# Let them Talk Neg

## Case Answers

### 1NC Speech is Violence

#### Hate speech is not productive dialogue; it is an act of violence against marginalized groups.

McConnel 12

(Reed E. McConnel. “Why Harvard's Hate Speech Policies Are Necessary”. The Harvard Crimson. April 18, 2012. <http://www.thecrimson.com/article/2012/4/18/hate-speech-libertarians/>)

The most common argument I have encountered for unrestricted free speech on college campuses is that if we prohibit people from saying certain things, they will simply never talk about them. As a result, their prejudice and oppression—the problems that we are trying to stamp out in the first place with restrictions on speech—will continue quietly, unchecked. However, the argument goes, if we allow people to express these thoughts openly, then there will be discussion about them that leads to greater understanding. This was the view expressed by the member of the Harvard Libertarian Forum quoted in the article, and one that I think is fundamentally misguided. There certainly should be dialogue around issues of racism, sexism, homophobia, and other forms of oppression. If someone has prejudices, a good way to erase these prejudices can indeed be to engage in dialogue with that person in order to understand where their attitude is coming from and educate them about the moral and logical fallacies of their prejudice. But there is also a need to protect people from having violence perpetrated against them. When someone calls a black person the “n” word out of hatred, he or she is not expressing a new idea or outlining a valuable thought. They are committing an act of violence. Speech has great power. It can—and often does—serve as a tool to marginalize and oppress people. Laws that restrict hate speech simply seek to prevent violence against marginalized, oppressed groups in order to prevent them from becoming further marginalized and oppressed. There are freedoms to do things, and there are freedoms from things. When our freedom to speak our mind impinges on someone’s freedom from fear, or on someone’s right to feel safe in their community, then that freedom should not stand unregulated in any group that wishes to create a safe and respectful society for its members. We cannot create a respectful learning environment at our university if students from marginalized groups feel that their administration condones acts of violence against them. University regulations against hate speech are entirely necessary for maintaining respect and dignity among the student body, and Harvard’s policies to this end are well thought-out and fair—and certainly not worthy of protest.

### 1NC Counterspeech Bad

#### Arguing minorities should engage in a dialogue with aggressors is: rooted in paternalism, ineffective, and puts the oppressed further at risk

Yun and Delgado, JDs, 94

(David, partner @Jaudon & Avery LLP, Richard, Law@Alabama, “Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation.” California Law Review. 1994. http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1712&context=californialawreview)

Defenders of the First Amendment sometimes argue that minorities should talk back to the aggressor. .[FNSS] Nat Hentoff, for example, writes that antiracism rules teach black people to depend on whites for protection, while talking back clears the air, emphasizes selfireliance, and strengthens one’s self-image as an active agent in charge of one’s own destiny. [FN86] The "talking back" solution to campus racism draws force from the First Amendment principle of "more speech,” according to which additional dialogue is always a preferred response to speech that some find troubling. [FN 87] '884 Proponents of this approach oppose hate speech rules, then, not so much because they limit speech, but because they believe that it is good for minorities to learn to speak out. A few go on to offer another reason: that a minority who speaks out will be able to educate the speaker who has uttered a racially hurtful remark. [FN88] Racism, they hold, is the product of ignorance and fear. If a victim of racist hate speech takes the time to explain matters, he or she may succeed in altering the speaker’s perception so that the speaker will no longer utter racist remarks. [FN89] How valid is this argument? Like many paternalistic arguments, it is offered blandly, virtually as an article of faith. In the nature of paternalism, those who make the argument are in a position of power, and therefore believe themselves able to make things so merely by asserting them as true. [FN90] They rarely offer empirical proof of their claims, because none is needed. The social world is as they say because it is their world: they created it that way. [FN91] In reality, those who hurl racial epithets do so because they feel empowered to do so. [FN92] Indeed, their principal objective is to reassert and reinscribe that power. One who talks back is perceived as issuing a direct challenge to that power. The action is seen as outrageous, as calling for a forceful response. Often racist remarks are delivered in several-on-one situations, in which responding in kind is foolhardy. [FN93] Many highly publicized cases of racial homicide began in just this fashion. A group began badgering a black person. The black person talked back, and paid with his life. [FN94] Other racist remarks are delivered in a cowardly fashion, by means of graffiti scrawled on a campus wall late at night or on a poster placed outside of a black student’s dormitory door. [FNQS] in these situations, more speech is, of course, impossible. 885 Racist speech is rarely a mistake, rarely something that could be corrected or countered by discussion. What would be the answer to ”Nigger, go back to Africa. You don’t belong at the University“? "Sir, you misconceive the situation. Prevailing ethics and constitutional interpretation hold that I, an African American, am an individual of equal dignity and entitled to attend this university in the same manner as others. Now that I have informed you of this, I am sure you will modify your remarks in the future”? [FN96] The idea that talking back is safe for the victim or potentially educative for the racist simply does not correspond with reality. it ignores the power dimension to racist remarks, forces minorities to run very real risks, and treats a hateful attempt to force the victim outside the human community as an invitation for discussion.

### XT: Counterspeech Bad

#### Counterspeech is ineffective, not used, and causes psychological harms.

Brown, PhD, 15

(Alex Brown. Mar 5, 2015. “Hate Speech Law: A Philosophical Examination.”

More generally, there is some evidence to suggest that barriers to counterspeech are the greatest for victims of face-to-face hate speech (e.g., the use of racial insults, slurs, or derogatory epithets directed at specific individuals in person). As mentioned in Ch. 3 [3.1], in her study of hate speech Nielsen found that the most common reaction to racist hate speech on the part of those targeted by it is to ignore the remark and simply leave the situation. Only 28% of people of color, for example, reported making verbal responses to racist speech (Nielsen 2002: 277), and even then 'only when they ate in situations where they felt relatively safe, such as a crowded public area’ (ibid.). This finding undermines the plausibility of the claim that counterspeech by the victims of face-to-face hate speech is a no less effective but less restrictive alternative to hate speech law; at least, that is, when it comes to instantaneous, face-to-face counterspeech. This claim overlooks a powerful psychological mechanism controlling human responses to conflict situations. Nielsen reports that part of the problem is fear that speaking back may provoke yet more hate abuse or even violence (ibid.). This is certainly the reported experience of Matsuda, who in the late 1980s received hate mail as a consequence of speaking M public about her views on freedom of expression and hate speech, and subsequently made a decision not to publish her ideas in the popular press for fear of receiving threats against her person (remarks in Borovoy et al. 1988-1989, 3631. Similarly, there is evidence to suggest that this fear has led some complainants in Australia to withdraw complaints about hate speech even under the private processes of dispute resolution established by hate speech legislation (e.g., Gelber 2002: 851. There is also a psychological cost that might be borne by the victims of hate speech if society expects them to take sole responsibility for tackling the problem. If they are made to feel that it is their duty or obligation to engage in counterspeech, what happens when they do not? Will this become yet another (illegitimate) source of shame or self-loathing? Another part of the problem is that dealing with the effects of hate speech can be time consuming, reducing the time that someone might have to actually engage in counterspeech. This is the reported experience of the writer Amanda Hess, who suffered online harassment and intimidation based on her gender. 'I've spent countless hours over the past four years logging the online activity of one particularly committed cyberstalker just in case' (Hess 2014). At this stage, it might be pointed out that using legal restrictions to com-bat hare speech also sucks up a lot of time. The victims of hate speech may need to expend a considerable amount of time as complainants, plaintiffs, or even chief witnesses for the prosecution in criminal cases. And then there are the judges and legal scholars who in some cases have spent decades arguing against one another, time that might have been profitably spent doing other things, such as eloquently speaking out against hate speech (cf. Delgado and Stefanic 2009: 360-361). However, it is surely relevant that when victims of hate speech do decide to take a legal course of action they can normally expect to receive not inconsiderable support from legal professionals, who sham the time burden. Counterspeech undertaken by the victims of hate speech is often without this specialist support. (258-9)

#### Counterspeech places minorities in a dangerous situation and forces the burden of changing society onto them

Yun and Delgado, JDs, 94

(David, partner @Jaudon & Avery LLP, Richard, Law@Alabama, “Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation.” California Law Review. 1994. http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1712&context=californialawreview)

D. "More Speech"-Talking Back to the Aggressor as a Preferable Solution to the Problem of Hate Speech Defenders of the First Amendment sometimes argue that minorities should talk back to the aggressor.85 Nat Hentoff, for example, writes that antiracism rules teach black people to depend on whites for protection, while talking back clears the air, emphasizes self-reliance, and strengthens one's self-image as an active agent in charge of one's own destiny.8 6 The "talking back" solution to campus racism draws force from the First Amendment principle of "more speech," according to which additional dialogue is always a preferred response to speech that some find troubling.87 Proponents of this approach oppose hate speech rules, then, not so much because they limit speech, but because they believe that it is good for minorities to learn to speak out. A few go on to offer another reason: that a minority who speaks out will be able to educate the speaker who has uttered a racially hurtful remark."8 Racism, they hold, is the product of ignorance and fear. If a victim of racist hate speech takes the time to explain matters, he or she may succeed in altering the speaker's perception so that the speaker will no longer utter racist remarks.8 9 How valid is this argument? Like many paternalistic arguments, it is offered blandly, virtually as an article of faith. In the nature of paternalism, those who make the argument are in a position of power, and therefore believe themselves able to make things so merely by asserting them as true.90 They rarely offer empirical proof of their claims, because none is needed. The social world is as they say because it is their world: they created it that way.91 In reality, those who hurl racial epithets do so because they feel empowered to do so. 92 Indeed, their principal objective is to reassert and reinscribe that power. One who talks back is perceived as issuing a direct challenge to that power. The action is seen as outrageous, as calling for a forceful response. Often racist remarks are delivered in several-on-one situations, in which responding in kind is foolhardy. 93 Many highly publicized cases of racial homicide began in just this fashion. A group began badgering a black person. The black person talked back, and paid with his life.94 Other racist remarks are delivered in a cowardly fashion, by means of graffiti scrawled on a campus wall late at night or on a poster placed outside of a black student's dormitory door.95 In these situations, more speech is, of course, impossible. Racist speech is rarely a mistake, rarely something that could be corrected or countered by discussion. What would be the answer to "Nigger, go back to Africa. You don't belong at the University"? "Sir, you misconceive the situation. Prevailing ethics and constitutional interpretation hold that I, an African American, am an individual of equal dignity and entitled to attend this university in the same manner as others. Now that I have informed you of this, I am sure you will modify your remarks in the future"? 96 The idea that talking back is safe for the victim or potentially educative for the racist simply does not correspond with reality. It ignores the power dimension to racist remarks, forces minorities to run very real risks, and treats a hateful attempt to force the victim outside the human community as an invitation for discussion. Even when successful, talking back is a burden. Why should minority undergraduates, already charged with their own education, be responsible constantly for educating others?

### 1NC Opacity

#### The demand for counterspeech is a request for transparency that puts oppressed people in a precarious position-opacity is superior

Walker, PhD, 11

(Corey, former chair Africana Studies @Brown, “How Does It Feel to be a Problem?': (Local) Knowledge, Human Interests, and The Ethics of Opacity” Transmodernity: Journal of Peripheral Cultural Production of the Luso-Hispanic World, 1(2))

The ethics of opacity presents “more than an accusation regarding the actions and behavior of the oppressive cultures; it goes to the heart of the issue. It is an accusation regarding the world view, thought structures, theory of knowledge, and so on, of the oppressors. The accusation is not simply of bad acts but, more importantly, of bad faith and bad knowledge.”23 An ethics of opacity is thus defined by its critical orientation to liberation as articulated by and with the opaque ones. It is a critical intellectual posture that disrupts the dominant logic of coloniality/modernity in exploring the hidden and unknown, the repressed and submerged narratives, histories, and epistemologies – the sites of opacity that are the conditions of im/possibility of the contemporary world. Such an ethic is available because, as Long writes, “the strategies of obscuring these peoples and cultures within the taxonomies of the disciplines of anthropology as primitives or the classification of them as sociological pathologies is no longer possible” (211). The ethics of opacity helps to structure our ability “to effect the deconstruction of the mechanisms by means of which we continue to make opaque to ourselves, attributing the origin of our societies to imaginary beings, whether the ancestors, the gods, God, or evolution, and natural selection, the reality of our own agency with respect to the programming and reprogramming of our desires, our behaviors, our minds, ourselves, the I and the we.”24 Such a move has significant implications for “reimagining our forms of life” and opens up potentially emancipatory possibilities for a critical theory of knowledge in the interests of those on the underside of modernity (204). In a crucial sense, it is the emergence and existence of the opaque ones that conditions the im/possibility of the project of Enlightenment rationality. Long states, “As stepchildren of Western culture, the oppressed have affirmed and opposed the ideal of the Enlightenment and post- Enlightenment worlds. But in the midst of this ambiguity, for better or for worse, their experiences were rooted in the absurd meaning of their bodies, and it was for these bodies that they were regarded not only as valuable works but also as the locus of the ideologies that justified their enslavement . . . . The totalization of all the great ideals of Western universalization met with the factual symbol of these oppressed ones.”25 The infinite meaning and depth of the “factual symbol of these oppressed ones” is the location of ethics of opacity and in turn structures the relation to epistemology. Indeed, highlighting the relation of ethics and epistemology thus becomes a critical process that cannot be evaded. The disruption produced by the ethics of opacity suggests the primacy of method of procedure as opposed to the fundamental question of ontology for the project of critical theory in the interests of humanity.26 To this end, such an ethical imperative interrupts the imperial/colonial economy of knowledge that privileges a conceptualization of knowledge that conquers through a commitment to clarity of content and transparency of method. The will to clarity and transparency within this theoretical enterprise rests on a fundamental violence that denies difference and negates alternative possibilities of thought as well as of action. The character of this will to know is marked by a process that necessarily seeks to conquer epistemologically and otherwise. Instead, an ethic of opacity develops a critical posture that welcomes the “opaque ones” as fundamental partners in the quest for knowledge. It is a reflexive injunction that reminds us that we always already think in and against particular epistemic traditions and conditions that in/form us. The challenge thus becomes how do we develop a theory of knowledge in critical relation with an ethics of opacity?

**Schooling is structured to promote colonialism/racism-reforms within the system fail**

**Rodriguez, PhD, 12**

(Dylan, Racial/Colonial Genocide and the "Neoliberal Academy": In Excess of a Problematic", American Quarterly. Volume 64. Number 4. December )

These local examples express the academy’s paradigmatic ordering of bodies, vulnerabilities, and intellectual hierarchies. That is, such everyday dehumanization illustrates the systemic logics, institutional techniques, rhetorics, and epistemologies of violence and power that undergird the academy’s racial and colonial foundations even—especially—as they resurface in our current working and thinking conditions. These dehumanizing violences exceed the effects of the academy’s neoliberalization; they require an urgent, strategic, mutual centering of the analytics of racial/colonial genocide. Framed in the long historical scope of modernity, racial/colonial genocide is a logic of human extermination that encompasses extended temporal, cultural, biological, and territorial dimensions:3 the mind-boggling body counts associated with commonly recognized “genocides” are but one fragment of a larger historical regime that requires the perpetual social neutralization (if not actual elimination) of targeted populations as (white, patriarchal) modernity’s premise of [End Page 809] historical-material continuity. This is why Indian reservations, the U.S. prison and criminalization regime, and even Arizona’s ban on ethnic studies need to be critically addressed through a genocide analytic as well as through focused critiques of neoliberalism’s cultural and economic structures: the logics of social neutralization (civil death, land expropriation, white supremacist curricular enforcement) always demonstrate the capacity (if not the actually existing political will and institutional inclination) to effectively exterminate people from social spaces and wipe them out of the social text. To appropriate a well-known phrase, I’m advancing an abolitionist praxis without guarantees—of either victory or survival. Activisms that form in confrontation with the academy’s long historical complicities in racial/colonial genocide might be understood within an “urgency imperative” that seeks to denaturalize and ultimately dismantle the conditions in which these systems of massive violence are reproduced.4 There are thriving circuits of radical thought that aim to do just that: for example, the very presence of anticolonialism, black radicalism, Native American feminism, and prison abolitionism as recognizable streams of scholarly and pedagogical labor within institutional spaces—and more importantly, the vibrant and urgent ways in which many (though still far too few) people inhabit these spaces—has become a matter of life and death in more ways than one. The capacities to produce such scholarship (including the creation of counterarchives, vital epistemological and theoretical tools, course syllabi, and mentorship) have been hard-won by multiple histories of liberation struggle and intense intellectual innovation, and cohere in the academy through affinities of ideas, analytics, and scholars whose [End Page 810] work is mutually nourishing and critically enabling.Intellectuals engaged in such projects are always more than “academics,” in the sense that their scholarly engagement is not secured by the academy proper. This expansive grounding is an “antidisciplinarity” of a certain kind: if what animates their intellectual work is what I have tentatively named an abolitionist desire, such radical intellectuals always understand themselves to be working in alien (if not hostile) territory. The academy is never home: some of us are subject to eviction and evisceration, alongside the surveillance, discipline, and low-intensity punishment that accrues to those of us who try to build modalities of sustenance and reproduction within liberationist genealogies, particularly when we are working and studying in colleges and universities.6 I am undecided as to whether the university is capable or worthy of being “transformed” from its dominant historical purposes, or if it ought to be completely abolished. For now, I am interested in the radical creativity that can [End Page 811] come from the standoff position in-and-of-itself. Such a position reveals that the fundamental problem is not that some are excluded from the hegemonic centers of the academy but that the university (as a specific institutional site) and academy (as a shifting material network) themselves cannot be disentangled from the long historical apparatuses of genocidal and protogenocidal social organization. It is not just different structures of oppressive violence that radical scholars are trying to make legible, it is violence of a certain depth, with specific and morbid implications for some peoples’ future existence as such. If we can begin to acknowledge this fundamental truth—that genocide is this place (the American academy and, in fact, America itself)—then our operating assumptions, askable questions, and scholarly methods will need to transform. At a moment of historical emergency, we might find principled desperation within intellectual courage.

### XT: Opacity

#### The affirmative derives their offense from making student demands on the state and capitalism visible to our oppressors however this makes cooption and being crushed by the state inevitable Phillips writes:

**Phillips, PhD, 99**

(Kendall – Professor of Communication at Syracuse University, “Rhetoric, Resistance, and Criticism: A Response to Sloop and Ono,” in Philosophy & Rhetoric, Volume 32, Number 1, 1999, <http://www.jstor.org/stable/40238019?seq=1#page_scan_tab_contents>)

Despite acknowledging the efficacy of out-law discourses. Sloop and Ono assume that the critiques generated and presented by the out-law community have only minimal effect. The irony, and indeed arrogance, of this assumption is evident when they claim: "There are cases, however, when, without the prompting of academic critics, out-law discourses serve local purposes at times and at others resonate within dominant discourses, disrupting sedimented ways of thinking, transforming dominant forms of judgment" (60; emphasis added). Sloop and Ono seem to suggest that such locally generated critiques are the exception, whereas the political efficacy of the academic critic is the rule. This seems an odd view, given that the justification for their out-law discourse project is the lack of politically viable academic critique and the perceived potency of out-law conceptions of judgment. Their suggestion that out-law communities are in need of the academic critic contradicts not only the already disruptive nature of existing out-law discourses (the grounds for using out-law discourse), but also the impotence of contemporary critical discourse (the warrant for studying out-law discourse). By this I do not mean that the critiques and theories generated by academically instituted intellectuals have not been incorporated into subversive discourses. Just as out-law discourses inevitably mount critiques of dominant logics, so, too, the perspectives on rhetoric and criticism generated by academics are used in resistance movements. Feminist critiques of patriarchy, queer theories of homophobia, postcolonial interrogations of race have found their way into the service of resistant groups. The key distinction I wish to make is that the existence of criticism (academic or self-generated) in resistance does not necessitate Sloop and Ono's move to a criticism of resistance. What Sloop and Ono fail to offer is an adequate argument for "taking public speaking out of the streets and studying it in the classroom, for treating it less as an expression of protest" (Wander 1983, 3) and more as an object for analysis and reproduction within the political economy of the academy. Philip Wander made a similar charge against Herbert Wicheln's early critical project, and this concern should remain at the forefront of any discussion aimed at expanding the scope and function of criticism. Sloop and Ono offer numerous directives for the critic without addressing whether the critic should be examining out-law discourses in the first place While it is too early to suggest any definitive answer to the question of criticism of resistance, some preliminary arguments as to why critics should not pursue out-law discourses can be offered: (1) Hidden out-law discourses may have good reasons to stay hidden. Sloop and Ono specifically instruct us that "the logic of the out-law must constantly be searched for, brought forth" (66) and used to disrupt dominant practices. But are we to believe that all out-law discourses are prepared to mount such a challenge to the dominant cultural logic? Or, indeed, that the members of out-law communities are prepared to be brought into the arena of public surveillance in the service of reconstituting logics of litigation? It seems highly unlikely that all divergent cultural groups have developed equally, or that all members of these groups share Sloop and Ono's "imperial impulse" (51) to promote their conceptions and practices of justice. (2) Academic critical discourse is not transparent. Here I allude to the overall problem of translation (see Foucault 1994; Lyotard 1988; Lyotard and Thebaud 1985; Zabus 1995) as an extension of the previous concern. Critical discourse cannot become the medium of commensurability for divergent language games. Are we to believe that the "use" of out-law discourse by critics to disrupt dominant practices can fail to do violence to these diverse/divergent logics? Are out-law discourses merely tools to be exploited and discarded in the pursuit of returning leftist academic discourse to the center? (3) Perhaps the academic translation of out-law discourse could be true to the internal logic of the out-law community. And, perhaps the re-presentation of out-law logic within the academic community will bestow a degree of legitimacy on the out-law community. Nonetheless, the effect of legitimizing out-law discourse is unknown and potentially destructive. In an effort to siphon the political energy of out-law discourse into academic practice, we may ultimately destroy the dissatisfaction that serves as a cathexis for these out-law discourses. It seems possible that academic recognition might take the place of struggle for material opportunities (see Fraser 1997). But, will academic legitimation create any material changes in the conditions of out-law communities? I mean to suggest, not that it is better to allow the out-law community to suffer for its cause, but rather that incorporating the struggle into an (admittedly) impotent academic critique does not offer a prima facie alternative The concerns raised here are not designed to dismiss Sloop and Ono's provocative essay. The divo-gent critical logic they outline deserves careful consideration within the critical conmninity, and it is my hope that the concerns I raise may help to further probleoiatize the relationship between resistance and rhetorical criticism. As I have suggested, my purpose is to use the provocative nature of Sloop and Ono's project to extend disputes regarding the ends of rhetorical criticism. Diverging perspectives on the ends of criticism have been categorized by Barbara Wamick (1992) as falling along four general lines: artist, analyst, audience, and advocate. Leah Ceccarelli (1997) discerns similar categories around the aesthetic, epistemic, and political ends of rhetorical criticism. The out-law discourse project presents clear ties to the notion of critic as advocate. For Sloop and Ono, the critic is an interested party, discerning (and at times disputing) the underlying values and forces contained within a discourse. Additionally, however, the out-law discourse critic is an analyst focusing on the hidden, aberrant texts of the out-law and "render[ing] an incoherent or esoteric text comprehensible" (Wamick 1992, 233). Now, I am not suggesting that a critic must serve only one function or that the roles of advocate and analyst are mutually exclusive; rather, these entanglings of power (political ends) and knowledge (epistemic ends) are inevitable. My concern is that we not neglect the complexity of these entanglements. Turning covert out-law discourses into objects of our analyses runs the risk of subjecting them both to the gaze of the dominant and to the power relations of the academy. As the works of Michel Foucault (especially 1979, 1980) aptly illustrate, practices presented as extending such noble goals as emancipation and humanity may endow institutions of confinement and objectification. Any justification for studying out-law discourse because doing so may extend our political usefulness in the pursuit of emancipatory goals must not obscure the already existing power relations authorizing such studies. Our attempts to extend our domains of knowledge and expertise (authority) must not be pursued unrefiexively.

### 1NC Colorblindness

#### Rejecting colorblindness shuts down debate and prevents adequate policy discussion – we must embrace colorblindness in order create effective solutions to racial problems

**BANKS ‘9** (Ralph Richard; Jackson Eli Reynolds Professor of Law – Stanford University, “Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship,” 25 Harv. BlackLetter J. 41, Spring, l/n) ww

This Part considers how the race and law scholarship of the future might benefit from the neo-racial approach. The hallmark of the neo-racial perspective is that it recognizes the complexity of many contemporary controversies and takes seriously competing views about how best to reconcile conflicting interests. To illustrate the neo-racial approach, I consider the principle of colorblindness in the context of equal protection doctrine, about which race and law scholars have been writing for years. n15 Much of the recent commentary has centered on the Supreme Court's decisions in the Seattle-Louisville cases n16 and in the University of Michigan affirmative action cases. n17 While these cases raise distinct issues and have yielded different results, n18 the opinions in all of the cases have been read to express the Court's commitment to colorblindness as the polestar of its equal protection jurisprudence. Race and law scholars have relentlessly decried the notion of colorblindness; in the views of many of these scholars, the invocation of colorblindness is tantamount to racism. n19 Why colorblindness should be so widely regarded by scholars as racist is not obvious. After all, the term might be meant as nothing more than a particularly forceful expression of a nondiscrimination mandate that is widely held in our society. Why then do race and law scholars so often regard as racist the invocation of colorblindness? [\*51] I think part of the answer has to do with the belief that the application of colorblindness is selective. The prevailing perception among scholars is that courts are quick to strike down affirmative action policies in the name of colorblindness, n20 but they are reluctant to take aggressive measures to root out discrimination that burdens members of historically disadvantaged racial minority groups. n21 Further, there is the suspicion that proponents of colorblindness embrace the principle strategically, n22 at least partly because it can be used to prohibit policies such as affirmative action that benefit members of disadvantaged racial minority groups. n23 What makes the colorblindness discourse all the more pernicious, in the eyes of many race and law scholars, is that the insistent invocation of colorblindness can be taken to imply that we have already brought racial discrimination to an end. n24 Colorblindness thus seems to limit, if not altogether eliminate, affirmative action, at the same time that it rhetorically underwrites the belief that racial inequality need no longer be considered a problem in American society. In this view, colorblindness embodies a norm of formal equality that, in practice, permits a nearly willful blindness to ongoing discrimination and a callous disregard of persistent racial inequalities. The irony, then, is that colorblindness prohibits overt discrimination, even if intended to benefit historically disadvantaged racial minority groups, while it permits covert discrimination, even if it subordinates already disadvantaged groups. As one prominent scholar puts it, colorblindness "threatens to become the dominant manner by which Americans ... excuse persistent racial inequality as simply life." n25 [\*52] Nonetheless, it is a mistake for race and law scholars to equate the invocation of colorblindness with racism. One reason for this is that colorblindness is associated with an antidiscrimination commitment that most Americans endorse. I don't doubt that there are some people for whom the embrace of colorblindness is largely strategic, a matter of justifying their opposition to policies that would benefit disadvantaged minorities. But there are other people, by any measure a substantial portion of the United States population, who would disfavor racial discrimination irrespective of which group it benefits. Colorblindness appeals to these people as well. We would do well to take seriously moral intuitions that are held by a large portion of the United States population. One product of categorically rejecting colorblindness and likening it to racism is a debate that becomes polarized, with each side entrenched in its own position, unwilling to acknowledge the legitimacy of opposing arguments. The opposing camps do not talk to each other so much as they talk past each other. Lost is the opportunity for persuasion and the identification of common ground. What this means as a practical matter for race and law scholars is that our preaching may be well received by the choir, but will likely fail to convert the broader population. One is unlikely to persuade people whose positions one has vilified as racist. Moreover, a preoccupation with colorblindness as racism could divert attention from the effort to formulate good policy. The belief that any assertion of colorblindness necessarily signifies racism undermines one's ability and inclination to sympathetically interpret policy positions associated with colorblindness. If one regards colorblindness as racism, one need not engage the positions with which it is associated. Instead, it is sufficient to condemn the principle and impugn the motives of those who advance it. An underlying issue here is whether colorblindness is necessarily incompatible with substantive racial justice, so that a commitment to substantive racial justice unavoidably entails a rejection of colorblindness. In my view, it is more possible to accommodate colorblindness with substantive racial justice than is often thought. It is important to note that the principle of colorblindness is always limited; few would advocate pushing it to its logical endpoint. At the extreme, a commitment to colorblindness could prohibit antidiscrimination law itself. After all, antidiscrimination law, both in operation and origin, is necessarily race conscious. Judges and administrative agencies could hardly enforce antidiscrimination law without being conscious of race; similarly, public and private institutions could not fully comply with the law without being conscious of race. The very existence of laws that prohibit racial discrimination reflects an awareness of the socially destructive consequences of racial discrimination. But, of course, few commentators advocate the abolition of antidiscrimination law in the name of colorblindness. Thus, there is acceptance of the fact that a commitment to colorblindness need not preclude all forms of race consciousness. One way that I think about these issues is admittedly paradoxical: Debates about colorblindness always entail choosing among different varieties of race consciousness. Any purportedly colorblind standard can [\*53] always be understood in terms of the race consciousness that it permits. It is always the case that even ostensibly colorblind standards permit some race consciousness because few courts or commentators would want to push colorblindness to its conceptual limit. One example, about which I have written previously, concerns the use of race by law enforcement officers. Even as commentators assail racial profiling, n26 virtually no one contends that police officers should be precluded from investigating only members of a particular race when a crime victim has identified her assailant as a member of that racial group. n27 Selecting suspects in that manner is undeniably race conscious, yet the practice could not plausibly be prohibited, no matter how vehement one's commitment to colorblindness. As a practical matter, even the most stringent articulations of colorblindness will permit some forms of race consciousness. This same interplay between colorblindness and race consciousness is apparent in the Supreme Court's equal protection jurisprudence. Equal protection doctrine--which is often condemned by commentators for its embrace of colorblindness--has for years pivoted on the distinction between affirmative action policies on the one hand and so-called race neutral alternatives on the other. It was in two of the cases typically thought to usher in the era of colorblind equal protection doctrine--Adarand Constructors, Inc. v. Pena n28 and City of Richmond v. J.A. Croson n29 that the Court incorporated consideration of race neutral alternatives into the narrow tailoring prong of the strict scrutiny test. In the Court's formulation, the permissibility of a race conscious affirmative action policy depends partly on the unavailability of efficacious race neutral alternatives. n30 As the Court noted in Grutter v. Bollinger, narrow tailoring "requires serious, good faith consideration of workable race neutral alternatives." n31 In the narrow tailoring analysis, a policy maker's failure to consider race neutral alternatives could imperil an otherwise permissible affirmative action policy. If this doctrinal structure embodies the principle of colorblindness, as many commentators have asserted, then its treatment of race neutral alternatives suggests that such policies are colorblind. Indeed, during the period leading up to the Court's decisions in the University of Michigan affirmative action cases, commentators vigorously debated the feasibility of race neutral policies such as the Ten Percent Plan n32 enacted in [\*54] Texas and those in which admissions officers would consider applicants' socioeconomic status. n33 Unlike conventional affirmative action policies, such policies would not treat individual applicants differently on the basis of their race. Yet so-called race neutral alternatives could readily be characterized as race conscious. They may not have differentiated among individual applicants on the basis of race, but what if they were enacted for race-related reasons? If the Ten Percent Plan, for example, were enacted in order to realize the same racial diversity goals as the invalidated affirmative action policy, then its characterization as colorblind becomes more contestable. Indeed, some prominent opponents of affirmative action recently have argued that race neutral policies such as the Texas Ten Percent plan are discriminatory and should be subject to strict scrutiny if challenged. n34 My point here is not that race neutral policies should be subject to strict scrutiny, much less invalidated. Rather, what it is important to see is that the idea of colorblindness is itself malleable, subject to alternative formulations. One might view a commitment to colorblindness as prohibiting only policies that differentiate among individuals on account of race in the distribution of burdens or benefits. Alternatively, one might extend the colorblindness principle to formally race neutral practices that are undertaken for a race-related purpose. The same sort of issue about formally race neutral policies arises in the Court's decision in the Seattle-Louisville cases. n35 The Court viewed the challenged policies as subject to strict scrutiny because they took account of individual students' race in assigning them to schools. But what about the sorts of policies that Justice Kennedy endorsed in his concurring opinion? n36 Does a district violate the principle of colorblindness by intentionally deciding to construct a new school at a location where its student population would be the most racially diverse? What if the district draws attendance zones so as to increase racial diversity? Or decides to create [\*55] magnet schools or other special programs in order to further integration? Justice Roberts declined to express any opinion on the propriety of such "race neutral" policies. Justice Kennedy wrote a concurring opinion in defense of race neutral means of promoting integration, even as he voted to invalidate the race-based assignment plans used in Seattle and Louisville. n37 Most recently, the issue of race neutral measures undertaken for a race-related purpose has surfaced in the New Haven fire fighters case that is currently before the Supreme Court. n38 The case arose from the City's decision not to certify the results of a promotions examination once it became clear that the African-American applicants performed so poorly on the test that not one of them could be promoted. n39 White candidates, some of whom would have been promoted, filed suit. There is some dispute about precisely why the City declined to certify the exam results--the plaintiffs allege that the City bowed to political pressure from a prominent black clergyman who supported the mayor, while the City attributes its decision to concern about liability in a disparate impact suit filed by the African-American candidates--but there is no doubt that the case raises the question of the permissibility of race neutral measures undertaken for a race related purpose. A commitment to colorblindness does not dictate the outcomes of these cases. Colorblindness is always qualified in one way or another. It is always pitted against competing principles or goals. The resolution of particular cases should depend on considerations specific to that context. So, rather than vilify colorblindness, we should analyze the specific policy choices implicated by concrete controversies. We should redirect energy from espousing broad principles to conducting more focused inquiries. Just as racism need not be a focal point of discussion, so too could colorblindness be pushed to the margins of the analysis. We need not condemn colorblindness in toto. What we do need to do is to argue affirmatively on behalf of what we think are the best policies. The same approach that applies with race neutral measures could be used with conventional affirmative action policies. If we are to convince people about the desirability of affirmative action, we need to make concrete arguments about why a particular policy is a good policy. Doing so would require honest assessment of its costs and benefits, compared to the costs and benefits of race neutral alternatives. My sense is that many reasonable people are uncomfortable with affirmative action in part because they do not see why the policy is needed, given the possibility of race neutral alternatives. A proper response to such concerns is not to dismiss them as racist, but instead to attempt to persuade by marshalling relevant facts and drawing on widely-held values. The approach I have sketched could yield many benefits. Assessing the costs and benefits of concrete policy proposals is more likely to persuade [\*56] people about the policies we care about. Over time, I think that such an approach might also undermine the rhetorical appeal of colorblindness. Incremental shifts might alter attitudes toward colorblindness itself, making it seem less a self-evidently desirable objective. Alternative principles that are more context-specific might govern in domains where colorblindness now seems ascendant. In any case, my sense is that the process of change begins with concrete policies, which then may shape commitment to and understanding of general principles.

### AT: Reverse Enforcement

#### Reverse enforcement is paternalistic and wrong

Yun and Delgado, JDs, 94

(David, partner @Jaudon & Avery LLP, Richard, Law@Alabama, “Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation.” California Law Review. 1994. http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1712&context=californialawreview)

B. The "Reverse Enforcement" Argument A second paternalistic argument is that enactment of hate speech rules is sure to hurt minorities because the new rules will be applied against minorities themselves.61 A vicious insult hurled by a white person to a black will go unpunished, but even a mild expression of exasperation by a black motorist to a police officer or by a black student to a professor, for example, will bring harsh sanctions. The argument is plausibile because certain authorities are racist and dislike blacks who speak out of turn, and because a few incidents of blacks charged with hate speech for innocuous behavior have occurred. Nadine Strossen, for example, asserts that in Canada, shortly after the Supreme Court upheld a federal hate speech code, prosecutors began charging blacks with hate offenses. 62 But the empirical evidence does not suggest that this is the pattern, much less the rule. Police and FBI reports show that hate crimes are committed much more frequently by whites against blacks than the reverse. 63 Statistics compiled by the National Institute Against Violence and Prejudice confirm what the police reports show, that a large number of blacks and other minorities are victimized by racist acts on campus each year.' Moreover, the distribution of enforcement seems to be consistent with commission of the offense. Although an occasional minority group member may be charged with a hate crime or with violating a campus hate speech code, these prosecutions seem rare.6 5 Racism, of course, is not a one-way street; some minorities have harassed and badgered whites. Still, the reverse-enforcement objection seems to have little validity in the United States. A recent study of the international aspects of hate speech regulation showed that in repressive societies, such as South Africa and the former Soviet Union, laws against hate speech have indeed been deployed to stifle dissenters and members of minority groups.6 6 Yet, this has not happened in more progressive countries.67 The likelihood that officials in the United States would turn hate speech laws into weapons against minorities seems remote.