recently, the Ninth Circuit upheld an injunction against Napster for abetting copyright infringement. *See* Matt Richtel, *Napster's Clouded Future*, N.Y. Times, Feb. 14, 2001, at C1. Ironically, Napster's demise has coincided with the rise of more sophisticated music-swapping websites that are more difficult to monitor. *See* Matt Richtel, *With Napster Down, Its Audience Fans Out*, N.Y. Times, Jul. 20, 2001, at A1.

presumed, quantifiable monetary harms for their violation.[12] In contrast, outside the realm of direct, face-to-face tortious assaults, courts are reluctant to impose liability upon entities that do little more than assert opinions, however hateful, that are protected by the First Amendment.[13] Indeed, some might contend that in capitalist and multiculturalist America, neither wealthy musical artists nor people of color have much to fear from upstarts such as Napster or

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12. For example, in copyright claims, 17 U.S.C. § 504(c) (1994) provides for presumed statutory damages as follows, in pertinent part:

> (c) Statutory Damages.—
>
> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000 [subject to certain conditions].

17 U.S.C. § 504(c) (1994).

13. *See, e.g.*, UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys., 774 F. Supp. 1163, 1181 (E.D. Wis. 1991) ("The problems of bigotry and discrimination sought to be addressed here are real and truly corrosive of the educational environment. But freedom of speech is almost absolute in our land and the only restriction the fighting words doctrine can abide is that based on the fear of violent reaction.").

Unfortunately, because of the power bestowed upon the First Amendment, law enforcement officers are sometimes reluctant to police even direct, face-to-face assaults. In its Spring 2001 report, the Southern Poverty Law Center described a verbal attack on Bridget Newman, 16, by Jonathan Phelps, a member of an anti-gay church in Topeka, Kansas. When she complained to the police, Newman and her mother were told, "Oh, you must be from out of town. The Phelpses just do these things and there's nothing we can do about it. It's within their legal rights." Bridget noted, "I turned away crying and really upset. They had all the rights and I had none." *A City Held Hostage: Homosexual-Hater Fred Phelps' Lawsuits and Heavy-Handed Tactics Have 'Bullied into Submission' an Entire Kansas City*, Intelligence Rep. (S. Poverty Law Ctr., Montgomery, Ala.), Spring 2001, at 19, 26 (quoting Bridget Newman).

the fringe white supremacist, respectively; after all, the latter two will likely never be able to amass enough power or influence to seriously affect the former. Does one really think, for instance, that Madonna's uncanny ability to sell millions of records will be damaged by Napster?[14] Analogously, how likely is it that America would return to a de jure racial caste system?

There are, nonetheless, two essential harms wrought by hate speech that require redress, one direct and one indirect. First, coming upon a white supremacist website contributes directly to the insult and humiliation suffered by many people of color on a daily basis. This is a harm that is well documented in the social psychology literature and has been cited to at length by such preeminent legal scholars as Professors Richard Delgado, Charles Lawrence III, Mari Matsuda, and Kimberlé Crenshaw; thus, it needs only brief mention here.[15] While it might be difficult for some to imagine the harm something as ridiculous as a racist website might have on an intelligent, educated person of color, as Peggy Davis notes, cognitive psychology is replete with examples of how seemingly minor assaults on minority psyches or "microaggressions," while perhaps harmless individually, collectively wreak havoc on the person of color to reinforce the myth of white superiority and, simultaneously, minority inferiority.[16] Each hateful message displayed on a white supremacist

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14. Indeed, one might argue that non-Madonna fans might be converted after sampling some of her music via Napster.

15. *See, e.g.,* Mari J. Matsuda et al., Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993) (collection of seminal hate-speech articles by Professors Matsuda, Delgado, Lawrence, and Crenshaw); Gordon W. Allport, The Nature of Prejudice 142 (25th Anniversary ed., 1979) ("One's reputation, whether false or true, cannot be hammered, hammered, hammered, into one's head without doing something to one's character."); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2332 (1989) ("In addition to physical violence, there is the violence of the word. Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group.").

16. As Peggy Davis explains:

> "These are subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders." Psychiatrists who have studied black populations view them as "incessant and cumulative" assaults on black self-esteem.
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> Microaggressions simultaneously sustain[ ] defensive-deferential thinking and erode[ ] self confidence in

website aims to put the person of color in her place and reinforces the current American racial caste system which, consciously or unconsciously, promotes the idea that nonwhites are inferior to whites. Decrying society's resistance to censoring racist speech, Professor Lawrence warns that

> it is not just the prevalence and strength of the idea of racism that makes the unregulated marketplace of ideas an untenable paradigm for those individuals who seek full and equal personhood for all. The problem is that the idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick

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> Blacks. . . . [B]y monopolizing . . . perception and action through regularly irregular disruptions, they contribute[ ] to relative paralysis of action, planning and self-esteem. They seem to be the principal foundation for the verification of Black inferiority for both whites and Blacks.
>
> The management of these assaults is a preoccupying activity, simultaneously necessary to and disruptive of black adaptation.
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> [The black person's] self-esteem suffers . . . because he is constantly receiving an unpleasant image of himself from the behavior of others to him. This is the subjective impact of social discrimination . . . . It seems to be an ever-present and unrelieved irritant. Its influence is not alone due to the fact that it is painful in its intensity, but also because the individual, in order to maintain internal balance and to protect himself from being overwhelmed by it, must initiate restitutive maneuvers . . .—all quite automatic and unconscious. In addition to maintaining an internal balance, the individual must continue to maintain a social facade and some kind of adaptation to the offending stimuli so that he can preserve some social effectiveness. All of this requires a constant preoccupation, notwithstanding . . . that these adaptational processes . . . take place on a low order of awareness.
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> Vigilance and psychic energy are required not only to marshall adaptational techniques, but also to distinguish microaggressions from differently motivated actions and to determine "which of many daily microaggressions one must undercut."

Peggy C. Davis, *Law As Microaggression*, 98 Yale L.J. 1559, 1565–66 (1989) (internal citations omitted).

> cattle, or diseased wheat). Racism is irrational and often unconscious. Our belief in the inferiority of non-whites trumps good ideas that contend with it in the market, often without our even knowing it.[17]

The second harm is an indirect one: people of color are indirectly harmed by the white supremacist website because of its cost-efficient nature as a propaganda disseminator, leading to the increased risk that hateful speech might turn into hateful acts. Despite the best efforts of groups such as the Simon Wiesenthal Center, the Anti-Defamation League, and Hatewatch that have led to a softening of the content of many racist websites, the number of racist websites has actually increased over time.[18] While there has been only one case linking hate speech website propaganda to actual violence,[19] there have been several cases in which members of hate groups who have committed crimes have led to the liability of the organizations themselves through vicarious liability and agency

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17. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 468.

18. Bill Hendrick, *Hatred Under Attack*, Atlanta J. & Const., Apr. 15, 2000, at B1, 2000 WL 5452166 ("'As the Internet grows, we can expect this to grow,' [the Anti-Defamation League's] Kaiman says. 'The number of hate groups had started a downward trend until the Internet caught on.'"); *The Year in Hate*, *supra* note 2, at 34–35 ("By using the Internet, hate groups reached out electronically to a potential audience of millions of people. . . . [Some] believe the sites have the insidious effect of cultivating sympathizers even if they do not swell hate group membership rolls.").

19. In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999), the court entered judgment on a jury verdict of $107 million in favor of abortion providers who sued anti-abortion activists based on, among other things, the public disclosure of the providers' names and addresses and the offer of rewards for the successful termination of these providers' work. This information was disseminated through the use of posters and an Internet website called the "Nuremburg Files." *See* Steven G. Gey, *The Nuremburg Files and the First Amendment Value of Threats*, 78 Tex. L. Rev. 541 (2000) (discussing the First Amendment issues raised by the Nuremburg Files litigation, and explaining the error on the part of civil libertarians in dismissing any free speech claims on behalf of the defendants). The plaintiffs' victory was short-lived, however. On appeal, the Ninth Circuit ruled that the activists' posters and website could not reasonably be construed to be direct threats that either the defendant organizations or their agents would physically attack the plaintiffs; hence, the posters and website were forms of protected speech under the First Amendment. Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 244 F.3d 1007 (9th Cir. 2001).

principles.[20] To the extent that our tort law allows recovery against organizations and individuals that had no direct hand in an assault committed by the groups' members, it would arguably not be much more of a fiction to recognize a causal link between website hate speech and crimes committed by race mongers inspired by such propaganda. In perhaps the most famous domestic terrorist act of recent memory, Timothy McVeigh, the notorious Oklahoma City bomber, had direct links to the anti-government and anti-minority Christian Patriot movement, providing yet another example of the nexus between hateful speech and violent action.[21] Indeed, outside the law, the effect of violent speech on one's psyche has well-documented empirical support. The American Academy of Pediatrics recently called for a limit on the amount of television children should watch, citing its findings that media may contribute to short-term aggressive behavior.[22]

Aside from the link between hate speech and violent acts, and the increased risk of more acts because of the proliferation of racist websites, there is reason to believe that recent changes in the substantive content of some websites might further exacerbate matters. Because of the success civil rights groups such as the Southern Poverty Law Center have had at holding hate

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20. The most recent celebrated case of this sort was the Southern Poverty Law Center's multimillion-dollar verdict against the Aryan Nations for some of their members' physical assaults on two Jewish plaintiffs. *See, e.g.*, Sam Howe Verhovek, *Leaders of Aryan Nations Found Negligent in Attack*, N.Y. Times, Sept. 8, 2000, at A24; *Attack Victims Buy Aryan Nation Compound*, N.Y. Times, Feb. 14, 2001, at A24 ("A mother and son whose [$6.3 million] lawsuit bankrupted the neo-Nazi Aryan Nations bought the group's 20-acre compound for $250,000 today and said they planned to sell it, perhaps to a human rights organization.").

21. *See, e.g.*, Tanya Telfair Sharpe, *The Identity Christian Movement: Ideology of Domestic Terrorism*, 30 J. Black Studies 604 (2000).

22. *See* Am. Acad. of Pediatrics, Policy Statement, *Children, Adolescents, and Television (RE0043)*, 107 Pediatrics 423–26 (2001) ("This statement describes the possible negative health effects of television viewing on children and adolescents, such as violent or aggressive behavior, substance use, sexual activity, obesity, poor body image, and decreased school performance."), http://www.aap.org/policy/re0043.html. *See also* Marilyn Elias, *Fight for Quality TV Moves to Pediatrics*, USA Today, Feb. 6, 2001, at D1 ("In a hard-hitting new policy, the [American Academy of Pediatrics] called on doctors to create local coalitions that would promote widespread 'media education' for youngsters and protest violent and sex-drenched programming.").

organizations responsible for the acts of their members,[23] racist organizations have abandoned using their websites as cost-effective recruiting tools.[24] Despite the convenience and economy of posting membership applications on their websites, racist organizations fear that if more join as members and then engage in violent acts, the organizations themselves could then be held vicariously liable. Many racist websites advocate 'lone wolf' actions by their visitors; they do not ask website visitors to join the organization, but do encourage them to perpetrate crimes against minorities as 'lone wolves' or single operators.[25] By encouraging violent acts without soliciting membership from the perpetrators, web-based racist organizations hope to avoid liability while continuing to spread the gospel of hate.

But what is the solution? Like Professor Matsuda, I advocate the censorship of hate speech that satisfies three criteria: "(1) The message is of racial inferiority; (2) The message is directed against a historically oppressed group; and (3) The message is persecutorial,

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23. *See, e.g.*, Editorial, *A Jury in Idaho Puts Matt Hale on Notice*, Peoria J. Star, Sept. 15, 2000, at A04 ("'[The recent multimillion dollar Aryan Nations verdict] sends a warning to hate group leaders that they better be careful when inciting their followers to violence,' said Mark Potok, editor of the Southern Poverty Law Center's Intelligence Report."); Martha Irvine, *Victim Suing Supremacist in Shooting*, Associated Press, Apr. 4, 2000, 2000 WL 17836609 ("A black pastor who was wounded in a shooting rampage is suing white supremacist Matt Hale and his World Church of the Creator in an attempt to hold Hale responsible for the acts of one of his followers."); *Proponent of Silence May Have Talked Too Much*, Intelligence Rep. (S. Poverty Law Ctr., Montgomery, Ala.), Spring 2001, at 2 (reporting that Alex Curtis, a 25-year-old Californian who runs the racist E-zine, *Nationalist Observer*, "has long lectured other white supremacists on the benefits of 'lone wolf' violent resistance. Don't keep membership lists, don't go to rallies or meetings where you can be observed, and, should you decide to break the law, be sure not to tell anyone about it.").

24. *See Cyberhate Revisited: A Long-time Monitor of Hate Sites on the Internet Argues that They are Less Important to Extremists than is Commonly Believed*, Intelligence Rep. (S. Poverty Law Ctr., Montgomery, Ala.), Spring 2001, at 44, 45 ("The far more important way kids get into this [extremist] movement is through music.... That's why [Neo-Nazi National Alliance leader] William Pierce bought Resistance Records [America's leading distributor of racist music].").

25. *See* Lakshmi Chaudry, *Hate Sites Bad Recruiting Tools*, Wired News On-Line, May 23, 2000 ("The sites instead are beginning to promote 'lone wolf' or 'lone shooter' activism, which encourages individuals to go out and act on their own."), http://www.wired.com/news/print/0,1294,36478,00.html.

hateful, and degrading."[26] But unlike Professor Matsuda and other critical race theorists who have artfully articulated various reasons for why hate speech should be censored, I rely on the First Amendment defamation doctrine known as the 'public/private figure' distinction, which acknowledges the difference in power that hurtful speech has depending on the status of the plaintiff. The Supreme Court defines 'public figures' as those who have a more prominent societal role and have greater access to the media than 'private figures,' which justifies a greater burden on the former to prove that defamatory statements made against them are actionable. Utilizing this framework, I contend that white supremacist websites operate to perpetuate the privilege of whiteness, thereby continuing to help white 'public figures' at the expense of 'private figures,' nonwhite groups whose speech, even if equally offensive, deserves to be heard because of the lesser power they have in society. More specifically, because whites, like 'public figures,' have a more prominent societal role and a greater access to the media when compared with nonwhites, who are more like 'private figures,' the former deserve less protection than the latter, who are less able to effectively combat hurtful speech.

The remainder of this Article unfolds in three parts: Part II briefly examines the debate between those, who like Professor Matsuda, favor greater protection for minorities vulnerable to hate speech, and First Amendment absolutists who are skeptical of any burdens on pure speech. Part III provides another perspective on the above debate by highlighting the 'public/private figure' distinction as an area within First Amendment law that acknowledges differences in power, a construct anti-hate speech advocates should use to further their cause. Specifically, this section places the 'public/private figure' division in a theoretical and historical context, and then provides empirical support[27] for the thesis that whites enjoy a more 'prominent societal role' and greater 'access to media' than nonwhites. Part IV applies the 'public/private figure' analogy to the context of websites, arguing that white supremacist websites should be censored while anti-majority ones should not.

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26. Matsuda, *supra* note 15, at 2357.

27. I thank my research assistant, Matt Hughson, for conceiving of this method of analysis and for finding the data in support of my thesis.

II. THE CURRENT DEBATE OVER HATE SPEECH: EQUALITY v. INDIVIDUALITY

The current debate over the content-based censorship of hate speech pits two important core values against each other: equality against individuality.[28]

Those favoring greater censorship of hate speech beyond time, place, and manner restrictions assert that the Equal Protection values embedded in the Fourteenth Amendment require that individuals who harm less powerful minorities by perpetuating white supremacist notions through their speech are not privileged to do so.[29] As social psychologists[30] and critical race scholars[31] have argued,

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28. For two wonderful surveys of the leading articles and cases in this area, see Heyman, *supra* note 7, and Juan F. Perea et al., Race and Races ch. 10 (2000).

29. While the Supreme Court ruled a hate speech code facially invalid in the landmark case *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), it has upheld statutes enhancing sentences of bias-motivated criminals (Wisconsin v. Mitchell, 508 U.S. 476 (1993)) and recently, it denied certiorari in a case in which a middle schooler was disciplined for drawing a Confederate flag, without the administration having proven that he harbored racially-motivated intent. West v. Derby Unified School Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 71 (2000). Thus, even within the context of First Amendment claims, the Court will allow notions of community to prevail over individual rights to express oneself.

30. *See generally* Allport, *supra* note 15 (providing a scholarly social science approach to understanding racial prejudice); John F. Dovidio & Samuel L. Gaertner, *Changes in the Expression and Assessment of Racial Prejudice*, *in* Opening Doors: Perspective on Race Relations in Contemporary America 119 (Harry J. Knopke et al. eds., 1991) (focusing on racial attitudes of white Americans, and concluding that while white Americans are becoming "less prejudiced and more egalitarian," negative feelings toward nonwhites persist); Vetta L. Sanders Thompson, *Perceptions of Race and Race Relations Which Affect African American Identification*, 21 J. Applied Soc. Psychol. 1502 (1991) (reporting results of a study on variables impacting racial identification and determining that "perceived experiences of racism have an important impact on each parameter of racial identification"); Howard Schuman et al., Racial Attitudes in America: Trends and Interpretations 193–95 (1985) (tracing changes in attitudes toward principles of equal treatment). These and other interesting psychological studies are examined in Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 Wis. L. Rev. 627.

31. *See generally* Matsuda et al., *supra* note 15 (presenting articles by four critical race scholars on the First Amendment and noting the impact of racist speech); Davis, *supra* note 16 (discussing the microaggressions suffered by African-Americans and the resultant effects on self-esteem); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice*

racism harms by denying nonwhites their full citizenship not only through direct verbal assault, but also by reinforcing the false notion of white superiority. In addition, these commentators also have noted that, aside from the fact that current First Amendment jurisprudence allows for content-based regulation of speech in areas such as child pornography,[32] obscenity,[33] "fighting words,"[34] and defamation,[35] many other industrialized nations have enacted anti-hate speech legislation, not the least of which is our northern neighbor, Canada.[36] Indeed, Professor Delgado and Jean Stefancic

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Habit, 83 Calif. L. Rev. 733 (1995) (suggesting that colorblind formalism in courts may promote unconscious discrimination); John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 Law & Ineq. 97 (1998) (stating that the harm of racist language lies in its ability to suggest an individual or a group's "place" within society).

32. *See* Osborne v. Ohio, 495 U.S. 103 (1990) (upholding anti-child pornography statute against First Amendment challenge).

33. *See* Miller v. California, 413 U.S. 15, 36 (1973) (reaffirming that obscene material is not protected by the First Amendment).

34. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (upholding conviction on ground that "fighting words" are not protected under First Amendment). *But see* Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, 106 Harv. L. Rev. 1129 (1993) (arguing for the overruling of *Chaplinsky*).

35. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

36. *See* Richard Delgado & Jean Stefancic, Must We Defend Nazis? 63 (1997)

> ([O]ver the past century the courts have carved out or tolerated dozens of "exceptions" to free speech. These exceptions include speech used to form a criminal conspiracy or an ordinary contract; speech that disseminates an official secret; speech that defames or libels someone; speech that is obscene; speech that creates a hostile workplace; speech that violates a trademark or plagiarizes another's words; speech that creates an immediately harmful impact or is tantamount to shouting fire in a crowded theater; "patently offensive" speech directed at captive audiences or broadcast on the airwaves; speech that constitutes "fighting words"; speech that disrespects a judge, teacher, military officer, or other authority figure; speech used to defraud a consumer; words used to fix prices; words ("stick 'em up—hand over the money") used to communicate a criminal threat; and untruthful or irrelevant speech given under oath or during a trial.).

In reviewing other countries' experiences, Professor Henry Louis Gates, Jr. points out that Canada's enforcement of its censorship provisions has resulted in the

concluded that the current First Amendment law is moving away from free speech absolutism to the recognition of discrete areas appropriate for censorship.[37] A lot has happened to the First Amendment since 1997 that calls this thesis into doubt, especially with the Supreme Court's recent decisions in *Boy Scouts of America v. Dale*,[38] which arguably expanded First Amendment group associational and expressive rights, and *City of Erie v. Pap's A.M.*,[39] which arguably curtailed them.[40] In addition, the 2000-01 term saw the Supreme Court uphold free speech claims in three different contexts while granting certiorari in several other cases to be argued in 2001-02,[41] making a new prediction on a possible trend premature. Irrespective of what the Court does, critical theorists have made a strong case for why hate speech should be censored by emphasizing

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targeting of minority voices, gays, lesbians, and even the prominent black feminist scholar bell hooks. Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, New Republic, Sept. 20 & 27, 1993, at 37, 44.

37. *See* Delgado & Stefancic, *supra* note 36, at ix

> (This book brings good news: the First Amendment's liberation is at hand. The law of free speech is finally modernizing itself, finally taking in nuance, context sensitivity, and consideration of competing values. Passing into history are the days when stale mottos—"the rule of law is otherwise! you lose"—foreclosed consideration of any and all claims for speech limitation.).

38. 530 U.S. 640 (2000) (holding that New Jersey anti-discrimination law forcing Boy Scouts to employ gay scoutmaster violated organization's free association rights under the First Amendment).

39. 529 U.S. 277 (2000) (upholding local ordinance requiring nude dancers to wear g-strings as constitutionally permissible burden on dancers' free expression rights under First Amendment).

40. Significantly, in the hate speech context, the Court denied certiorari in a case in which a middle schooler was disciplined for drawing a Confederate flag, without the administration having proven that he harbored racially motivated intent. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 71 (2000).

41. *See* Erwin Chemerinsky, *Overview: A Supreme Court Term to Remember*, 2001 Sup. Ct. Rev. 9, 15 (noting that "free speech claims often succeed[ed]" during the 2000-01 term and citing three cases from the term); Subject Index, 3 Preview U.S. Sup. Ct. Cas. 178 (Nov. 19, 2001) (listing four new cases in the First Amendment area that were to be argued before the Supreme Court during October through December 2001).

the importance of sustaining and affirming the dignity of those most often targeted by such invective—people of color.

In response, First Amendment advocates argue that free speech rights actually protect both the white supremacist and his intended victim by allowing the latter redress through the exercise of her own anti-racist speech. Both within[42] and outside[43] the legal academy, commentators have decried the culture of victimhood they believe is perpetuated through the creation of hate speech-based claims. After all, the freedoms of speech and assembly were used during the civil rights movement in the 1960s to secure rights for minorities. For people of color to abandon their commitment to the constitutional amendment that allowed for their greater societal liberation appears shortsighted.[44] Moreover, Justice Holmes was skeptical of any irreversible harm to be caused by new ideas borne of free speech: "If in the long run [these] beliefs . . . are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[45] As Professor Harry Kalven, Jr. summed up the libertarian position: "Freedom of speech is indivisible; unless we protect it for all, we will have it for none."[46]

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42. *See, e.g.,* Stephen Carter, Reflections of An Affirmative Action Baby 177 (1992); Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-*Brown *Era*, 46 Vand. L. Rev. 865, 898 (1993).

43. *See* Dinesh D'Souza, Illiberal Education: The Politics of Race and Sex on Campus 228–29 (1991) (arguing that affirmative action at universities perpetuates close-mindedness and intolerance by projecting whites as guilty of racism, and minority beneficiaries of affirmative action as victims); Gates, *supra* note 36, at 37 (suggesting that restricting hate speech as a means of protecting civil liberties only redirects the issue of racial inequity while failing to find a real solution to the socioeconomic gap between blacks and whites in America).

44. *See, e.g.,* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484, 567 ("Only strong principles of free speech and association could—and did—protect the drive for desegregation."). *See generally* Harry Kalven, Jr., The Negro and the First Amendment 4, 6 (1966) (focusing on the impact of the civil rights movement on the First Amendment).

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

46. Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. Rev. 428, 432 (1967). *See also* Lee C. Bollinger, The Tolerant Society 57 (1986) (stating that the paradox of protecting the harmful speech of those who seek to destroy the values of free speech is one of many arguments why the libertarian position is incredulous); Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 Colum. L. Rev. 979, 979–80 (1990)

While both the First and Fourteenth Amendments should theoretically co-exist peacefully, the two sides' preference of one over the other stems from a fundamental disagreement over the power that speech wields in American society. Those who believe in censoring hate speech contend that absolute free speech rights perpetuate white supremacy because the status quo privileges some speech over others. Thus, some commentators place little stock in the speech of the powerless. As Professor Lawrence has noted:

> Most blacks—unlike many white civil libertarians—do not have faith in free speech as the most important vehicle for liberation. The first amendment coexisted with slavery, and we still are not sure it will protect us to the same extent that it protects whites. . . . We are aware that the struggle for racial equality has relied heavily on the persuasion of peaceful protest protected by the first amendment, but . . . they disrupt business as usual and require the self-interested attention of those persons in power.[47]

Professor Delgado adds that

> racist speech, by placing all the credibility with the dominant group, strengthen[s] the dominant story [and] also works to disempower minority groups by crippling the effectiveness of their speech in rebuttal. This situation makes free speech a powerful asset to the dominant group, but a much less helpful one to subordinate groups—a result at odds, certainly, with marketplace theories of the First Amendment.[48]

In contrast, free speech advocates dispute this, contending that all speech is created equal and will be listened to in the marketplace of ideas. Only if all speech is free will the truth prevail, they argue. As Justice Holmes stated in *Abrams v. United States*:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best of truth is the power of the thought to get itself accepted in the competition of the market, and

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(stating the view that harms caused by speech are more similar to harms caused by nonspeech than is commonly thought).

47. Lawrence, *supra* note 17, at 466–67.

48. Delgado & Stefancic, *supra* note 36, at 67–68.

> that truth is the only ground upon which their wishes safely can be carried out.[49]

The next section presents an argument to support the egalitarian's claim (and rebut the absolutist's) that some speech is more powerful than others by relying on the traditional First Amendment distinction between 'public' and 'private' figures in defamation law. Because of their 'prominent societal role' and 'access to media,' so-called 'public figures' must bear more defamatory speech than 'private figures.' This distinction supports the egalitarian theory that if the speech of minorities is less powerful than that of whites, then whites should bear the burden of hurtful speech because they are more likely to be protected by the First Amendment than similarly situated nonwhites.

III. ANOTHER VIEW: LESSONS FROM THE 'PUBLIC/PRIVATE FIGURE' DIVISION

A. Group Libel Laws: The Traditional Role Defamation Has Played in the Hate Speech Debate

References to defamation law in the debate between egalitarians and libertarians over hate speech usually begin and end with citations to *Beauharnais v. Illinois*, which upheld a state statute criminalizing statements that defamed groups on the basis of "race, color, creed or religion."[50] Egalitarians extol group libel laws as shining examples of communitarianism,[51] concerned less with rabid over-censorship than with society's failure to address the issue of racist behavior.[52] In contrast, libertarians question the wisdom (and

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49. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

50. 343 U.S. 250 (1952).

51. *See* Note, *A Communitarian Defense of Group Libel Laws*, 101 Harv. L. Rev. 682 (1988).

52. As one commentator noted:

> All things taken together, it is hard to believe that we would lose our character as a constitutional democracy if a number of cities and towns suddenly took a harder line on the matter of racial and religious defamation, or if a policeman, say, in Chicago, moved a shade too quickly one day and took an anti-Negro speaker off a public corner. One has the sense, somehow,

egalitarians acknowledge the possible invalidity[53]) of *Beauharnais* specifically and the enterprise of group libel generally. Justice Douglas labeled the case "a misfit in our constitutional system"[54] for its allegedly unwarranted restraint on free speech.

Indeed, Professor Hadley Arkes, himself a supporter of the egalitarian position, concedes that, post-*Beauharnais*, the Supreme Court has limited the scope of defamation law by abridging plaintiffs' rights of recovery. Specifically, Professor Arkes notes that the Court's decisions in *New York Times v. Sullivan*[55] and its progeny have made it increasingly difficult for 'public officials' and 'public figures' to recover under libel unless they can show that the injurious statements were made with 'actual malice'—with knowledge or reckless disregard of the falsity of the statement, a most demanding standard.[56] He concludes, therefore, that "[i]t has become vastly harder now to win a libel suit,"[57] implying that group libel suits are even worse candidates for success than individual claims. Because of this generally held belief among both egalitarians and libertarians that defamation law offers no modern insights following

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> that we can survive occasional errors of that sort without impairing the basic character of this regime or absorbing flaws that reach to the level of principle. Or at least, one might say, we could survive those mistakes more easily than we could survive the consequences of making no judgments at all, or professing no recognition or any standards by which one could ever hope to judge.

Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 Sup. Ct. Rev. 281, 333.

53. *See, e.g., id.* at 287 (noting that "the status of *Beauharnais* is a live question"); Note, *supra* note 51, at 682–83 ("Although the Supreme Court upheld the constitutionality of [*Beauharnais*], like provisions have since been subjected to continuing judicial and scholarly criticism. . . .").

54. Garrison v. Louisiana, 379 U.S. 64, 82 (1964) (Douglas, J., concurring).

55. 376 U.S. 254 (1964).

56. Arkes, *supra* note 52, at 286–87. In contrast, 'private figures' need only meet the higher standard where they are involved in a matter of 'public concern'; otherwise, their lesser prominence and access to media generally provide them a lesser standard of proof. *See infra* Part III.B (discussing 'public/private figure' distinction and citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

57. Arkes, *supra* note 52, at 287.

Beauharnais's emasculation, it is no wonder that the contemporary hate speech debate rarely mentions libel law.[58]

Nonetheless, there is another way of viewing the 'public/private figure' distinction in post-*Beauharnais* defamation law that might aid egalitarians like Professor Arkes and would support critical race theorists' claims of the imbalance in power between majority and minority speech. As the next section details, implicit in the 'public/private figure' distinction is the acknowledgment that the speech of a 'public figure' is more powerful than that of a 'private figure' because of the former's prominent social role and greater access to media. Thus, the Supreme Court requires the 'public figure' to first speak himself, absent a showing of 'actual malice'; such a burden does not rest on the shoulders of the 'private figure.' This dichotomy supports the egalitarian view that people of color, like 'private figures,' are more susceptible to harmful speech than their majority counterparts, who, like 'public figures,' have greater access to channels of speech and are more likely to be heard and accepted because of it.

Part B sets forth the 'public/private figure' model by applying it to the hate speech context and supports this theory by examining the struggle between majority/minority speech in American legal history. This part concludes by examining contemporary empirical evidence to support the theoretical and historical claims.

B. Lessons From The 'Public/Private Figure' Distinction in Defamation Law: A Theoretical, Historical, and Empirical Analysis

1. The Theory: 'Public/Private Figures' and 'Majority/Minority' Dynamics

From a theoretical perspective, much can be learned from the 'public/private figure' distinction in defamation law. By examining the 'public/private figure' division, we might shift our attention away from the speech rights of the individual website owner to the likely harm suffered by the targets of the speech.

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58. For example, Professors Delgado and Stefancic's 200-plus page book on hate speech devotes just three pages to the subject. *See* Delgado & Stefancic, *supra* note 36, at 218 (index entry for "defamation" cites pages 16, 67, and 98).

To fully understand the 'public figure/private figure' distinction, we must first briefly examine the Supreme Court's decisions in *New York Times v. Sullivan*,[59] *Curtis Publishing Co. v. Butts*,[60] and *Gertz v. Robert Welch, Inc.*[61] This trio formed the foundation of modern constitutional defamation law by delineating the 'public/private figure' divide. Prior to 1964, individual states could freely set their standards for defamation law without fear of constitutional challenge.[62] In *New York Times*, the Court held that a public official who claimed defamation on the basis of allegations that he engaged in racist acts could prevail only upon a showing of 'actual malice'—to wit, that the defendant newspaper printed the story either knowing it to be false or acting in reckless disregard of the statement's falsity.[63] The Court reasoned that the occasional erroneous statement was inevitable in a free and robust debate, and that while a public official should not be libel-proof, the 'actual malice' standard achieved a fair balance between free speech and tortious injury.[64] To allow common law suits by public officials on the less stringent grounds of negligence would lead to self-censorship by newspapers whose very purpose is to encourage open discourse.[65]

Three years later, the Court grappled with the question of whether a high standard of proof applied to more than just 'public officials.' In *Curtis Publishing Co. v. Butts*, a state university's athletic director sued to recover over newspaper allegations that he had conspired to fix a college football game.[66] A plurality of the Court concluded that a high burden should be placed on the 'public figure' plaintiff, stating that one who is a 'public figure' may only recover damages upon "a showing of highly unreasonable conduct constituting an extreme departure from the standards of

59. 376 U.S. 254 (1964).

60. 388 U.S. 130 (1967).

61. 418 U.S. 323 (1974).

62. *See, e.g.*, Dan Dobbs, The Law of Torts 1121 (2000) ("Since 1964, the structure of the common law defamation case has been radically altered by constitutional rulings based upon defendants' rights to free speech.").

63. 376 U.S. 254, 279–80 (1964).

64. *Id.* at 271–72.

65. *Id.* at 279.

66. 388 U.S. 130 (1967).

investigation and reporting ordinarily adhered to by responsible publishers."[67]

While concurring in the result, Chief Justice Warren differed with the plurality, writing that he would have required 'public figures' to show 'actual malice,' the same standard applied to 'public officials' in *New York Times* and one arguably more stringent than the plurality's. Warren offered three reasons for his heightened test: first, public figures have as much influence on public issues and events as public officials do; second, like public officials, public figures play a significant role in ordering society because, as a class, public figures have the same access to media as public officials, both for the purpose of influencing policy and responding to critique; and third, the general public has as legitimate and substantial an interest in public figures as it does in public officials.[68]

The last case in the trilogy, *Gertz v. Robert Welch, Inc.*, followed Warren's reasoning by adopting the 'actual malice' standard for 'public figures' and for some matters of 'public concern.'[69] Thus, a lawyer accused of being a "Communist-fronter" and a criminal,[70] while not a 'public figure' under these facts, was required to either prove actual damages or meet the actual malice standard to recover in defamation because the matter was one of 'public concern.'[71] More importantly, *Gertz* also identified two criteria to determine whether a person is a 'public' or 'private' figure: first, a 'public figure' generally has a greater access to the media to rebut any libelous statements through her own self-help free speech than does the 'private figure.'[72] Secondly, a 'public figure' usually has achieved societal prominence by thrusting herself into the limelight in order to resolve pressing public issues of importance.[73] Public figures have, in this sense, assumed the risk of criticism by virtue of their stature in the community.

In *Gertz*, we hear the Court echo Chief Justice Warren's *Curtis* concurrence that the first remedy against injurious speech is

67. *Id.* at 155.
68. *Id.* at 162–64.
69. 418 U.S. 323, 348–49 (1974).
70. *Id.* at 326.
71. *Id.* at 351–52.
72. *Id.* at 344.
73. *Id.* at 345.

the self-help response of more speech, which sounds much like the libertarian position in the hate speech debate. However, the Court's decision to draw an explicit distinction between public and private figures hints at an underlying egalitarian concept: that self-help may not be as effective for private figures who have achieved less societal prominence and have less access to media. The 'public/private figure' distinction, therefore, undergirds the free speech self-help remedy with a dose of egalitarianism.

Aside from the recognized imbalance in the power of public versus private figure speech, *Gertz* also implies that private figures deserve greater protection from defamation law than public figures. Although originally conceived as a method of determining the constitutional burden of proof required by a defamation plaintiff, the 'public/private figure' dichotomy also implicitly acknowledges that those 'public figures' who have achieved societal prominence and have greater access to media are less likely to suffer net harm than 'private figures' because the former can avail themselves of a presumably effective self-help remedy by speaking out against the defamer.[74] Because 'public figures' generally seek out attention, both good and bad, and because their notoriety often affords them immediate access to redress through the media, the law assumes that they need less protection from false and defamatory speech than the 'private figure,' the average person in society. Thus, the Hollywood actress often must grin and bear the untruths published about her unless she can prove 'actual malice,' while the same negligent speech directed at the 'soccer mom' next door would be actionable defamation in most jurisdictions. Does this mean that the 'soccer mom' will necessarily suffer more reputational harm than the Hollywood actress? No, but the law presumes that to be the case because unlike the actress, the 'soccer mom' has no publicist or spokesperson to immediately compose a press release to counter the allegedly defamatory statement.

Both of these implicit truths about 'private figures'—that their speech is less powerful and that they need greater protection from libel—can assist us with the problem of censoring 'white power' websites. Purveyors of 'white power' propaganda are themselves

74. *See id.* at 344–45 (noting that 'public figures' usually have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," and therefore, "they invite attention and comment").

members of the white majority, which, because of its greater societal prominence and access to the media, both historically and contemporarily, are arguably like the 'public figures' of defamation law. In contrast, people of color and minority website owners that put forth anti-white propaganda are like 'private figures' because, as a group, they enjoy less societal prominence and access to media when compared with their white counterparts.

Using this analogy between 'public figures' and 'the white majority,' on the one hand, and 'private figures' and 'the nonwhite minority,' on the other, creates a strong case for censoring anti-minority web speech by white supremacists but not anti-white web speech by black separatists. White supremacist websites perpetuate notions of race privilege enjoyed by European-Americans in the United States, the 'public figures,' to the detriment of people of color, 'the private figures.' If one of the underlying goals of the 'public/private' figure distinction is to offer more protection to 'private figures,' then censoring the free speech rights of white supremacists would arguably be permissible under this interpretation of this First Amendment construct.

In contrast, black separatist websites that injure 'the white majority' through equally harmful speech should be allowed to exist for two reasons: first, if black separatists are members of the 'private figure' group of persons of color, under the *Gertz* analysis, it is likely that their speech will not carry as much power as the same speech uttered by white supremacists, who are members of the 'public figure' group. And second, the targets of the anti-majority speech are themselves 'public figures' who, by virtue of their greater societal prominence and access to media, have an effective self-help remedy by putting forth their own speech.

2. Historical and Contemporary Support for the 'Public/Private Figure' Prongs of 'Prominent Societal Role' and 'Access to Media'

One might contend that the 'public/private figure' model described above is flawed because it permits the proliferation of some kinds of racist speech. Put differently, the 'public/private figure' distinction arguably should be used to censor any speech that discriminates on the basis of race. Thus, any anti-white or 'black

power'[75] websites should also be censored alongside the white supremacist ones to the extent that they, too, perpetuate the idea of racial discrimination.

At one level, this criticism has merit: both anti-white and anti-minority websites spew racial hatred and put down others on the basis of their race; both groups could therefore be considered 'public figures' under this argument because they perpetuate the dominant narrative that race matters, rather than promoting the ideal of colorblindness. However, looking more closely at the underlying rationales for the 'public/private figure' distinction, the history underlying American race relations, and contemporary empirical evidence, it becomes clear that white power groups are part of a larger 'white societal majority' that more closely fits the 'public figure' characterization.

a. Like Public Figures, Whites Have Achieved Societal Prominence By Establishing and Perpetuating White Privilege

While many whites would not want to be associated with 'white power' groups, all whites enjoy certain power, privilege, and prestige by virtue of their race that make them akin to 'public figures.' First, by establishing the dominant narrative that presupposes and perpetuates white supremacy and privilege, the white majority has achieved 'societal prominence' by thrusting itself into the public limelight, much like public figures in defamation law have done. By excluding many other racial voices from the discourse for so long, the white majority has taken center stage in defining race relations in America, and so should be willing to 'assume the risk' of being at the forefront of that discourse.

Briefly surveying American history, whites have time and again dictated racial order in the United States. From slavery[76] to the

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75. This example is illustrative, not exclusive. My analysis would, therefore, apply to other nonwhite-owned websites that printed anti-white messages, but I am not aware of any, whereas 'black power' websites do in fact exist.

76. Starting with the constitutional compromise that allowed for the preservation of slavery in the United States (*see* U.S. Const. art. I, § 2, cl. 3, § 9, cl. 1, and art. IV, § 2, cls. 1, 3), black slaves were regarded as little more than property (*see* Dred Scott v. Sandford, 60 U.S. 393 (1857)), and hence, had no formal method to challenge their oppression. Instead, they had to rely on methods

Asian Exclusion Laws[77] to the more recent backlash against affirmative action,[78] the dominant narrative of white privilege has been maintained and nurtured by a white majority unwilling to relinquish power. Like the Hollywood star whose celebrity allows her to command a $20 million per picture salary, the white majority has created a society in which its power is institutionally ensconced, and thus, it (like the movie star) should accept any criticisms of its 'performance' as a way of accepting responsibility for the 'lead role' it has decided to undertake. And while many whites—the poor and disabled, for instance—have also been excluded from the dominant discourse, they have nonetheless benefited from the privileges that their whiteness affords them. These less powerful are akin to the 'involuntary' public figures of defamation law:[79] while they have not been able to influence the public discourse in the way their more powerful white brethren have, they nonetheless benefit from the privileges their whiteness secures. In contrast, minority voices have been almost completely silenced by the overwhelming power (whether intentionally or unintentionally) of the white voice, and should therefore, like 'private figures,' be afforded more protection

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of self-help (e.g., the Underground Railroad and slave uprisings) or on the work of white abolitionists.

77. Upheld by the Supreme Court in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Chinese Exclusion Act forbade Chinese nationals from entering the United States. The Court deferred to Congress's assessment that the Chinese were "unassimilable" and left unchecked, would invade and overrun white America. Other laws limited immigration and naturalization to whites only, and were commonly upheld by the Supreme Court. *See generally* Ian F. Haney-Lopez, White by Law: The Legal Construction of Race (1996) (exploring the social and legal origins of white racial identity and tracing the reasoning of courts in justifying whiteness).

78. "Affirmative action—the practice of considering race as a factor in university admissions—is currently under attack in Michigan and Florida, and it has been beaten down in Washington, Texas, and California in recent years." Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 Mich. J. Race & L. 195, 199–200 (2000). The assault against affirmative action has not been led exclusively by the majority; many prominent African-Americans believe it is in the best interests of that group to dismantle such policies. *See* Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 Conn. L. Rev. 1, 58–59 (1999) (noting Stephen Carter, Justice Clarence Thomas, Shelby Steele, and Ward Connerly as among the prominent blacks who oppose affirmative action).

79. *See, e.g.*, Dobbs, *supra* note 62, at 1177 ("[C]ourts have recognized public figure status in some cases even when the defamation plaintiff did not inject herself into public issues and also when no controversy was involved.").

when they speak, even when they use language that also expresses hatred of the white power structure.

Aside from the theoretical and historical bases for white privilege, contemporary empirical evidence supports the idea that, like 'public figures,' the white majority has achieved more 'societal prominence' than people of color when tested against several measures—numerosity, economic power, representation in corporate America, educational achievement, and representation in elected and appointed office. Although the demography of the United States is changing,[80] whites were projected to comprise 82.2% of the American populace per the November 2000 U.S. Census Bureau statistics; in contrast, blacks were projected to comprise 12.8%; American Indian, Eskimos, and Aleuts, 0.9%; and Asian and Pacific Islanders, 4.1%, respectively.[81] Measured by economic wealth, non-Hispanic white

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80. As reported in *The Economist*, the predicted demographic diminution of white majority power from 1950 to 2050 is dramatic indeed:

> In the 1950 census, America was 89% white and 10% black. Other races hardly got a look in. Now Latinos account for around 12% of the population. Within the next five years, they will overtake blacks to become the largest minority group. If current trends continue, they will be the majority in Los Angeles County in ten years. In 20 years, they will dominate Texas and California. By 2050, one in four of the 400 [million] people who will then be living in the United States will be Latino—and if you add in Asians, their joint share will be one in three.

Oh, Say, Can You See?, Economist, Mar. 11, 2000, at 63. Even still, by 2050, whites will still account for roughly two-thirds of the American population, given these projections.

81. U.S. Census Bureau, U.S. Dep't of Commerce, Resident Population Estimates of the United States by Sex, Race, and Hispanic Origin: April 1, 1990 to July 1, 1999, with Short-Term Projection to November 1, 2000, *available at* http://www.census.gov/population/estimates/nation/intfile3-1.txt (last visited Nov. 17, 2001). Hispanics of any race are predicted to comprise 11.9% of the population in November 2000. *Id.*

Americans are one of only two groups whose three-year (1997-99) average median household income exceeds the national mean.[82]

Disparities between whites and nonwhites exist in the areas of employment and education as well. Among its many findings, the Federal Glass Ceiling Commission reported in 1995 that 97% of senior managers of Fortune 1000 Industrial and Fortune 500 companies were white; for Fortune 2000 Industrial and Service companies, black men with a professional degree earned 21% less than white men with the same degree in the same job category; finally, only 0.4% of managers were Hispanic.[83] At all collegiate and graduate levels, more whites have earned educational degrees than either blacks or Hispanics.[84]

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82. The other is the "Asian and Pacific Islander" group. The three year (1997–99) average median household income by race statistics are as follows:

1. All races—$39,657
2. White (Non-Hispanic)—$43,287
3. Black—$26,608
4. American Indian/Alaska Native—$30,784
5. Asian/Pacific Islander—$48,614
6. Hispanic—$29,110

U.S. Census Bureau, U.S. Dep't of Commerce, Income of Households by Race and Hispanic Origin Using 1997–1999 3-Year-Average Medians, Income 1999, Table B, http://www.census.gov/hhes/income/income99/99tableb.html (last visited Nov. 17, 2001).

83. Fed. Glass Ceiling Comm'n, *A Solid Investment: Making Full Use of the Nation's Human Capital*, Recommendations of the Glass Ceiling Commission (Final Report) 9 (Nov. 1995) (describing the realities of glass ceiling barriers in corporate America), *available at* http://www.ilr.cornell.edu//library/e_archive/gov_reports/GlassCeiling/default.html?page=documents.

84. U.S. Census Bureau, U.S. Dep't of Commerce, Highest Degree Earned, by Sex, Race, Hispanic Origin and Age: Spring 1993, http://www.census.gov/population/socdemo/education/p70-51/table01.txt (last visited Oct. 17, 2001). The statistics (numbers in thousands) are as follows:

Finally, it is worth noting that whites are far better represented among both elected and appointed officials. Citing a 1992 survey by the U.S. Census, the Population Reference Bureau notes:

> The 106th Congress includes among its 535 voting members 37 African Americans, 18 Hispanics, and three Asians and Pacific Islanders in the U.S. House of Representatives; and two Asians and Pacific Islanders and one American Indian in the U.S. Senate. . . . [In addition,] less than 5 percent of local elected officials were black, Hispanic, Asian, or American Indian. African Americans were 3 percent of all local elected officials, Hispanics were 1 percent, American Indians and Alaska Natives were 0.4 percent, and Asians and Pacific Islanders were only 0.1 percent of all elected local officials.[85]

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1. Doctorate
a. White—1,105
b. Black—48
c. Hispanic—24

2. Professional
a. White—1,956
b. Black—60
c. Hispanic—101

3. Masters
a. White—7,454
b. Black—523
c. Hispanic—294

4. Bachelors
a. White—21,746
b. Black—1,683
c. Hispanic—948

5. Associates
a. White—7,236
b. Black—759
c. Hispanic—488

Id.

85. Kelvin M. Pollard and William P. O'Hare, *America's Racial and Ethnic Minorities: Political Participation*, 54 Population Bull., Sept. 1999, at 40–42. More specifically, the racial make-up of the 106th Congress is as follows:

1. Total members—535 (435 H.R., 100 Senate)
2. Black—37 (6.91%) (37 H.R., 0 Senate)

And, as is common knowledge, not one of the United States' 43 Presidents, 47 Vice-Presidents, or 16 Supreme Court Chief Justices has been a person of color.

Thus, from a theoretical, historical, and empirical perspective, a strong argument can be made to equate 'public figures' with the white majority in American society because they have achieved more societal prominence than their nonwhite counterparts.

b. Like 'Public Figures,' Whites Have Greater Access to Media than Nonwhites

In addition, defamation law teaches that 'public figures' typically have greater access to media than their 'private figure' counterparts. This access provides them with the opportunity to mitigate their harms by speaking out against their alleged defamers. This second prong acknowledges that the speech of public figures is more effective and powerful than that of private figures. Thus, the 'access to media' idea acknowledges that, even within our First Amendment jurisprudence, not all speech is created equal, contrary to absolutists' assertions. Indeed, just as the white majority has voluntarily (or consciously) and involuntarily (or unconsciously) thrust itself into (and hence benefited from) the dominant racial narrative, it has also enjoyed greater access to the media than minorities. This greater access translates into more powerful speech for the white majority—speech that will more likely be heard, understood, and accepted by society than that of the racial minority.

Aside from the aforementioned dominance exerted by the white majority over the racial discourse in American history,[86] empirical evidence supports the proposition that white Americans typically enjoy greater access to the media and therefore have a better opportunity for self-help than nonwhites. First, statistics particularly relevant to the issue of website censorship reveal that certain minorities have less access to computers and the Internet, and therefore may be less able to use that media to refute hate speech directed against them. As of 1997, while 78% of all schools

3. Hispanic—18 (3.36%) (18 H.R., 0 Senate)
4. Asian/Pacific Islander—5 (0.9%) (3 H.R., 2 Senate)
5. American Indian—1 (0.2%) (0 H.R., 1 Senate)

Id.

86. *See supra* Part III.B.2.a.

were wired to the Internet, 84% of schools with less than 6% minority students were wired to the Internet, as compared to 63% for schools with greater than 50% minority students.[87] Outside the classroom, statistics suggest that while Internet use among blacks is growing,[88] the U.S. Commerce Department recently reported that whites and Asian-Americans are twice as likely as blacks and Hispanics to have Internet access.[89] In 1998, computer household ownership by race was as follows: Non-Hispanic whites—46.6%; Hispanic—25.5%; Non-Hispanic Blacks—23.2%; other Non-Hispanic—50.9%.[90] And second, overall representation of minorities among television and radio owners is far below their presence in the national population. In 1994, minorities represented almost 23% of the national workforce but controlled only 2.9% (323) of the 11,128 commercial radio and television stations on the air; in addition, people of color controlled only 0.2% (15) of the approximately 7500 cable television operators.[91]

Just as a strong argument can be made that the white majority has achieved 'societal prominence' to satisfy the 'public figure' definition's first prong, the previous discussion shows that empirical evidence also supports the claim that like public figures, the white majority has substantially greater access to media, and hence a more effective self-help remedy, than nonwhites.

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87. *See* Steve Rhodes, *Classrooms With Class—And Possibly Espresso Machines,* Newsweek, Dec. 14, 1998, at 20 (describing the U.S. Department of Education's statistics on schools' Internet access).

88. LeGina Adams, *Internet Use on the Rise*, Black Enterprise, Mar. 1, 2001, at 28.

89. U.S. Dep't of Commerce, Falling Through the Net: Toward Digital Inclusion, *available at* http://www.esa.doc.gov/508/esa/fallingthoughthenet.htm (last visited Nov. 17, 2001). *See* Bob Jackson, *Black, Hispanic Web Access Lags*, Rocky Mtn. News, Mar. 16, 2000, at 61A, 2000 WL 6590300 (citing Commerce Department's report *Falling Through the Net*).

90. U.S. Dep't of Commerce, National Telecommunications and Information Association, Chart A-10: Percent of U.S. Households with Computers By Race/Origin 1984–1998 (Selected Years), http://www.ntia.doc.gov/ntiahome/fttn99/App_III/Chart-A-10.html (last visited Nov. 17, 2001).

91. Fed. Communications Comm'n, 1994 Statistics, http://www.fcc.gov/Bureaus/Mass_Media/Notices.fcc94323.txt (last visited Nov. 17, 2001).

IV. THE MODEL APPLIED: CENSOR WHITE POWER, TOLERATE NONWHITE SPEECH

While the empirical evidence generally supports the thesis that whites should be considered 'public figures' and minorities 'private figures' in terms of their relative prominence in society and access to media, and that therefore, minorities are entitled to greater protection against hate speech, how does this analogy support the censorship of websites? According to one source that tracks racist websites, there are approximately 244 white supremacist websites and seven black separatist websites.[92] Just as the white majority has arguably achieved 'public figure' status in general society, it appears that 'white supremacist' websites enjoy the same prominence in cyberspace vis-à-vis minority hate speech websites.

However, to test the theory and the evidence supporting it, this next section will examine two cases of censorship—one of a white supremacist website and one of a black power website.

A. Censoring the White Supremacist Website

When I typed in "www.angelfire.com/sk/naziwhitepower" into my browser on January 26, 2001, I was immediately sent the following message: "you are entering Nazi teritory [sic] . . . Blacks keep out!" The backdrop for this message was a page full of swastikas.[93]

On the website, "www.stormfront.org," I found the following description of the infamous Rodney King beating in Los Angeles:

> Consider what happened. If, let us say, an Italian had led the police on a breakneck chase at a hundred miles an hour, been stopped by a roadblock, and beaten while resisting arrest, there would have been no cameraman waiting, and the incident, if reported at all, would have been given five

92. The 244 are broken down into the following: KKK—97 websites; Racist Skinhead—19; Neo-Nazi—80; Identity—30; Neo-Confederate—18. There are also 115 "Other" websites, which do not fit into any of the categories described above. *Active Hate Sites on the Internet in the Year 2000*, Intelligence Rep. (S. Poverty Law Ctr., Montgomery, Ala.), Spring 2001, at 40.

93. www.angelfire.com/sk/naziwhitepower (last visited Jan. 26, 2001). This website is no longer available.

> lines on an inner page of the local newspaper. The man arrested would have been only a White man and no one would have been interested.
>
> The criminal who tried to escape belonged to the race which is recognized as superior because the White slaves have to work hard to support it, encourage its guinea-pig style breeding, and provide it with Cadillacs and other necessities of life. He was a black gorilla, so huge that his wrists were too big for handcuffs, and his hundred-mile an hour attempt to escape was halted by a roadblock that was set by directions over short-wave radio that anyone could hear. The camera-man was waiting, shot his 'footage,' and the poison-pen press and our enemies' boob-tubes made the incident a national agitation, at the time and for a year thereafter while the courts were troubled with litigation about the incident.
>
> The mayor of the rotting city—a nigger!—was given what he had long sought, a pretext to force from office the chief of police in Los Angeles, whose department was one of the most efficient and relatively honest in the United States, and to replace him with a nigger, who, you may be sure, will teach his White subordinates not to interfere with savages exercising their Civil Rights to hunt White rabbits. The policemen who had done their duty were persecuted in the courts and finally acquitted by a jury of White Americans, so bigoted that they did not know that the savage pets of the Master Race can do no wrong.[94]

Applying the 'public/private figure' analysis to these two examples, both exemplify the hateful, venomous perpetuation of white supremacy at the expense of minorities. Per Professor Matsuda's analysis, both examples are messages of racial inferiority directed against a historically oppressed group which are arguably persecutory, hateful, and degrading.[95] Controlled by members of the white majority, these 'public figure' websites uphold the values of white privilege and superiority that should be silenced to protect the equal rights of 'private figures' harmed by their racist invective.

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94. Revilo Oliver, *Prompt Confirmation*, www.stormfront.org (last visited Oct. 15, 2001).

95. *See supra* text accompanying note 26.

B. Tolerating the Anti-White Website

A visit to the House of David website, hosted by a so-called "Black Separatist" group, reveals the following:

> The 12 tribes of Israel are those who are the descendants of both the slaves and indigenous people of the Americas. Additionally, they are scattered throughout the Caribbean Islands, and the four corners of the earth. Read Deuteronomy 28:15-68 and II Esdras 13:40-46.
>
> NATIONALITY, a word often used but frequently misinterpreted. Many people today view the term "nationality" as the country (land mass) you are from or the color of your skin, while others characterize it by what language you speak. Due to this misconception, it is necessary to explain the word "Nationality". Nationality, derives from the word "Nation". When you study the etymology (the origin) of the word "nation", its Latin root is Natio which means BIRTH; RACE. So when you are asked about your nationality, the correct response would be to say what lineage/race you come from, according to your father.
>
> As we study our history and nationality, we uncover a mystery hidden for ages. The Blacks (so-called Negroes), Indians (of Native American descent), and Latinos of Indian descent etc, are in actuality, all of the same lineage (NATIONALITY / RACE). According to the Bible, these people are all descendants of the ancient ISRAELITES. They are the people that were delivered from the land of Egypt, the land of their captivity, by the hands of Moses.[96]

This website uses the Bible to justify its anti-white message, not unlike the way the Christian Separatist movement uses the same text to justify its anti-minority message.[97] However, the theoretical,

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96. House of David website, http://www.hodc.com/12tribes.htm#tribes (last visited Nov. 17, 2001).

97. Consider the following from the Christian Separatist website:

> This passage is from the Apostle Paul's letter to the Galatians (5:19-21). Let us categorically consider this list of those works or actions of the flesh that are clearly designated in our Bibles as unacceptable behavior or those works that are excluded from the behavior of the just man. 1. Mongrelization. Translated for moiceia or *moicheia*, which carries a primary

historical, and empirical support underlying the 'public/private figure' distinction suggests that the anti-white message carries less power than the anti-minority message for at least three reasons: first, as members of the white majority, the Christian Separatist group helps promote and perpetuate the message of white privilege and superiority long established by those majority group members who have achieved societal prominence by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[98] While their specific message of racial separation might not be adhered to by a majority of whites today,[99] the Christian Identity member's viewpoint supports the status quo in which whites sit atop the American racial pyramid. In contrast, the House of David's speech is a response to, and critique of, the existing racial order. As Professor Matsuda eloquently states:

> While white-hating nationalist expressions are troublesome both politically and personally, I would interpret an angry, hateful poem by a person from a historically subjugated group as a victim's struggle for self-identity in response to racism. It is tied to the structural domination of another group. Part of the special harm of racist speech is that it works in concert with other racist tools to keep victim groups in an inferior position. Should history change course, placing former victim groups in a dominant or equalized position, the newly equalized group will lose the special protection suggested here for expression of nationalist anger.[100]

> meaning of seedline corruption; thus, whether race-mixings or relationships between persons of the same race. The Biblical use of the word presupposes the existence of two distinct seedlines: the pure and unadulterated seedline of the Adamic family of God's family, later known as Israel, and the existence of a non-white seedline of impure and therefore unclean beings. Paul therefore lists as a prohibited behavior of the flesh the adulteration of any pure seedline or being created in the original cosmotic world order according to the laws of nature—as a behavior or action that is an unjust behavior.

V.S. Herrell, *The Actions of the Flesh*, Christian Separatist, http://www.christianseparatist.org/Briefs.html (last visited Oct. 17, 2001).

98. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

99. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia anti-miscegenation statute as unconstitutional).

100. *See* Matsuda, *supra* note 15, at 2361–62.

Second, the power of the white Christian Separatist's message is multiplied by the prevalence of other Christian Identity websites (not to mention other white supremacist groups that advocate anti-miscegenation[101]); indeed, one source identifies 30 Christian Identity websites, over *four times* as many as the seven Black Separatist groups it lists.[102] Thus, it is much more likely that an Internet visitor would stumble upon the hateful speech of a white supremacist than a black separatist. The increased probability of encountering hateful speech in turn raises the likelihood that the direct and indirect harms to persons of color discussed previously[103] might ensue.

And third, as 'public figures' that might be harmed by the House of David's words, the white majority has many avenues for redress, from their own access to the Internet or to regular broadcast media as well as through their representatives in government and the public sphere.[104] Weighing the potential harms suffered by the 'public figures' against the speech of these members of the minority group, the proper balance appears to favor keeping offensive anti-majority websites uncensored.

C. Objections to the 'Public/Private Figure' Model

There are at least three objections that might be raised against this model.

First, one might object that there is no valid way to incorporate my analysis into existing First Amendment jurisprudence to provide actual relief for minorities because current law frowns upon content-based regulation of speech. While it is true that content-based regulation is typically suspect, the Supreme Court in *Turner Broadcasting System v. Federal Communications Commission*[105] recognized that such restrictions could pass

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101. *See, e.g.*, Alabama White Knights of the Ku Klux Klan, *Q. What Does the Klan Think About Interracial Marriages?*, Official Website, http://www.kukluxklan.net/index18.html (last visited Nov. 17, 2001).

102. *See supra* note 92 and accompanying text.

103. *See supra* notes 15–21 and accompanying text.

104. *See supra* statistics in Part III.B.2.

105. 512 U.S. 622 (1994).

constitutional muster if they survive strict scrutiny.[106] Strict scrutiny, in turn, requires that the government's regulation be reasonably necessary to achieve a compelling interest.[107] In the context of hate speech, this has proven a formidable hurdle because the Court has recognized that while combating racism is an important interest, regulations that discriminate on the basis of viewpoint generally violate First Amendment dictates.[108] Despite the current orthodoxy, I offer the 'public/private figure' model if not to ultimately persuade this Supreme Court, then to point out that current First Amendment defamation law actually supports egalitarian claims that some speech is more powerful than others, contrary to the libertarian position.

A second argument might be that I misuse the 'public/private figure' model by creating analogies to groups out of a legal construct intended to apply only to individuals. Indeed, the Supreme Court's decision to move away from the *Beauharnais* group libel model to the constitutional determination of individual claims set forth in *New York Times* and its progeny supports this position.[109] While it

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106. *Id.* at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

107. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992) ("The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests . . . .").

108. *See id.* at 391

> (In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But "fighting words" that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents.);

396 ("Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.").

109. *See, e.g.*, Arkes, *supra* note 52, at 287 ("In view of the erosion in the concept of libel, one must wonder whether the ground has been cut out from under the decision in *Beauharnais*. There were some who thought, when the *Times* case was decided, that it marked the end of *Beauharnais*.").

certainly has been questioned,[110] *Beauharnais* has never been overruled. In addition, while *New York Times* and its progeny focus on individualized determinations of who is and is not a 'public figure,' that does not render invalid my contention that implicit in the dichotomy is the assertion that a public figure's speech is more powerful than a private figure's. What I have done here is no different from what plaintiffs' lawyers do when filing a class action lawsuit:[111] I have taken an individual characteristic—the difference in speech power implicit in the 'public/private figure' divide—and have used it to describe the experiences of whites versus nonwhites based on a review of historical and contemporary evidence regarding the 'societal prominence' and 'access to media' of the two groups.[112]

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110. *See, e.g.,* Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1200 (9th Cir. 1989)

> (The Supreme Court opinion in *Beauharnais* is generally regarded as providing some support for group libel claims. The cases decided since *Beauharnais*, however, have substantially undercut this support. To the extent that *Beauharnais* can be read as endorsing group libel claims, it has been so weakened by subsequent cases such as *New York Times* that the Seventh Circuit has stated that these cases "had so washed away the foundations of *Beauharnais* that it cannot be considered authoritative.")

(internal citations omitted).

111. *See* Fed. R. Civ. P. 23:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

I thank Professor Frank Valdes for suggesting this argument.

112. Hence, corollary arguments as to whether Al Sharpton or the white soccer mom would likely be classified as 'public' or 'private' figures misses the point. While I acknowledge that the 'public/private figure' dichotomy was intended as a way to define individual defamation plaintiffs, my use of the dichotomy is to create a class definition to support my censorship argument. Thus, any references to individual classifications is a non sequitur.

Finally, a third argument might question the need to remedy the direct and indirect harms wrought by hateful Internet speech because, unlike television, radio or even public rallies, accessing hate speech on the Internet requires more deliberate action on the part of the recipient. Thus, despite the proliferation of white supremacist websites, they are less likely to cause harm than other media. The Supreme Court raised similar points in the context of Internet pornography:

> Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content." For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."[113]

I have also chosen not to discuss the issue of anti-minority remarks made by other people of color, although I am inclined to agree with Professor Matsuda's thoughtful analysis. *See* Matsuda, *supra* note 15, at 2363–64

> (What of hateful racist and anti-Semitic speech by nonwhites? The phenomena of one subordinated group inflicting racist speech upon another subordinated group is a persistent and touchy problem. Similarly, members of a subordinated group sometimes direct racist language at their own group. The victim's privilege becomes problematic when it is used by one subordinated person to lash out at another. While I have argued here for tolerance of hateful speech that comes from an experience of oppression, when that speech is used to attack a subordinated-group member, using language of persecution, and adopting a rhetoric of racial inferiority, I am inclined to prohibit such speech.).

Ultimately, the lines between white and nonwhite are easier to define. In addition, not much is gained by trying to determine which among oppressed groups has suffered most and is therefore most worthy of assistance.

113. Reno v. ACLU, 521 U.S. 844, 854 (1997) (internal citations omitted).

Even if accessing information over the Internet is more difficult than through other media, thereby mitigating any direct harms to the recipient, the indirect harm through the perpetuation of hateful, racist ideologies would still exist. In addition, unlike in the Internet pornography context where one goal is to directly protect the underage recipient from receiving such material,[114] the censorship of white supremacist websites aims to indirectly protect persons of color who might be harmed by the viewers themselves.[115]

V. CONCLUSION

The success of the 'public/private figure' model as a means for censoring hate speech depends on one's faith in an institutionally racist legal system employing the analogy correctly. As Professor Lawrence acknowledges, the danger with framing the hate speech debate as one of expressive liberty versus racial equality is that, in the current environment, "we [may] have advanced the cause of racial oppression and placed the bigot on the moral high ground, fanning the rising flames of racism."[116] In a country in which my 'public/private figure' argument will most likely be enforced by institutions infused with unconscious racism, it might be more likely that minorities expressing anti-majority viewpoints will be censored more often than white supremacists.[117] And even if I could present empirical evidence of the disproportionate effect hate speech has on minorities when compared with whites, there is no guarantee that I could persuade many, since statistics are sometimes seen as reflecting the biases of their proponents.[118] However, anti-hate speech

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114. *Id.* at 849 ("At issue is the constitutionality of two statutory provisions enacted to protect minors from 'indecent' and 'patently offensive' communications on the Internet.").

115. *See supra* notes 19–20 and accompanying text.

116. Lawrence, *supra* note 17, at 436.

117. Professor Gates notes, for instance, that in the year that the University of Michigan enforced its hate speech code, more than twenty claims of violating the code were brought against blacks by whites for violating the code, while no claims were brought against a single white person. *See* Gates, *supra* note 36, at 37.

118. *See, e.g.*, David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 Mich. J. Race & L. 237, 252–57 (2001) (arguing that the statistics he has gathered detailing racial profiling by

advocates who are attracted to my thesis should be clear about its premise: the 'public/private figure' analysis is not grounded in a desire to censor based on the skin color of the speaker, rather it acknowledges the power differential that exists between certain forms of speech and others, a power differential that, in America, is based on skin color.[119]

police departments have been met with skepticism); McCleskey v. Kemp, 481 U.S. 279, 312–13 (1987)

> (At most, the Baldus study [which detailed the disproportionate effects of the death penalty on black people] indicates a discrepancy that appears to correlate with race. Apparent disparities in sentencing are an inevitable part of our criminal justice system. The discrepancy indicated by the Baldus study is "a far cry from the major systemic defects identified in Furman.")

(internal citations omitted).

119. Indeed, in an ideal world, I would prefer that neither anti-majority nor anti-minority hate speech existed. But to the extent that we live in a self-interested, individualistic society marked by disparities in socioeconomic and political power, I offer this modest proposal as a 'second-best' solution for a 'second-best' world.