

2008

Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace

Terry Smith

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Constitutional Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

Smith, Terry. "Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace." American University Law Review 57, no.3 (February, 2008): 523- 584.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace

Abstract

Free speech controversies erupt from reactions to outlier voices, and these voices are often those of subordinated citizens such as racial minorities. Employing the tools of narrative, interviews with litigants and subjects, and interdisciplinary analysis of case law, Professor Terry Smith probes whether the social inequality of government employees of color affects the rigor of the First Amendment protection afforded their speech. Professor Smith argues that all public sector employees lack sufficient protection because their speech typically does not receive the highest constitutional scrutiny and because of the Supreme Court's recent decision in *Garcetti v. Ceballos*, which stripped public sector employees of much constitutional recourse when their speech is made pursuant to their official duties. Yet when this already porous protection is applied in cases involving workers of color who may speak from the vantage point of their social inequality, the interaction of subordinate status and outsider speech distorts the proper application of extant-albeit still inadequate-First Amendment doctrine. Rather than repair to advocating a change in the level of constitutional scrutiny accorded public employee speech, Professor Smith draws on the Supreme Court's recent decision in *Burlington Northern & Santa Fe Ry. Co. v. White*, involving retaliation under Title VII, to demonstrate how First Amendment public employee plaintiffs, including employees of color, can fortify the First Amendment's protections within the framework of existing law.

Keywords

Employment Law, First Amendment, Constitutional Law

ARTICLES

SPEAKING AGAINST NORMS: PUBLIC DISCOURSE AND THE ECONOMY OF RACIALIZATION IN THE WORKPLACE

TERRY SMITH*

TABLE OF CONTENTS

Introduction.....	524
I. Stories About Race, “Speech on a Matter of Public Concern,” and Social Inequality.....	529
A. Talking While Black: A Narrative and a Topology	529
B. Richard Ceballos and the Invisible Hand of Race	537
C. <i>Rankin v. McPherson</i> : The Black Assassin	542
D. Ward Churchill and Heretic Voices of Color in a Moment of Unity	550
E. Leonard Jeffries: The Black Racist.....	558
II. Accounting for Inequality: The Limitations of Current Doctrine	564

* Terry Smith, Professor of Law, *Fordham University School of Law*, A.B., *Brown University*; J.D., *New York University School of Law*. Professor Jennifer L. Eberhardt of *Stanford University*’s Department of Psychology pointed me in the direction of a rich body of social psychology literature that informs this Article. Dr. Fern L. Johnson guided me to several of the sociolinguistic sources relied on. Participants in the New York Writers Group gave insightful—and unflinchingly blunt—critiques of an early draft of this Article. Those participants were: Kendall Thomas, Tanya Hernandez, Paulette Caldwell, Twila Perry, Holly Maguigan, E. Bennett Capers, Caroline Gentile, Penny Andrews, and Beryl Jones. I also presented this Article at the 2006 Critical Race Workshop held at *American University, Washington College of Law*. There, Professors Darren Hutchinson, Barbara Flagg, Sumi Cho, and Natsu Saito, among others, gave helpful input. Participants at the 2007 Southeast/Southwest Law Professors of Color Scholarship Conference, in particular David Cruz as commentator, made invaluable suggestions on a later draft of this Article, as did George Cochran, Irene Thomas, Mechelle Dickerson, and Trina Jones. Finally, Mary Godfrey provided unfailing research support.

A. Mapping the Doctrinal Present: Avoiding Strict Scrutiny	565
B. Mapping the Doctrinal Present: The Limitations of Equal Protection.....	568
C. Mapping the Doctrinal Present: <i>Garcetti</i> 's Invitation to Discrimination	572
D. Summary: Does the First Amendment Account for the Social Inequality of the Speaker?.....	575
III. Accounting for Inequality Incrementally.....	576
A. <i>Burlington Northern</i> as a Superior Approach	577
B. Re-litigating <i>Garcetti</i>	578
Conclusion	583

INTRODUCTION

Politics can be deeply personal, and its practice need not, of course, be electoral. The practice of identity politics in the workplace is not novel, manifesting itself both in individual antidiscrimination claims and even in the collective bargaining context.¹ In the public sector, the practice of identity politics often merges with politics in its purest sense, as workers' speech receives First Amendment protection from employer sanction only if it is "commenting upon matters of public concern"² and not merely a personal grievance.³ The constraints of First Amendment protection invite the practice of identity politics by proxy, in which the patina of a larger societal issue is the vehicle by which differences among workers are expressed.⁴

Identity politics in the workplace coexists uneasily with a legal regime of non-discrimination, for its practice may render a worker of

1. See Molly McUsic & Michael Selmi, *Postmodern Union: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1350–51 (1997) (discussing the tension between an individual rights model of workplace equality and unionism and noting that "federal law effectively encouraged employees to define their grievances at the workplace, and to organize themselves, through reference to personal or group identity rather than through a union").

2. *Connick v. Myers*, 461 U.S. 138, 143 (1983) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

3. *Id.* at 146–48.

4. Scholars have focused on race discrimination by proxy, in which employers utilize characteristics highly correlated with race as a basis for adverse job actions against applicants. See, e.g., Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1288–89 (2005) (exploring the effect of being perceived as a member of a certain racial group on a person's hiring or promotion prospects). This use of the proxy concept is distinct from my construct: this Article is concerned with identity-based speech rather than status discrimination and with constitutional protections against retaliation for such speech rather than discrimination.

color more susceptible to discrimination.⁵ If we accept the legal and cognitive psychology literature that demonstrates that prejudice against racial minorities emanates from latent attitudes learned and reinforced over time,⁶ consider the relative potency of these cues for latent prejudice: a White supervisor who works with a Black, versus a White supervisor who works with a Black whom she overhears implying that President Ronald Reagan was a racist.⁷ The Black employee in the latter example draws attention to her race, to her social inequality, in a manner that potentiates a more instant and perhaps visceral cuing of latent prejudices. To place matters in a contemporary context, consider the recent verbal gaffe by Senator Joseph Biden in describing Democratic presidential primary opponent Barack Obama, who is Black. Biden said of Obama: he is “the first mainstream African-American who is articulate and bright and clean and a nice-looking guy.”⁸ Setting to one side the stereotypical antithesis of Blacks as inarticulate, not bright, dirty, and ugly that Biden’s description inadvertently underscores, the statement also suggests the parameters of acceptable Black candidates for White Americans. Shirley Chisholm, Jesse Jackson, and Al Sharpton were not mainstream candidates because each of their candidacies was strongly identified with their racial group, Blacks. As with candidates, when workers of color speak from a vantage point that is strongly identified with their racial background, their speech places them outside the mainstream of the White employment environment.

Public employees enjoy free speech rights not enjoyed by private sector workers.⁹ This disparity creates greater potential for “voice” to

5. See Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75, 76 (2006) (“[S]elf-identifying speech, because it makes us susceptible to discrimination, is often the first casualty of that discrimination.”).

6. See *infra* notes 39–46 and accompanying text (surveying academic literature on unconscious racial stereotyping and bias).

7. See *infra* notes 106–110 and accompanying text (using cognitive psychology to analyze a White employer’s reaction to a Black employee who made comments suggesting that Reagan was a racist).

8. Dan Balz, *Biden Stumbles at the Starting Gate*, WASH. POST, Feb. 1, 2007, at A6.

9. See, e.g., *Edmonson v. Shearer Lumber Prods.*, 75 P.3d 733, 739 (Idaho 2003) (“[A]n employee does not have a cause of action against a private sector employer who terminates the employee because of the exercise of the employee’s constitutional right of free speech.”). But see *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3d Cir. 1983) (“Although Novosel is not a government employee, the public employee cases do not confine themselves to the narrow question of state action. Rather, these cases suggest that an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities [i.e., speech].”). Most courts have rejected *Novosel*’s extension of free speech rights to private sector employees. See *Grinzi v. San Diego*

become both a vehicle by which identity politics is practiced as well as an instigator of the process by which employees are racialized. To racialize or “race” a person or his speech is to bring to bear the dominant social position of the listener and the unequal social position of the speaker in assessing the legitimacy of the speech.¹⁰ Racialization is a process, a type of racial profiling that permutes itself in relation to the racial category of its object and the cultural understandings attendant to that category.¹¹ Critically, however, racialization can occur not only when workers of color consciously employ speech on matters of public concern in the practice of identity politics, but rather whenever these workers address a topic and express a viewpoint that is associated with their social subordination. Whether intended as an act of identity politics or not, such expressions collide with the dominant social norms of the White workplace. These norms, which are both implicit and explicit in character, are imported from external society into the workplace and reflect majoritarian hegemony.¹² The stigmatization engendered by such speech reflects an economy of racialization, in which some norm-violational conduct is more acceptable than others, depending on the degree to which the conduct at issue is raced. I do not invoke the term economy to mean bartering of any sort but rather to describe a structure by which the liabilities of racialization are meted

Hospice Corp., 14 Cal. Rptr. 3d 893, 900 (Cal. Ct. App. 2004) (citing numerous cases in which the court has refused to adopt, or expressed disapproval of, *Novosel*).

10. See Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 904 n.4 (2003) (discussing the process by which individuals are “raced” by Whites in order to resist equality-enhancing benefits, such as affirmative action); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 443 n.52 (1990) (citing Comments of Kendall Thomas at the Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, *Duke Law School*, Jan. 26, 1990) (noting with approval Professor Thomas’s assertion that individuals are “raced” through millions of ongoing contemporaneous speech/acts).

11. See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000) (asserting that the racialization process, in the context of its application to Chinese Americans, is based upon a stereotype that the Chinese are unable and unwilling to assimilate into American society).

12. See Gerald R. Ferris et al., *Reactions of Diverse Groups to Politics in the Workplace*, 22 J. MGMT. 23, 27 (1996) (“The dominant group in an organization at any given time tends to establish the general tone for all other groups. Because Caucasian males typically represent the majority, and indeed, the dominant coalition in most organizations, they tend to be the ones selected as ‘insiders’; that is, the ones taught to hone their political skills and perfect their craft.”); Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 ALA. L. REV. 1, 9 (2005) (“Norms arise only because rational individuals attain benefits from interacting with others and thus value the acceptance of others. Individuals attempt to determine the majority preference, and the failure to act in accordance with the view of the majority negatively impacts one’s perceived attractiveness to other group members.”).

out.¹³ For instance, as suggested heretofore, race is often more threatening to Whites when it talks back to them than when it merely exists among them.¹⁴ Within the economy, or along the continuum, of racialization, then, such conduct may more readily engender in a listener's mind an association between the employee of color and his social inequality.¹⁵ The vitality of First Amendment protection afforded the expression of speech by those most likely to be victimized by the economy of racialization is the focus of this Article. The implications of the First Amendment's protection of norm-violational speech by people of color for the norm-violational conduct of broad classes of socially unequal employees are a concomitant concern. Finally, this Article probes the reciprocal implications of speech constraints in the public and private sectors.

In Part I, after setting forth an autobiographical narrative that maps many of the social inequities of minority racializable speech, I traverse the continuum of racialization by examining a recent Supreme Court case in which a Latino assistant district attorney's speech had no apparent racial overtones, *Garcetti v. Ceballos*.¹⁶ *Garcetti* arguably represents the low ebb of racialization while illustrating how race-imbued social predispositions can nevertheless influence an employer's reaction to employee speech. *Rankin v. McPherson*,¹⁷ an earlier Supreme Court case, locates a different point in the economy of racialization, one where the racial cast of the speech is unmistakable but where we lack sufficient information to know whether the speaker intended to hold herself out as an active practitioner of identity politics. Occupying an uncertain space in between *Rankin* and the archetype of racialization is the controversy surrounding *University of Colorado* Professor Ward Churchill.

13. An economy in this respect means "[a]n orderly, functional arrangement of parts; an organized system." THE AMERICAN HERITAGE DICTIONARY 583 (3d ed. 1996).

14. Cf. *Davis v. Boykin Mgmt. Co.*, No. 91-CV-359E(M), 1994 WL 714517, at *4 (W.D.N.Y. Dec. 21, 1994) (rejecting the employer's argument that the terminated plaintiff in a Title VII action must show that he was replaced by a member of a non-protected class, for "an employer might tolerate outspokenness in his white employees but find objectionable a comparable lack of reserve by a black employee because of a feeling that blacks 'should know their place'"); *Coleman v. Clark Oil & Ref. Co.*, 568 F. Supp. 1035, 1040 (E.D. Wis. 1983) (citing a Black plaintiff's allegation that job promotions were given to Blacks "less outspoken regarding matters of apparent racial discrimination").

15. See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1399 (1997) (defining the "political economy of race" as "the processes through which race is used to distribute power and maintain racial privilege"); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1230 (2002) (referencing the role of the political economy of race in endowing different skin colors with different social significance).

16. 126 S. Ct. 1951 (2006).

17. 483 U.S. 378 (1987).

Churchill, a Native American professor, used the term “little Eichmanns” in characterizing as enablers of American genocide the workers who perished in the September 11, 2001 World Trade Center attacks.¹⁸ The ensuing controversy raised confusing questions about the authenticity of Churchill’s Native American heritage as well as questions about Churchill’s interpretation of indigenous people’s history,¹⁹ the resolution of which could have broad implications for outsider scholarship and academic freedom generally. That the controversy trained on Churchill’s heritage and his scholarship on Native Americans—matters having no apparent relationship to his controversial statements regarding 9/11—simultaneously illustrates how the economy of racialization can de-value speech based on the perceived absence of the racial bona fides of the speaker and how the very same bona fides can be deployed to subordinate a person of color when he behaves inconsistently with White norms. Finally, Part I discusses *Jeffries v. Harleston*,²⁰ a federal circuit case in which a Black professor consciously exercises racial and arguably racist voice. The institutional and public outcry against Jeffries,²¹ whether justified or not, crystallized his status as a social subordinate and demonstrated a regimen for processing the errant speech of unequals that fortifies their inequality.

Having shown how status inequality interfaces with speech on matters of public concern to the disadvantage of employees of color in Part I, Part II of this Article explores the doctrinal challenges that First Amendment jurisprudence faces in attempting to account for the social inequality of a speaker in the employment context. I discuss the courts’ tendencies and limited stated justifications for applying only intermediate scrutiny to the prototype public employee free speech claim. I then discuss the doctrinal machinations in which plaintiffs engage in order to obtain closer scrutiny of their claim. Finally, in order to demonstrate the full frailty of First Amendment protection for some of the most socially vulnerable speakers, I unpack in greater detail the inequality-reinforcing characteristics of the Court’s holding in *Garcetti v. Ceballos*.²² Part III concedes that the

18. Ward Churchill, “*Some People Push Back*”: *On the Justice of Roosting Chickens*, <http://www.kersplebedeb.com/mystuff/s11/churchill.html>.

19. See *infra* note 127 and accompanying text (explaining that the authenticity of Churchill’s claim of Native American heritage has been challenged).

20. *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994), *modified by* 52 F.3d 9 (2d Cir. 1995).

21. See *infra* note 169 and accompanying text (relating how Jeffries’s employer classified his speech as racist and anti-Semitic).

22. 126 S. Ct. 1951 (2006).

Supreme Court is unlikely to dash the *Pickering*²³/*Connick*²⁴ balancing test, under which courts effectively apply intermediate scrutiny to employee free speech claims. I propose, however, a tactical means of shedding greater light on the manner in which speakers' social subordination distorts the proper application of the First Amendment in determining the protection speech is due. To do this, I juxtapose *Garcetti* with another retaliation case from the 2005–2006 term, *Burlington Northern & Santa Fe Railway Co. v. White*.²⁵ I demonstrate that although it involves statutory speech rights under Title VII, *Burlington Northern* represents a competing vision about the social meanings and effects of workplace discourse and offers principles logically transferable to the Supreme Court's First Amendment jurisprudence. I then re-litigate *Garcetti* under the aegis of *Burlington Northern*.

I. STORIES ABOUT RACE, "SPEECH ON A MATTER OF PUBLIC CONCERN," AND SOCIAL INEQUALITY

A. *Talking While Black: A Narrative and a Topology*

I sat in a faculty meeting some years ago during which a White colleague urged the adoption of a faculty resolution condemning the anonymous drawing of swastikas on library desks.²⁶ The matter had previously come to the attention of various faculty members as well as the law school administration. The resolution was uncontroversial

23. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

24. *Connick v. Myers*, 461 U.S. 138 (1983).

25. 126 S. Ct. 2405 (2006).

26. My use of personal narrative, a first for me, reflects a longstanding belief in praxis: race is a lived phenomenon, and those who write about it, regardless of their color, ought not to be "imperial scholars," out of touch with the very realities and people whose plights are their subject matters. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 568 (1984) (criticizing White scholars for attempting to monopolize the area of civil rights scholarship). Delgado claimed that a number of these scholars were not attuned to the lives, perspectives, and aspirations of the very people about whom they were writing. See *id.* (noting, for example, one author's claims that Blacks no longer needed heightened judicial protection because they had ceased being an insular minority). This concern seems no less pertinent to scholars of color who write in the area of race generally and about critical race theory in particular.

Imagine a proponent of tort reform who became a multi-millionaire by winning a personal injury suit. Imagine an ardent opponent of a woman's right to choose who had an elective abortion. Imagine the opponent of affirmative action who advances under its auspices. From these examples, it should be clear that some ideological positions are difficult to de-personalize and, as such, fairly expose their proponents to a challenge of personal consistency. In the context of race scholarship and critical race theory, those who espouse progressive and critical race theory but do not live it within their own professional or personal environs seem very much susceptible to Delgado's charge.

and passed without debate, with obligatory thanks to its sponsor. While appropriately prideful of its vote, the faculty's actions were *de rigueur*: symbolic racism, or racial insult, is a relatively facile object of opprobrium for all but the racially hidebound.²⁷ Popular racial discourse trains on such symbols (e.g., nooses,²⁸ crosses, swastikas) and words that demean (e.g., "nappy-headed ho's"²⁹). My colleagues' concerns and actions were thus microcosmic.

27. At least two types of symbolic racism require distinction here. One is the type that enables institutional discrimination by covertly and pretextually marginalizing people of color. This type of symbolic racism recasts racial motives as "moral feelings that blacks violate such traditional American values as individualism, self reliance, the work ethic, obedience, and discipline." Kevin Durrheim & John Dixon, *Attitudes in the Fiber of Everyday Life: The Discourse of Racial Evaluation and the Lived Experience of Desegregation*, 59 AM. PSYCHOLOGIST 626, 628 (2004) (quoting Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCHOL. 414, 416 (1981)). This brand of "symbolic racism is the glue that links political conservatism to racial prejudice among Whites in the contemporary era." David O. Sears & P.J. Henry, *The Origins of Symbolic Racism*, 85 J. PERSONALITY & SOC. PSYCHOL. 259, 264 (2003).

Swastikas, confederate flags, burning crosses, and the like may well aid and abet institutional discrimination, but there is nothing covert about these symbols. They are the manifestations of old-style racism driven underground by a modern "self-presentational" norm that overt discrimination not be displayed. See Durrheim & Dixon, *supra*, at 631 (asserting that individuals' concerns about being perceived as racist have led to "[r]acial stereotypes [that] are implied rather than explicitly stated"). Thus, I use the term "symbolic racism" to refer to transparent artifacts of racism, like a swastika or calling a person of color "nigger." To be sure, these symbols are often used to connote racial violence. See, e.g., Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Critics?*, 93 GEO. L.J. 575, 631 (2005) (noting the Supreme Court's reliance on the distinctive nature of cross burning as a harbinger of racial violence in denying that activity First Amendment protection). But racial symbolism in popular discourse is now just as often deployed by Whites to imply an equivalency between tangible harms, such as being deprived of political representation, and ethereal offenses, such as being harmed by the visual appearance of a district. See *Shaw v. Reno*, 509 U.S. 630, 638, 642 (1993) (holding that White plaintiffs who suffered no impairment to either the proportionality of congressional representation from their state or to their right to freely cast a vote were permitted to bring a constitutional claim because a newly drawn congressional district "though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race . . ."). I thus also use the term symbolic discrimination in contradistinction to what are often more consequential forms of racism, such as being denied a job on the basis of race or suffering present effects from the legacy of state-sanctioned discrimination.

28. Following the "Jena 6" controversy, in which violence erupted at a local high school in Louisiana after a noose was hung on a "Whites only" tree, a spate of noose-hanging incidents occurred throughout the country, causing an emotional debate about the meaning of the symbol. See, e.g., Paul Vitello, *Few Answers About Nooses But Much Talk of Jim Crow*, N.Y. TIMES, Oct. 21, 2007, at A31 (reporting on incidents in the New York metropolitan area); Paul Vitello, *This Halloween, the Man in the Noose Seems to Have Won a Reprieve*, N.Y. TIMES, Oct. 27, 2007, at B1 (reporting that the noose symbol had become so sensitive an issue around the country that the Halloween ghoul in a noose had drawn protests).

29. See *infra* note 176 and accompanying text (asserting that the racist insult employed by Don Imus pales in comparison to the effects on minorities of the policies of politicians such as Ronald Reagan and Trent Lott).

Many of these same colleagues, however, could not see how it was plausible to charge the law school—and by extension, them—with discrimination for their rejection of each of eight Black entry-level candidates for a tenure-track position that the school had called back over a five-year period. Indeed, one of the most resistant to this inference was the very colleague who sponsored the motion concerning the swastikas. My colleagues' denials seemed particularly strained in light of these candidates' qualifications, which included doctorate degrees, federal appellate clerkships, law review memberships, and well-placed law review publications. The source of the disparity in their reaction to the swastikas versus their failure to hire qualified Black entry-level candidates appeared to lie in their belief that there were neutral justifications for their hiring decisions that insulated them from the same ignominy associated with swastikas. My colleagues did not appreciate that racial discrimination is most likely to take place when there is a neutral justification rather than when the actor's behavior clearly abridges a social norm, as did the drawing of the swastikas.³⁰

Institutional racism, whose manifestations are often more inferential than direct, does not lend itself to the convenient moral indignation of railing against a symbol; rather it requires a higher order of thought and an understanding of the structural impediments to equal opportunity and their interaction with individual Whites' motives, actions, and privileges.³¹ Those who press

30. See Gordon Hodson et al., *Processes in Racial Discrimination: Differential Weighting of Conflicting Information*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 460, 469 (2002) ("Whites' bias against Blacks is most likely to be expressed when socially appropriate, normative responses are less clearly defined and negative responses can be justified on factors others [sic] than race."); see also Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 747 (2005) (arguing that as a consequence of the conflict between denial of personal prejudice and latent prejudice feelings and beliefs, "discrimination is most likely to occur in contexts where it can be justified as something other than discrimination").

31. See John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 358 (2007) (comprehending racism as more than bad motives and actions on the part of individual actors: "race, racial meanings, and racial practices are really about all people in the United States, cultural meaning, institutional arrangements, and their interactions. These inter-institutional actions and structures cannot be understood by looking for a single cause."); see also Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Discrimination*, 109 YALE L.J. 1717, 1728 (2000) (setting forth a theory of discrimination that neither relies solely on the motivated actions of individuals nor ignores their relevance). Lopez states:

In this way, the term "institutional racism" functions here on both technical and popular levels. In the technical sense, the phenomenon at issue is institutional racism because it involves unconsidered actions rooted in the sorts of institutions contemplated by New Institutionalism: the background scripts and paths that mark social and organizational life. In the popular sense, it is institutional racism because it describes activity more likely to

a charge of institutional discrimination, as I did on behalf of the Black law teaching candidates, are at a marked rhetorical and political disadvantage because the depth of the victimization wrought by institutional prejudice often cannot be abridged into a visual representation or an epithet. Thus, rather than being hailed like my colleague who had proposed the resolution condemning the desk swastikas, my conduct came to be viewed as violating unspecified community norms.³²

If all condemnation of racism is not created equally because all racism is not equally recognized, a similar inequality applies to those who speak about race. As an African American man who was the most vociferous, and sometimes the lone, voice concerning questions of minority hiring, I came to understand this acutely over the course of fifteen years at my institution. Progressive White colleagues perceived their antiracist obligations to be limited to voting for the Black candidates rather than challenging the persons and structures that conspired to defeat—and in several instances mistreat—these candidates.³³ Untenured colleagues of color were constrained by

arise within the formally organized bodies commonly referred to as institutions—for example, the courts.

Id. at 1727–28. Although I believe that a lack of sophistication in appreciating institutional racism played a large role in the faculty's behavior, I would not dismiss White microaggression as a cohabiting explanation. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (describing microaggression against Blacks as “subtle, stunning, often automatic and non-verbal exchanges which are ‘put downs’ of blacks by offenders” (quoting Chester M. Pierce et al., *An Experiment in Racism: TV Commercials*, in TELEVISION & EDUCATION 62, 66 (C. Pierce ed., 1978))).

32. Whites recoil at being accused of discrimination or bigotry. See *infra* note 96 and accompanying text (discussing Whites' discomfort at even the prospect of being perceived as racist). The reaction of my colleagues thus emulated a well-traversed flight from substance:

Minority (as well as non-minority) law professors and students who are committed to fostering diversity and inclusion in the legal profession are quite familiar with the ways in which resistance to exclusionary admissions, appointments, and promotion practices is silenced. Oftentimes, this silence is organized around discourses of “collegiality,” which cast resistance as “uncollegial,” or through discourses of “academic freedom.” These discursive practices enable impunity by silencing internal criticism and deflecting external accountability from the frequently racist and sexist decision-making processes through which social elites reproduce their political, institutional, and cultural dominance.

Elizabeth M. Iglesias & Francisco Valdes, *Expanding Directions, Exploding Parameters: Culture and Nation in LatCrit Coalitional Imagination*, 33 U. MICH. J.L. REFORM 203, 219 (2000); see also Sharon Elizabeth Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 22 (1999) (“Naturally, the radical voices of oppositional thinkers who focus their concerns primarily on institutional racism are even less likely to be heard by White society or by their moderate ‘formal equality’ allies of color.”).

33. The reticence of progressive White colleagues, and their propensity to retreat no sooner than their reticence was overcome, was perhaps the most frustrating aspect of my advocacy for minority hiring. Just as these colleagues occupy a

their status. Other colleagues of color who enjoyed the protections of tenure appeared at least as invested in mollifying White colleagues as they were in resisting racism. In this company, I was easily cast as a “race man.” With this moniker came the common tropes and canards of racialization, including charges of “divisiveness,”³⁴ uncollegiality,³⁵ and unwarranted anger.³⁶

Free speech is perhaps never free of social costs, but these costs are borne in different ways by speakers of different races. Were my speech my only departure from community norms or expectations, perhaps this narrative would be unilluminating on the subject of workplace discourse. But I spoke the language of an outsider while occupying the shoes of a social unequal. I was Black in a White institution. Perhaps more importantly, I was Black and male in a White institution. I could not help but wonder, based on their at times irrational and apoplectic reactions to my charges of discrimination in hiring,³⁷ whether some colleagues heard and

privileged space in general due to their race, they also occupy a privileged position with respect to debates about race: “It is widely acknowledged among antiracists that Whites are taken more seriously when talking about racism than are people of color, just as feminists know that men are taken much more seriously than are women when they are talking about sexism.” Eileen O’Brien, *Whites Doing Antiracism: Discourse, Practice, Emotion and Organizations* 104–05 (May 1999) (unpublished Ph.D. dissertation, University of Florida), available at http://etd.fcla.edu/UF/amg2153/obrian_e.pdf.

34. The charge by Whites that accusing them of discrimination is divisive is a rhetorical move whose logical extension would chill any claim of discrimination. See Derrick Bell & Linda Singer, Commentary, *Making a Record*, 26 CONN. L. REV. 265, 266 (1993) (“The debate [regarding a claim of racism] immediately centers upon the propriety of the accusation and the character of the accuser. The complaint is displaced or discredited, even though we never reach its merits.”).

35. The use of collegiality standards to suppress racial dissent and marginalize those who charge discrimination typifies the process of racialization as that term is conceived in this Article. The encroachment on a norm of racial hierarchy need not be great to earn the disrepute of being uncollegial. Sumi Cho, “Unwise,” “Untimely,” and “Extreme”: *Redefining Collegial Culture in the Workplace and Revaluing the Role of Social Change*, 39 U.C. DAVIS L. REV. 805, 809–10 (2006). When the speaker is a member of a minority group, as he often will be in the context of a charge of discrimination, his status is liable to be deployed to devalue his speech, for modern psychology teaches “that ‘subjective judgments of interpersonal skills and collegiality are quite vulnerable to stereotypic biases.’” Hart, *supra* note 30, at 748 (quoting Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOLOGIST 1049, 1056 (1991)).

36. When Whites refer to a Black man as “angry,” the semantic choice is often a nod to stereotype. See Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 568 n.225 (2003) (citing BELL HOOKS, *KILLING RAGE: ENDING RACISM* 18–19 (1995)) (contrasting the popular view of Black anger as gratuitously violent with the intellectual militancy represented by figures such as Malcolm X).

37. These reactions ranged from coercion (i.e., informing an untenured colleague of color that she should not have voted in support of a particular motion I made) to aggression (i.e., accosting me in a hallway with the expectation that I would retract my positions and then labeling me arrogant when I refused to do so) to

interpreted my speech through the prism of their privilege and my racial inequality. I strongly suspect that they did—and continue to. The highly publicized experiences of the litigants of color discussed hereinafter reveal that my own experience is far from aberrational.

Justice Harry Blackmun, in a moment of judicial candor, observed in a dissenting opinion on public employee privacy rights that “judges are never free from the feelings of the times or those emerging from their own personal lives.”³⁸ Blackmun could just as easily have been referring to any other decision-maker or even to humans generally. He might have added that these personal influences need not be conscious. As Professor Linda Krieger has observed in her highly regarded application of cognitive psychology to status-based discrimination, individuals seldom process information *sui generis*; rather, they simplify it into broader categories to expedite an understanding, albeit an imperfect one, of persons and events.³⁹ These cognitive processes can “result in stereotyping and other forms

provocation (i.e., publicly and confrontationally deriding my claim that race almost certainly played a role in the rejection of eight consecutive Black entry-level candidates) to suppression (attempting to sanction my speech). Concededly, these are also reactions to unpopular speech made by non-minorities, but an equality of hostile treatment can be meted out with different motives and can inflict quite unequal injury. The social position of an employee to whom such reactions are directed shades the cultural meaning of the exchange as well as the perceptions of the minority employee’s responses.

People of color like me and the Black candidates on whose behalf I spoke are far more likely to be victimized by institutional rather than symbolic discrimination. See Lopez, *supra* note 31, at 1723 (contending that institutional racism “may well constitute the greatest source of ongoing harm to minority communities”); see also Harris, *supra* note 15, at 1216 n.4 (“[I]nstitutional practices are in fact the most dominant form of reproducing racial inequality in the modern age.” (citing Lopez, *supra* note 31, at 1730–48)). Yet because the former is often treated as an unprovable abstraction, White colleagues could with impunity belittle my charges of discrimination against Black teaching candidates. See Victor M. Goode & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 *FORDHAM URB. L.J.* 1143, 1159 (2003) (noting that while evidence of symbolic racism such as racial epithets and threats of violence have resulted in rewards of damages for emotional harm in the context of housing discrimination lawsuits, emotional harms caused by the more subtle practice of institutional racism have been harder to prove). Moreover, my or any other minority employee’s response to retaliatory actions of the sort enumerated here will be disadvantaged because such actions are often consciously or unconsciously perpetrated with a view towards eliciting a response that conforms to the stereotype the aggressor harbors of the minority employee’s racial group. See Smith, *supra* note 36, at 568 n.225 (contending that any confrontational opposition to discrimination by an African American employee is prone to being discounted as mere violent behavior because of the stereotypical portrayal of African Americans as angry).

38. *O’Connor v. Ortega*, 480 U.S. 709, 734 n.3 (1987) (Blackmun, J., dissenting).

39. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1188–91 (1995) (explaining that to approach every new encounter or individual as a unique experience would overwhelm the cognitive abilities of humans).

of biased intergroup judgment previously attributed to motivational processes.”⁴⁰ Once in place, stereotypes operate as a latent schema for perceiving other people and information about other people.⁴¹ No intent is necessary to summon the stereotypes into operation.⁴² Indeed, a decision-maker is often unaware that he harbors them.⁴³

The processing of language is not significantly different from the cognitive processing of people and information about people, for as sociolinguists observe, “people may be just as ‘biased’ in the interpretation of conversation or media messages.”⁴⁴ Discourse plays an integral role in the reproduction of societal prejudice and discrimination. The process is symbiotic. On the one hand, the manner in which Whites discuss minorities, both in everyday conversation and in the media and other elite conduits, reinforces in-group racial hegemony and out-group racial stereotypes.⁴⁵ On the other hand, the same social cognition that affects Whites’ discourse about minorities also affects their perception and interpretation of minority speech.⁴⁶ I have little doubt that much of the opposition to

40. *Id.* at 1187.

41. *See id.* at 1190 (relating that schemas “influence[] the interpretation, encoding, and organizing of incoming information and mediate[] the drawing of inferences or the making of predictions about the schematized object or event”).

42. *See id.* at 1188 (noting that because stereotypes are created outside of the awareness of individuals, the individual employs them unintentionally).

43. *See id.* (explaining that people are unable to fully comprehend their own cognitive processes, and therefore stereotypes are a product of the individual’s unconscious mind).

44. TEUN A. VAN DIJK, COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK 249 (1987).

45. *See id.* at 31 (“[S]ocial cognitions, in general, and ethnic attitudes, in particular, are acquired, shared, validated, normalized and communicated primarily through talk (and the media) rather than through perception and interaction.”); *id.* at 359–67 (discussing how prejudicial attitudes formulated by elite groups are promulgated through the media).

46. *See id.* at 23 (“[P]eople seldom act as passive reproducers of personal or social information derived from previous communicative events. . . . [R]ecipients apply a number of discourse comprehension strategies resulting in mental representations that may be rather distant transformations of the original source messages.”); *id.* at 25 (“[T]he strategies of talk and persuasion must correspond to cognitive strategies for the manipulation of ethnic information in memory.”); *id.* at 37 (“No serious account of discourse meaning, coherence, or other semantic properties is possible without notions such as concepts, knowledge and beliefs, frames, scripts, or models, that is, in terms of mental representations and cognitive processes of various kinds.”); *id.* at 203 (“Each time in-group members are confronted with (information about) new, salient out-groups, they need not figure out again what properties of such a group are relevant and about which characteristics opinions should be formed. . . . With a minimum of information, group members are thus able to form relevant and effective belief and opinion systems about the out-group. Obviously, this process is a function of several social structures and processes, such as communication, interaction, goals, and real or imagined social relationships with the out-group.”).

Dr. Fern L. Johnson’s theory of Language-Centered Perspective on Culture captures the dynamics of interracial discourse as a cross-cultural exchange among

my speech was born of the often unconscious processes described above, though I do not discount the role of motivation.

I opposed what I perceived to be discrimination against Black teaching candidates as a form of personal resistance to racism. People of color risk psychological and physical harm in internalizing discrimination.⁴⁷ Those who use self-help to confront it are often compelled to do so as a result of the injury wrought by discrimination and as a self-defense mechanism against further harm.⁴⁸ To be sure, not all employees who broach subjects about race or other controversial topics do so as an advocate. Yet their speech is still subject to the arbitrary workings of interpretive bias (both cognitive-process-based and motivational) and social and situational inequality. The stories below parallel my own in important respects. First, the workers' speech engages racism beyond its symbolic incarnation; the speakers thus labor under a political and rhetorical handicap that affects the perceived legitimacy of their speech. Second, whether intentional or not, the speech is referential to the workers' own social inequality, making it more likely that the very status to which their speech adverts becomes a determinant in assessing the speech's legitimacy. Finally, the workers' social inequality is deployed by White listeners to de-legitimize their speech.

These cases and current controversies, like my own, confirm that outsider speech by persons of color is high-risk, norm-violational conduct that subjects them to the economy of racialization in the workplace. Reactions and sanctions may vary with the precise nature of the speech and other incidentals, but in each instance, the social inequality of the speaker—his race—plays a discernible role in the interpretation of and reaction to his speech. I set forth the narratives below to round out the critical foreground for interrogating whether the First Amendment is capable of neutralizing the social inequality

American citizens. See FERN L. JOHNSON, *SPEAKING CULTURALLY: LANGUAGE DIVERSITY IN THE UNITED STATES* 63 (2000) ("Because communication arises within the cultural frameworks of participants, it is neither neutral nor objective but, rather, thickly cultured. . . . Intercultural communication occurs when the participants do not have full command of one another's cultural patterns or discourses and must somehow communicate across the divide.").

47. See Smith, *supra* note 36, at 548–49 (discussing studies on adverse health effects, such as high blood pressure and increased feelings of stress, that result from minorities suppressing anger over racism).

48. See *id.* at 548–50 (reviewing the results of studies that indicate that suppressing one's hostility toward racism contributes to hypertensive blood pressure and that responding to unfair treatment reduces the deleterious effects of discrimination).

of the speaker in determining whether a public employee's speech will be protected.⁴⁹

B. Richard Ceballos and the Invisible Hand of Race

When he voiced concerns that a deputy sheriff may have falsified information on an affidavit for a search warrant, deputy district attorney Richard Ceballos, a Latino, was not on a crusade against police misconduct,⁵⁰ although a then-recent police corruption scandal, the Rampart scandal, had left indelible imprints on the

49. I have intentionally selected cases and controversies involving speakers of color whose speech is politically left-of-center for two reasons. First, as a historical matter, Blacks who have been persecuted by the government for their speech have been primarily those whose speech matches the left-of-center political shade. See, e.g., *Bond v. Floyd*, 385 U.S. 116, 137 (1966) (overturning on First Amendment grounds the Georgia House of Representatives' exclusion of Representative Julian Bond, who had been refused his seat because of his vocal criticism of American involvement in Vietnam); MARTIN BAUML DUBERMAN, PAUL ROBESON: A BIOGRAPHY 388 (1988) (chronicling the State Department's revocation of singer-actor-activist Robeson's passport following his speech denouncing President Truman's deployment of troops to Korea and Black Americans' service in the war); Jeffrey Rogers Hummel, *Not Just Japanese Americans: The Untold Story of U.S. Repression During 'The Good War'*, 7 J. HIST. REV. 285, 303 (1986), available at http://www.ihr.org/jhr/v07/v07p285_Hummel.html (documenting that of the more than 200 prosecutions during World War II under the Espionage Act, the Foreign Agents Registration Act, the Smith Act, or the Selective Service Act, Blacks made up the largest number, with Black Muslims and other Blacks who sympathized with the Japanese as victims of White oppression composing most of this group).

Second, while I do not doubt that conservative minorities such as Justice Clarence Thomas are in some sense "raced" when they are criticized for their White-identified views, we should appreciate the disingenuousness of their claim. Black conservatives flirt with an inherent logical fallacy in insisting their ideology should not be defined by racial metrics—that is, they should not be expected to reflect Black views. Even as they insist that they should not be pigeonholed or stereotyped in this manner, some of the most influential of this lot, like Thomas, are guilty of stereotyping Blacks whose views *are* representative of the Black body politic. See Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 286–87 (2005) (critiquing Justice Thomas's view that a heavily Black congressional district drawn to elect a Democrat should be viewed as an unconstitutional racial gerrymander rather than a permissible partisan gerrymander: "Justice Thomas is a jurist who has refused to be defined by his race to any extent but is willing to define Black voters solely in terms of their race."). Moreover, the Black conservative claim of being "raced" or stereotyped is often a complaint that their views are being critiqued by other Blacks for their racial harm in the same way these Blacks critique the views of White conservatives. Their claim, in short, is a plea for racial exemption. Contrary to these specious claims, when conservative minorities are "raced" in the sense that this Article uses that term, it is in the unusual case where there is same-race authority, see, for example, Scott Jaschik, *\$600K for Fired Professor*, INSIDE HIGHER EDUC., Jan. 26, 2007, <http://insidehighered.com/news/2007/01/26/cobbs> (reporting on a Black Republican who had views that were in "a distinct minority" at a historically Black college and was fired from her tenured position at the school), or in cases where the conservative minority's political calculations misfired with the White audience whose receptivity was initially presumed. My jurisprudential analysis can be applied to either of these non-paradigmatic circumstances.

50. Telephone Interview with Richard Ceballos, District Attorney, Los Angeles County, in L.A., Cal. (Sept. 28, 2006).

criminal justice system in Los Angeles.⁵¹ Nor did Ceballos author the memoranda questioning the veracity of the police affiant as an act of identity politics, though he describes one lieutenant seeking his removal from the case as a “classical redneck.”⁵² Finally, Ceballos did not believe his actions were perceived through racialized lenses by his supervisors, for indeed one of his immediate supervisors was, like he, a Latino.

Notwithstanding Ceballos’s memos, his supervisors decided to proceed with prosecution of the case.⁵³ At a suppression hearing, Ceballos testified about the inaccuracies he found in the affidavit.⁵⁴ The trial court denied the motion to suppress.⁵⁵ In the aftermath of these events, Ceballos was transferred from his supervisory position of calendar attorney, assigned to another courthouse, and denied a promotion.⁵⁶ Believing these and other actions to be retaliation for his memoranda questioning the veracity of the police affiant, Ceballos sued, alleging a violation of his First Amendment rights.⁵⁷

In *Garcetti v. Ceballos*, the United States Supreme Court answered Ceballos’s claim prophylactically. Although public sector employees do not forfeit free speech rights by virtue of their government employment, “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁵⁸ Ceballos may have fallen victim to the Supreme Court’s misguided efforts to contrive a categorical distinction between public employee speech as citizen and public employee speech as servant, but, at first blush and by his own reckoning, he was not a victim of his employer’s racialization of him or his speech. The economy of racialization, however, is one of shades and degrees rather than demarcations. Speech, even if not intended as identity speech, may be racialized in

51. See generally Lou Cannon, *One Bad Cop*, N.Y. TIMES MAG., Oct. 1, 2000, at 32 (detailing the Rampart scandal, in which corrupt Los Angeles police officers stole drug evidence to sell on the streets, planted weapons on innocent suspects, shot innocent victims, and falsely testified about their activities); *id.* at 62 (reporting that the Rampart scandal exposed a criminal justice system in which “[c]orrupt police officers have been protected by laws, ballot initiatives and court decisions that have tipped the scale against defendants”).

52. Telephone Interview with Richard Ceballos, *supra* note 50.

53. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1956 (2006).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1960.

proportion to its susceptibility to being perceived as identity speech,⁵⁹ and racialization, in turn, does not depend on the active intentions of those to whom the speech is directed.⁶⁰

Although he did not understand his supervisors' retaliatory actions to be influenced by his race or theirs, Ceballos nonetheless described the mentality of his supervisors as "protect the police."⁶¹ In his view, he was punished for "not going along with the program."⁶² Indeed, Ceballos's Latina supervisor, Najera, was arguably even more encamped in this mentality, given her familial connections to law enforcement: both her husband and brother were policemen.⁶³ Stripped of any racial connotations, the conduct of Ceballos's supervisors certainly fits what social psychologists refer to as "the minimal group paradigm": the mere existence of social groups creates biases by which members of the in-group pre-judge members of an out-group.⁶⁴ The injection of race as an element of the social group exacerbates the potential for prejudice.⁶⁵ Here, the groups divided along the lines of those more inclined to side with the police and those more inclined to question them. Despite his shared ethnicity with one of his supervisors, Ceballos's supervisors

59. See KEITH REAVES, VOTING HOPES OR FEARS? WHITE VOTERS, BLACK CANDIDATES AND RACIAL POLITICS IN AMERICA 78–90 (1997) (using a social experiment to demonstrate that those political issues with a greater racial content display greater ability to prime Whites to vote against Black candidates: "The political effectiveness of 'racial code' is related to Whites' perceptions about the importance of race in the campaign."); Jennifer Yatskis Dukart, Comment, *Geduldig Reborn: Hibbs as a Success(?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 CAL. L. REV. 541, 570 (2005) (summarizing psychological research demonstrating that as the importance of a group characteristic increases, the observer will categorize based on that characteristic). However, in formal deliberative settings outside of conversational and political discourse, namely jury deliberations, some studies have shown the salience of race as an issue at trial to increase the evenhandedness of jurors' convictions and sentencing of defendants. See Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1016 (2003) ("[S]tudies provide support for the hypothesis that White juror bias is actually more likely to occur in trials without salient racial issues, where norms regarding race are weak—a conclusion that is consistent with theories of modern racism.").

60. See *supra* notes 39–46 and accompanying text (explaining that because the formation of stereotypes occurs unintentionally in an individual's subconscious, the individual applies them in the context of racialization without knowing that he is doing so).

61. Telephone Interview with Richard Ceballos, *supra* note 50.

62. *Id.*

63. *Id.*

64. Don Operario & Susan T. Fiske, *Racism Equals Power Plus Prejudice*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 33, 45 (J. Eberhardt & S. Fiske eds., 1998).

65. See *id.* at 45–46 (basing social groups on real-world factors such as race, rather than on random factors created for the purpose of studies, intensifies prejudice because of the existence of longstanding antagonism towards social out-groups and a desire to maintain the present social hierarchy).

represented a hegemonic social viewpoint while Ceballos's speech was an outlier, particularly in the setting of a prosecutor's office.

The "protect the police" mentality of prosecutors ensues in large part from their dependence on the police to develop evidence and testify in order to bring successful criminal prosecutions.⁶⁶ This practical reality is girded by cognitive bias, for "[i]n hypothesis testing terms, [prosecutors] are testing the hypothesis that the defendant is guilty. The phenomenon of confirmation bias suggests a natural tendency to review the reports not for exculpatory evidence that might disconfirm the tested hypothesis, but instead for inculpatory, confirming evidence."⁶⁷ Thus, it is not difficult to understand how and why Ceballos's speech abridged a work norm.

Nor is it difficult to connect that workplace norm to a larger social pathos. Setting to one side Najera's familial associations with the police, which likely reinforced her views, the citizenry at large tends to have a favorable view of the police.⁶⁸ Ceballos's challenge to the veracity of the police officer's search warrant affidavit affronted the mutualistic operation of societal perception and workplace norms, to say nothing of the personal feelings of his Latina supervisor.

We have thus far artificially denuded the "protect the police" mentality of its racial vestiges, largely in deference to Ceballos's belief that race played little obvious role in his discipline. Race, however, plays an undeniable role in the public perception of the police, and Ceballos's challenge to the honesty of a police officer did not take place in a cultural vacuum. One survey found that while nearly half of Whites expressed the highest level of satisfaction with neighborhood police, only a quarter of Blacks did, and only about a third of Latinos did.⁶⁹ Blacks, and to a lesser extent Latinos, are more likely to perceive the police as corrupt, to believe that they use excessive force, to believe that the police stop people without good reason, and to report having been the recipient of insulting language

66. See Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 305 (2001) (asserting that a prosecutor's relationship with police officers can create conflicts with his ethical responsibility to ensure that justice is done).

67. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1603 (2006).

68. See Ben Brown & William Reed Benedict, *Perceptions of the Police: Past Findings, Methodological Issues, Conceptual Issues and Policy Implications*, 25 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 543, 546-47 (2002) (citing survey data indicating that the police represented one of the most favorably looked upon organizations in the United States).

69. Ronald Weitzer & Steven A. Tuch, *Determinants of Public Satisfaction with the Police*, 8 POLICE Q. 279, 289 (2005).

from a police officer.⁷⁰ In light of these findings, when Ceballos, a Latino, brought alleged police misconduct to the attention of one White superior, Sundstedt, and another superior whose husband and brother were police officers, his speech may not have had obvious racial content, but it carried with it racial connotations. It is in this regard that Ceballos's experience can be placed within the economy of racialization, even if at a low ebb.

The precise placement of Ceballos's experience within the economy of racialization varies depending on whether the perspective is ex-ante or ex-post. Although Ceballos's initial assessment of the retaliation against him was that it was largely colorblind and outside the sector of racialization, his actions following the incident suggest otherwise. He co-founded the Latino Prosecutors Association, composed of Latino prosecutors.⁷¹ He is currently the president of the National Hispanic Prosecutors Association.⁷² And he became a member of several other minority organizations, including the Hispanic National Bar Association and the California La Raza Lawyers Association.⁷³ He readily attributes his increased political activism to the retaliation.⁷⁴ Rather than a contradiction, however, Ceballos's assessment of his treatment versus his reaction to it is perhaps more accurately viewed in terms of pre-conscience versus post-conscience racial identity formation.⁷⁵

Ironically, the very contestability of Ceballos's experience as a racialization event marks an important point of convergence with my own speech narrative. I contend that speech that expresses a viewpoint identified with the speaker's social inequality exposes the speaker to discrimination that he might not have otherwise incurred and permits the racial attributes and/or attitudes of the discussants to

70. Ronald Weitzer & Steven A. Tuch, *Race and Perceptions of Police Misconduct*, 51 SOC. PROBS. 305, 314 (2004).

71. Email from Richard Ceballos, District Attorney, Los Angeles County, to Terry Smith (Feb. 2, 2007) (on file with author).

72. *Id.*

73. *Id.*

74. *See id.* ("I don't think race had much if anything to do with what happened to me. But because of what I experienced, I became more politically active.").

75. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1173–76 (2004) (discussing "progression" models of racial identity development but cautioning that these models may not adequately explain Latino racial identity formation). My discussion of Ceballos's circumstances presents no occasion for me to critique the adequacy of these progression models, since I do not purport to evaluate Ceballos's life circumstances but rather only the change in how Ceballos came to approach his job. That change roughly maps the contours of progression models, in which the minority has a neutral or negative racial self-identity but transitions to "a strongly racially identified subject who is better socially adjusted and resilient in discriminatory circumstances." *Id.* at 1174.

affect the perceived legitimacy of the speech. Ceballos's avowed intentions were quite different from my own, and his speech lacked the obvious racial content that my statements to my colleagues about faculty hiring did. Regardless of these differences, both types of conduct were met with attempts at retaliation and suppression. Thus, even if we totally de-racialize Ceballos's experience, it nevertheless illustrates the unique character of speech as an impetus for in-group discrimination against non-conforming viewpoints and marks a baseline for evaluating the reactions of authorities confronted with speech more unambiguously identified with the social inequality of the speaker. If Ceballos was targeted for retaliation for arguably non-racial speech made pursuant to his job, we should relax any incredulity about the likelihood of negative reactions to racialized speech. We will see as we progress through the continuum of racialization that: (1) non-conforming speech, regardless of its racial content, provokes a similar reaction against speakers of color; and (2) the Supreme Court's First Amendment jurisprudence does little to mitigate this problem generally and even less when the non-conforming speech is indicative of the speaker's social inequality.

C. Rankin v. McPherson: *The Black Assassin*

Ardith McPherson, a Black woman who worked as a clerical in a constable's office in Texas,⁷⁶ was an unlikely spokesperson for African Americans, but when she spoke the sentiments of her identity group regarding the policies of President Ronald Reagan, she assumed this mantle, even if inadvertently. McPherson's speech regarding the policies of a popular president in a region of the country where his popularity was greatest was socially taboo fare—speech that violated general norms about how race and racism are to be discussed as well as the specific culture of her workplace. Moreover, the reaction to her speech, both from four Justices of the United States Supreme Court and from her employer, illustrates how Black oppositional speech is often re-interpreted by institutional actors to fit the stereotype that such actors harbor of Blacks in general, outspoken Blacks in particular.

Because former President Ronald Reagan has now been deified, it may be difficult for many to remember the social divisions he engendered as president. Reagan was as wildly unpopular among

76. See *Rankin v. McPherson*, 483 U.S. 378, 380 (1987) (describing her duties as "purely clerical," although her official title was deputy constable).

African Americans as he was popular among most White voters.⁷⁷ He did little to dispel African Americans' suspicions that his "conservatism" was at least in part a stalking horse for racial regression.⁷⁸ Indeed, a majority of Blacks viewed Reagan as a "racist."⁷⁹ Reagan began his 1980 campaign in Philadelphia, Mississippi, a town associated with some of the worst violence against civil rights activists during the 1960s.⁸⁰ The President's crusade against welfare cheats had a racial cast to it, as it was widely—though inaccurately—perceived by White voters that Blacks made up the bulk of welfare recipients.⁸¹ Reagan aggressively opposed affirmative action⁸² and nominated to the federal bench judges who took the narrowest view of constitutional provisions and statutory rights whose

77. See THEODORE RUETER, *THE POLITICS OF RACE: AFRICAN AMERICANS AND THE POLITICAL SYSTEM* 247–48 (1995) (noting that Reagan had received the lowest percentage of Black votes of any Republican presidential candidate and perhaps any Republican candidate for any office in American history).

78. See *id.* at 47 (describing Reagan as "a chief apostle of contemporary racial conservatism").

79. An ABC News poll found that 56% of Blacks viewed Reagan as a racist. Milton Coleman, *Reagan Rating Falls in Poll of Blacks: 56% Say President Is a Racist*, WASH. POST, Jan. 18, 1986, at A1. See also ABC News/Washington Post Poll, *Do You Think of Ronald Reagan as a Racist?*, The Roper Center for Public Opinion Research (Jan. 14, 1986), http://poll.orpub.com/document.php?id=quest86.out_4299&type=hitlist&num=0 (summarizing the results of the poll, which six years into Reagan's presidency found that 56% of Blacks thought Reagan was a racist).

Most White voters were fully cognizant that Reagan's policies were harming Blacks. A 1986 poll by the Joint Center for Political Studies asked: "Do you think that Reagan's policies have been harmful to blacks or not?" A striking 72% of the White respondents answered yes. Joint Center for Political Studies, *Do You Think That Reagan's Policies Have Been Harmful to Blacks or Not?* (1986), http://poll.orpub.com/document.php?id=quest86.out_4302&type=hitlist&num=3. Yet a majority of White voters still had a favorable opinion of President Reagan throughout his presidency. See CBS News/New York Times Poll, *Is your opinion of Ronald Reagan favorable, not favorable, undecided, or haven't you heard enough about Ronald Reagan yet to have an opinion?*, The Roper Center for Public Opinion Research (April 12, 1990), http://poll.orpub.com/document.php?id=quest90.out_9035&type=hitlist&num=0 (indicating that 59% of Whites had a "favorable" opinion of Reagan in 1984 and 51% of Whites had a "favorable" opinion in 1990). Furthermore, a substantial plurality of Whites approved of Reagan's performance on civil rights issues for minorities, even though they understood Reagan to be harming Blacks. Joint Center for Political Studies, *Do You Approve or Disapprove of the Way President Reagan Is Handling the Civil Rights of Minority Groups?* (1986), http://poll.orpub.com/document.php?id=quest86.out_4301&type=hitlist&num=2.

80. PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 300 (1999) (noting that White voters were not offended by the symbolism of Reagan commencing his campaign by declaring "I believe in states' rights" in a town where local Whites had murdered three civil rights workers).

81. See *id.* (arguing that Reagan's crusade against "big government" focused mainly on programs that Whites identified with Blacks, namely welfare and food stamps).

82. See HAROLD C. FLEMING & VIRGINIA FLEMING, *THE POTOMAC CHRONICLE: PUBLIC POLICY AND CIVIL RIGHTS FROM KENNEDY TO REAGAN* 251 (1996) (detailing the Reagan administration's sustained attack on affirmative action).

implementation profoundly affected the everyday lives of Americans of color.⁸³

McPherson shared the abiding suspicions of Reagan harbored by most African Americans. In 1981, she and some coworkers learned over an office radio of John Hinckley's attempted assassination of President Reagan.⁸⁴ McPherson shortly thereafter engaged a coworker (who was also her boyfriend) in a conversation, her recollection of which went as follows:

Q: What did you say?

A: I said I felt that that would happen sooner or later.

Q: Okay. And what did Lawrence say?

A: Lawrence said, yeah, agreeing with me.

Q: Okay. Now, when you—after Lawrence spoke, then what was your next comment?

A: Well, we were talking—it's a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use [M]edicaid, and at the time, I was thinking that's what it was. . . . But then after I said that, and then Lawrence said, yeah, he's cutting back [M]edicaid and food stamps. And I said, yeah, welfare and CETA. I said, shoot, if they go for him again, I hope they get him.⁸⁵

Although McPherson and her boyfriend believed they were in a room by themselves, her last remark was overheard by a coworker who in turn reported it to Constable Rankin.⁸⁶ When asked by Rankin if she made the remark, McPherson responded, "Yes, but I didn't mean anything by it."⁸⁷ She was immediately fired.⁸⁸

McPherson brought suit alleging a violation of her First Amendment rights. Writing for the majority, Justice Thurgood Marshall first noted the classic duality of the government employer: it is both an employer concerned with the efficient operation of the government's affairs and a public entity bound by the constraints of the First Amendment.⁸⁹ As such, the government employer cannot dismiss or discipline an employee merely because the employer disagrees with the content of her speech.⁹⁰ Rather, the threshold

83. See KLINKNER & SMITH, *supra* note 80, at 302 (discussing Reagan's efforts to stack the federal bench with "racial conservatives").

84. Rankin v. McPherson, 483 U.S. 378, 381 (1987).

85. *Id.*

86. *Id.*

87. *Id.* at 381–82.

88. *Id.* at 382.

89. *Id.* at 384.

90. *Id.*

question in determining whether McPherson's dismissal was constitutional was whether her speech was "on a matter of public concern."⁹¹ This determination in turn depended on the content, form, and context of McPherson's statements. If McPherson's speech was on a matter of public concern, her interest in making her statement had to be weighed against the employer's interest in efficiency, considering such issues as her speech's interference with work, personal relationships, and intra-office harmony.⁹²

Justice Marshall disposed of the first issue with dispatch. Because McPherson's statement was not a threat to kill the President, but rather was a controversial coda in a discussion about President Reagan's policies that transpired after an attempt on his life, her speech was clearly on a matter of public concern.⁹³ In so holding, Marshall eschewed a characterization of McPherson's speech that appeared apt, particularly in light of his otherwise gratuitous reference to McPherson as "a black woman."⁹⁴ Under the eschewed depiction of her speech, McPherson's speech was about racial discrimination, which, according to the Court's prior case law, was "a matter inherently of public concern."⁹⁵ The Court's identification of racial discrimination as a matter of public concern, however, is a classic illustration of the disconnect between pronouncements of law by the Court and social transformation. If racial discrimination is "a matter inherently of public concern," it is also a tinderbox, so much so that avoidance of the charge is one reason for the lack of socialization between Whites and Blacks.⁹⁶

But McPherson's termination can be understood to reflect more than the taboo and stultification around race talk in America. She prevailed in the Supreme Court by one vote against four Justices who ascribed violent motive to her speech in much the same way my colleagues had instrumentally translated my own speech. Consider Justice Scalia's apoplectic dissent, which reflects a broader stereotype about Black self-assertion:

91. *Id.* at 384–85.

92. *Id.* at 388–89.

93. *Id.* at 386.

94. *Id.* at 380.

95. *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979)).

96. See J. Nicole Shelton & Jennifer A. Richeson, *Intergroup Contact and Pluralistic Ignorance*, 88 J. PERSONALITY & SOC. PSYCHOL. 91, 97 (2005) ("Whites anticipate that out-group members will perceive them as being cold and prejudiced and, as a consequence, will behave negatively toward them. . . . Whites explain their avoidance of intergroup contact as a result of their concerns about being rejected because of their race.").

Given the meaning of the remark, there is no basis for the Court's suggestion that McPherson's criticisms of the President's policies that immediately preceded the remark can illuminate it in such a fashion as to render it constitutionally protected. Those criticisms merely reveal the speaker's *motive* for expressing the desire that the next attempt on the President's life succeed, in the same way that a political assassin's remarks to his victim before pulling the trigger might reveal a motive for that crime. The majority's magical transformation of the *motive* for McPherson's statement into its *content* is as misguided as viewing a political assassination preceded by a harangue as nothing more than a strong denunciation of the victim's political views.⁹⁷

Speech by a Black man accusing a law school of discrimination against teaching applicants is re-interpreted as incivility. Speech by a cleric accusing the President of discrimination is likened to an assassination plot. Social psychology offers insights into the disparity between speech and perception. Studies suggest that a racial minority's social inequality has a negative impact on the listener's perception of what is said. These studies do not focus on political speech as such. Instead, they examine so-called ambiguously aggressive acts by both White and Black subjects to determine whether those acts are interpreted similarly by an observer. A 1980 study by Sagar and Schofield in the *Journal of Personality and Social Psychology* concluded as follows:

[E]ven relatively innocuous acts by black males are likely to be considered more threatening than the same behaviors by white males. This tendency to perceive threat in blacks' behaviors appears to be all too generalizable to a number of situations and populations in this country. It occurred in Duncan's study in which white college students saw one confederate give another a light shove in the context of a rather heated discussion. It appeared again in this study as sixth-grade students judged four different interaction types that involved no direct suggestion of anger and, in two cases, no physical contact whatsoever. Most notably, in this study behavior ratings by black students reflected the same antiblack bias as those by white students.⁹⁸

97. *Rankin*, 483 U.S. at 396–97 (Scalia, J., dissenting) (internal citations omitted).

98. H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 596 (1980).

Sagar and Schofield and other social psychologists reveal how people of color become victims of “differential social perception.”⁹⁹ Predicated on psychology’s empiricism that “we tend to perceive what we wish or expect to perceive,”¹⁰⁰ testing of the differential social perception hypothesis has found that Whites have a lower threshold for perceiving an act as violent when the actor is Black than when a White performs the very same act.¹⁰¹ The intrusion of racial stereotypes into social perceptions has been demonstrated to affect the speed with which Whites identify weapons¹⁰² and the rate at which they misidentify a harmless object as a weapon.¹⁰³

Regardless of the experimental context, however, if racial stereotype taints our perception of ambiguously aggressive behavior by Blacks, it undoubtedly taints our perception of self-assertive behavior by Blacks, particularly when the behavior is speech about race itself, speech associated with the actor’s social inequality. Sociolinguists’ study of cultural communication norms supplies a critical insight into the cognitive and rhetorical dissonance between Justice Marshall’s and Justice Scalia’s perceptions of McPherson’s speech:

Many of the more assertive and aggressive African American behaviors (e.g., shouting, threatening) are not in the realm of typical public behavior for European Americans and signal impending physical violence when presented. European Americans may interpret African American behavior as signaling physical confrontation when none is intended, particularly when the behavior includes shouting, animated gesturing, and staring. Kochman (1981) argues that relative confidence in the ability to deal with anger is the basis for these divergent perceptions. . . . African Americans have less need to repress these feelings and

99. Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 590–98 (1976).

100. *Id.* at 590.

101. *Id.* at 596. Like Sagar and Schofield’s experiment, Duncan’s involved a series of taped vignettes, the scripts for which varied only with respect to the race of the harm-doer and the victim. The discussion between the actors becomes somewhat excited and culminates in one actor lightly shoving the other. The tapes were shown individually to 104 White undergraduate students attending the *University of California at Irvine*. When the harm-doer was Black, 75% of the students described his actions as violent, whereas when the harm-doer was White and the victim Black, only 17% of the subjects labeled the behavior as violent. *Id.* at 595.

102. See B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 187 (2001) (“[N]on-Black participants were faster to identify guns when they were primed by Black versus White faces.”).

103. *Id.* at 188.

their expressions since they believe they can control the escalation of events.¹⁰⁴

If racial stereotypicality permeates a Supreme Court Justice's view of McPherson's language, it is not difficult to understand how it may have infected her supervisor's decision to terminate her. Antiblack mythology is ingrained into the sub-conscience of White Americans. The discipline of social psychology confirms that much racism is aversive in character and arises from deep-seated cognitive and attitudinal biases.¹⁰⁵ As a working-class Black woman, McPherson's speech on a matter of public concern potentially primed a number of such biases held by her White superior, Rankin.¹⁰⁶ For instance, Whites attempt to conceal the existence of racism in the United States by insisting that equal opportunity exists for all.¹⁰⁷ Speech such as McPherson's that challenges this notion by questioning the racial sensitivity of the President of the United States may have upset White norms. Likewise, the stereotype of the indolent Black welfare recipient is common among White Americans.¹⁰⁸ McPherson's defense of welfare and similar programs may have activated that stereotype. In any case, the power differential between McPherson and her boss made it more likely that Rankin would bring to bear negative stereotypes in his decision-making, for social psychology confirms that the situational inequality of a minority increases the tendency of Whites to deploy such stereotypes.¹⁰⁹ So, too, does a heightened emotional state, which Rankin was likely experiencing upon hearing McPherson's remarks.¹¹⁰

As a social unequal, McPherson's exercise of her First Amendment rights was freighted with these and other disabilities. Had she been a

104. MICHAEL L. HECHT ET AL., *AFRICAN AMERICAN COMMUNICATION: ETHNIC IDENTITY AND CULTURAL INTERPRETATION* 105 (Language & Language Behaviors vol. 2, 1993).

105. Krieger, *supra* note 39, at 1188–91.

106. See Email from Jeri Costello, Constable, to Terry Smith (Mar. 1, 2007) (on file with author) (stating that Rankin is White, though his race is omitted from the case).

107. See JOE R. FEAGIN & HERNAN VERA, *WHITE RACISM: THE BASICS* 150–51 (1st ed. 1995) (outlining “the gospel of the work ethic” that is so central to the White conception of self).

108. *Id.* at 151.

109. See Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 177, 181 (2003) (“[P]articipants [in the study] exposed to a black subordinate . . . revealed greater automatic racial bias . . . than participants anticipating an interaction with a black superior”); *id.* (“Situational power is known to influence the extent to which individuals engage in category-based information processing, such as stereotyping.”).

110. See Hai-Sook Kim & Robert S. Baron, *Exercise and the Illusory Correlation: Does Arousal Heighten Stereotypic Processing?*, 24 J. EXPERIMENTAL SOC. PSYCHOL. 366–80 (1988) (confirming the correlation between physiological arousal and an increased tendency to perceive stereotypical similarities).

Black man and spoken the same words, the racialization of her speech may well have been greater. The threat perception by Whites is greater when assertive conduct is engaged in by Black males, regardless of age.¹¹¹ I had understood this during my years of advocating for minority hiring and refusing to be co-opted or coerced into silence. My activism prompted two White colleagues to comment to another that the law school would not likely hire another Black man in the near future. The colleague to whom the remark was made admonished them that their disposition smacked of illegal discrimination, among other opprobrium. The anti-racist norm transgressors¹¹² instantly sought refuge in what sociolinguist Teun van Dijk has termed “transfer[ring] the charge to others: ‘I have nothing against blacks, but my neighbours (customers, etc.) . . .’”¹¹³ Although the norm transgressors disassociated themselves from their own statements, fifteen years after my hiring, I remained one of two Black male faculty members, the other having been hired at the same time as I.

As different as McPherson’s motivations to speak may have been from mine—she appears to have been engaged in casual conversation, I in a cause—the convergence in the treatment of our speech, its racialization, is remarkable and suggests the limitations of current First Amendment doctrine to protect public sector workers like McPherson. *Pickering/Connick’s* balancing test, coupled with its recent hollowing by *Garcetti*, is a baleful invitation for the public employee to address a matter of public concern where the employee

111. Sagar & Schofield, *supra* note 98, at 596; see Wendy Berry Mendes et al., *Challenge and Threat During Social Interactions with White and Black Men*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 939, 950 (2002) (reporting the results of an experiment that used physiological reactions to measure threat perception). Among the authors’ conclusions were: “The results of this experiment support the hypothesis that participants experience threat during social encounters with devalued group members. Non-Black participants interacting with Black or disadvantaged SES confederates exhibited CV responses consistent with threat during two separate tasks.” Mendes et al., *supra*, at 950; see also Roy L. Brooks, *American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 71 J.L. & SOC. CHALLENGES 1, 57–58 (2005) (“[A]ssertive behavior by Black males that is encouraged in the home and on the playground usually is seen as negative behavior in the classroom.” (quoting Valora Washington & Joanna Newman, *Setting Our Own Agenda: Exploring the Meaning of Gender Disparities Among Blacks in Higher Education*, 60 J. NEGRO EDUC. 19, 23 (1991))) (quotations omitted).

112. See David Mellor et al., *The Perception of Racism in Ambiguous Scenarios*, 27 J. ETHNIC & MIGRATION STUD. 473, 473 (2001) (asserting that overt racism is viewed as politically unacceptable in the United States).

113. Teun A. van Dijk, *Denying Racism: Elite Discourse and Racism*, in RACISM AND MIGRATION IN WESTERN EUROPE 179, 181 (J. Solomos & J. Wrench eds., 1993), available at <http://www.discourses.org/OldArticles/Denying%20racism%20-%20Elite%20discourse%20and%20racism.pdf> [hereinafter *Elite Discourse*].

is already more likely to be the victim of discrimination. The slender one-vote reed on which McPherson's victory in the Supreme Court hung suggests that First Amendment public employee jurisprudence does not account for the social inequality of speakers and is thus unable to effectively intervene in the economy of racialization in the workplace.

D. Ward Churchill and Heretic Voices of Color in a Moment of Unity

Professor Ward Churchill is a Native American scholar and activist who is not ocularly identifiable as a racial minority. His statements following the terrorist attacks of September 11, 2001, however, would eventually cause him to be repeatedly identified as a Native American and marginalized for bringing to bear "an Indian point of view" about contested issues of Native American history,¹¹⁴ even as his own authenticity as a Native American was questioned by critics. In the process of this controversy's unfolding, Churchill would find himself in the company of a distinct minority—some of the most prominent members of which were Black Americans—who did not outwardly conform to post-9/11 expectations of good citizenship.¹¹⁵ In an essay entitled "*Some People Push Back*": *On the Justice of Roosting Chickens*, Churchill questioned the innocence of those who perished in the World Trade Center because they had, however passively, supported the United States' surgical bombing of Iraq that had led to the deaths of 500,000 Iraqi children.¹¹⁶ Likening Americans' support of the bombing of Iraq during the Gulf War and afterwards to German

114. Telephone Interview with Ward Churchill, Professor of Ethnic Studies, *University of Colorado at Boulder*, in Boulder, Colo. (Mar. 9, 2007).

115. See Edward Epstein, *Lone Dissenter in House War Vote is Oakland's Lee*, S.F. CHRON., Sept. 15, 2001, at A10 (stating that Representative Barbara Lee of Oakland, California was the only member of Congress to vote against the resolution passed within days of 9/11 that gave the President authority to attack Afghanistan); George Will, *Populist Russ Feingold Could Be Democrats' Answer in 2008*, TALLAHASSEE DEMOCRAT, Nov. 13, 2005, at 5E (noting that another Black congresswoman, Representative Cynthia McKinney of Georgia, suggested that the Bush administration had known in advance about the 9/11 attacks). McKinney "darkly hints that President Bush may have known that the 9/11 attacks were coming and welcomed them as a boost for defense-industry stocks owned by 'persons close to' his administration." Will, *supra*; see also Cedric John, *Black Radical Enigma*, MONTHLY REV., Dec. 2004, at 42 (pointing out that New Jersey State poet laureate Amiri Baraka ignited a firestorm by suggesting that Israeli Prime Minister Ariel Sharon had prior knowledge of the 9/11 attacks and forewarned Jewish employees to exit the towers). Other acts of protests by African Americans drew less notoriety because they did not involve public figures. See, e.g., Betty Pleasant, *Black Voices of Dissent Raised Amid National Unity*, L.A. SENTINEL, Sept. 27, 2001, at A1 (two American Black Muslim firefighters in Miami-Dade County refused to ride fire engines featuring the American flag because they viewed the flag as a symbol of oppression).

116. Churchill, *supra* note 18.

citizens' support for Adolf Hitler, Churchill said of the World Trade Center victims:

To the extent that any of them were unaware of the costs and consequences to others of what they were involved in—and in many cases excelling at—it was because of their absolute refusal to see. More likely, it was because they were too busy braying, incessantly and self-importantly, into their cell phones, arranging power lunches and stock transactions, each of which translated, conveniently out of sight, mind and smelling distance, into the starved and rotting flesh of infants. If there was a better, more effective, or in fact any other way of visiting some penalty befitting their participation upon the little Eichmanns inhabiting the sterile sanctuary of the twin towers, I'd really be interested in hearing about it.¹¹⁷

"Little Eichmanns" is a reference to Adolf Eichmann, an architect of the Holocaust.¹¹⁸

Although the media and press focused on the above-quoted statement, which itself makes no reference to race, the broader scope of the essay (or as Churchill calls it, the op-ed piece¹¹⁹) expresses an ethno-contrarian perspective, borrowing its title from Malcolm X's infamous reaction to the assassination of John F. Kennedy—"chickens coming home to roost"—and describing Iraqi children killed during America's bombing campaign as "vast legions of brown-skinned five-year-olds . . . shivering in the dark, wide-eyed in horror, whimpering as they expired in the most agonizing ways imaginable."¹²⁰ The essay represented his "intellectual understanding as a person of color" of the events of 9/11.¹²¹ Unlike Ceballos or McPherson, Churchill's speech was race-conscious and represented a form of identity advocacy.¹²² Although his speech's point of entry into the economy of

117. *Id.*

118. See Michelle York, *Remark on 9/11 Sparks Storm at College*, N.Y. TIMES, Jan. 31, 2005, at B3 (describing Eichmann as "the architect of the plan to exterminate the Jews"). Churchill disputes the popular media's understanding of Eichmann's role in the Holocaust and hence of Churchill's analogy: "The comparison was of technocrats. Eichmann is someone who, after all, killed no one. He made the trains run on time." Telephone Interview with Ward Churchill, *supra* note 114.

119. Telephone Interview with Ward Churchill, *supra* note 114.

120. Churchill, *supra* note 18.

121. Telephone Interview with Ward Churchill, *supra* note 114.

122. Although the essay represented his intellectual understanding of 9/11 as a person of color, Churchill believes that "a White person would end up with the same intellectual understanding as a person of color" if the White person possessed a factual understanding of United States history. *Id.* By this, Churchill does not imply that the thoughts he articulated in the essay were shared by people of color but not by Whites. *Id.* Indeed, there appears to be no polling data taken in the immediate aftermath of the attacks of 9/11 seeking to gauge racial differences in the perception of events. Whether mass silence and expressions of empathy after 9/11 can be taken

racialization differs somewhat from the prior narratives, Churchill believes that his social inequality, his status as a self-identifying person of color, figured determinatively in the amplitude with which his speech was heard.

Churchill's controversial post-9/11 essay did not exist in a vacuum; it was part of a continuum of a decades-long political and scholarly activism in the Native American Movement. In January of 2005, *Hamilton College* in New York rescinded a speaking invitation to Churchill because of the essay, though the piece by then was three years old and had gone largely unnoticed.¹²³ Shortly before *Hamilton College's* negation, Churchill had been a defendant in a criminal trial in which he and others were indicted for their actions in connection with a protest of a Denver-area Columbus Day celebration, an event which Churchill believes glorifies the genocide of Indians.¹²⁴ Representing himself pro se, Churchill used the trial as a teaching moment about the genocide.¹²⁵ After his acquittal, Churchill held a news conference, a victory lap of sorts. The celebration would be a tempered one, for *Hamilton College's* revocation of its invitation and the flap over his 9/11 comments would follow shortly. These controversies, in Churchill's view, were part of a different continuum: a sustained effort to blunt his "counter-hegemonic interpretation of American history and social order."¹²⁶

In the ensuing controversy, race would present itself as a paradox of sorts. Although hate mail and threats of violence referenced Churchill's Native American heritage derogatorily, others—including at one point, Churchill's employer, the *University of Colorado*—

as national unity across races is a complex inquiry. See Norma Adams-Wade, *A Different Perspective on Sept. 11*, DALLAS MORNING NEWS, Sept. 26, 2001, at 18A (noting that prominent Black activists had withheld criticism of United States policy in the wake of 9/11).

Churchill's personal experience in receiving approximately 8,000 emails following the inception of the controversy over his essay was that of those who identified themselves racially or whose race could be discerned, the emails reacting negatively to the essay were almost exclusively from Whites while those from people of color were positive. Telephone Interview with Ward Churchill, *supra* note 114.

123. The College, however, did not initially revoke its invitation to Churchill; rather, it changed his appearance to a "panel discussion." York, *supra* note 118. Churchill's visit was ultimately cancelled after *Hamilton College* received more than 6,000 emails objecting to Churchill's visit, and Churchill and *Hamilton College* officials received threats of violence. Patrick D. Healy, *College Cancels Speech Over 9/11 Remarks*, N.Y. TIMES, Feb. 2, 2005, at B1.

124. Telephone Interview with Ward Churchill, *supra* note 114.

125. According to Churchill, "the argument to genocide is key to all of my work." *Id.*

126. *Id.*

questioned the authenticity of his heritage.¹²⁷ The former conduct, which the university apparently ignored,¹²⁸ is easily recognized as unadorned racialization. The inquisition into Churchill's heritage, however, is less cognizable as the deployment of race to de-legitimize Churchill's speech, since on its face it appears to be an effort to remove the cloak of race from the controversy. But such questions of authenticity sought to undermine Churchill's overall credibility.¹²⁹ Moreover, from Churchill's point of view, the questions were an exercise in the ultimate kind of racial supremacy. "The power is in the naming," according to Churchill.¹³⁰ The questions around authenticity conveyed the message, "You will be who you're told to be."¹³¹

The *University of Colorado* eventually conceded that it could not discipline Churchill for his remarks about 9/11.¹³² Nevertheless, undeterred by appearances of pretext,¹³³ the university brought charges of "research misconduct" against Churchill on the heels of

127. See Kirk Johnson, *University Changes Its Focus in Investigation of Professor*, N.Y. TIMES, Mar. 26, 2005, at A9 ("Detractors of Professor Churchill came out of the woodwork, questioning his claim to be part Indian."). The *University of Colorado* undertook a preliminary review of allegations that Churchill had fabricated his Indian heritage and referred the matter for further investigation because his Indian identity was "material to his scholarship." Report on Conclusion of Preliminary Review in the Matter of Professor Ward Churchill (Mar. 24, 2005), available at <http://www.colorado.edu/news/reports/churchill/report.html>.

128. An Open Letter from the Department of Ethnic Studies, University of Colorado at Boulder to the Board of Regents, President Betsy Hoffman and Interim Chancellor Phil DiStefano (Apr. 25, 2005), available at http://wardchurchill.net/files/b_ethnic_studies_open_letter.pdf ("The University is well aware that Ward Churchill and other members of the Department have been subjected to death threats, threats of violence and overtly racist attacks. It *could* have publicly condemned these threats of violence and expressions of racial hostility. Instead, its stunning silence has effectively empowered the attackers to continue.").

129. Telephone Interview with Ward Churchill, *supra* note 114.

130. *Id.*

131. *Id.* Others, however, viewed questions about the authenticity of Churchill's Native American heritage as being integral to questions about the integrity of his scholarship. See, e.g., David Kelly, *Colorado Professor Faces Claims of Academic Fraud*, L.A. TIMES, Feb. 12, 2005, at A17 (noting critics ascribed a motive to Churchill's questioning "blood quantum" standards for Indians in federal law: "Critics say Churchill's motives were clear: As long as tribes required some standard of proof for membership, he would never be admitted.").

132. Johnson, *supra* note 127.

133. Because the research misconduct inquiry followed so closely on the heels of the controversy surrounding Churchill's 9/11 remarks, the use of research misconduct as a basis for terminating Churchill likely creates a mixed-motive First Amendment case, in which the university must show by a preponderance of the evidence that it would have reached that same decision to terminate Churchill even in the absence of his 9/11 comments. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (stating that the board of education must show by a preponderance of evidence that it would have reached the same employment decision even in the absence of a teacher's protected statements).

the public controversy over his 9/11 remarks. The charges centered on “a small fraction of Professor Churchill’s extensive body of academic work,” in most instances focusing on “no more than a few paragraphs within much longer essays”¹³⁴ The Committee investigating the charges consisted of no Native Americans and no scholars of Native American Studies, a subset of Ethnic Studies, the department in which Churchill was tenured.¹³⁵ From Churchill’s standpoint—one symbolically corroborated by the Committee’s composition—the investigation was an attempt at “re-asserting white expertise, white authority, white interpretation.”¹³⁶

The Committee issued a 124-page report finding Churchill guilty of research misconduct and recommending that he be de-tenured and terminated.¹³⁷ An appreciation of the report’s broader context is essential to any assessment of the role of race, real or perceived, in the report’s production. On the one hand, the Committee acknowledged that the timing of its investigation was suspect, and it questioned the university’s motives in pursuing the charges.¹³⁸ This acknowledgment, however, had the whiff of a prelude, for the Committee proceeded as if its own actions could be hermitically cordoned off from the events that precipitated—or least inarguably preceded—its constitution. On the other hand, the Committee acknowledged that the essays under scrutiny were “broad accounts” for which “extensive notes would not be expected or required.”¹³⁹ The Committee then undertook a minutely detailed inspection of Churchill’s footnotes. Where one omission or mistake was insufficient to constitute a basis for a finding of research misconduct,

134. Report of the Investigative Committee of the Standing Committee on Research Misconduct at the University of Colorado at Boulder Concerning Allegations of Academic Misconduct Against Professor Ward Churchill, May 9, 2006, at 8, *available at* <http://www.colorado.edu/news/reports/churchill/download/WardChurchillReport.pdf> [hereinafter Report on Research Misconduct].

135. *Id.* at 103–05. The Committee did have as a member a Chicano, José Limón. Churchill describes Limón as “[t]he Whitest person on the panel.” Telephone Interview with Ward Churchill, *supra* note 114. He adds, “People of color serving in this capacity are striving to be whiter than White.” *Id.* Here, Churchill is alluding to the phenomenon of “exceptionalism.” Exceptionalism is an implicit pact between Whites seeking cover from the charge of racism and a person of color seeking to ingratiate himself with those Whites to ostracize an outspoken person of color. *See* Smith, *supra* note 36, at 546 n.111 (explaining that exceptionalism entails elevating some members of the subordinate group above others, where the White decision-maker may essentially tell the preferred minority that he is not like the others).

136. Telephone Interview with Ward Churchill, *supra* note 114.

137. Report on Research Misconduct, *supra* note 134, at 99. The disciplinary recommendation, which was not part of the university’s charge to the Committee, was not unanimous. *Id.* at 102.

138. *Id.* at 4.

139. *Id.* at 10.

the Committee bootstrapped that omission or mistake to others to find a “pattern,” parts of which depended on the others for substantive significance.¹⁴⁰ Finally, the Committee purported not to act as arbiters of contested historical fact in Native American history.¹⁴¹ Yet its enterprise inexorably devolved into the realm of arbiter at several points in its report.¹⁴² In sum, any evaluation of whether race affected the Committee’s interpretation of and reaction to Churchill’s speech (specifically, his scholarship) must bear in mind the aegis under which the Committee was constituted and the cross-purposes that its charge appeared to impose on it.

Sociolinguist Teun van Dijk posits, “If knowledge is power, then knowledge of other people may be an instrument of power over other people. This truism is especially relevant in examining the academic discourse of race and ethnicity.”¹⁴³ If the inquiry into Churchill’s scholarship was a contrived metamorphosis of identity-based remarks about 9/11 into concerns about academic integrity, it was likewise a foray (even if inadvertent) into the controversial question of who should control historical narrative—who, in van Dijk’s terms, shall exercise power. Churchill is raced in this inquisition, not because of its inherently racial properties—that would be a tautology—but rather because the Committee suffuses its situational power with characteristics of racial hegemony. A central charge of research misconduct against Churchill focused on whether he exaggerated his claims that the United States Army intentionally spread smallpox to Mandan Indians by distributing infected blankets to them. The report concludes that Churchill “fabricated” his account,¹⁴⁴ and that it

140. Compare *id.* at 73 (noting that the omission of the page number of a source was not serious “unless it forms part of a pattern”), with *id.* at 82 (aggregating Churchill’s alleged mistakes to find the requisite pattern).

141. See *id.* at 12 (“The Committee stresses that we were not charged with determining what actually happened in southern New England in 1614–1618 or Fort Clark, North Dakota, in 1837. We have accordingly not tried to produce our own account of those events.”).

142. See *id.* at 94 (“Professor Churchill was disrespectful of Indian oral traditions when dealing with the Mandan/Fort Clark smallpox epidemic of 1837.”); *id.* at 97 (acknowledging genocidal campaigns against Indians but finding that Churchill had exaggerated his claims); *id.* at 65 (acknowledging that members of the United States Army held “strong anti-Indian views” but concluding there was “no evidence to support Professor Churchill’s claim that the U.S. Army intended to kill off the Mandan Indians”). In a puzzling admission that belied its ability to settle the disputed matters of history before it, though it embarked on precisely that task, the Committee conceded that “we have not attempted to examine every possible work written on the topics in question: we have merely examined the evidence relevant to his particular claims.” *Id.* at 12.

143. Elite Discourse, *supra* note 113, at 158.

144. Report on Research Misconduct, *supra* note 134, at 68.

could find “no evidence to support this claim.”¹⁴⁵ The Committee does not question that genocide was attempted on American Indians,¹⁴⁶ nor does it appear to question that smallpox was one agent of the attempted genocide. This is for good reason, for prominent historians have documented the use of biological warfare against the Indians.¹⁴⁷ Moreover, there is abundant historical evidence that the United States Army was instrumental in carrying out the attempted genocide against the Indians,¹⁴⁸ even if the specific means of annihilation is subject to debate.

That the Committee held Churchill to a more exacting standard because of the role of ethnicity is evidenced by the language of the report itself. “The interdisciplinary work and social commitment of ethnic studies scholars may require an even stronger fealty to standards of veracity and evidence,” the Committee wrote,¹⁴⁹ presaging the standards under which it would judge Churchill’s scholarship. Although such paternalism does not necessarily equate to racism, it harkens to a frequent strategy of Whites met with a claim of racism, particularly when the claim is unorthodox or radical in nature. The “irritation with minority radicals who are seen as ‘exaggerating’” is one symptom of modern institutional racism in academia.¹⁵⁰ Both within and outside of academia, Whites respond defensively to charges of racism with the challenge to “prove it!”—and not merely by inference.¹⁵¹ In holding fast to footnote details that it initially acknowledged were not even necessary to be provided,

145. *Id.* at 69.

146. *Id.* at 97.

147. See, e.g., HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 87 (1999) (documenting the use of smallpox-infected blankets by the British Army against Indians in lands west of the Appalachians and describing this stratagem as “a pioneering effort at what is now called biological warfare”).

148. See, e.g., WILLIAM LOREN KATZ, BLACK INDIANS: A HIDDEN HERITAGE 55–57 (1997) (detailing the United States military’s role in quashing Seminole Indian resistance at “Fort Negro”: “[f]or years, the U.S. sent its enormous resources of troops, ships, and military supplies to crush Seminole resistance to its slaveholding way of life”).

149. Report on Research Misconduct, *supra* note 134, at 6; see also *id.* at 97 (“[T]he damage done to the reputation of ethnic studies as a field . . . is a consideration in our assessment of the seriousness of Professor Churchill’s conduct.”).

150. Elite Discourse, *supra* note 113, at 195.

151. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1378 (1992) (“When a white person hears a black person use a word like ‘racist,’ the response is often a strong defensive reaction that implicitly says to the black person, ‘prove it!’ And the standards of proof are those white people are comfortable with: evidence of conscious racial animus, intent to harm and degrade.”).

the Committee exhibited these common traits of White supremacy in discourse.¹⁵²

Churchill himself is less certain about another regard in which the Committee arguably subordinated him based on his social inequality. At the conclusion of its report, the Committee opines on Churchill's attitude, his collegiality or lack thereof, and his alleged propensity for the ad hominem in responding to critics.¹⁵³ Churchill initially observed that these comments "could be" racial in nature but later more strongly characterized them as being part of the "recantation dimension" of the Committee's efforts.¹⁵⁴ According to Churchill, in seeking contrition from him, the Committee behaved as if it were asking him to "prove that I'm subjugated to you [the Committee]."¹⁵⁵ Professor Sumi Cho has addressed the racial dimension of collegiality standards:

"Collegial" is what those in power happen to define it as at the time. As such, it absorbs the normative values of the dominant culture. Thus, the utter malleability of the term poses the same dangers to particular identity groups as any other doctrine or rule that suffers from over-vagueness. . . . Under this "can't we all get along" formulation, those who transgress the cultural norm of gendered and racial hierarchy appear to be "impolite" and "uncollegial" regardless of history, context, or power relations.¹⁵⁶

The context and mechanisms for the racialization of Ward Churchill and his speech and scholarship are complex and have the character of both motivational and cognitive behavior. Yet Churchill believes his racialization is at its root quite simple. Regarding the 9/11 essay, Churchill opines, "I don't think a White person would have written it," and if he had, the *University of Colorado* "would have simply tried to ignore it."¹⁵⁷

152. The Committee condescendingly attributed Churchill's alleged research misconduct to his lack of formal training in history and lack of a doctorate degree. See Report on Research Misconduct, *supra* note 134, at 100. The racial connotations of this language rest not in elitism—for such is perhaps an endemic characteristic of the academy—but rather in its skewed application. Whites have assumed some of the most important positions in our society without the formal credentials for doing so. See, e.g., RAVI BATRA, GREENSPAN'S FRAUD 81 (2005) (recounting Alan Greenspan's appointment as chairman of the Council of Economic Advisors despite his lack of a Ph.D. and lack of scholarship).

153. Report on Research Misconduct, *supra* note 134, at 98.

154. Telephone Interview with Ward Churchill, *supra* note 114.

155. *Id.*

156. Cho, *supra* note 35, at 809.

157. Telephone Interview with Ward Churchill, *supra* note 114. Churchill uses Noam Chomsky, a controversial White professor at the *Massachusetts Institute of Technology*, as a point of comparison. *Id.* But even White elected officials have made statements substantively similar to Churchill's, and they have been lauded for their

E. Leonard Jeffries: The Black Racist

Leonard Jeffries¹⁵⁸ is a “racist.” He is not a racist because he denied people jobs or other opportunities based on their race. Nor did he gain this disrepute by committing an act of racial violence. Instead, he is a racist because of the way he discussed racism. In criticizing public school curricula as racially biased, Jeffries laced his oratory with the miasma of ethnic insult. He referred to various state and federal officials as an “ultimate, supreme, sophisticated, debonair racist” and a “sophisticated, Texas Jew.”¹⁵⁹ He accused “rich Jews” of having financed the slave trade.¹⁶⁰ He also opined that Jews and “Mafia figures” in the media conspired to negatively portray and thereby destroy Blacks.¹⁶¹

In addition to ethnic stereotyping, Jeffries’s speech was controversial because it was at points specific, lambasting not Whites generally—for which he would have been charged with overbreadth—but Jews directly and Italians indirectly. The broader purpose of Jeffries’s speech, and whatever legitimacy that purpose might have had, was subsumed by his choice of language. Jeffries is racist because in the American dialectic on race, Americans have equated racial insult with other kinds of racism and have placed the speaker on a par with other racist actors.¹⁶² If, however, Ardith

honesty rather than persecuted. For instance, Congressman Ron Paul of Texas, a 2008 presidential aspirant, recently said the following about 9/11:

Have you ever read the reasons they attacked us? They attacked us because we’ve been over there; we’ve been bombing Iraq for 10 years. . . . I’m suggesting that we listen to the people who attacked us and the reason they did it, and they are delighted that we’re over there because Osama bin Laden has said, “I’m glad you’re over on our sand because we can target you so much easier.”

Editorial, *Between the Lines at the GOP Debate, II: Ron Paul Has Earned His Place at the Podium*, ORANGE COUNTY REG., May 18, 2007, http://www.ocregister.com/ocregister/opinion/editorials/article_1698826.php.

The conservative *Orange County Register* praised Paul’s honesty. See *id.* (criticizing Paul’s political opponents for mischaracterizing his forthright statements regarding the causes of the 9/11 attacks, and implying that Paul’s campaign continues to “gain steam” because of his honesty). So, too, did numerous other publications, such as the less ideological *Des Moines Register*. See David Yepsen, Editorial, *Romney, Paul, Giuliani All ‘Win’ in GOP Debate*, DES MOINES REG., May 17, 2007, at A15 (noting that Paul’s opposition to the war may help him gain some support if the GOP does not fare well in 2008).

158. *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994), *modified by* 52 F.3d 9 (2d Cir. 1995).

159. *Jeffries*, 21 F. 3d at 1242.

160. *Id.*

161. *Id.*

162. This is akin to what Professor Martha Mahoney describes as “color evasion”:

When whites are color evasive, they fail to notice their own color, the color of others, and any difference between them. Color evasion treats noticing color or race as a manifestation of prejudice. Although color evasion seems

McPherson exercised her free speech rights under the weight of an American discomfort with racial discourse in general and a White tendency to radicalize the speech and actions of Blacks, Jeffries was similarly handicapped because he is a *Black* racist.

Derrick Bell's allegorical work, *Faces at the Bottom of the Well: The Permanence of Racism*,¹⁶³ forcefully depicts the caldron that envelopes the Black speaker who breaches what Bell refers to as "the rules of racial standing." Bell gives definition to one of these rules by engaging in a dialogue with a fictional character named Geneva. He asks, "It's not set out in the Fourth Rule, Geneva, but have you noticed that those blacks who utter 'beyond the pale' remarks are never forgiven."¹⁶⁴ Citing the Reverend Jesse Jackson's "Hymie and Hymietown" remarks from his 1984 presidential bid as well as remarks by the controversial Louis Farrakhan, Geneva responds:

I understand why a group is upset by what it deems racial or religious insults, but I doubt that I'm alone in not understanding why blacks who lack any real power in society are not forgiven while whites, including those at the highest levels of power, are pardoned. For example, many Jewish spokespeople complained bitterly when President Reagan went to lay a wreath at the Nazi cemetery at Bitburg in Germany, but they do not continue to harass him about the issue everywhere he goes. No one denounced Reagan as anti-Semitic for going. More significantly, neither President Bush nor the whites who support him are called on to condemn Reagan in order to prove that they are not anti-Semitic.¹⁶⁵

to many white Americans like courtesy, the idea that noticing race is itself prejudiced rests on a fundamental sense that race involves the inferiority of the "Other." White privilege is the product of a social history of racial power and subordination. Adopted in an effort to avoid being racist, color evasion implicitly preserves values drawn from essentialist racism.

Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 808–09 (2003).

The notion of an equivalency between White racism and conduct such as Jeffries's has been persuasively rejected:

What is often referred to as "black racism" consists of judgments made about whites by some black leaders or commentators to the effect that "no white people can be trusted" or "the white man is the devil." But these critical ideas or negative prejudices are not the equivalent of modern white racism. The latter involves not just individual thoughts but also widely socialized ideologies and omnipresent practices based on entrenched racialized beliefs. The prejudices and myths used to justify antiblack actions are not invented by individual perpetrators, nor are they based only on personal experience. These patterns of highly racialized thought are embedded in the culture and institutions of a white-centered society.

FEAGIN & VERA, *supra* note 107, at x.

163. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

164. *Id.* at 121–22.

165. *Id.* at 122.

The meta-principle that one divines from the colloquy is that race talk in the United States is framed in a hierarchy, an ordering that is influenced by the race of the speaker, the object or subject of his speech, and the political power of those who are insulted by the speech. This hierarchy, in turn, supplies Whites accused of racism with an arsenal of rhetorical devices to blunt the charge while reinforcing the accuser's social inequality. Sociolinguist Teun van Dijk discusses the common practice of denial and observes that "denials often lead to the strategic move of reversal: Not we are the racists, *they* are the 'true racists.'"¹⁶⁶ The anti-racist speaker is recast as the racist in reversal.¹⁶⁷ This move is facilitated by the social dominance of the group practicing reversal and the relative political weakness of the accuser.¹⁶⁸

In practical terms, it did not matter whether Jeffries was correct in his charge that New York school curricula were racially biased; his selection of language allowed critics to deploy the full panoply of denial techniques, including reversal.¹⁶⁹ This has significant consequences for the perpetuation of societal discrimination. The power not only to dismiss a problem as non-existent but to define the language with which the problem must be discussed is the ultimate power of evasion. Moreover, the charge of racism or anti-Semitism against an African American has a potency that it lacks against a more powerful actor.¹⁷⁰ If racism is a cause of one's social inequality, indicting him with that very malevolence diffuses responsibility for his inequality. The identity of the victims and perpetrators of racism becomes discursive, and the elusiveness of culpability sets a psychological, cultural, rhetorical, and even legal boundary against which the propriety of protest or outsider discourse is measured.¹⁷¹ In

166. Elite Discourse, *supra* note 113, at 184. Sociologist Eduardo Bonilla-Silva refers to this defense mechanism simply as "projection," a rhetorical device used to "escape from guilt and responsibility and affix blame elsewhere." EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM* 63-64 (2d ed. 2006).

167. Elite Discourse, *supra* note 113, at 184.

168. See *id.* at 181 ("Denials challenge the very legitimacy of anti-racist analysis, and thus are part of the politics of ethnic management: as long as a problem is being denied in the first place, the critics are ridiculed, marginalised or delegitimated: denials debilitate resistance.").

169. For instance, the President of City College, Jeffries's employer, condemned his remarks as "racist" and "anti-Semitic." Joseph Berger, *College Chief Calls Jeffries 'Racist,' But Defends Keeping Him*, N.Y. TIMES, Nov. 5, 1991, at B1.

170. See *infra* notes 174-181 and accompanying text (recalling several instances of racism by politicians and others in the public eye and noting that the public is more tolerant of White racist behavior than controversial Black speech).

171. Cf. Elite Discourse, *supra* note 113, at 227 (discussing the diffusion of blame for racism in the Netherlands). "[D]iscrimination is presented as a universal characteristic of humanity, which seems to make it as harmless as a traffic

the legal context, for instance, Justice Powell could rationalize his cabined view of permissible affirmative action by noting that:

[T]he white “majority” itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only “majority” left would be a new minority of white Anglo-Saxon Protestants.¹⁷²

Because of these boundaries and the capacious definition of “minority” that they accommodate, even a broad charge of discrimination, in contrast to Jeffries’s pointed accusations, may subject a Black speaker to the process of reversal.¹⁷³

The process of reversal marginalizes the Black speaker in a way that comparable charges of racism against a White do not. From their support of Ronald Reagan, despite their belief that his policies harmed Blacks,¹⁷⁴ to the re-ascension of Senator Trent Lott after his public embrace of segregation,¹⁷⁵ White Americans have

misdemeanor, while at the same time defusing the special role of white Europeans in racism.” *Id.* at 227.

172. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295–96 (Powell, J.) (1978) (plurality opinion announcing the judgment of the Court). More recently, Justice Stevens has harshly criticized this type of rhetorical maneuver by the Supreme Court’s conservative majority in rolling back the goals of primary and secondary school integration:

There is a cruel irony in The Chief Justice’s reliance on our decision in *Brown v. Board of Education*, 349 U.S. 294 (1955). The first sentence in the concluding paragraph of his opinion states: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin” This sentence reminds me of Anatole France’s observation: “[T]he majestic equality of the la[w] forbid[s] rich and poor alike to sleep under bridges, to beg in the street, and to steal their bread.” THE CHIEF JUSTICE fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools.

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Stevens, J., dissenting).

173. See, e.g., Daniel Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853, 856–57 (1995) (because Jews and Asian Americans are “traditionally oppressed groups,” disproportionately represented in economic and educational elites, denominating the concept of merit as a social construct intended to perpetuate the power of dominant groups, as critical race theorists have done, implies negative and anti-Semitic views about these groups’ success).

174. See *supra* notes 77–83 (asserting that Reagan’s policies were hostile towards Blacks but were largely embraced by the electorate).

175. Lott was forced to step down as Senate Majority Leader after remarking that if America had elected Senator Strom Thurmond as President in 1948, it “wouldn’t have had all these problems.” Charles Babington, *Lott Rejoins Senate Leadership: In Comeback Mississippian Is Elected GOP Whip over Alexander*, WASH. POST, Nov. 16, 2006, at A4. Thurmond had run on a segregationist platform in 1948. *Id.* Four years after Lott’s resignation, the Republican caucus elected Lott Minority Whip, the party’s

demonstrated a leniency toward anti-Black dispositions that has no parallel in their processing of controversial speech by Blacks.¹⁷⁶ Thus, the condemnation of Louis Farrakhan and one of his lieutenants, Khallid Abdul Muhammad, for alleged anti-Semitic remarks was such a cause célèbre that none other than Congress itself intervened to censure them.¹⁷⁷ Yet no censure was in order for a United States Senator's public embrace of segregation.¹⁷⁸ A venerated civil rights leader, Andrew Young, was roundly criticized not for the inaccuracy of his statements about groups that have exploited Blacks economically but rather for having the temerity to make these observations publicly.¹⁷⁹ Meanwhile, the publication of scholarship

second-highest post in the Senate. *Id.* "Lott's feat ranks among the more impressive political comebacks of recent times." *Id.*

176. The (temporary) demise of White shock-jock Don Imus does not belie this point. Despite an American preoccupation with celebrity that borders on frivolity, Imus's on-air racial insult of the Black women of a college basketball team does not compare to the direct, tangible harm inflicted by the policies of President Reagan or Trent Lott. Indeed, the danger in allowing Whites to assuage their collective racial conscience by condemning racial insult is that "we're reinforcing this notion that [racial insult is] all that racism is." David Alexander, *Imus Firing Should Not End Race Debate: Experts*, Apr. 13, 2007, <http://www.reuters.com/article/domesticNews/idUSN1344138620070413?pageNumber=3&sp=true> (quoting Darren Hutchinson, Professor of Law, American University, Washington College of Law).

177. See Clarence Page, *Doing the 'White' Thing on Capitol Hill*, CHI. TRIB., Jan. 20, 1999, at 19 (noting the congressional vote to censure Farrakhan). Muhammad was censured by the United States House of Representatives and Senate for a 1993 speech in which he referred to Jews as "bloodsuckers." Jayson Blair, *K.A. Muhammad, 53, Dies; Ex-Official of Nation of Islam*, N.Y. TIMES, Feb. 18, 2001, at 40.

178. Senator Carl Levin of Michigan introduced the motion to censure Louis Farrakhan in the United States Senate. When asked whether he would introduce a censure motion against Lott, he declined to do so unless it was done on a bipartisan basis. *Senators Rick Santorum and Carl Levin Discuss Iraq, the War on Terrorism, Trent Lott, and the New Bush Economic Team*, NBC News Transcripts, *Meet the Press*, Dec. 15, 2002. Levin, a Democrat, would not even call for Lott to step down as Senate Majority Leader. *Id.* His reticence to condemn White racism with the same vigor as Black speech is not atypical. White Americans at times display a pathological craving for inverting the prototype of American racism by purporting to demonstrate that Blacks, too, are racists. Consider that nearly *twenty years* after Jesse Jackson's infamous "Hymietown" remark, the Boston City Council passed a resolution condemning his use of the term. Scott S. Greenberger & Alice Gomstyn, *Resolved: That Councilors Never Forget*, BOSTON GLOBE, Oct. 31, 2002, at B1. In juxtaposition to this manic vigilance of Black speech, consider the Louisiana State Republican Party Committee's refusal to censure state Representative David Duke for his past leadership of the Ku Klux Klan. *Louisiana GOP Won't Censure Duke*, L.A. TIMES, Sept. 24, 1989, at 24. Whites' psychological need to project their racism onto Black victims has become so absurd that the eighty-year-old namesake of the only law school in Rhode Island recently blamed his use of the term "nigger" during a university trustees meeting on rap music. See Associated Press, *R.I. School Official Resigns After Slur*, WashingtonPost.com, July 16, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/16/AR2007071600808_pf.html (quoting Ralph Papitto's explanation of his use of the term: "The first time I heard it was on television and then rap music or something").

179. See, e.g., Cynthia Tucker, *Opinion, Stereotypes Fester—Thanks Even to Young*, ATLANTA J. CONST., Aug. 27, 2006, at A6. Along with many other editorial-page

proposing that Black applicants not be admitted to elite law schools has been feted as worthy of intellectual exploration.¹⁸⁰ The boundaries for legitimate discourse are different for speakers of different races, depending on the race and social positions of those about whom they speak and of those evaluating the speech. As one commentator lamented after observing the nation's preoccupation with Farrakhan's speeches as compared with its laxity toward White neo-Nazi militia groups associated with the Oklahoma City bombings, "it is far easier for Americans to censure blacks than whites, even when the infractions are of different orders of magnitude."¹⁸¹

The attempt here, as it has been in all the narratives used, is not to justify Jeffries's incipient speech, but rather to demonstrate that his social inequality as a racial minority and the social dominance of those evaluating his speech likely interacted to distort the discourse. Whether current First Amendment doctrine accounts for the operation of and attempts to neutralize these social inequities is the next inquiry.

editors, Tucker criticized Young for defending Wal-Mart's practice of driving neighborhood shops out of business. Young argued that many of these shops provided poor services to Black communities and observed: "Those are the people who have been overcharging us—selling us stale bread and bad meat and wilted vegetables. . . . I think they've ripped off our communities enough. First it was Jews, then it was Koreans, and now it's Arabs. Very few blacks own these stores." *Id.* Without any factual refutation of Young's assertions, Tucker, who is Black, reflexively decried his comments as "bigotry." *Id.*

I addressed rhetorical moves like Tucker's in my own editorial concerning Young's comments:

There's a familiar pattern here. A black public figure criticizes a particular ethnic group such as Jews, and his sin of specification, rather than the substance of his charge, becomes the focus of public attention. It's the racial equivalent of wag the dog, a perfect deflection of the public's attention from the real, more serious issue. And a black public official is the perfect foil because his perceived gaffe dilutes the moral legacy of black people as victims of exploitation by virtually every ethnic group in the United States, including Jews, Koreans and Arabs.

Posting of Terry Smith to Blackprof.com, Andy Young's Truth, America's Blues, <http://www.blackprof.com/?p=1588> (Aug. 20, 2006).

180. See Adam Litak, *For Blacks in Law School, Can Less Be More?*, N.Y. TIMES, Feb. 13, 2005, at 3 (reporting on a study by Professor Richard Sander that purported to demonstrate that admitting Black students to less prestigious law schools, rather than elite ones, would increase the number of Black lawyers). Blacks are all too common fodder for studies like that authored by Sander, which, to be sure, may rely on data but also on "inference and speculation." *Id.* And unlike the flight from substance and knee-jerk condemnations provoked by controversial speech from Blacks, Sander's work has been engaged on its own terms. See *id.* ("His critics generally accept, and sometimes even praise, aspects of his empirical work.").

181. Nell Irvin Painter, Editorial, *Hate Speech in Black and White*, BALT. SUN, May 8, 1995, at 9A.

II. ACCOUNTING FOR INEQUALITY: THE LIMITATIONS OF CURRENT DOCTRINE

The interaction of social inequality with free speech rights is a vexing concern that neither courts nor academics have quelled. Owing to the First Amendment's strongly individualist tradition and equal protection's countervailing pedigree of concern for group subordination, the jurisprudence outside the employment context has been bifurcated with little mutual accommodation.¹⁸² But the tension between equality and expression engaged by the scholarship of Professor Nan Hunter and others¹⁸³ is one that is only partially permutated in the public employment context. For one thing, the requirement that an employee's speech be on a matter of public concern, and the reduced protection for speech that primarily implicates the employee's idiosyncratic interests, dilutes the individual-versus-group dichotomy that underpins the broader First Amendment debate. Under the *Pickering/Connick* construct, in order to receive protection, the employee becomes a de facto spokesman for other individuals in the community or workplace who share his point of view. Nonetheless, the critical insight contributed by this body of scholarship is a need for an identity-sensitive First Amendment jurisprudence, in which the social inequality of the speaker is incorporated into the analysis rather than ignored.

Outside the employment context, the goals of social equality and free expression have clashed where one group has attempted to exclude another from its activities because it objects to the excluded group's viewpoint. Hunter uses as a paradigm *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,¹⁸⁴ in which parade organizers were permitted to exclude pro-homosexual advocates.¹⁸⁵ While Hunter's frame of reference (i.e., one organization excluding members of another) is factually distinguishable from the employment setting, the conceptual underpinning of her argument is

182. See Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671, 1686 (2000) ("Individualism supplied the cultural meaning of the First Amendment and became indelibly associated with the nation's keystone freedom."); *id.* at 1690 ("By contrast to the mobility intrinsic to the jurisprudence of expression, the jurisprudence of equality has grown into a dependence on the fixity of identity, a doctrinal form of immobility.").

183. *Id.* at 1712 (citing Steven Shiffrin, *The Amendment and the Meaning of America*, in IDENTITIES, POLITICS, AND RIGHTS 307 (Austin Sarat & Thomas R. Kearns eds., 1995)).

184. 515 U.S. 557 (1995).

185. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 10 (2000).

germane: “[S]peech performs identity.”¹⁸⁶ That is, social identity for certain sub-populations is constructed through their dissent from the mainstream, or as Hunter puts it, from a unique “point of view(ing)”¹⁸⁷ The imbricate stories relayed in Part I demonstrate how the dissenting speech of the minority actor contributes to disadvantageous perceptions of him, particularly when the speech is oppositional to racism or a prevailing societal ukase that reflects racial divides. Hunter strives to create a conceptual framework for accommodating equality and speech claims.¹⁸⁸ The backdrop for the discourse in the employment context, however, is a more rudimentary argument about which level of scrutiny employee free speech claims are entitled to. In the sections that follow, I first discuss the courts’ general refusal to apply strict scrutiny to free speech claims by public sector employees, underscoring the especial disadvantage that this practice poses for minority plaintiffs whose speech is referential to their social inequality. I then discuss the limited and inadequate role that courts have permitted equal protection to play in public employee speech cases and why equal protection doctrine is unlikely to fill the First Amendment’s void in protecting socially unequal speakers such as racial minorities. Finally, I revisit in some detail the rationale of the Supreme Court’s holding in *Garcetti v. Ceballos*, in which the Court further eroded the protections available to public employee free speech and thus reduced the First Amendment’s ability to neutralize social inequality among speakers.

A. *Mapping the Doctrinal Present: Avoiding Strict Scrutiny*

Courts generally do not apply strict scrutiny to the content-based restrictions placed on employee speech by government employers.¹⁸⁹

186. *Id.* at 11.

187. *Id.* at 12. Hunter writes:

Expressive identity theory envisions expression and equality as a continuum, rather than a dichotomy. It embodies two components that can never be fully disaggregated. As a result, identity becomes less fixed, less easy to define, classify, or contain, a development that could reinvigorate equal protection jurisprudence. A theory of expressive identity differs from identity politics because this unruliness arises not solely from the concept of difference, but also from that of dissent. Expressive identity marks the juncture where equality claims can successfully incorporate point-of-view(ing) rationales. Theorizing expressive identity seeks to recuperate dissent for equality.

Id.

188. *See id.* at 20 (proposing a three-step doctrinal inquiry).

189. John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1141–42 (2005); *see* Alexandra Gruber & Barbara Kritchevsky, *The Uneasy Coexistence of Equal Protection and Free Speech Claims in the Public Employment Context*, 31 U. MEM. L. REV. 559, 587–88

The variegated intermediate-level scrutiny courts do apply results in upholding speech restrictions on government workers “for reasons that would not suffice if the same restrictions were imposed on others.”¹⁹⁰ The level of constitutional scrutiny almost certainly affects the courts’ ability to account for the social inequality of an employee penalized for his speech.¹⁹¹

Lower courts seldom explicate the jurisprudential reasons for the application of intermediate scrutiny; they simply note that the Supreme Court’s *Pickering/Connick* balancing test amounts to intermediate rather than strict scrutiny.¹⁹² The Supreme Court, however, has made clear its twin concerns that the government employer not be prevented from running an efficient shop¹⁹³ and, concomitantly, that government employees not enjoy free speech

(2001) (noting that public employee speech receives “far less First Amendment protection than the average citizen”).

190. Fee, *supra* note 189, at 1141–42; *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 465 (1995) (“Congress may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.”).

191. See, e.g., *Shahar v. Bowers*, 114 F.3d 1097, 1103 (11th Cir. 1997) (en banc) (explicitly rejecting strict scrutiny and instead applying *Pickering/Connick* balancing to government applicant’s claim that the withdrawal of her job offer as a staff attorney in the Georgia Attorney General’s office was based on her lesbian “marriage” and that such action violated her First Amendment associational rights). The Eleventh Circuit credited the State Attorney General’s concerns over the public’s perception of a state lawyer symbolically defying Georgia’s non-recognition of same-sex marriages and the possible conflicts of interest that the plaintiff may have in gay rights cases, such as those banning sodomy, in which Georgia had already been and was likely to again be a defendant. *Id.* at 1104–07. Georgia had, for instance, been the defendant in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overturned* by *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). The circuit court concluded that the attorney general’s concerns outweighed the plaintiff’s associational interests. *Id.* at 1110.

192. E.g., *Akers v. McGinnis*, 352 F.3d 1030, 1037 (6th Cir. 2003); *Shahar*, 114 F.3d at 1102–03; see also *Int’l Ass’n of Firefighters, Local No. 3803 v. Kan. City*, 220 F.3d 969, 973–74 (8th Cir. 2000) (adapting *Pickering/Connick* intermediate scrutiny to a public employee’s First Amendment associational claim).

Even where courts have attempted to provide a rationale for applying intermediate rather than strict scrutiny, their logic has amounted to little more than a tautology. For instance, in *Kansas City*, the court rejected the application of strict scrutiny because of the “distinction between Kansas City’s role as a sovereign and the government’s role as an employer.” 220 F.3d at 973. Although the government’s differing roles might give rise to different interests to be weighed, it does not explain why a lesser constitutional standard should be applied to those interests. See *Knight v. Conn. Dep’t of Publ. Health*, 275 F.3d 156, 166 (2d Cir. 2001) (providing a similarly circular rationale for the application of intermediate scrutiny to a hybrid speech-association claim).

193. See *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (“The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.”).

rights incongruous with private sector employees where the former's speech does not implicate matters of public concern.¹⁹⁴

Recent critiques of heightened scrutiny by legal scholars raise concerns about its salutary nature.¹⁹⁵ Yet strict scrutiny's potency is relative and can only be appreciated in relation to lesser standards of review, in this instance *Pickering/Connick* balancing. One can plausibly imagine a different outcome for Professor Leonard Jeffries had this nebulous balancing test been replaced by strict scrutiny's requirement that the government demonstrate a narrowly tailored compelling interest before disciplining Jeffries for his speech by demoting him as chair of the Black Studies Department at the *City University of New York* ("CUNY").¹⁹⁶ Instead, the Second Circuit, interpreting Supreme Court precedent, held that the university need not show the actual disruptiveness of Jeffries's speech; it was sufficient under *Pickering/Connick* balancing that the government "make a *substantial showing* that the speech is, in fact, *likely to be disruptive*."¹⁹⁷ This standard allowed the university to speculate about the harmfulness of Jeffries's speech without confronting how the relative social inequality of Jeffries vis-à-vis his critics may have infected any assessment of disruption.¹⁹⁸ Strict scrutiny would have required the university to move beyond hypothetical concerns.¹⁹⁹ The more demanding evidentiary predicate would not have required "an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action,"²⁰⁰ for the exigent circumstances necessitating

194. See *Connick v. Meyers*, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.").

195. See, e.g., Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1534 (2004) (arguing that "heightened scrutiny" of classifications based on sexual orientation—a regimen effectuated by *Lawrence v. Texas*, 123 S. Ct. 2472 (2003)—will paradoxically lead to greater governmental scrutiny of gay conduct); Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 209–11 (2005) (using historical examples to illustrate that "strict scrutiny may be susceptible to skewing effects or manipulation in times of crisis").

196. *Jeffries v. Harleson*, 52 F.3d 9 (2d Cir. 1995).

197. *Id.* at 13 (citing *Waters v. Churchill*, 511 U.S. 661 (1994)). *Waters* held that the speech for which a public employer disciplines an employee need not be the employee's actual speech so long as the employer reasonably concludes that the employee made the remarks at issue. 511 U.S. at 667.

198. See *infra* notes 233–248 and accompanying text (prescribing a framework for detecting the effect of social inequality).

199. See *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (applying strict scrutiny to Georgia's allegedly race-based redistricting plan and requiring a "strong basis in evidence" that the plan was necessary to cure the effects of past discrimination).

200. *Connick v. Myers*, 461 U.S. 138, 152 (1983).

prompt action by the government is one factor to be taken account of in determining whether it possesses a compelling interest.²⁰¹ In Jeffries's circumstances in particular, because Jeffries remained a tenured professor and because "the position of department chair at CUNY is ministerial, and provides no greater public contact than an ordinary professorship,"²⁰² strict scrutiny would not have undermined the Supreme Court's purported concerns with efficiency and workplace stability. What strict scrutiny would have likely achieved, however, is a more probing inquiry into the university's claims of disruption and, ultimately, a different result.

Whatever the deficiencies of strict scrutiny review, they pale in comparison to the vagaries and lopsidedness of *Pickering/Connick* balancing. Cases such as *Jeffries* suggest that in order to neutralize the social inequality of the speaker in assessing the constitutional protection his speech is due, the Supreme Court's jurisprudence must elevate the First Amendment standard for all public employee speech. To the extent that the current jurisprudence is lacking generally, it may disproportionately vitiate protection for the speech of racial minorities when these employees' speech violates White-sanctioned workplace norms.

B. Mapping the Doctrinal Present: The Limitations of Equal Protection

Because strict scrutiny will not generally be applied to public employees' First Amendment free speech claims, employees have re-articulated such claims under the Equal Protection Clauses of the Fifth and Fourteenth Amendments. The objective of this relocation is to obtain under the fundamental rights prong of equal protection what *Pickering/Connick* balancing denies them: strict scrutiny.²⁰³ Where the equal protection claim is predicated on the public employee's exercise of his First Amendment free speech rights, courts have generally rejected the claim as repetitive of the free speech claim.²⁰⁴ Thus, in the archetypal public employee free speech case in

201. Cf. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972) (permitting the government to abrogate the constitutional requirement of notice and an opportunity to be heard before seizing private property where there is "a special need for very prompt action").

202. *Jeffries*, 52 F.3d at 14.

203. Gruber & Kritchevsky, *supra* note 189, at 586-87.

204. See, e.g., *Thompson v. City of Starkville, Miss.*, 901 F.2d 456, 468 (5th Cir. 1990) (determining that the plaintiff failed to state an equal protection claim based on the exercise of his free speech rights where plaintiff cannot point to others who exercised such rights for purposes of determining unequal treatment). Gruber and Kritchevsky conclude that the approach taken in these cases is correct:

which the claim of unequal treatment is undifferentiated from the free speech claim, the Equal Protection Clause has demonstrated no greater capacity to neutralize the social inequality of the speaker than has the First Amendment.

The variations on the uses of equal protection in conjunction with free speech claims present ameliorative possibilities that are more theoretical than real. Each of the public employees in the narratives of Part I, for instance, could claim classification or status discrimination under the Equal Protection Clause based on his or her race or nationality.²⁰⁵ But race-based status discrimination claims suffer a quite low rate of success.²⁰⁶ Where speech and listeners' reactions thereto are proxies for race—as they are in the foregoing narratives—the very subtlety of the interaction of speech and race frustrates, if not dooms, an already disadvantaged status claim.

Rather than relying on his status, a speaker could allege content or viewpoint discrimination—that is, he could allege that an employer punished him for his speech on a particular subject or for advocating

The situation is different . . . when the plaintiff claims that the only basis on which he was treated differently was his exercise of First Amendment rights. Most lower courts have properly found that plaintiffs in these cases do not state equal protection claims. This result is correct because the plaintiff's allegation in these cases is simply that the employer erred in treating him differently from other employees because he exercised his right to speak. The question is whether the employer had the right to treat him differently for speaking. That is the precise question for which the Court developed the *Pickering-Connick* analysis.

Gruber & Kritchevsky, *supra* note 189, at 601 (footnotes omitted).

Even where lower courts have recognized an equal protection claim predicated on an employee's exercise of his free speech rights, they have eschewed the use of strict scrutiny out of similar overlap concerns as those courts that have refused to recognize the equal protection claim. *See, e.g.,* Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006) (upholding the employee's equal protection claim based on the exercise of his free speech but declining to use fundamental rights analysis, which would apply strict scrutiny, because plaintiff constituted only a class of one). While the *Scarbrough* court recognized the Supreme Court's holding in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), that equal protection claims can be brought by a class of one, it declined to apply *Olech* to fundamental rights analysis because to do so "would allow the Equal Protection Clause to render other constitutional provisions superfluous." 470 F.3d at 261.

205. *See* Gruber & Kritchevsky, *supra* note 189, at 594 ("[T]he lower courts have consistently allowed public employees to state claims that invoke the classification strand of equal protection law, claims in which employees allege that they were discriminated against based on class membership, in addition to First Amendment claims.").

206. *See, e.g.,* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558–60 (2001) (citing statistics and noting that "plaintiffs in employment discrimination suits generally fare worse than most other kinds of civil plaintiffs"); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 912 (2005) ("The state of employment discrimination practice can be easily summarized: plaintiffs are losing almost all of the cases they file except for a few isolated ones, most notably sexual harassment claims.").

a particular viewpoint but did not discipline others who similarly exercised their First Amendment rights.²⁰⁷ Although non-employment cases such as *R.A.V. v. City of St. Paul*²⁰⁸ establish that governmental favoritism in the proscription of speech that the government is otherwise entitled to prohibit will be subject to strict scrutiny,²⁰⁹ the public sector employee faces two immediate difficulties in pursuing an equal protection claim on this basis. First, the claim requires a comparator. The employee who merely claims that he was punished for exercising his First Amendment rights while those who did not speak were spared discipline must rely on the *Pickering/Connick* test, which provides a reduced standard of judicial review.²¹⁰ Moreover, the equal protection claimant must show that he was “similarly situated” to those who did exercise their rights and were not disciplined. Within a White-dominated workplace that tacitly incorporates societal norms, these criteria are problematic. Two commentators provide an example through which the complications can be explored. According to Alexandra Gruber and Barbara Kritchevsky, “an employee who speaks of ‘black power’ and an employee who speaks of ‘white power’ would be similarly situated, even if the ‘white power’ expression had more of a disruptive effect on the work environment.”²¹¹ A preference by an employer for either viewpoint should receive strict scrutiny.²¹²

Yet things are not so simple in the economy of racialization in the workplace. First, racial identity is a defining characteristic in most African Americans’ lives in a manner that it is not in the lives of White Americans precisely because, as the socially dominant group,

207. See Gruber & Kritchevsky, *supra* note 189, at 598–99 (listing cases where alleged viewpoint discrimination occurred). “Viewpoint discrimination is . . . an egregious form of content discrimination,” the latter being directed at the subject matter of the speech, the former at the particular view taken on a subject. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

208. 505 U.S. 377 (1992).

209. See *id.* at 395–96 (applying strict scrutiny to a hate-crimes ordinance that singled out certain fighting words—i.e., speech expressing racial hostility—but permitted other expressions that the government was likewise capable of proscribing—i.e., the expression of hostility on the basis of homosexuality).

210. See Gruber & Kritchevsky, *supra* note 189, at 601 (noting that lower courts have denied the equal protection claim and applied *Pickering/Connick* balancing to these circumstances because “[t]he question [in the equal protection claim] is whether the employer had the right to treat him differently for speaking. That is the precise question for which the Court developed the *Pickering-Connick* analysis.”). But see *Kantha v. Blue*, 262 F. Supp. 2d 90, 107–08 (S.D.N.Y. 2003) (suggesting that a speech-based equal protection claim might survive where plaintiff can show that similarly situated employees “who did not complain about Blue’s conduct, were treated differently” from her).

211. Gruber & Kritchevsky, *supra* note 189, at 609.

212. *Id.* at 610.

Whites “have the option to set aside consciousness of the characteristic that defines the dominant class—in this case, race.”²¹³ Despite their consciousness of race and its centrality to their identity, in a culture of White meta-privilege,²¹⁴ people of color necessarily engage in self-censorship in their discussions with Whites. African Americans are more likely to engage each other in discussions about Whites and racism and are more likely to restrict discussions with Whites to more pedestrian topics.²¹⁵ These dynamics curtail the efficacy of content or viewpoint discrimination claims because, first, people of color do not as a practical matter enjoy the same opportunity of expression as Whites in a White-dominated workplace; and second, the search for comparators for a minority employee who does engage in identity speech will likely be hampered by the reduced need of Whites to engage in such speech.

A minority employee’s content or viewpoint discrimination claim is further complicated by judicial vagaries in determining who is a similarly situated employee²¹⁶ and by an apparent insistence on a showing of intentional conduct, even when the employee is not complaining of status-based or class-based discrimination. The Second Circuit’s articulation of the applicable standards is illustrative of both these hurdles:

In establishing the similarly-situated element, we have warned that “the level of similarity between plaintiffs and the person with whom they compare themselves must be extremely high.” A plaintiff must show that (1) “no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and [(2)] the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake.”²¹⁷

213. Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2035 (1995).

214. See Barbara J. Flagg, *Foreward: Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL’Y 1, 2 (2005) (defining Whiteness as an ultimate privilege because “Whiteness sets the terms on which racial identity is constructed”).

215. HECHT ET AL., *supra* note 104, at 110.

216. See *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (“To prove discriminatory effect, the plaintiffs are required to show that they are members of a protected class, that they are otherwise similarly situated to members of the unprotected class, and that plaintiffs were treated differently from members of the unprotected class.”) (internal citations omitted).

217. *Skehan v. The Vill. of Mamaroneck*, 465 F.3d 96, 110 (2d Cir. 2006) (internal citations omitted); see *Aponte-Torres v. Univ. of Puerto Rico*, 445 F.3d 50, 57 (1st Cir. 2006) (requiring that an equal protection plaintiff show selective treatment with an “intent to inhibit or punish the exercise of constitutional rights”) (internal citation omitted); *Morrison v. City of Middletown*, 464 F. Supp. 2d 111, 120 (D. Conn. 2006)

Judicial insistence on exacting verisimilitude between speech comparators undermines the salutary effect of escaping the strictures of the *Pickering/Connick* test. Moreover, the indirect requirement of an intent to harm—as expressed by the allowance of a mistake defense—ignores prevailing social science that demonstrates that bias, whether against status or speech, need not be motivational but instead often arises from unconscious cognitive processes.²¹⁸ Thus, while content or viewpoint discrimination is perhaps the best judicially recognized means of accounting for inequality in workplace speech, it is far from sufficient.

C. *Mapping the Doctrinal Present: Garcetti's Invitation to Discrimination*

*Garcetti v. Ceballos*²¹⁹ further etiolates a First Amendment employee jurisprudence in which all employees may have too little protection but where this insufficiency abets racial inequality in the workplace, affording the minority employee still less protection. Imagine that Ceballos, described in Part I as a conscientious public servant rather than a racial meliorist, did engage in identity politics. That is, he brought to bear in a relevant fashion his cultural perspective on a work issue—here, the question of a sheriff deputy's dishonesty in submitting an affidavit. Because *Garcetti* categorically permits employer sanction of speech made pursuant to an employee's official job duties, Ceballos's culturally imbued perspective on the question of the sheriff deputy's dishonesty can now be pretextually discriminated against with impunity. A savvy public employer, of course, would not announce the biases that inform its sanction of Ceballos's speech, nor for that matter need the employer even be cognizant of its biases. Under such circumstances, equal protection doctrine is highly unlikely to pick up the First Amendment's slack. The per se approach of *Garcetti* encourages unremediable content discrimination, discrimination that amounts to racial discrimination where the disciplined minority employee has intertwined his racial inequality with his speech.

("[P]laintiff cannot prevail absent prima facie showing that he is identical in all relevant respects to the individuals with whom he compares himself."); *Cooper v. Smith*, 855 F. Supp. 1276, 1282 (S.D. Ga. 1994) (dismissing an equal protection claim on narrow construction of similarly situated requirement because the plaintiff could not point to "other employees [who] publicly expressed distaste for their jobs and their superiors").

218. See *supra* notes 38–43 and accompanying text (explaining that a person may be completely unaware that he is stereotyping a coworker or an event).

219. 126 S. Ct. 1955 (2006).

Garcetti's per se approach is justifiable from neither a practical nor a constitutional standpoint. The twenty-first century has ushered in the most diverse workforce in United States history. With work as the most significant sphere of interracial and inter-cultural exchange,²²⁰ its potential as an agent for distancing the nation from its discriminatory past is considerable.²²¹ Yet scholars of organizational behavior caution that workplace diversity can brew dysfunctionality and conflict where employers and workers conceive diversity in homogenizing rather than operationally pluralistic terms. Professor David A. Thomas of the *Harvard Business School* and Professor Robin Ely studied the interactions of workers and management in three racially diverse work settings, but found that the productivity and harmony of the groups varied with their conception of diversity:

When a work group views cultural differences among its members as an important resource for learning how best to accomplish its core work, group members can negotiate expectations, norms, and assumptions about work in service of their goals, and conflicts that arise are settled by a process of joint inquiry. . . . In work groups in which it is legitimate for group members to bring all of their relevant knowledge and experience to bear on the core work of the group—including knowledge and experience linked to their cultural identity—members are more likely to feel valued and respected in the group and to receive more validation for their cultural self-identities. . . . This heightens group members' feelings of effectiveness . . . and motivation to achieve. . . . By contrast, when a work group views cultural differences as having the potential to make only a marginal or negative contribution to work, the dominant cultural group likely defines prevailing expectations, norms, and assumptions about work, and conflicts, if not suppressed, are settled by power. . . . This impedes learning and limits members' sense of self- and group efficacy.²²²

Thus, for all of its professed concerns with efficiency in the government workplace, the Court in *Garcetti* fails to grapple with the workplace of the twenty-first century, in which dissent must be managed as an integral and healthy by-product of diversity in order for racially heterogeneous workplaces to prosper. There is far less

220. See CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 3 (2003) (“[O]f all the places where adults interact with others, the workplace is likely to be the most demographically diverse.”).

221. See *id.* at 11 (“A significant body of empirical research on intergroup relations confirms that cooperative interaction of the sort that often happens at work tends to produce more positive attitudes and relations across ethnic and racial lines.”).

222. David A. Thomas & Robin Ely, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 266–67 (2001).

incentive for the government employer to engage in best management practices, however, where the Court has licensed it to cleanse the workplace of divergent viewpoints when they are expressed as part of the employee's formal duties. Although a private employer might eschew such a heavy-handed approach for fear of the inefficiencies it may create, "a public employer, unlike his private counterpart, is not guided by the profit motive and constrained by the normal operation of the market."²²³

The majority in *Garcetti* attempted to leaven the harshness of its rule by suggesting that employers will voluntarily encourage the kind of exchanges that its decision makes punishable and by pointing to other statutory protections for employees, such as federal and state whistle-blower laws.²²⁴ This maneuver, however, only underscored the constitutionally antiquated nature of the majority's rule. Whistle-blower statutes evince an emerging societal consensus that speech such as Ceballos's that seeks to expose governmental malfeasance should be protected. The Court has recognized the relevance of society's "emerging awareness" and "emerging recognition" of the contours of constitutional liberty in its substantive due process cases.²²⁵ Although it has applied a different analysis to cases asserting an infraction of a liberty that is enumerated in the Bill of Rights,²²⁶ the Court has not analyzed such rights wholly without reference to social understandings.²²⁷ For instance, in determining whether a public employer was justified in searching the office of an employee, the Court has asked as a threshold inquiry whether the employee has "an expectation of privacy that society is prepared to consider reasonable."²²⁸

223. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 227 (1977) (discussing private sector/public sector difference in the context of collective bargaining agreement agency shop arrangements).

224. 126 S. Ct. at 1953.

225. See *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (asserting that people are to be afforded substantial protection in matters pertaining to sex).

226. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 698 n.26 (2000) (Stevens, J., dissenting) (distinguishing the right of intimate association protected by substantive due process from the right of expressive association protected by the First Amendment); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (demarcating the broad concept of liberty encompassed by the Fourteenth Amendment's Due Process Clause from specific rights contained in the Bill of Rights); *Specht v. Jensen*, 832 F.2d 1516, 1521 n.6 (10th Cir. 1987) (distinguishing between substantive due process analysis and violations of the Bill of Rights).

227. See generally James E. Fleming, *Securing Deliberative Democracy*, 48 STAN. L. REV. 1, 7 (1995) (arguing that the Supreme Court's First Amendment jurisprudence is in essential respects the "mirror image[]" of its substantive due process analysis).

228. *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987).

Different enumerated rights may require a different weighting of societal norms, especially where a counter-majoritarian liberty such as the First Amendment is invoked. Nevertheless, given the considerable extent to which the Court in *Garcetti* focused on the government employer's interests, it is not unreasonable to attempt to ascertain employees' understandings of fair workplace speech parameters. In a different parlance, what is the "psychological contract" between workers and employers regarding workplace speech?²²⁹ It is most unlikely that Richard Ceballos, the plaintiff in *Garcetti*, reasonably expected to be subject to discipline for exposing potential mendacity by a deputy sheriff. Most workers feel at liberty to express views that differ from their employer's on even a highly controversial subject like the invasion of Iraq.²³⁰ Moreover, most do not believe the expression of such views will derogate productivity.²³¹ If workers expect that employers will act in good faith where the workplace speech is unrelated to the mission of the organization, they would indeed be surprised to find that speech "made pursuant to their official duties," when not otherwise disruptive, was per se unprotected.²³²

D. Summary: Does the First Amendment Account for the Social Inequality of the Speaker?

The foregoing discussion demonstrates that while all public employee speech enjoys some protection under the First Amendment or a combination of the First Amendment and the Equal Protection

229. See generally Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 550 (2001) (explaining that the psychological contract between the employee and employer includes their varying perceptions, beliefs, and interpretations with regard to workplace interaction).

230. See *Work Life During Wartime: Tensions, Anxiety, Risks of Discrimination Invade the Workplace*, 21 HUMAN RESOURCES REPORT (BNA, INC.) 341, 341 (2003) (reporting the results of a survey conducted by the Employment Law Alliance which found that 89% of workers believed that they could express a view on the Iraq War that differed from their boss').

231. *Id.*

232. See Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 158 (2007) (suggesting a due process resolution to cases like *Garcetti*).

When the government employer directs or encourages employees, as part of their job, to exercise and express their judgment or to disclose wrongdoing on matters of public concern, it implicitly promises them that they will not be subject to reprisals for doing so in a conscientious manner. . . . That implied contractual limitation on employer discretion should give rise to a limited property interest in employment and a right under the Due Process Clause to an impartial hearing

Id.

Clause, these protections are overly porous. When race is added as a differentiating characteristic among speakers, these protections become even more hollow because the courts' inquiry into the workplace discourse is generally limited to intermediate rather than strict scrutiny. This standard of constitutional review has obviously not prevented some public sector employees, both Black and White, from prevailing. Ardith McPherson's narrow triumph is testament to this. Yet these successes do not speak to the cases that fall through the cracks, like *Jeffries*.

The application of strict scrutiny would go far in addressing the interference of social inequality with the protection of workplace speech. But advocating the application of strict scrutiny is mainly precatory. *Pickering/Connick* balancing is well ingrained in the fabric of First Amendment jurisprudence, and the Court's posture in *Garcetti* suggests an inclination to restrict rather than expand the First Amendment regimen. The need to account for social inequalities among speakers must thus not only contend with, but ultimately dovetail with, these realities. It is to this task that the final section of this Article now turns.

III. ACCOUNTING FOR INEQUALITY INCREMENTALLY

Garcetti v. Ceballos's artificial distinction between speech made pursuant to an employee's official duties and speech made as a citizen on the job increased the frailty of a free speech jurisprudence that already fails to adequately protect socially unequal speakers. Yet in *Burlington Northern and Santa Fe Railway Co. v. White*,²³³ decided during the same term as *Garcetti*, the Court demonstrated an appreciation for the subtle ways in which speech can be suppressed and punished. This understanding is germane to any effort to dissipate the effects of social inequality in the exercise of free speech. Although the First Amendment and Title VII's anti-retaliation provision differ in reference to the right at issue, I contrast *Garcetti* and *Burlington Northern* below to illuminate the two very different views of workplace discourse that the Court harbored in the same term. I then employ the broader teachings of *Burlington Northern* to re-litigate *Garcetti*.

233. 126 S. Ct. 2405 (2006).

A. Burlington Northern as a *Superior Approach*

Like Ardith McPherson, Sheila White's journey to the Supreme Court began as a result of her speech. Unlike McPherson, White's speech was about the discrimination she encountered as the lone female in her department.²³⁴ White, a Black woman who operated a forklift for a private employer, complained of harassment to her supervisor and filed a charge of discrimination with the Equal Employment Opportunity Commission.²³⁵ Each action was met punitively by agents of the defendant, Burlington Northern.²³⁶ As a result, White filed suit under Title VII's anti-retaliation provision, which makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII]."²³⁷

Regardless of the differences between the sources of the rights, any protection of speech will raise common concerns. Principal among these concerns are the chilling effects of employer actions on the exercise of the speech right. Relatedly, free speech rights must be attuned to the dynamics of the range of interactions in which the protected speech may take place. The Supreme Court in *Burlington Northern* was tasked with deciding which employer actions qualify as prohibited retaliation under Title VII,²³⁸ implicating both foregoing concerns. In deciding that Title VII's anti-retaliation provision extended beyond so-called ultimate employment decisions such as terminations and pay cuts, the Court was cognizant of the subtleties that can characterize workplace discourse: "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."²³⁹

With this recognition in mind, the Court avoided the kind of categorical rule it announced in *Garcetti*, refusing to delineate specific prohibited retaliatory acts, and instead broadly holding that an act is retaliatory if "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"²⁴⁰ The Court in *Burlington Northern* refused to eliminate whole categories of

234. *Id.* at 2409.

235. *Id.*

236. *Id.*

237. *Id.* at 2411.

238. *Id.* at 2410.

239. *Id.* at 2415 (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81–82 (1998)).

240. *Id.*

potentially chilling employer actions because it recognized that context matters. Yet in *Garcetti*, the Court may have eliminated from First Amendment protection entire categories of workplace speech made pursuant to an employee's official duties without any regard for the context in which that speech occurs. *Garcetti*'s approach, narrowly construed, calcifies the inadequacies of a First Amendment doctrine that perpetuates social inequalities in the workplace. By contrast, *Burlington Northern*'s sensitivity to context, if transported into First Amendment jurisprudence, could offset not only *Garcetti*'s inattention to context but also some of the disadvantages of the courts' general resistance to applying strict scrutiny to public employee speech. To see how, let us re-litigate *Garcetti*, not under *Burlington Northern*'s rule—for it is understood that *Burlington Northern* was construing a specific statute—but rather using *Burlington Northern*'s approach, which is apropos across a range of speech protections.

B. Re-litigating Garcetti

Organizational behavior research confirms that workers do bring to bear their cultural backgrounds in the performance of their work duties.²⁴¹ Richard Ceballos's own account of his motives in questioning the veracity of a deputy sheriff suggests that workers may not always be aware of the impact of their own cultural background on their workplace conduct. Recall that there are in essence two Ceballoses: pre-conscience, in which his Latino heritage played no role in his decision, and post-conscience, in which the controversy and penalty ensuing from his decision caused Ceballos to become involved with a number of Latino legal organizations.²⁴² The post-conscience Ceballos poses particular challenges for courts attempting to apply the rule of *Garcetti*, for Ceballos, conscious of himself as a *Latino American prosecutor*, represents W.E.B. Du Bois's classic duality of personhood for people of color: they are at once members of

241. See Thomas & Ely, *supra* note 222, at 257 (finding cultural identity to be a "significant factor" shaping the performance of study subjects' job duties in employment settings that draw on employees' cultural backgrounds as a source of knowledge and insight); see also Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279–93 (2000) (discussing the costs to minorities of adopting workplace identities for the purpose of conforming to White workplace norms or disabusing Whites of minority stereotypes); Flagg, *supra* note 213, at 2011–16 (illustrating through the now-famous example of "Keisha Akbar" how racial background is brought to bear on the work performance of Black Americans and proposing a Title VII remedy when employer policies discriminate against non-assimilating minorities without business necessity for doing so).

242. See *supra* notes 71–75 and accompanying text (describing the activist role taken by Ceballos as a Latino in the legal community).

their cultural groups, which imbue their lives with unique and indelible characteristics, and members of the broader American community.²⁴³ When the former is brought to bear in the execution of work duties, the minority American's speech is indisputably speech as a citizen, even if the speech coincides with speech that the employee would otherwise make "pursuant to his employment duties."²⁴⁴

The challenge for courts, and the opportunity for plaintiffs, involves separating the duality that might accompany the workplace speech of a person of color or any other social unequal. This is where *Burlington Northern's* lessons about context can have consequential application in First Amendment jurisprudence. Obviously, if speech of the same nature as the speech that was subject to discipline takes place outside of work, the speech is not strictly speech made pursuant to the employee's official duties and is therefore not within the rule of *Garcetti*.²⁴⁵ But it is unlikely that most employees will have occasion to use public venues for speaking about work-related matters. Save for a highly visible public venue or extraordinary efforts by an employer, it is equally unlikely that employees could prove that an employer was aware of speech on work-related matters that took place outside of work. Thus, the prototype case involves the employee of color who speaks at work pursuant to his official duties *in the same manner he would speak as a citizen*. In short, the prototype is an employee of color who practices

243. See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 5 (Gramercy Books 1994) (1903) (describing the African American state of being as a duality: "One ever feels his twoness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body. . ."). Commentators have adapted Du Bois's classic construct to various other minority groups. See, e.g., Jean Shin, *The Asian American Closet*, 11 *ASIAN L.J.* 1, 8 (2004) ("An analogous kind of dividedness may be observed in the case of Asian Americans—a division between the foreign Asian and the assimilable Asian American.").

244. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1956 (2006); cf. Estlund, *supra* note 232, at 152 ("[I]nternal employee dissent often emerge[s] from a deeply personal sense of civic and moral obligation, not just the dutiful performance of the job one is paid for.").

245. The speech would thus be subject to traditional *Pickering/Connick* balancing, unless its content placed it outside the parameters of public concern. See *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (ruling that off-the-job speech subject to discipline is not entitled to balancing where speech exploits employer's image but is not a topic of "legitimate news interest").

Ceballos made public statements about his controversy, specifically to the Mexican American Bar Association. See First Amended Complaint, *Ceballos v. Garcetti*, No. 00-11106 (C.D. Ca. filed Sept. 24, 2001). The Supreme Court remanded the case to determine whether these statements formed part of the basis for the actions against Ceballos. *Ceballos*, 126 S. Ct. at 1962. The case was settled without judicial resolution of these claims. Telephone Interview with Richard Ceballos, *supra* note 50.

his duality in the workplace. The narrowest reading of *Garcetti* would punish the exercise of this duality merely because it coincided with the employee's official duties. This constraint would have a uniquely burdensome impact on those employees most likely to voice norm-violational speech in the workplace, including employees of color.

Both Title VII and First Amendment jurisprudence have long recognized that employers sometimes act with mixed motives, proper and improper, in disciplining employees.²⁴⁶ The same duality of purpose that may motivate an employer can also account for an employee's speech. Unless lower courts must engage in an asymmetrical fiction in which employers can harbor mixed motives but employees cannot, a more salutary reading of *Garcetti* would permit an employee to demonstrate that the speech made pursuant to his official duties was also made with the intent of speaking as a citizen. *Burlington Northern* helps to define the full evidentiary scope that should be available to an employee in meeting this burden. Under this reading of *Garcetti*, the post-conscience Ceballos's founding of the Latino Prosecutors Association and his presidency of the National Hispanic Prosecutors Association would be evidence of an intent to speak beyond the dictates of his formal duties as a prosecutor, for these affiliations suggest that Ceballos seeks to bring to bear cultural viewpoints in the performance of his work.

To the extent that the post-conscience Ceballos voices views on the job that are not in fulfillment of his official duties, but are nonetheless related to duties that may arise in the future, this, too, would be evidence of an intent to speak as a citizen.²⁴⁷ For instance, let us suppose that Ceballos in casual conversation opined on the facts of a case pending in a jurisdiction not his own. Suppose further that those facts involved potential mendacity by a police affiant. If, as a citizen, Ceballos expressed the same kind of skepticism about the hypothetical police affiant's conduct that he ultimately expressed in his own case, the happenstance of being presented with similar facts in the fulfillment of his own duties should not force him to suppress

246. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (determining that under Title VII, "[w]hen . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate factors"); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (holding that the "District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct").

247. Cf. *Ceballos*, 126 S. Ct. at 1959 (distinguishing between speech relevant to the subject matter of an employee's job versus speech made pursuant to an employee's official duties).

his views or place him at greater risk for punishment because now those views are expressed as part of his duties. Instead, his prior expressions should be allowed as some evidence of an intent to speak as a citizen.²⁴⁸ When an employer in a mixed-motive case has demonstrated that it would have reached the same result even in the absence of the improper motive, it prevails, at least as to monetary damages.²⁴⁹ The public employee who demonstrates that his speech coincided with speech that he would ordinarily make as a citizen would not prevail in his case but rather would advance his case to the balancing stage of the *Pickering/Connick* test.²⁵⁰

One consequence of the contextual application²⁵¹ of *Garcetti* commended by *Burlington Northern* may be to encourage employees to engage in a more explicit brand of identity politics in the workplace

248. The proposal I set forth here is superior to that of one commentator who has sought to demarcate the line for First Amendment protection based on where the speech is made, allowing employers broad latitude to punish on-the-job speech but treating the speech as that of a citizen when it is directed to the public. Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1044–45 (2005). First, Kozel's prescription rests on the notion that "matters affecting the operations of public service-providers are potentially matters of public interest . . . [, and] encouraging employees to make their grievances public might well be desirable." *Id.* at 1045. Whatever the desirability of a public airing of internal office matters, placing the onus of locating a public audience on the public employee as a condition of receiving constitutional protection is both unfair and awkward. It is unfair because unless an employer has restricted workplace speech only to matters concerning work, much discussion that takes place in the workplace will resemble that which takes place outside the workplace, yet Kozel's construct would leave such speech without protection. As Kozel concedes, under his proposal, Ardith McPherson's statements about President Ronald Reagan would likely be unprotected unless she carried them outside the office and into "the public discourse." *Id.* at 1046. Yet there was no policy in the Constable's office prohibiting the private discussion of political matters, and the attempt to impose any such policy in a nation where the lines of work and private life blur out of practical necessity would be Orwellian. See ESTLUND, *supra* note 220, at 119 ("Studies show that, when people are asked with whom they discuss matters of importance, including politics, co-workers figure as frequently as spouses, and more often than any other category of nonrelatives.").

Most importantly, Kozel's proposal has little relation to how people communicate in a multicultural workplace. Workers bring to bear their cultural perspectives on their jobs, the very same perspectives that Kozel is apparently willing to protect as long as they are kept out of the workplace. Kozel's approach punishes those workers who are most likely to challenge workplace norms with their cultural perspectives. Any such outcome begs the question: why should prevailing norms, and those willing to hew to them, be privileged in the workplace?

249. Under Title VII, an employer's showing that it would have reached the same result limits the employee's remedy to declaratory and injunctive relief and attorney's fees and costs. 42 U.S.C. § 2000e-2(m) (2000).

250. *Connick v. Myers*, 461 U.S. 138, 140 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

251. Cf. Smith, *supra* note 36, at 566 (proposing a contextual, self-defense model of opposition conduct under Title VII's anti-retaliation provision in which courts would ask: "Would the totality of the employee's experience with his employer cause a reasonable employee of the same race to behave in the same fashion?").

in order to clearly demarcate speech as a citizen versus speech pursuant to employment duties. A more pronounced identity politics in the workplace will in turn bring the First Amendment's policing of social inequality into sharper relief. An employee such as Ceballos would not be incentivized to downplay the racial dimension of his questioning the veracity of a White police officer's affidavit. Rather, statements that are shown to be part of a continuum of an employee's authentic, independent race-consciousness would be insulated from *Garcetti*'s reach but would still be subject to discipline if shown to be unduly disruptive.²⁵² This outcome is proper inasmuch as outspoken employees of color bear a risk of intersectional discrimination arising from both their status and speech that is referential to that status.²⁵³

The broadening of the contextual inquiry for workplace speech sanctioned by *Burlington Northern* ameliorates not only the rule of *Garcetti* but also the broader overhang of intermediate scrutiny of employee workplace speech. The "searching inquiry" of strict scrutiny may be unattainable by *Burlington Northern*'s proxy, but broadening the contextual inquiry will bring more precision to *Pickering/Connick* balancing. For instance, Richard Ceballos's attorneys did not pursue as a premise of their case the fact that his superiors were more likely to be aggrieved by his questioning the truthfulness of a police officer because one of them was married to

252. A public-sector employee who imports his race-consciousness into the workplace should not be any more disadvantaged for doing so than the private-sector employee who seeks protection under Title VII from work demands that violate his religious tenets. No per se approach is used in the latter cases; rather, the inquiry turns on reasonable accommodation. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 78, 78 (1977). If the practice of race-consciousness is overly disruptive to the workplace, the *Pickering/Connick* framework, like its analog in the religion context, absolves the employer of any obligation to tolerate the employee's behavior.

253. See Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 307–08 (2001) (synthesizing the doctrinal pedigree of intersectionality and related theories of discrimination: "[I]ntersectionality theory provides a formidable challenge to the notion that scholars can adequately examine or provide solutions to one form of subordination without analyzing how it is affected and shaped by other systems of domination"). Although intersectionality theory has largely focused on the confluence of multiple disadvantageous statuses in shaping the experience of discrimination, I have previously set forth a comparable theory in the context of protected speech under Title VII's anti-retaliation provision and race:

Race is simply not distinguishable from conduct opposing racism where, as the psychological and medical evidence demonstrates, that opposition is both a manifestation of racism's harm and an effort to avoid further harm. If this is true, then conduct that perpetuates racism cannot be treated differently from conduct that punishes opposition to racism.

Smith, *supra* note 36, at 572.

an officer.²⁵⁴ In *Pickering/Connick* balancing, once employee speech is determined to be on a matter of public concern, the employer must show that the speech was disruptive or had the potential for disruption in order to justify disciplining the employee. Evidence of personal bias on the part of the employer against the speech vitiates a showing of disruption and instead suggests that objections to content were the true reason for employer discipline.

Similarly, Ceballos could have established that the views he voiced were more likely to subject him to discipline because they were readily associated with the views of people of color and thus more likely to cause his superiors to interpret those views through the disadvantageous prisms that people of color are commonly seen and heard. In making such an allegation, Ceballos need not have brought an equal protection claim and suffered the disadvantages attendant to that doctrine. As *Burlington Northern* intimates, a litigant should not be foreclosed from establishing the factual background of his speech and the responses thereto. Indeed, liberal rules of pleading and discovery facilitate the full factual development and presentation of a claim.²⁵⁵ These facts may help courts to ascertain “the real social impact of workplace behavior.”²⁵⁶ In the context of employee free speech and *Pickering/Connick* balancing, these background facts are relevant to both the determination of whether the speech is on a matter of public concern—hardly a culturally neutral inquisition, as evidenced by Justice Scalia’s racially stereotyped dissent in *Rankin v. McPherson*²⁵⁷—and whether any putative or actual disruptiveness of the speech is primarily the result of its norm deviance or genuinely threatens the legitimate operational concerns of the employer.

CONCLUSION

Disclaiming any connection between Ward Churchill’s 9/11 remarks and the allegations of research misconduct, the President of the *University of Colorado* recommended Ward Churchill’s dismissal to

254. First Amended Complaint, *Ceballos v. Garcetti*, No. 00-11106 (C.D. Ca. filed Sept. 24, 2001).

255. See, e.g., NAN D. HUNTER, *THE POWER OF PROCEDURE: THE LITIGATION OF JONES v. CLINTON* 63–73 (2002) (detailing a crucial stage in *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998), in which the district court allowed Jones to assert allegations regarding President Clinton’s extramarital affairs “for the purpose of clarifying plaintiff’s constitutional and civil rights claims as far as proof at trial is concerned”).

256. *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2415 (2006).

257. See *supra* notes 97–110 and accompanying text (discussing the impact of a speaker’s race on how his speech is interpreted).

the university's Board of Trustees.²⁵⁸ The recommendation was accepted, and Churchill was fired.²⁵⁹ Churchill's First Amendment suit against the university is ongoing.²⁶⁰ Its outcome, and the events leading to it, underscore the peril for all public employee free speech, for if the free exchange of ideas—especially provocative ones—is not countenanced in the academic setting, they are surely endangered elsewhere.

The most indelible lessons in the law are those that are personally experienced. Reading about the litigants whose stories inform this Article, and conversing with Ceballos and Churchill, caused me to reflect deeply about how my own speech and that of millions of other ordinary people of color is routinely placed under a racial microscope. For private sector employees, most of whom are at-will, the traditional regimen of antidiscrimination law does not purport to address the intersection of speech and status that creates a unique vulnerability to discrimination for the minority employee. But the brooding presence of the First Amendment has not permitted the minority public sector employee's speech to escape the racial lens either. This Article is a small contribution in the struggle to peel back the lens, to permit people of color to speak unburdened by the inequality of their status. To the dismay of some, and to the surprise of others, I have insisted on this equality for my own speech. Ceballos, McPherson, Jeffries, Churchill, and numerous other courageous litigants of color fortify my determination.

Ward Churchill's odyssey through the courts may well come to define not merely the latest juncture in an evolving First Amendment jurisprudence but to some degree, how free we remain as a people. Change cannot occur without dissent, and the right of peaceful dissent cannot be guarded if its parameters are drawn on the implicit assumption that prevailing norms should be privileged.

258. *The Ward Churchill Endgame*, INSIDE HIGHER ED, May 29, 2007, available at <http://www.insidehighered.com/news/2007/05/29/churchill>.

259. Arthur Kane, *CU Seeks Dismissal of Churchill Lawsuit*, DENV. POST, Sept. 5, 2007, at B5.

260. *Id.*